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Empowering Victims of Grand Corruption: an Emerging Trend

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EMPOWERING VICTIMS OF GRAND CORRUPTION: AN EMERGING TREND?

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Abstract

Who is the victim of systemic corruption? The traditional answer in law is everyone and no one, or public administration itself. When state funds are misused or go missing, at the most the State is the victim. Therefore, only the State has standing to sue for, or receive restitution of, the stolen assets. But that long-held consensus is changing. Activists and lawyers have begun to argue that under systematic corruption it's not just states, but individuals and communities as well as society as a whole that suffer losses and need to be both represented and repaired.

Courts are beginning to agree, based on human rights law developed in large part in the context of atrocity crimes and now translated to the sphere of anti-kleptocracy. Prior research has focused on asset recovery in capital exporting states, and how it should be returned to the people of the looted country. This article brings together for the first time the background law and systematizes the cases in the courts of the looted country, focusing on Latin American states because they generally both suffer from top-down, systemic corruption and have been at the vanguard in marrying international human rights law, victim participation in criminal proceedings, and international anti-corruption law. It posits that victims want to participate in corruption trials not just to get reparations, but also to access the case files in order to seek information for further investigations and to monitor the diligence and strategic choices of prosecutors. Finally, it also highlights the sometimes indirect ways in which international law becomes effective in national courts, here involving not only vertical moves from international bodies to national courts, but horizontal shifts from one subject area to another.

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Who is the victim of systemic corruption? In more and more places, grand corruption no longer matches the individual, episodic "bad apple" scenarios around which much anti-corruption law is built. Nor is it simply a question of the citizenry having to pay off underpaid police, teachers, or permit issuers to get their services. Instead, grand corruption, also described as kleptocracy or systemic corruption, involves high-ranking officials using and transforming the entire apparatus of the state, from the highest levels, for private gain. That is, state or private officials do not only solicit and accept bribes to channel business to private interests or to create phantom jobs or projects, they also use control over, or alliances with, legislators, regulators, and judges to create laws and regulations that permit the sacking of the state and ensure impunity for doing so. Corruption has become the *raison d'etre* of the state itself.

While corruption is not a new problem, globalization has increased the scale, ease, and scope of money movements and thus money laundering, increasing the ability of kleptocrats to hide the proceeds of large-scale corruption. International aid and commercial flows can be skimmed even with the "safeguards" that have been put in place to avoid such skimming. Beneficial ownership, bank secrecy havens, and the explosion of "enablers"—law firms, accounting-consulting powerhouses, and the like—have made it easier to create layers of global ownership that make it difficult to follow the money. The immense amount of money generated by illegal business— from drugs to trafficking in people, minerals, timber, and wildlife—provides an inexhaustible source of financing, and cover, for kleptocracy. Organized crime networks are now allied with "legitimate" elites and officials on the take to create interlocking systems that control territory, populations and resources. States with weak or nonexistent institutions and rampant inequality have facilitated the takeover of state resources by the few. To give just the most recent example, allegations abound around the world about fraud or other misconduct in pandemic-related spending or procurement.[2] Far from being failed states, these are states that work very well for those few, just not for the common good. One recent estimate found over 60 countries where grand corruption is the "operating system."[3]

The traditional answer in law to the question of who is a victim in grand corruption cases is everyone and no one, or public administration itself. When state funds are misused or go missing, at most the State is the victim. Therefore, only the State has standing to sue for, or receive restitution of, the stolen assets. When the assets are found abroad, they should be repatriated to the state, and when proceedings are domestic, only the State is able to represent the interests of the people in proceedings—criminal or administrative—to recoup its losses. Until recently, this was the consensus.

However, that consensus is slowly changing. In the last decade or so, activists and lawyers have begun to argue that it's not just states but individuals and communities as well as society, that suffer losses and need to be both represented and repaired in cases

[2] *Why Fighting Corruption Matters in Times of COVID-19*, TRANSPARENCY INT'L (Jan. 28, 2021), https://www.transparency.org/en/news/cpi-2020-research-analysis-why-fighting-corruption-matters-in-times-of-covid-19.

[3] *See generally* SARAH CHAYES, THIEVES OF STATE (2015).

involving grand corruption.[4] These arguments come in part from the experience of state capture and the difficulties of holding corrupt leaders and company officials accountable, as well as from a history of human rights and humanitarian law development around the rights of victims. The emerging bottom-up movement now recognizes the human rights implications of grand corruption and is striving to translate those implications into policy and caselaw.

Latin America has a leading role in the corruption and human rights conversation, which has moved anti-corruption from a concern of technocrats to a popular movement.[5] Cases in the region are slowly beginning to reflect the new thinking on victims' rights, while courts in other cases have reiterated the old-school view of the state as the only victim. The debate reflects the prominence of the issue in Latin America where grand corruption, often combined with the broad reach of organized crime, is a highly salient public issue.[6] Latin America has also been at the forefront of struggles to assert and formalize the rights of victims of human rights violations, including state obligations of prevention and redress.

This emerging movement, first chronicled here, is in some ways surprising. There are few hard obligations in human rights law around combatting corruption, which was not even widely recognized as a human rights issue until recently. The United Nations Convention Against Corruption, described below, contains obligations "subject to domestic law." And yet, courts are increasingly using the jurisprudence developed out of obligations towards victims of human rights-related crimes, first at the international and regional level and then widely incorporated into domestic cases in new areas such as anti-corruption. This article traces how the current crop of human rights infused anti-corruption cases have been influenced by the decades-long struggle in the region to identify, investigate, and prosecute grave violations of human rights, including crimes against humanity, enforced disappearances, extrajudicial executions, and torture. Secondarily, discussions on reparations for corruption are drawn from prior experience with diffuse harms in environmental and climate-related cases. In other words, international law is moving not just into domestic systems, but the precepts developed in one area of law are migrating to others.

This article posits that the fight for victim access to information, participation, and reparation for those who have been harmed by acts of grand corruption is a step forward in effectively combatting systemic corruption and kleptocracy in three ways. First, victim

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[4] *See, e.g. Open-ended Intergovernmental Working Group on Asset Recovery,* Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation, CAC/COSP/WG.2/2016/CRP.1 (Aug. 4, 2016), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf.

[5] *See, e.g.*, 9and10news Site Staff, *Mass Protests Held Against Brazil President Bolsonaro*, 9&10 NEWS (Sept. 13, 2021), https://www.9and10news.com/2021/09/13/mass-protests-held-against-brazil-president-bolsonaro/; Astrid Suarez & Regina Garcia Cano, *A look at what has prompted thousands to protest across Colombia*, GLOB. NEWS (May 10, 2021, 1:47 PM), https://globalnews.ca/news/7848667/colombia-protests-explained/; Giovanni Batz, *Guatemala's National Strike Demands Structural Change*, NACLA REP. (Sept. 7, 2021), https://nacla.org/guatemala%E2%80%99s-national-strike-demands-structural-change.

[6] *What People Think: Corruption in Latin America & The Caribbean*, TRANSPARENCY INT'L (Sept. 23, 2019), https://www.transparency.org/en/news/what-people-think-corruption-in-latin-america-the-caribbean# ("85% of people think government corruption is a big problem").

participation, either directly or through an organization that represents them, can surface new information and help unravel the skeins of scheming, thus allowing anti-corruption campaigners to connect dots, find leads, and open new lines of investigation. In practice, this access-based rationale looks very much like arguments in favor of freedom of information and access to justice.

Second, participation shines a light on proceedings that otherwise risk public prosecutors or judges colluding in sweetheart deals with those charged with corruption. The incentives for prosecutors—whether because they themselves are complicit, or simply because it is difficult and expensive to prosecute powerful political and economic actors in complex cases shrouded in secrecy—are to make a deal, quickly and quietly, or to ignore all but the most notorious cases. Judges will often need an outside push to consider difficult damages and causation issues. The higher up the suspect is in government or private elites, and the more systemic the corruption, the more likely that investigations and proceedings will feature easy non-prosecution deals, incompetent prosecutions, loss of files or of witness whereabouts, and the like.

Third, victims bear the brunt of the lack of services or personnel, shoddy or unsafe infrastructure, or land grabs and environmental mayhem that are the result of many corruption schemes. While sometimes these effects are diffused throughout society, more often they are not. Where specific individuals or communities are differentially affected, they are usually already marginalized or vulnerable. Moreover, civil society and victim groups are often the whistleblowers on corrupt deals and are attacked for their advocacy. Sometimes, as in the case of environmental and indigenous rights activist Berta Cáceres,[7] they are murdered. Putting a face to the real effects of grand corruption helps clarify the stakes and build public support for investigations and trials. Ultimately, it helps rebuild the missing or shaky trust in public institutions which is a prerequisite for a functioning democracy.

Part I of this article explains the evolving international law on the rights of victims to access proceedings and to claim reparations in grand corruption cases. Part II considers cases arising from Latin America that clearly show the dual influences of the UN law against corruption and the prior human rights-based decisions of the courts regarding broad access to information and participation rights for victims. Part III returns to international law on reparations and its potential applicability to grand corruption. Part IV takes up risks, difficulties, and objections. Part V concludes with some recommendations to advance this agenda.

I. The Evolving Law on Corruption and Human Rights

[7] *See* Nina Lakhani, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, THE GUARDIAN (Jun. 4, 2017, 6:30 EDT), https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres (describing community violence and murders of known activists opposing the construction of the Agua Zarca dam on the Gualcarque river in Honduras). *See also* NINA LAKHANI, WHO KILLED BERTA CÁCERES? DAMS, DEATH SQUADS, AND AN INDIGENOUS DEFENDER'S BATTLE FOR THE PLANET (2020).

