

# Dealing with the consequences: Repairing the social damage caused by corruption

Dr. Juanita Olaya

[JuanitaOlaya@gmail.com](mailto:JuanitaOlaya@gmail.com)

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What do you steal when you bribe a government official? Do you cause any harm when you negotiate a kickback? Is it any different if “everybody does it”? When does your conflict of interest turn into an improper advantage and harms others? These are questions that judges, prosecutors, lawyers, citizens and activists need to confront when dealing with corruption cases.

From a legal policy and practice perspective, this paper takes on these questions and explores the issue of what is the damage caused by corruption, who are its victims, and how can we repair it. We also look at the issue of how do we come forward by taking this point of view. The core idea of this document is two-fold. On the one hand, the recognition that there are damages caused by corruption at the individual, social and collective levels, leads to the option of pursuing its reparation through litigation. On the other, this same recognition creates awareness on the relevance of trust and the value of the public interest among social groups. The proposal is to increase efforts to develop trust and to clarify the value of public good and this is feasible even in contexts where judicial systems are weak, and litigation and reparation seem hard to achieve. The aim here is not to propose a tool to fight corruption, but to promote fairness and trust. This approach works at two different levels: by pursuing reparation through strategic litigation, change is sought by enforcing legal (formal) norms; by promoting trust and an enhanced valuation of the public interest the change is sought at the level of social (informal) norms. These are two different but complementary paths, where the outcomes of both should be similar, this is to promote behavioural change.

This paper builds on an earlier paper I wrote on this subject documenting the use of the concept of social damage in corruption cases in a specific case in Costa Rica,<sup>1</sup> by searching for other experiences and promoting further reflection on the topic thus taking the issue further. This explains the numerous references to that paper and the experience of Costa Rica in this document. In pushing the issue further, it aims at encouraging readers to take action and also to share their experiences with us and enrich the discussion.<sup>2</sup>

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<sup>1</sup> Repairing Social Damage Out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica (December 6, 2010). Written with the research support of Anja Roth and Kojo Atisso. Available at SSRN: <http://ssrn.com/abstract=1779834> and also here in English <http://juanitaolaya-impacttools.com/2011/01/31/corruption-causes-social-damage-can-it-be-repaired/#more-73> and here in Spanish: <https://juanitaolaya-impacttools.com/initiatives/corruptions-social-damage/>

<sup>2</sup> Comments, input and ideas are welcome at [JuanitaOlaya@gmail.com](mailto:JuanitaOlaya@gmail.com)

## The Public Interest is at the Core of Corruption

Corruption occurs when someone abuses his/her entrusted power for his/her private gain. In short, it is the imposition of a private interest over the public interest. Corruption would not be corruption if there was no harm to the public interest. This is what makes corruption different from say, simple robbery. This is the difference between nepotism and family or clan loyalty. The problem is we think of corruption more often in terms of its forms (bribery, kickbacks, conflicts of interest, nepotism) and then forget what the issue is about, tending to forget the essence. We often fall prey of calling corruption anything that falls short of our expectations.

Recognizing the essential role of public interest in characterizing corruption enables us to focus. This entails the following:

- Fighting corruption should not be a goal in itself, and is of little help if this doesn't translate in better services or better life conditions for the citizens (in other words, the public good).
- The damage to the public good coming out of corrupt activity is real and tangible, and should be repaired.

## What is the damage corruption produces?

Those aspects of life that are relevant and considered by legal systems worth protecting are called "legally protected goods", whether us individuals exercise rights over them or not, or whether we are just entitled to them. For example, I have a property right over my property; as a human being I also have a right to my dignity and my good name; as a citizen, I am entitled to an accountable, effective and functioning Government. A damage, legally speaking, is a fact, an occurrence, a situation whereby my rights or those entitlements are affected, diminished or violated thus creating legal implications. Relevant is that those rights and entitlements are recognized and protected by the legal system.

As this brief description recalls, those rights and entitlements find their origins in different sources:

- On my own will: for example through a contract by which I acquire some property or a decision by which I decide to participate on a public bid for a public contract.
- On my own condition as a human being both individually (as in first generation human rights to life, name, dignity, freedom of expression etc.); and also collective in the realm of public goods (as in second generation collective rights like the right to health, education, freedom of association)
- On my condition as a citizen and a member of a society in a specific country also in the realm of public goods (a stable economy, an accountable government, a safe environment free of war and a trustworthy justice system).

The damage caused by corruption is on first instance at the social or collective level: on the public interest, the public good. On that what concerns all members of society alike. This is the social damage. Social damage can be described as *"the loss experienced in aspects and dimensions of the collective or the community relevant to the law (thus legally protected)"* (...) *"it is a type of damage that falls upon individuals, as members of a community but not on an individual in particular. This includes therefore the environment, social trust, the trust and credibility of the institutions, collective fundamental rights like health, security, peace, education and good governance and good public*

*financial management among others (...).<sup>3</sup>* This is the damage directly related to the public interest and occurs when this public interest is affected, not requiring the existence of a specific individual or collective rights to it. The damage is here enough to serve as cause for action.

Occasionally, the damage can also fall on specific individuals and on identifiable groups affecting specific rights. At the individual level, for example you could have the kid who dies as a consequence of having been treated with out-dated medicine sold as new through a fraudulent agreement between the public hospital and a pharmaceutical company, with the complacency of the local government supervisor. You could also find the company who lost an open bid after refusing to pay a bribe. The damage caused by corruption can also be collective and affect an identifiable group of people, imagine for example if all clients of a certain mobile phone company have to pay higher rates than they would have, had the mobile company not bribed its way in to the service delivery contract.