Starting in the late 1970s, and accelerating in the twenty-first century, states began to prosecute companies tied to their jurisdiction accused of bribing foreign officials, through the Foreign Corrupt Practices Act, the UK Bribery Act and other similar laws.[8] Almost all the successful cases settled before trial with large fines, paid to the U.S. or British treasuries. None of the money was returned to the country where the bribery took place. Eventually, critiques of this situation pushed the prosecuting states to develop more nuanced and creative strategies for returning assets to the home country without having them returned to the corrupt structures that demanded illicit payments in the first place. The U.S., for instance, created the Department of Justice's Kleptocracy Asset Recovery Initiative.[9] In a few cases, assets were earmarked for development purposes[10] and in one case (BOTA Foundation in Kazakhstan) a separate foundation, with multistakeholder oversight, was created to distribute the funds.[11]

More fundamentally, the perception of corruption changed. Until the 1990s, theorists were divided as to whether corruption sapped economic strength or greased the wheels of economic growth. Even after international financial institutions officially declared war on corruption in the mid-1990s, the aggrieved party was still the state alone, deprived of development revenue. Moreover, corruption was an aberration, an exception to good governance norms that needed to be rooted out. The moralizing tones of, usually a developed country's, modernizers seemed to permeate the discussion.[12]

Starting in the 2010s, increased consideration of economic, social, and cultural rights, and the glaring impact of grand corruption on public services, led to new consideration of corruption as a human rights issue. In 2009, the International Council on Human Rights Policy published a report on the topic.[13] The United Nations Human Rights Council published a number of resolutions as well as a 2015 report on the negative effect of corruption on human rights.[14] In 2019 the Inter-American Commission on Human Rights put out a ground-breaking report on the link between corruption and human rights. Among other findings, the Commission wrote: [I]n light of the State's obligation [to investigate acts of corruption] ... the state authorities ... must initiate without delay serious, impartial and effective investigations by all available legal means and aimed at determining the truth of the facts and the prosecution and eventual punishment of the perpetrators. During the

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[8] *See generally* Organization for Economic Co-Operation and Development (OECD) (for a compendium of similar laws); Foreign Corrupt Practices Act (FCPA) of 1977, 15 U.S.C. §§ 78dd-1–78dd-3; Bribery Act, 2010, c.23 (UK), https://www.legislation.gov.uk/ukpga/2010/23/contents.

[9] *See, e.g.*, *Money Laundering and Asset Recovery Section*, THE U.S. DEP'T OF JUST. https://www.justice.gov/criminal-mlars.

[10] LARISSA GREY ET AL., FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY 5 (2014), https://www.oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf.

[11] *See generally* SWATHI BALASUBRAMANIAN & COLBY PACHECO, ACHIEVING DEVELOPMENT IMPACT WITH AN INCLUSIVE ASSET-RETURN MODEL: THE CASE OF THE BOTA FOUNDATION IN KAZAKHSTAN, IREX (2015), https://www.irex.org/sites/default/files/node/resource/bota-case-study_0.pdf.

[12] *See, e.g.*, the critique posed by David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455 (1999).

[13] *See* INT'L COUNS. ON HUM. RTS. POL'Y, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION (2009), https://reliefweb.int/sites/reliefweb.int/files/resources/9B49DD6CB2609631492575BB001B821D-Corruption_HRts.pdf.

[14] Rep. of the Human Rights Council, U.N. Doc. A/HRC/28/73 (Jan. 5, 2015).

investigation process and the judicial proceedings, the victims should have ample opportunity to participate and be heard, both in the clarification of the facts and the punishment of those responsible, as well as in the search for just compensation."[15] At the same time, the Organization for Economic Co-operation and Development (OECD) also recognized the link, recommending that businesses coordinate their anti-corruption and human rights compliance activities more closely.[16]

The development of a series of international treaties, culminating in the 2005 United Nations Convention Against Corruption (UNCAC), changed the perception of who was considered a victim, who had the right to participate in proceedings, and who was the subject of reparations. For the first time, UNCAC provides that victims of corruption have rights. A number of articles make clear that the state is not the only victim of corruption, and that those harmed have access and compensation rights. The obligations in Articles 32 and 35 are "hard," (framed as "shall," unlike much of the Convention) although given the differences in national legal systems, the particulars are left to each state. Article 13(1) sets out a policy of encouraging public participation in anti-corruption efforts.[17] Article 32(5) reads: "Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence." Clearly, if the only victim of corruption offences were the State, this article would be unnecessary, nor would it include the reference to "victims" in the plural. According to the treaty's drafting history, States contemplated individual, collective, and legal (corporate) victims. One early draft of the text read:

> 1. Each State Party shall ensure that its domestic legislation takes into account the need to combat corruption and provides, in particular, for effective remedies for **persons** whose rights and interests are affected by corruption in order to enable them, in accordance with the principles of their domestic law, to obtain compensation for damage suffered. [emphasis added]
> 2. Each State Party shall, subject to its domestic law, allow the views and concerns of victims to be presented and considered at the appropriate stages of

[15] La Organización de los Estados Americanos [OEA], Comisión Interamericana de Derechos Humanos [CIDH], *Corrupción y derechos humanos: Estándares interamericanos*, at 107, Doc. 236, (Dec. 6, 2019) http://www.oas.org/es/cidh/informes/pdfs/CorrupcionDDHHES.pdf.

[16] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], INTERNATIONAL ORGANISATION OF EMPLOYERS [IOE], CONNECTING THE ANTI-CORRUPTION AND HUMAN RIGHTS AGENDAS: A GUIDE FOR BUSINESS AND EMPLOYERS' ORGANISATIONS (Sept. 2020), https://biac.org/wp-content/uploads/2020/09/2020-08-31-Business-at-OECD-IOE-AC-HR-guide.pdf.

[17] G.A. Res. 58/4, U.N. Convention Against Corruption at 13(1) (Oct. 31, 2003)("Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.").

> criminal proceedings against offenders without thereby undermining the rights of the defence. [18]

In the course of the negotiations, the concerns of the States Parties to the UNCAC about victims were so important that they led delegates to create a separate article, which subsequently became Article 35. Article 35 sets out a requirement 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.[19]

The legal action referred to in Article 35 may be civil, or it may form part of a criminal action; this flexibility was deemed necessary by the existence of different legal systems.

In the preparatory work for Article 35, there are other indications of its scope. States proposed, for example, that the compensation should cover "material damage, loss of profits and non-pecuniary losses."[20] It is impossible to think that a State, as such, could suffer the last two types of damage, especially non-pecuniary. This is also reflected in the Interpretative Note in Article 35, which specifies that "[t]he expression 'entities or persons' includes States as well as legal and natural persons." Finally, Article 57(3)(c), on asset recovery, requires states to "… give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime." This makes it clear that states are not the only entities entitled to recovered assets.

Taken together, these articles make clear that persons or entities other than the state are entitled to participate in proceedings, whether they be criminal or civil suits, or administrative actions. The provisions beg the question of how to define "victim" or "persons who have suffered damage." Perhaps understanding the difficulties in too strict a formulation given wide differences in national law, the preparatory drafts simply required that (1) damages have been caused to the person or entity and (2) that there is a causal link between the act of corruption and the damages.[21] How strictly a causation requirement should be construed, and whether it is subject to limits based on legal or proximate cause, has been the subject of debate ever since.

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[18] Travaux Préparatoires de las negociaciones para la elaboración de la Convención de las Naciones Unidas contra la Corrupción [Preliminary Activities of the Negotiations for the Elaboration of the U.N. Convention against Corruption] at 32(A) (Nov. 2012), https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_S.pdf [hereinafter *Preliminary Activities Against Corruption*].

[19] *Preliminary Activities Against Corruption*, *supra* note 18, at 35. In addition, Article 57(3) reads: (c)In all other cases, 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. *See also* Anita Ramasastry, *Is There a Right to be Free from Corruption?*, 49 UC DAVIS L. REV. 703, 708 (2015).

[20] *Preliminary Activities Against Corruption*, *supra* note 18, at 35.

[21] *Preliminary Activities Against Corruption*, *supra* note 18, at 35.

II. The interpretation of UNCAC: filling gaps from other sources of international law

Human rights groups and the networks of family members of those killed and forcibly disappeared in the 1970s and 1980s under authoritarian regimes and during civil wars have changed the legal landscape for anti-corruption campaigners. They were one of the driving forces behind developing international law on the rights of victims to participate as rights-bearers in criminal processes, on an equal footing with defendants. Victims have rights, including the right to be heard, the right to demand the truth of what happened to them and their loved ones, and the right to reparation. The definitions developed in this context, involving powerful figures able to create impunity for themselves, have proven useful in anti-corruption efforts involving equally powerful figures.

Human rights law provides a right to remedy for victims.[22] The evolution of soft law elaborating these provisions began with the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[23]

> "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[24]

In the context of human rights law, this was followed by 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, which uses an almost identical definition[25] .

The Inter-American human rights system has played a key role in broadening and specifying the definition of a victim. In many countries in the Americas, the jurisprudence of the Inter-American system is binding law, while in others it is highly influential. The Rules of Procedure of the Inter-American Court of Human Rights, in force since November 2000, defines "alleged victim" in Article 2 (Definitions) as " the person whose rights under the Convention or another treaty of the Inter-American System have allegedly been violated."[26] Likewise, Article 35 establishes that in order to submit a case to the Court, the Inter-American Commission must identify the alleged victims, and when it is not possible to identify one or more alleged victims because there are massive or collective violations, the court will decide in due course whether to consider them victims.[27]

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[22] E.g. International Covenant on Civil and Political Rights, Treaty Series 999 (December): 171 (1966), Art. 2(3).

[23] G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (Nov. 29, 1985).

[24] G.A. Res. 40/34, *supra* note 22, ¶ 1.

[25] G.A. Res. 60/147, ¶ 8 (Dec. 16, 2005).

[26] Inter-Am. Ct. H.R. [IACHR], *Rules of Procedure of the Inter-American Court of Human Rights*, art. 2, ¶ 25 (November 28, 2009), https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf.

[27] *Id*. at art. 35, ¶ 1.

The jurisprudence of the Inter-American Court has progressively broadened the definition of a victim and has recognized victims who were not originally recognized as such.

In the judgment handed down on November 19, 1999, in the *Case of Villagrán Morales y Otros (Street Children) v. Guatemala,* the Court recognized the relatives of the minors who were tortured and murdered as victims in their own right. Such relatives were subjected to cruel, inhuman, and degrading treatment as a result of the heinous crimes perpetrated against their children by state agents.[28]

The Court has also recognized the rights of indigenous communities as such, not just the rights of individual community members. In its most recent pronouncement on the subject, Advisory Opinion 22/16 of February 26, 2016,[29] the Court reiterated its recognition of indigenous and tribal communities, as well as trade union organizations, as subjects of rights in and of themselves who can collectively invoke the human rights protected by the Convention. The Court stressed that the violation of those rights has a collective dimension and cannot be limited to individual effects.

The jurisprudence of the European Court of Human Rights (ECHR) is less expansive. The Court has consistently held that the Convention does not provide for the institution of an *actio popularis*.[30] Article 34 of the European Convention defines victim as including the person or persons directly or indirectly affected by the alleged violation, either because it caused harm or because they have a valid and personal interest in seeing it brought to an end. [31] An association that merely represents the general interests or populations involved, rather than their interest in the specific dispute, does not qualify.[32] On the other hand, where an association was formed specifically to defend the legal rights of its members in the dispute under consideration, the ECHR found that:

> The term "victim" in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that

[28] Villagrán Morales et al v. Guatemala, Inter. Am. Ct. H.R. (ser. C) No. 63, ¶ 174-176 (Nov. 19, 1999); *see also* Bámaca Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 163-165 (Nov. 25, 2000).

[29] Ownership of Rights of Legal Persons in the Inter-American Human Rights System (Interpretation and Scope of Article 1.2, in Relation to Articles 1.1., 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62.3 of the American Convention on Human Rights, as well as Article 8.1. A and B of the Protocol of San Salvador), Advisory Opinion 22/16, Inter-Am. Ct. H.R. (ser. A) No. 111 ¶ 71-76 (Feb. 26, 2016).

[30] *See* Roman Zakharov v. Russia, App. No. 47143/06 ¶¶ 164-171 (Dec. 4, 2015), https://hudoc.echr.coe.int/eng?i=001-159324 (listing requirements for standing for the institution of an *actio popularis*). Under certain circumstances, for example secret surveillance, a threat of harm is enough to give rise to standing. Id. See note 76 for more on *actio popularis.*

[31] Vallianatos & Others v. Greece, Apps. No. 29381/09 and 32684/09, 59 Eur. Ct. H. R. 12, 536-537 ¶47 (Nov. 7, 2013), https://hudoc.echr.coe.int/eng?i=001-128294.

[32] *Id.* at ¶48.

> obtained in the present case. The Court cannot disregard that fact when interpreting the concept of "victim." Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.[33]

Thus, associations and groups can be victims but there must be a tight link between the association's purposes and the object of the litigation.

The advent of the International Criminal Court (ICC) in 1998 also advanced the discussion of victims' rights. The Rome Statute governing the ICC contains extensive provisions regarding victims' participation at different stages of the proceedings,[34] and (for the first time in an international criminal proceeding) allows for court-ordered reparations.[35] These innovations gave rise to a robust debate over the forms and extent to which victims could or should participate in criminal justice, especially in cases where impunity tends to be the norm.[36] It also led to a great deal of thinking about how to provide integral reparations where it was difficult to tie the wrongdoing to specific victims.[37]

Current debates surrounding the role of victims in grand corruption cases have been informed by this evolution in the areas of human rights and international criminal law.[38] Thus, victims' groups have pushed for access to and participation in the proceedings, in addition to insisting on a broad view of what integral reparations should look like. These developments are starting to show up in national courts. The next section takes up these aspects in turn.

III. Participation of victims in proceedings

National courts have found that victims of corruption—or non-governmental organizations representing the public interest in combatting corruption—can participate in

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[33] Gorraiz Lizarraga & Others v. Spain, App. No. 62543/00, ¶38 (Apr. 27, 2004), https://hudoc.echr.coe.int/eng?i=001-61731.

[34] *See* Rome Statute of the International Criminal Court art. 68(3), ¶ 3, Jul. 17, 1998, 37 I.L.M. 99 ("where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.").

[35] . *Id.* at art. 75 ¶¶ 1-6.

[36] Luc Huyse, *The Process of Reconciliation*, *in* RECONCILIATION AFTER VIOLENCE: A HANDBOOK,20 (David Bloomfield et al. eds., 2003); Christine Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475 (2011).

[37] There have been debates about the proper allocation of responsibility between the Court's reparation orders and the separate Trust Fund for Victims. *See, e.g.*,WAR CRIMES RESEARCH OFFICE, THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT (June 2010), https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-12-the-case-based-reparations-scheme-at-the-international-criminal-court/.

[38] Another strand of thinking on victims' rights comes from environmental law. Environmental cases provide a rich history of how to remedy diffuse harms, including by granting civil society groups or indigenous peoples the right to represent the interests of natural features like rivers and mountains. That evolving jurisprudence is beyond the scope of this article. *See, e.g.*,David Takacs, *We Are the River*, UNIV. ILL. L. REV. 545, 545 (2021).

criminal or administrative proceedings brought by the state. Others have added corruption charges to what would otherwise be criminal negligence cases. And still others have refused to allow victims to participate, on the grounds that the state is the only victim.

Courts have taken two major routes to let victims in: directly linking their interests to the case or allowing public interest groups focused on anti-corruption to act in the name of the victims, often where law allows representation of "diffuse interests" by such groups. I discuss each below.

A. Direct representation

In some corruption cases, the causal link between the corrupt acts and harm to specific plaintiffs is easy to make and proximate cause is less problematic. These are generally cases where a separate tort (civil damages) case would be warranted, but where victims, especially in civil law systems, find it important to join the criminal case for corruption as private prosecutors, *partie civile*, or complainants. This may be based on the need for access to information about the facts, on the difficulties and costs of separate civil actions, or on a healthy suspicion of the prosecuting authorities (or all three).

A good example is the "*Once*" ("*Eleven*") case in Argentina. Leaders of the Ministry of Transportation in charge of running and maintaining commuter trains apparently pocketed the train maintenance budget over several years, leading to dilapidated and unsafe trains. In February 2012, a train crash killed 51 people and injured 789 others.[39] The courts found the state officials guilty of fraudulent administration and sentenced two ex-Ministers of Transportation, among others, to prison.[40] The representatives of various classes of victims of the crash participated in the proceedings.

Another potential example comes from the IGSS/Pisa and IGSS/Chiquimula cases in Guatemala. High-ranking officials in the procurement and head offices of the state's medical service, along with well-connected private operators, received a $2.5 million dollar bribe from a large medical supply firm for a multimillion-dollar contract to provide kidney dialysis to 530 patients.[41] The firms had no existing clinics, no knowledge or experience of the procedure, and supplied faulty or inoperative dialysis machines and supplies that caused patients great pain. Infections increased 900% and 49 people died.[42] A group of patients, aided by two civil society groups, brought a criminal complaint. The fraud portion of the complaint eventually led to over twenty indictments. The issue of victims' participation arose when a group of eight former patients accepted the defendants'

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[39] *One train crash: Argentine ex-ministers jailed*, BBC NEWS (Dec. 29, 2015), https://www.bbc.com/news/world-latin-america-35196316.

[40] Tribunal Oral en lo Criminal Federal 2 [TOCF nro.2] [Oral Federal Criminal Court], 30/3/2016, "Córdoba, Marco Antonio y otros s/ inf. Arts. 196, inc. 1 y 2 y 173, inc. 7° en función del 174 del CP"/ Registro de sentencias nro. 1753 (CFP 1188/2013/TO1) (Arg.) (presenting the case against the Ministry of Transportation regarding the February 22, 2012 train collision).

[41] Nómada, *El pago de Pisa a los sobrevivientes del IGSS parece un gesto humano, pero busca algo más*, NÓMADA (Feb. 27, 2018) https://nomada.gt/pais/la-corrupcion-no-es-normal/el-pago-de-pisa-a-los-sobrevivientes-del-igss-parece-un-gesto-humano-pero-busca-algo-mas/.

[42] *Id*. See also the three-part investigation by Insight Crime into this case: Alex Papadovassilakis, *Social Insecurity: The Case of IGSS-Pisa in Guatemala* (Dec. 2021), https://insightcrime.org/investigations/social-insecurity-case-igss-pisa-guatemala/.

(inadequate) settlement offer and the victims' lawyers quit. The trial court ruled that the remaining victims and their family members could not testify or otherwise participate in the proceedings because they had lost their representation, but an appeals court panel reversed this, finding that due process required that they be able to present evidence.[43] Until now, no one has been held responsible for the wrongful deaths, and although the trial court convicted several men for fraud, the convictions were overturned in a questionable appeals court decision.[44]

The case of fraud in the bidding, contracting, and construction of the Agua Zarca hydroelectric dam on the Gualcarque River in Honduras would seem to be the poster child for the need for victims' participation in court proceedings involving grand corruption. Dam construction directly affected the livelihoods, health, and culture of downstream Indigenous communities.[45] Leaders of the Lenca community were murdered due to their vocal denunciations of corruption and their opposition to the project, on orders of dam construction executives and their security chiefs acting with the connivance of public authorities.[46] And without corrupt bidding and licensing processes, the dam would never have been built, at least not in the same way.[47] The victims included well-known Goldman Environmental Prize winner Berta Cáceres, who was shot in her home in March 2016. Moreover, community members and civil society organizations were skeptical that the Honduran prosecutor's and public ombudsman's offices would adequately represent the public interest, as they had been systematically weakened and faced strong pressures to go easy on the powerful.[48]

The case was originally investigated by the Organization for American States (OAS)-backed Anti-Corruption Mission (MACCIH), created to shore up the local prosecutor's office.[49] The prosecutor's office filed a case against DESA, the dam builder, in March 2019. [50] It alleged that the bidding process, environmental impact report, and other

[43] Nómada, supra note 42.

[44] Insight Crime, supra note 43.

[45] *See Agua Zarca Dam Conflict in Honduras*, CLIMATE DIPLOMACY, https://climate-diplomacy.org/case-studies/agua-zarca-dam-conflict-honduras (last visited Oct. 7, 2021) (detailing the conflict surrounding the construction of the Agua Zarca dam by Honduran company Desarrollos Energeticos S.A. (DESA)).

[46] *See* Nina Lakhani, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, THE GUARDIAN (Jun. 4, 2017, 6:30 EDT), https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-berta-caceres
(describing community violence and murders of known activists opposing the construction of the Agua Zarca dam on the Gualcarque river in Honduras). *See also* NINA LAKHANI, WHO KILLED BERTA CÁCERES? DAMS, DEATH SQUADS, AND AN INDIGENOUS DEFENDER'S BATTLE FOR THE PLANET (2020).

[47] Monte Reel, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, BLOOMBERG GREEN (Sept. 14, 2020, 7:00 AM), https://www.bloomberg.com/features/2020-blood-river-hydroelectric-power-honduras/ (analyzing the murders of Honduran activists and unsuccessful prosecutions of those killings).

[48] Julia Aikman Cifuentes and Adriana Beltrán, *A Year of Setbacks to Honduras' Anti-Corruption Efforts*, WOLA COMMENTARY (Feb. 4, 2021), https://www.wola.org/analysis/honduras-anti-corruption-efforts/.

[49] *See* Charles Call, *Fleeting Success: The Legacy of Honduras' International Anti-Corruption Mission* 8 (AM. UNIV. CTR. FOR LATIN AM. & LATINO STUD., Working Paper Series No. 27, June 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633943# (analyzing the impact of MACCIH and the OAS mission in Honduras).

[50] Proceso Digital, *El estatus de los casos MP-Maccih*, PROCESO DIGITAL (Dec. 6, 2020, 10:25 PM), https://proceso.hn/el-estatus-de-los-casos-mp-maccih/.

licensing processes had been irregular, unlawful, and fraudulent. Apparently, DESA was granted the contract without bidding for it and the environmental impact assessment did not meet any of the legal requirements, including consultation with the surrounding Indigenous communities. Charges were filed against 16 defendants, including fraud, abuse of authority, violations of the duties of state officials, negotiations incompatible with the exercise of public functions, and falsification of documents.

The trial court accepted, in the face of a defense challenge, the right of the Civic Council of Popular and Indigenous Organizations, known as COPINH, to be a civil party in the corruption case, giving their lawyers access to documents and hearings.[51] The judge used the United Nations definition of victim as "persons who, individually or collectively, have suffered harm … through acts or omissions that are in violation of criminal laws."[52] She also referred to ILO Convention 169 (on Indigenous Peoples), which requires free, prior, and informed consent before actions are taken that could affect the rights of Indigenous people. COPINH, the judge found, was an indirect victim. Defendants appealed.

The Court of Appeals, in an August 28th, 2019 decision, agreed with the defendants that COPINH was not a proper civil party.[53] They based this decision on two procedural provisions in national law. First, Article 17 of the Criminal Procedure Code[54] defines victims as those directly affected, including the state and public and private entities; the family member of someone who has been killed; and the members of a commercial or civic organization regarding the crimes that affect it as well as the common owners of property, with respect to their indivisible interests. The court assumed that only the civic organization provision applied, but then read it narrowly to refer only to commercial or property interests which, according to the court, were not implicated here. Moreover, ILO 169 had already been interpreted as merely a "programmatic" obligation by the Supreme Court, and so didn't change the outcome. Second, the court noted that this is not a human rights violations case, where the victim would have had standing to intervene. The only victim was the State because the protected interest is public faith and the administration of the state. Nor was the environmental harm to riparian communities enough, since remedying that harm was not the purpose of the lawsuit. The victims filed a constitutional challenge (known as an *amparo*) to the Supreme Court on November 4th, 2019.

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[51] *Violence, Corruption & Impunity in the Honduran Energy Industry: A profile of Roberto David Castillo Mejía*, DUE PROCESS L. FOUND 17 (August 2019), http://www.dplf.org/sites/default/files/violence-corruption-impunity-a-profile-of-roberto-david-castillo.pdf.

[52] G.A. Res. 40/34, ¶ A(1) (Nov. 29, 1985).

[53] Corte de Apelaciones de lo Penal con Competencia Nacional en Materia de Corrupción [Court of Criminal Appeals with National Jurisdiction Over Corruption], 28/8/2019, "Auto s/ Recurso de Apelación de la Defensa," (Exp. 13-2019) (Hon.); *see also* Centro de Estudio Sobre la Democracia (CESPAD) [Democracy Study Center], *Caso Fraude sobre el Gualcarque: arbitrariedad procesal y exclusion de las víctimas* [Fraud Case on the Gualcarque: procedural arbitrariness and exclusion of the victims], CESPAD (2021), http://cespad.org.hn/wp-content/uploads/2021/08/Gualcarque-WEB.pdf (providing reports on judicial decisions and structural reforms following the Fraud on the Gualcarque case).

[54] Código Procesal Penal [Criminal Procedure Code] art. 17 (1999) (Hon.), http://www.poderjudicial.gob.hn/CEDIJ/Leyes/Documents/CPP-RefDPI.pdf.

Over 18 months later, on August 10, 2021, the Supreme Court unanimously ruled in favor of COPINH.[55] The Court grounded its ruling in human rights law and ILO Convention 169 on Indigenous rights, in particular the right to participation of Indigenous peoples in decisions affecting their interests. It found that COPINH represented the Lenca and other Indigenous peoples, who had concrete interests in water and land rights in this case and thus constituted "victims." It referenced the U.N. definition, Article 8 of the American Convention on Human Rights establishing access to justice as a right, and due process provisions of the Honduran constitution.[56] Allowing COPINH to fully participate in the case would not interfere with the administration of justice, but rather provide transparency and objectivity.[57] While the decision referred to the rights of public interest organizations, it was a narrow ruling, based on the particular collective and territorial rights of the Indigenous Lenca and carefully distinguished the general right of legal entities to be classified as victims. As a result, all the proceedings subsequent to COPINH's exclusion have been nullified, and the case will be redone with full victim participation.[58]

The DESA case is not the only one in Honduras where direct harm is relatively easy to establish. In the Pandora case, corrupt lawmakers and their allies established two phantom foundations to receive international funds, supposedly for agricultural development, crop diversification, rural schools, and young rural mothers.[59] Instead, $11.7 million of the money went to illegally finance political campaigns.[60] Among those charged were former ministers, ex-functionaries of the Agriculture and Finance ministries, foundation heads, and elite businessmen. The Honduran Court of Appeals in 2020 closed the cases of 22 of the 28 charged defendants.[61] The specific villages and groups who were supposed to receive the funds, according to the projects financed, argued that they should have a claim as victims.[62] Nonetheless, when they tried to intervene in the appeal of the case closure, the Supreme Court denied them access to the proceedings.[63]

In these cases, the complainant can sue because of interests that are particular to them as an individual or as a group. In other cases, the difference between individual or group

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[55] Recurso de Amparo Penal SCO 0974/2019, Sala Constitucional, Corte Suprema de Honduras [Appeal for Criminal Protection SCO 0974/2019, Constitutional Room, Supreme Court of Honduras] (Hon.).

[56] *Id.*

[57] *Id.* (considering) at 18.

[58] Corte de Apelaciones de lo Penal con Competencia Nacional en Materia de Corrupción [Court of Criminal Appeals with National Jurisdiction Over Corruption], 1/9/2021, "Auto Motivado del 1 de sept. de 2021," (Exp. 13-2019) (Hon.), https://copinh.org/wp-content/uploads/2021/09/Gualcarque.-Corte-A.-Expediente-13-2019..pdf (describing the reasoning behind including COPINH in the matter before the court).

[59] Proceso Digital, *UFECIC presenta caso "Pandora" que involucra a 38 funcionarios y diputados en corrupción*, PROCESO DIGITAL (June 13, 2018, 6:02 PM) https://proceso.hn/ufecic-mp-presenta-caso-pandora-que-involucra-a-38-funcionarios-y-diputados-en-corrupcion/ (describing the Pandora case, an action alleging embezzlement and fraud of certain Honduran public officials).

[60] Proceso Digital, *El estatus de los casos MP-Maccih*, PROCESO DIGITAL (Dec. 6, 2020, 10:25 PM), https://proceso.hn/el-estatus-de-los-casos-mp-maccih/.

[61] EL CASO PANDORA: UN FALLO ALEJADO DE LA NORMATIVA JURÍDICA NACIONAL Y ESTÁNDARES INTERNACIONALES, CENTRO DE ESTUDIO PARA LA DEMOCRACIA (Jan. 2020), http://cespad.org.hn/wp-content/uploads/2021/01/Caso-Pandora-WEB-corregido.pdf (discussing the July 19, 2020 decision extensively).

[62] *Id.* at 22.

[63] Corte Suprema de Justicia, Sala Constitucional, Amparo Interpuesto por el Consejo para el Desarrollo Integral de la Mujer (Constitutional Challenge by the Council for Comprehensive Women's Development) (April 20, 2021) (Hon.) (decision on file with author).

victims representing their own interests and those representing the more diffuse interests of taxpayers or society at large are less clear. For example, there is a Mexican case involving bribes in highway construction used to finance political campaigns in the State of Mexico. Senator Emilio Alvarez and Ana Riojas, a member of the federal Assembly, who initially brought the complaint, brought a writ of *amparo* seeking to correct a lower court decision denying them access to the case file as "victims." They cited the evolution of domestic and international law (including UNCAC) to facilitate greater access for victims to criminal proceedings. They pointed to Article 20 of the Mexican Constitution, which sets out the rights of victims, Article 108 of the Criminal Procedure Code, and Article 4 of the Victims Law of 2013, which reads: "direct victims are physical persons who have suffered economic, physical, emotional or general harm or detriment that endangers or harms their legal goods or rights as a result of the commission of a crime or a human rights violation recognized in the constitution or in ratified treaties".[64] Here, the relevant rights violation is the right to be free from corruption. At least one lower court had already agreed with the complainants.[65]

The lower court treated the issue as one of standing, and found that to seek this remedy, the complainants had to show that their rights, or their individual or collective interests, had been affected. The generic interest of society was not enough, there had to be specific individual or group interests at stake.[66] The court then found that simply having denounced the illegal conduct to prosecuting authorities was not enough to convert the complainants into victims. They had not personally suffered physical harm, financial loss, or negative impact on a fundamental right as a result of the defendants' alleged crimes—in any case, the entire society was affected.[67]

The appeals panel disagreed.[68] It found that the definition of victim has changed in Mexican law over time, and that the new constitutional scheme post-2000 contemplates a progressive definition of victim, giving victims an equal status to offenders, including participation in criminal proceedings. The Mexican Supreme Court had earlier found that victims can challenge a prosecutor's failure to indict through *amparo* proceedings, due to the right to reparations that accrue to victims if there is a guilty verdict.[69] The court here found that a broad reading of the rights of victims was necessary given expansive Inter-American jurisprudence and given the growing importance of collective or supra-individual claims. Once the court recognized collective claims, it was a small step to name the fight against corruption as such a claim, one that therefore any affected member of society could raise. The court imposed two limits: the complainant must be part of the affected community and the complainant must actively file a complaint about the alleged

[64] *Id*. Ley General de Víctimas [LGV] Art. 4, Diario Oficial de la Federación [DOF] 09-01-2013, (Mex.).

[65] Adriana Greaves & Estefanía Medina, *Corrupción Nunca Más Un Delito Sin Víctimas,* [Never Again is Corruption a Victimless Crime] MEXICANOS CONTRA LA CORRUPCIÓN Y LA IMPUNIDAD (Mar. 27, 2021), https://contralacorrupcion.mx/corrupcion-nunca-mas-un-delito-sin-victimas.

[66] *Id.*

[67] *Id.*

[68] Emilio Álvarez Icaza Longoria y Ana Luciá Riojas Martínez, Octavo Tribunal Colegiado en Materia Penal del Primer Circuito [TCC] [First Circuit, 8th Tribunal Panel in Criminal Matters] R.P. 104/2020 (Mex.) (on file with the author).

[69] *Id.*

wrongdoing.[70] Here, those requirements were easily met, and thus the two legislators were entitled, as victims, to copies of the case file and to full participation in the proceedings.

Another recent case came to the same conclusion in administrative proceedings rather than a criminal prosecution. The Mexican Supreme Court found that 2016 reforms creating the General Law of Administrative Responsibilities as part of a package of anti-corruption laws changed the role of a complainant from that of a simple spectator to a central participant in the subsequent investigation and proceedings.[71] It thus overruled its earlier negative jurisprudence, citing the Inter-American Commission on Human Rights and anti-corruption treaties to find that where the authorities decide not to open an administrative proceeding despite a complaint, this impacts the complainant's desire to see the irregularities investigated --and thus, corruption effectively fought, as the constitutional reform intended—but also, at the same time, bars the complainant's ability to intervene actively in the proceeding as a third party, to argue, to present evidence. and even to disagree with decisions that determine the non-existence of administrative responsibility. Thus, "it is through the complainants that the social controls ("una contraloría social") that overcome the State's inabilities to combat the phenomenon of corruption can be relied on."[72] The complainant is different from a mere bystander and has standing to fully participate in the administrative proceedings against public employees.[73] However, because this is an administrative proceeding aimed at sanctioning the public servant, reparations for the complainant are not available.

B. Civil society organizations representing diffuse interests

A second way of managing victim participation is through representation by organizations. A number of countries' legislation gives public interest organizations standing in at least some cases to intervene in cases involving the interests they represent—including Argentina, Brazil, Ecuador, Peru, Chile, Costa Rica, El Salvador, Guatemala, Paraguay, Venezuela, and Bolivia.[74] Other countries have liberal standing requirements through the application of the ancient Roman principle known as *actio popularis*. Countries

[70] *Id.*

[71] Responsabilidades Administrativas, Suprema Corte de la Justicia de la Nación, Pleno de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, Undécima Época, 06/2001, Caso 29993 (Mex.), https://sjf.scjn.gob.mx/SJFSem/Paginas/DetalleGeneralScroll.aspx?id=29993&Clase=DetalleTesisEjecutorias.

[72] *Id.* at 2.

[73] *Id.* at 2.

[74] Código de Processo Penal [CPP.] [Crim. Proc. Code] art. 37 (Braz.); Código de Procedimiento Penal [CPP] [Crim. Proc. Code] arts. 76(4), 78 (Bol.); Código Procesal Penal [CPP] [Crim. Proc. Code] art. 70 (Costa Rica); Código Procesal Penal Comentado [CPPC] [Crim. Procedural Code Annotated] [Civil Code] art. 12(4), 302 (El Sal.); Código Procesal Penal [CPP] [Crim. Procedural Code] [Civil Code] art. 117(4), 302 (Guat.) Código Procesal Penal [CPP] [Crim. Proc. Code] art. 70 (Para.); Código Proceso Civil [Cód. Proc. Civ.] [Civ. Proc. Code] art. 82 (Peru). Código Proceso Penal [Cód. Proc. Pen.] [Crim. Procedural Code] arts. 118, 301 (Venez.); *see also Hacia el reconocimiento de la querella colectiva en causas de corrupción*, ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA [ACIJ] (2018), https://acij.org.ar/wp-content/uploads/2018/12/Hacia-el-reconocimiento-de-la-querella-colectiva-en-causas-de-corrupcion.pdf (discussing rights enshrined in various Latin American Criminal Procedure Codes).

that follow this principle typically will allow "any person" to sue the government for its failure to uphold the law.[75]

Thus, environmental organizations can represent the rights of the environment or of natural features, consumer rights organizations can represent the rights of consumers, and anti-corruption organizations can represent the interests of victims in corruption proceedings. The courts refer to collective harms (to a specific, identifiable group as such) and diffuse harms (to society as a whole or unorganized subgroups of people).[76] While most of these laws are geared towards public interest, or diffuse or collective interests generally, Argentina (as of 2009) allows public interest representation in crimes against humanity and grave human rights cases, and Costa Rica does so specifically in corruption cases. Brazil allows public interest organizations to intervene when the prosecutors' office has not acted by the legal deadline; the prosecutor's office can take control of the case back at any time.

A number of countries allow standing for environmental organizations in cases involving protection of the environment, and such standing is encouraged in treaties like the Aarhus and Escazú agreements.[77] Indeed, litigation around climate and the environment may prove a fruitful source of inspiration and caselaw on diffuse interests, public interest standing, and the required causal connection between the corrupt acts and the harm. For example, in the *Neubauer v. Germany* case brought by young activists to push Germany to establish more long-term climate reductions, the court held that the fact that climate impacts will affect virtually all persons living in Germany did not prevent the young plaintiffs from being affected in their own right, and therefore meant that they had standing to sue.[78]

The series of cases known as "Ill-Gotten Goods" (*Biens Mal Aquis*) in France gave new impetus to the push for organizational standing in corruption proceedings. In that case, the civil society organizations Transparency International and Sherpa denounced the political leaders of Equatorial Guinea, Congo, and Gabon and their families for their participation in acts of grand corruption connected with assets stolen from their countries and now located in France. The French Court of Cassation (the country's highest court in criminal matters) decided that the organizations had standing, as they had been specifically

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[75] Several countries in the region, as well as Spain and other European countries, employ versions of the "acción popular" or popular action. Juanjo Escophet, *La Acción Popular en Otros Paises* (Oct. 2019), available on Scribd.

[76] GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 3-6 (2009), https://perma.cc/YB2H-U45Y (identifying environmental harm as a diffuse harm and the differences in courts' and commentators' interpretations of collective and diffuse interests).

[77] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 4, Jun. 25, 1998, 2161 U.N.T.S. 447, https://unece.org/DAM/env/pp/documents/cep43e.pdf (listing requirements for standing for actions under the Aarhus Agreement); *See also* Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, art. 5, Mar. 4, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/4/S1800428_en.pdf (listing requirements for standing for actions under the Escazú Agreement).

[78] *Constitutional Complaints against the Federal Climate Change Act Partially Successful*, BUNDESVERFASSUNGSGERICHT (April 29, 2021), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

affected as anti-corruption organizations. Article 2 of the French criminal procedure code[79] requires a showing of damages to be classified as a victim and to be able to act in the criminal case. The acts of corruption reported were considered sufficient to generate personal and direct effects on the complainant organizations, and therefore to give them participation in the criminal trial even without specific authorization from the legislature.[80] As a result, the son of Equatorial Guinea's president was stripped of his Paris mansion, among other goods.[81]

Organizations have sought the ability to see the files and evidence, to be able to propose and cross-examine witnesses, and to address the court at sentencing. Criminal files are usually closed except to the parties, including those designated as victims. The organizational goal here is to contribute additional evidence and perspectives and to ensure that the case is being diligently prosecuted.

Thus, in Argentina, the courts have held that civic anti-corruption organizations may access the case file so long as doing so does not implicate privacy concerns of the parties or reveal details of prosecutorial strategy. In a case popularly known as "Bribes in the Senate" the Argentine courts prosecuted former president de la Rúa and other high-ranking government officials for politically related bribery.[82] Two anti-corruption NGOs petitioned for access to the case file. The Buenos Aires federal court found that organizations defending collective interests were in a position analogous to those of an individual victim with respect to their legal interests. They were, at the very least, potential victims. Given that, regulations limiting access to the case file to prosecutors and parties were not absolute and had to give way to the interest in openness and public access that underlay Argentina's (then recent) procedural reforms. However, this interest was limited to the court documents in the case and did not extend to personal information about the defendants.

A different Argentine case directly connects access for anti-corruption organizations to a human rights rationale. An anti-corruption group (Fundación Poder Ciudadano) acted as criminal complainant in a corruption case. The defendants objected that the criminal procedure code only allows civil society groups to intervene as complainants in cases of crimes against humanity or grave human rights violations.[83] The law at issue deals with

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[79] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.][CRIM. PROC. CODE] art. 2 (Fr.).

[80] Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 9, 2010, Bull. crim., No. 09-88-272 (Fr.).

[81] *Paris Villa of Equitorial Guinea Leader's Son Obiang Seized*, BBC (Aug. 3, 2012), https://www.bbc.com/news/world-africa-19120379. *See generally Teodorin Obiang Definitively Convicted In The "Ill-Gotten Gains" Case: A Decision That Puts The Final Dot On The Chapter Of Confiscation And Opens The Restitution One* (July 29, 2021), https://www.asso-sherpa.org/teodorin-obiang-definitively-convicted-in-the-ill-gotten-gains-case-a-decision-that-puts-the-final-dot-on-the-chapter-of-confiscation-and-opens-the-restitution-one .

[82] Juzgado Nacional en lo Criminal y Correccional Federal [JNCC] [National Court in Criminal and Federal Correctional Matters] 28/122005, "Incidente de asociación civil por la igualdad y la justicia," La Ley [Art] (149 CPPN) (Arg.).

[83] CODIGO PROCESAL PENAL DE LA NACIÓN [COD. PROC. PEN] art. 82 (Arg.) ("Intereses colectivos. Las asociaciones o fundaciones, registradas conforme a la ley, podrán constituirse en parte querellante en procesos en los que se investiguen crímenes de lesa humanidad o graves violaciones a los derechos humanos siempre que su objeto estatutario se vincule directamente con la defensa de los derechos que se consideren lesionados." [Collective interests. Associations or foundations, duly legally registered, may become civil parties in criminal cases investigating crimes against humanity or grave human rights violations, so long as their stated goal is directly related to the defense of the rights at stake.])

cases of death, torture, and forced disappearance arising from the "dirty war," not with corruption, they argued. The Federal Court of La Plata (2nd Chamber) disagreed, finding that since corruption affects a wide range of human rights, and the organization was set up to deal with corruption, the requirements of the statute were met.[84] As a complainant, the organization could participate in the proceedings, call witnesses, and make sure that the case moved forward.

Mexican courts, despite the openness to individual complainants representing the public interest, have been less willing to accept organizations, especially in high-profile cases where the apparent purpose of the intervention is to avoid a sweetheart deal between defendants and prosecutors. For example, the prosecution of former Veracruz governor Javier Duarte—believed to have stolen at least $35 million US dollars and (at the very least) allowed impunity for murders of journalists and others—resulted in a plea bargain that greatly reduced the charges and led to a relatively short nine-year sentence, given the gravity of the crimes.[85] TOJIL, an anti-corruption NGO, claimed that the short sentence reflected a sweetheart deal based on bribes to prosecutors and asked for an investigation. TOJIL also asked to be accorded victim status in that investigation. A lower court initially agreed, based on arguments similar to those above, but an appeals panel reversed 2-1, the majority finding that the complainants had not shown that they had suffered any legally cognizable harm, that there was no right to live in a corruption-free society, and that a human rights organization could only claim victim status if its members had been harassed or threatened as a result of their actions.[86] TOJIL has asked the Inter-American Commission on Human Rights to take the case; it is still under study regarding admissibility.[87]

In another emblematic case, the prosecutors' office refused to let the same organization intervene in the criminal case against former PEMEX (Mexican oil company) official Enrique Lozoya for grand corruption, a case connected to the Odebrecht bribery scandal. The organization, now supported by Mexico's interior ministry, has appealed that decision through an *amparo*.[88]

In short, courts are slowly opening the door to claims by victims, based on human rights considerations, but are obviously concerned about opening the door too wide and are searching for limiting principles. These to date include specific treaty obligations (as with ILO 169) or status as complainants in the case, not just interested parties.

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[84]Participación Ciudadana, *En Un Fallo Sin Precedente, La Justicia Permitió a Poder Ciudadano Ser Querellante en Causa de Corrupción* [In an Unprecedented Ruling, Justice Allowed Poder Ciudadano to be a Plaintiff in a Case of Corruption], PODER CIUDADANO (June 11, 2018), https://poderciudadano.org/en-un-fallo-sin-precedente-la-justicia-permitio-a-poder-ciudadano-ser-querellante-en-causa-de-corrupcion/.

[85] Kate Linthicum and Patrick J. McDonnell, *Ex-Mexican governor accused of embezzling billions just got 9 years in prison. Many think that's not enough*, L.A.TIMES, (Sept. 27, 2018).

[86] Atención y determinación [Attention and Determination], FED/VG/UNAI-CDMX/0000435/2018, Diario Oficial de la Federación [DOF], 04-10-2018 (Mex.).

[87]*Javier Duarte's Case*, TOJIL, https://tojil.org/english-respaldo.

[88] Arturo Angel, *Inteligencia Financiera Pide a Jueza Reconocer a ONG Como Víctima en Caso Lozoya y Darle Acceso Al Proceso* [*Financial Intelligence asks Judge to Recognize NGO as Victim in Lozoya Case and Give It Access to the Process*], ANIMAL POLITICO (Apr. 17, 2021), https://www.animalpolitico.com/2021/04/lozoya-uif-ong-corrupcion-victima/.

IV. Reparations for Corruption

Of course, the other reason why victims seek participation in corruption cases is to obtain reparations for the harm suffered. In general, reparations for harm are potentially available in civil suits, as a beneficiary of administrative proceedings against state officials, or through participation as a civil complainant or private prosecutor in a criminal case brought by the state. In countries where this is allowed, many victims prefer the criminal route, in part because the state bears the costs of investigating and trying the case. Often, civil suits are subject to short statutes of limitation, payment of a bond, and other procedural obstacles, especially when the defendants are powerful private actors or state officials.

There has been very little in the way of reparations to individual or collective victims in grand corruption cases, despite the language of Article 35 of UNCAC. Compensation has occasionally been paid for wrongful death or injury connected to corrupt acts, but the tie to corruption has not been explicit. There are substantial obstacles to implementing a holistic reparations policy, including lack of access to information and lack of expertise in defining, proving, and presenting expert opinions on what damages and broader reparations should entail. Cases involving grants of financial or other redress to individuals or public interest groups are scarce, in part because most cases have not yet reached a post-verdict stage.

Nonetheless, courts may learn from the region's experience implementing reparations programs in cases of grave human rights violations. One major change involves shifting from a compensation framework focused exclusively on individual money damages to a much wider and complex view of what is involved. The United Nations Basic Principles on the Right to Redress and Reparation set out an oft-used framework, encompassing restitution, rehabilitation, compensation, and guarantees/measures of non-repetition.[89] The Principles also make it clear that reparations need not be monetary but can also be the restoration of citizenship or a job, medical or psychosocial rehabilitation, or a wide variety of reform measures. Other work on integral reparations has stressed that they can be both material and symbolic, and both individual and collective. [90]

Given the scope of the harms and this "integral reparations" framework, most reparations for grave human rights violations have not come through tort-like damages administered by courts. Rather, government administrative programs have departed from attempting to put the victim back to where they would have been absent the violation and instead focus on acknowledgement, dignification and collective along with limited individual reparations.[91] In Colombia (but not elsewhere), land restitution has been a major

[89] G.A. Res. 60/147, ¶ 3, 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, (Dec. 16, 2005).

[90] *See e.g.*, Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157 (2004); *The Handbook of Reparations*, 56 AM. J. COMP. L. 236, 238 (2008) (book review).

[91] PABLO DE GREIFF, REPAIRING THE PAST: COMPENSATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS 4, 10, 12, 13, 15, 17 (2006).

focus of quasi-judicial proceedings.[92] Everywhere, such programs have involved at least a stated commitment to psycho-social and medical rehabilitation and a broad swath of reforms, even if in practice the reality has fallen far short of the stated goals.

Another lesson from reparations practices to date in the region that individual reparations can be limited and potentially divisive when the harms are widespread or perceived as collective harms. Intra-family disputes, marginalization of women and children in provision of compensation,[93] and the rise of a host of local opportunists and scam artists have accompanied these programs. Most surveys indicate that victims want individual compensation.[94] Collective reparations have generally focused on access to educational and health infrastructure and economic development (such as electrification, road construction, and market access), leading to debates about whether basic governmental functions can be rebranded as 'reparations.'[95] All these debates are relevant to thinking more creatively about reparations in the grand corruption context. It may be that a form of administrative reparations makes the most sense here as well.

In cases of grave human rights violations and international crimes, human rights law (especially in the Americas) prohibits blanket amnesties and limits the use of statutes of limitations or other immunity devices. Nonetheless, under certain circumstances, conditional amnesties that require truth-telling, restitution of stolen assets, and a commitment to not take up arms have been apparently acceptable, as in Colombia's Integral System for Truth, Justice, Reparation and Non-Repetition.[96] In the context of grand corruption, international law to date puts no such limits on amnesties or plea bargains, which are common. Should there be limits to such bargains given the propensity for authorities to go easy on the powerful? Should such deals be conditioned on continued monitoring or compliance, on apology, on those convicted being debarred from future employment or connections to state contracts? Should the rationales behind long statutes of limitations and/or equitable tolling while the wrongdoer cannot be brought to justice be extended to grand corruption cases, which are equally difficult to find evidence for and

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[92] *See, e.g.*, Philipp Wesche, *Business Actors and Land Restitution in the Colombian Transition from Armed Conflict*, 25 INT'L J. HUM. RTS. 295, 300-01 (2021).

[93] Ruth Rubio-Marin, WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (Social Science Research Council, 1st ed. 2006).

[94] *See e.g.*, PHUONG PHAM ET AL., SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 43 (Jan. 2009); PATRICK VINCK & PHUONG PHAM, BUILDING PEACE SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC 35 (Aug. 2010); PATRICK VINCK, A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SECURITY, DISPUTE RESOLUTION, AND POST-CONFLICT RECONSTRUCTION IN LIBERIA 66 (June 2011); PHUONG PHAM & PATRICK VINCK, TRANSITIONING TO PEACE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND JUSTICE IN NORTHERN UGANDA 44-45 (Dec. 2010).

[95] Naomi Roht-Arriaza & Katherine Orlovsky, *A Complementary Relationship: Reparations and Development, Intl. Ctr. For Transnat'l Just.,* July 2009, https://www.ictj.org/publication/complementary-relationship-reparations-and-development.

[96] *Comprehensive System of Truth Justice Reparation and Non-Repetition (SIVJRNR),* www.jep.gov.co/Infografas/SIVJRNR_EN.pdf (describing Colombia's Integral System for Truth, Justice, Reparation and Non-Repetition).

equally come up against powerful defendants able to engineer impunity? To date, cases involving reparations are mixed even in the context of international crimes.[97]

What would reparations look like? Sometimes it's easy: where properties have been stolen by force or duress, or obviously fire sale prices have been paid, as in Colombia[98] or Nayarit (Mexico),[99] restitution of either the property itself or the stolen funds, plus damages for pain and suffering, is appropriate. Where an individual, community, or specific group has suffered physical injury or wrongful death because of a malfunction or lack of function of equipment bought as part of a fraudulent scheme, as seen in the train maintenance or COVID-19 ventilator cases, victims should have the option of joining the criminal corruption case, bringing a separate civil torts case, or following both paths and receiving different damages for each. Collective entities like Indigenous peoples or unions should receive restitution and compensation for losses to land, natural and cultural resources, and for the time and expense of defending against corrupt schemes. In Guatemala and Colombia, judges have ordered private sector defendants to complete the public works projects that were never finished due to corrupt contracting, where it was clear the project would actually benefit affected communities and not simply become a useless "white elephant."[100] All this requires work to visualize and specify damages but can be done within existing frameworks.

A road construction case in Guatemala[101] provides one of the few examples where judges have gone beyond fines and compensation to incorporate the broader notion of

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[97] See cases from Chile deciding there is no statute of limitations for reparations for international crimes like enforced disappearance, versus Argentine cases finding that even though the crimes themselves are not subject to a statute of limitations, civil reparations actions for the same crimes are. Re Chile, *see:* Corte Suprema, Nº2080-08, *Ortega Fuentes, María Isabel con Fisco de Chile* (April 8, 2010) reproduced in Carlos Céspedes Muñoz, *Statute Of Limitations Of The Civil Action Derived From Crimes Against Humanity*, Revista de Derecho y Ciencias Penales nº 16 (131-150), 2011, Universidad San Sebastián (Chile). See also the position of the Inter-American Court of Human Rights, Caso Órdenes Guerra y otros vs. Chile, (Nov. 29, 2018), Series C No. 372. For Argentina, *see*, e.g. Supreme Court of Justice, *Villamil, Amelia Ana e/ Estado Nacional s/ daños y perjuicios*, .2 CSJ 203/2012 (48-V)/CS1 (March 8, 2017). Thanks to Ximena Medellín for raising this issue with me.

[98] Nelson Camilo Sánchez León, *Tierra en Transición: Justicia transicional, restitución de tierras y política agraria en Colombia* [*Land in Transition: Transitional Justice, Land Restitution, and Agrarian Policy in Colombia*] (2017) https://www.dejusticia.org/en/publication/tierra-en-transicion-justicia-transicional-restitucion-de-tierras-y-politica-agraria-en-colombia/.

[99] During the government of Governor Roberto Sandoval and Prosecutor Eduardo Veytia, the Mexican state of Nayarit suffered massive, forced dispossession of property by state authorities acting in concert with organized crime. *See* Lucía Chávez, *Corrupción y Crímenes Atroces en México: El Caso Nayrarit*, JUSTICIA EN LAS AMÉRICAS BLOG (Sept. 10, 2020), https://dplfblog.com/2020/09/10/corrupcion-y-crimenes-atroces-en-mexico-el-caso-nayarit/.

[100] This type of reparation needs to be preceded by careful study to ensure that roads will actually benefit farmers. They should not be "roads to nowhere" or primarily benefit the same corrupt elites and organized crime. *See, e.g.*, Alex Papadovassilakas, *Fugitive's Return Promises New Graft Revelations in Guatemala*, INSIGHT CRIME (Aug. 26, 2020), https://insightcrime.org/news/brief/fugitive-graft-guatemala/; *Odebrecht Case: Politicians Worldwide Suspected in Bribery Scandal*, BBC NEWS (Apr. 17, 2019), https://www.bbc.com/news/world-latin-america-41109132

[101] *See* STEVEN DUDLEY, THE WAR FOR GUATEMALA'S COURTS: HOW POLITICAL, CORPORATE, AND CRIMINAL INTERESTS SEEK TO INFLUENCE GUATEMALA'S JUSTICE SYSTEM (2014), https://insightcrime.org/images/Investigations/guatemala_ courts/TheWarforGuatemalasCourts (describing how the High Risk Courts are responsible for hearing complex or controversial human rights, corruption or organized

reparations incorporated into human rights law. The former mayor and other officials of the town of Chinautla gave out road-building contracts to family and friends who had no ability to carry them out. After a criminal conviction, the state asked for both material and moral damages, along with a public apology.

The trial court agreed with the government on damages in the amount equal to the crooked contracts (denying the request to triple the damages), but then added detailed instructions on "guarantees of non-repetition" as an element of reparations. First, the defendants were to publicly apologize in the town square to the people of Chinautla, promising to never do it again. The apology was to be videotaped and written and video versions were to be distributed to the local schools, media and the Association of Municipal Governments. Second, the town was to erect a plaque in a public place in front of the city hall, with the words "The Town of Chinautla has zero tolerance for the corruption and impunity of public employees and officials."[102] Third, the local magistrate was to witness and confirm that these acts were carried out within two weeks of the sentence, with criminal charges to follow from non-compliance.

More complex reparations questions arise when the harm encompasses an entire sector or when the complainant is a public interest organization. Should reparations be paid directly to the organization, on grounds that it has acted as a "private attorney general" and should be compensated for the time and risk involved? That is the theory, for example, behind citizen suits in the United States. Are there specific criteria that enhance the trustworthiness and legitimacy of anti-corruption NGOs or attorneys wishing to represent victims or groups of victims? Are there specific rules needed to ensure that recoveries for victim representatives accrue to victims? Should the organization have to agree to distribute any proceeds to those most affected? How would those be defined? Would the costs and fees of the organization be deducted? Or would it make more sense to use attorneys' fees or bounty-type provisions to encourage public interest organizations, while directing reparations to the public treasury? These questions, while crucial, await further research.[103] They are now being discussed on parallel tracks: in asset recovery cases[104] and in national courts dealing with corruption at home.

A few experiences in Latin America provide tantalizing glimpses of ways forward. Costa Rica pioneered the idea of social harm as an element of reparations. Social harm, a kind of diffuse harm, differs from collective harm or aggregated individual harms, in that those affected cannot be identified even as a group. Examples include environmental harm, harm to the government's reputation as an effective service provider, and harm to cultural heritage.

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crime cases and how the judges in this case were also familiar with cases involving genocide, crimes against humanity and similar crimes).

[102] Evelyn Boche, *Chinautla debe contruir un monumento contra la corrupcion* [Chinautla Should Construct a Monument Against Corruption], ELPERIÓDICO (Sept. 9, 2020), https://elperiodico.com.gt/nacionales/2020/09/09/chinautla-debe-construir-un-monumento-contra-la-corrupcion/.

[103] *See, e.g.*, JUANITA OLAYA GARCIA, DEALING WITH THE CONSEQUENCES: REPAIRING THE SOCIAL DAMAGE CAUSED BY CORRUPTION (2016), https://ssrn.com/abstract=3475453.

[104] *See, e.g.* Samuel J. Hickey, *Remediation in Foreign Bribery Settlements: The Foundations of a New Approach*, 21 CHI. J. INT'L L. 367, 367-418 (2021), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1790&context=cjil.

Article 37 of the Costa Rican Criminal Procedure Code allows victims of a criminal act to intervene in order to obtain restitution or damages.[105] To claim social harms, the Procurator or Inspector General [*Procuraduría*] represents the victims. Article 16[106] gives the *Procuraduría* the right to intervene in corruption and tax evasion cases and to have the same rights as the prosecutor therein. Article 38[107] specifically allows the *Procuraduría* to claim social damages for criminal acts that affect collective or diffuse interests. At the same time, Article 70 defines victims as "associations, foundations and others, in the crimes that affect collective or diffuse interests, so long as the objective of the group is directly related to those interests."[108]

These provisions have been applied in several dozen corruption and other types of cases. Among the largest corruption awards, the *Procuraduría* received $9.2 million in social harm against former president Calderón and former officials of the social security administration, arising out of a medical supplies contract that was steered to a specific supplier in exchange for bribes (Caja-Fischel case).[109] In the ICE-Alcatel telecommunications bribery case,[110] the defendant agreed to a partial settlement in 2015, paying $10 million to the *Procuraduría* for social harm.[111] Social harm was defined as the loss of trust in public administration.

Colombia also uses the mechanism of a Procurator or Inspector General to represent the public interest in cases involving corrupt government officials. In the Ruta del Sol II/Odebrecht case, private companies related to the Brazilian construction company Odebrecht paid off officials to win a road construction contract. In January 2017, the Inspector General filed a "popular action" on behalf of the collective interests of administrative morality, defense of public property, and efficient access to public services.[112] On December 6, 2018, the Administrative Court of Cundinamarca ruled in favor, ordering a suspension of the concession contract, measures aimed at rebidding the

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[105] Procuraduría General de la República de Costa Rica Jurisprudencia sobre Daño Social [Office of the Attorney General of the Republic of Costa Rica, Jurisprudence on Social Damage], https://www.pgr.go.cr/servicios/procuraduria-de-la-etica-publica-pep/temas-de-interes-pep/dano-social/jurisprudencia-sobre-dano-social/ ("Art. 38: Acción civil por daño social La acción civil podrá ser ejercida por la Procuraduría General de la República, cuando se trate de hechos punibles que afecten intereses colectivos o difusos").

[106] LA ASAMBLEA LEGISLATIVA DE LA REPÚBLICA DE COSTA RICA DECRETA: CÓDIGO PROCESAL PENAL [The Republic of Costa Rica Criminal Procedure Code] art. 16 (1996) https://wipolex-res.wipo.int/edocs/lexdocs/laws/es/cr/cr040es.pdf.

[107] *Id.* at art. 38.

[108] *Id.* at art. 75(allowing anyone to initiate or intervene as a private prosecutor, known as a "querrellante", in cases involving diffuse interests, abuse of power or human rights violations by a public official).

[109] Sala tercera de la corte suprema de justicia [Third Chamber of the Supreme Court of Justice] May 11, 2011, 04-005356-0042-PE (Cr.).

[110] Sala tercera de la corte suprema de justicia [Third Chamber of the Supreme Court of Justice] May 11, 2011, 04-006835-0647-PE (Cr.).

[111] Carlos Cordero Pérez, *Alcatel Lucent Indemniza al ICE con $10 Milliones por Daños y Perjuicios* [Alcatel Lucent Indemnifies ICE with $10 Million in Damages], EL FINANCIERO (Aug. 4, 2015, 3:04PM), https://www.elfinancierocr.com/tecnologia/alcatel-lucent-indemniza-al-ice-con-10-millones-por-danos-y-perjuicios/UXKPPC46UVGVPCJHNOUY5LDDOU/story/.

[112] Res. 5216, Feb. 15. 2017, sec. 5.1 (Colom.) https://www.sic.gov.co/sites/default/files/normatividad/052017/Resolucion_5216.pdf (the response to the Inspector General's action can be found in the precautionary measures decision).

road projects, an embargo on the defendants' assets, and the payment of $800,000 in collective damages.[113]

The use of the Inspector General's office allows diffuse interests to be represented without a showing that a specific organization has interests in the subject and puts state resources to work in favor of recovering assets that can then be used. However, in states where the entire apparatus of the state is either too weak, dysfunctional or captured to operate in the public interest, the Inspector General's office is as much at risk of failure or capture as the prosecutors or judges. Any monies obtained simply go back to the state's coffers, where there is no obligation that they be used to redress the harms alleged. In addition, if victims' agency in demanding participation in corruption cases has an independent value, it is not served through the use of the Inspector General mechanism.

V. Risks of a victim-centered approach

While expanding victims' access to court and to reparations has undeniable advantages, it also presents some caveats and risks. These include political, organizational, and security risks, as well as the over-privileging of criminal prosecutions over other, perhaps more impactful, approaches.

One clear risk is the abusive use of corruption charges by the powerful to disable political opponents or commercial rivals. While hard to prove, corruption is notoriously easy to allege, and the region is no stranger to the use of ill-founded charges to discredit, disable, and criminalize political opponents or social activists.[114] Organizations registered as "public interest" can mask a variety of funding and political agendas.[115] And a lot of corruption is legal, as "campaign finance" or "lobbying."

A second risk shares with cases involving grave human rights violations the dangers inherent in taking on powerful actors who enjoy broad impunity from investigation and action. Anti-corruption campaigners around the world have faced reprisal and bringing victims and their advocates into more active roles increases the dangers to them.[116] Third, expanding victim access will require re-tuning of prosecutors' and inspector generals'

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[113] *Condena histórica contra Ruta del Sol II* [Historic Condemnation of Ruta del Sol II], SEMANA (Dec. 14, 2018), https://www.semana.com/pais/articulo/tribunal-de-cundinamarca-emite-condena-historica-a-odebrecht/265530/.

[114] Among the most well-known examples are Lula da Silva in Brazil and Thelma Aldana or Juan Pablo Solórzano in Guatemala, but there are more.

[115] A good example would be the "Foundation Against Terrorism" in Guatemala, a recognized non-governmental entity, some of whose leaders were recently placed on the Engels sanctions list for their anti-democratic activities. *See* U.S. DEP'T. OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, SECTION 353 CORRUPT AND UNDEMOCRATIC ACTORS REPORT (2021), https://www.state.gov/reports/section-353-corrupt-and-undemocratic-actors-report/.

[116] *See generally* FRONTLINE DEFENDERS, FRONTLINE DEFENDERS' GLOBAL ANALYSIS 2020 (2020), https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf. *See also* FIDH, MEXICO CRIMINAL STRUCTURE WITHIN THE PUBLIC PROSECUTOR'S OFFICE OF THE STATE OF NAYARIT AND CRIMES AGAINST HUMANITY, 10 (2021), https://reliefweb.int/sites/reliefweb.int/files/resources/Mexico%20--%20Criminal%20structure%20within%20the%20Public%20Prosecutor%E2%80%99s%20Office%20of%20the%20State%20of%20Nayarit%20and%20crimes%20against%20humanity.pdf (discussing the experience of the Nayarit Truth Commission's efforts to expose corrupt land grabs, which led to killings and other harm).

offices and the development of new expertise in damages valuation, procedural mechanisms for group representation, and the like.

More fundamentally, a risk exists that expanding victims' access will inordinately privilege criminal accountability over other forms of dealing with grand corruption. These might include trying to make civil suits, asset recovery actions, or administrative actions more viable, the use of investigative or "truth" commissions focusing on corrupt networks or schemes, or political and popular organizing to remove corrupt individuals and their parties.[117] It might lead to a focus on individuals rather than structures and networks, which is exactly the opposite of what emerging research shows underlies corruption in the region. Criminal processes take a long time, are expensive, and require ceding decision-making to lawyers. They are also backwards looking, and it is not clear to what extent they create general deterrence.

These are, of course, the same critiques that accompanied the expansion of criminal justice, and especially international criminal justice. The International Criminal Court, in particular, has repeatedly faced criticism that it displaced other forms of justice, led to overblown expectations of access and reparations, and has depoliticized struggles to their detriment. It has taken years for the Court, and criminal justice generally, to be seen as one tool in a much larger toolbox, and not necessarily the main actor. A similar discussion can be expected to arise over grand corruption cases.

A final objection might center on the neocolonialist, pro-Western business agenda behind the anti-corruption work touted by the World Bank and IMF and by the rhetoric of developed country administrations. A more radical anti-corruption agenda would be bottom-up and would connect the anti-corruption agenda to allied efforts to hold businesses and international financial institutions accountable for human rights violations and environmental depredation. The anti-corruption groups leading the efforts described here tend to share this more bottom-up view.

VI. Conclusion

In order to move this agenda forward, civil society groups in the region should take a page (or two) from previous efforts regarding criminal prosecution of grave violations, as well as recent legal and political campaigns related to the right to a healthy environment and climate. For example, a concerted, multistate effort to create laws in those states that do not have them and allow long-standing, recognized, and active anti-corruption non-governmental groups to represent collective and/or diffuse interests, including in corruption cases, might be possible. This would especially be viable if pursued together with other groups working on cases involving diffuse interests, such as environmental groups. This would involve creating model legislation and then working to introduce and pass the legislation. Another similar initiative might involve enshrining the United Nation's

[117] Nómada, *El pago de Pisa a los sobrevivientes del IGSS parece un gesto humano, pero busca algo más,* NÓMADA (Feb. 27, 2018) https://nomada.gt/pais/la-corrupcion-no-es-normal/el-pago-de-pisa-a-los-sobrevivientes-del-igss-parece-un-gesto-humano-pero-busca-algo-mas/(civil suits have their own dangers, including small settlements to desperate victims, as exemplified by the IGSS-Pisa Guatemalan cases discussed earlier).

definition of "victim" into laws for criminal cases (i.e. criminal procedure codes) or into specific anti-corruption statutes. A final legislative strategy might focus on asset recovery laws, including in non-conviction-based confiscations, and their ability to fund victim reparations rather than simply return in full to state treasuries.

Beyond legislation, civil society groups that want to pursue a victim-centered strategy around corruption might look for forums and cases likely to create good precedent that could then be used as an example elsewhere in the region. In cases involving grave human rights violations, Argentine cases and the judgment in the Fujimori trial in Peru were particularly influential. These cases were cited and used elsewhere in the Americas. In the corruption context, cases would ideally feature a strong moral outrage component, but also as clear a causal link as possible between the harm and the corrupt acts, and, if possible, identifiable individuals or collectivities who suffered the harm. These might be related to COVID-19, land grabs, or corrupt contracting or licensing for environmentally and socially destructive megaprojects in the territories of Indigenous peoples. The goal would be to make good precedent and obtain integral reparations. If that is not possible, a secondary goal may be to set up a handful of good test cases for the Inter-American human rights system. It will take sustained pressure from petitioners in different states to develop a regional jurisprudence that can move national law forward.

As a matter of international law, rights-based approaches are becoming more salient in environmental and anti-corruption arenas, raising similar issues about standing, causality, and redress. Litigation strategies have begun to overlap and merge, as civil society networks exchange ideas and information not simply across countries but across previously separate subject areas. Parallel movements in corporate compliance, also driven by national law, international soft law principles, and professional networks, are increasingly integrating environmental, social (including human rights) and governance (including anti-corruption) (ESG) issues. We can look forward to greater borrowing among these previously discrete issue areas, as well as further expansions of human rights law into a broad array of social issues, based on the idea that victims should be at the center.