Collective damage could coincide with social damage as defined above, and can also be differentiated. They can coincide in that the very same characteristic that gives an “entitlement” to a group also defines it, like citizenship of a particular nation. In this case we can still identify the members of a group being a victim of corruption, although the nature of the harm is diffuse (they lose trust in their institutions, or the public budget allocation of their country is affected). They can be different in that collective damages indicate the existence of a collective right that has been affected, while social damage arises as an entitlement out of a legally protected public interest. Collective damages are similar to individual damages in that the victims are identifiable, and often, the mechanisms available to the latter are available to the former. Differentiating between the two will only be important if the mechanisms for redress in a specific country are rights based or “legitimate interest” based. In Costa Rica for example, the courts have acknowledged that citizens have a right to a corruption-free environment and to adequate public financial management and the law has given entitlement to the prosecutor to obtain redress for collective damages or harm to diffuse interests.<sup>4</sup>

The damage caused by corruption can be material, like in the case of financial loss, for example a failed infrastructure project due to corruption; or immaterial, as in the case of opportunities lost, for example in the case of embezzled public funds that other wise could have been used in enhancing health services; or also in the case of loss of trust and credibility of institutions.

The damage caused by corruption is therefore beyond the means used to cause it (the bribe for example) and include waste, lost opportunities and financial loss, but it also includes other dimensions of loss like trust and credibility of the institutions, the absence or malfunction of public goods. It thus includes monetary and non-monetary aspects of individuals and societies, and material and non-material aspects jus as well, all happening at individual, collective and social dimensions. The graph below illustrates with examples these different dimensions of the damage caused by corruption using the case of Alcatel in Costa Rica as an example.<sup>5</sup>

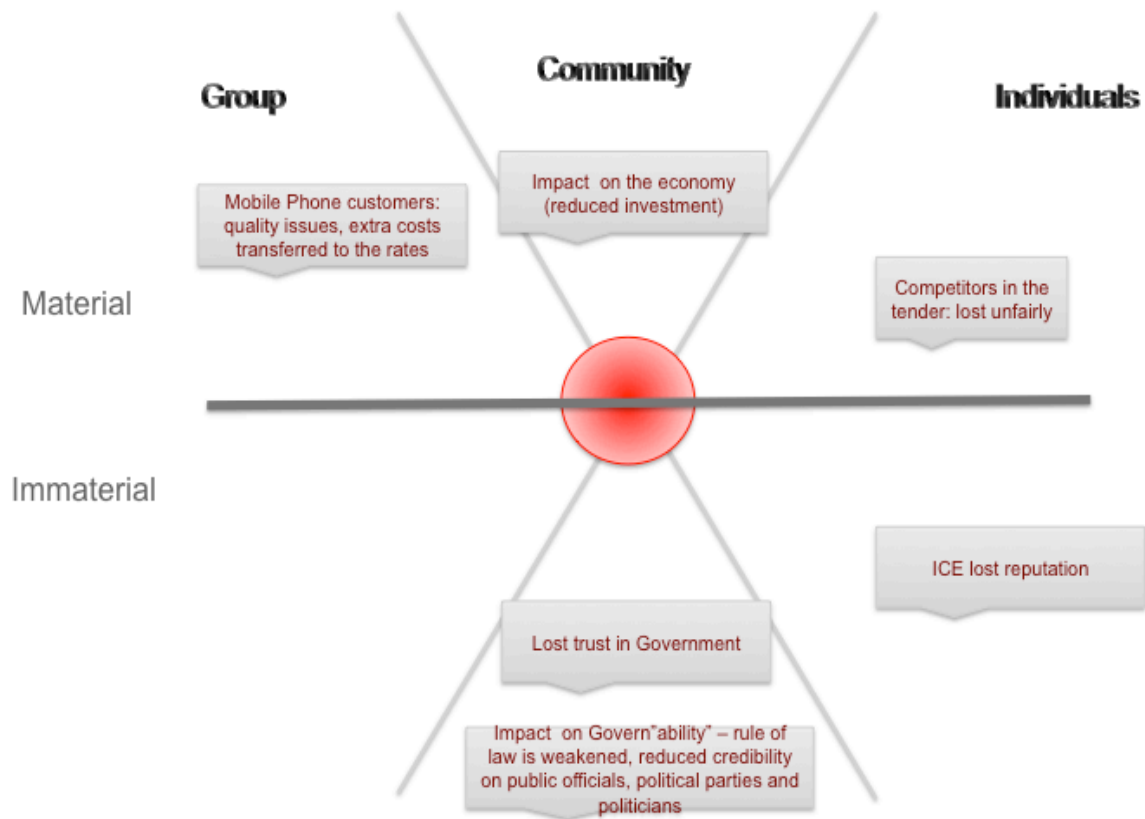
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<sup>3</sup> Olaya et al. Ob. Cit.

<sup>4</sup> Arguably, as described in the next section, the Costa Rican Law has also entitled NGOs and other originations when they have a special expertise or can demonstrate a legitimate interest also to initiate redress for cases of collective damage. The possibility has so far not been used and there have been calls for reform in Costa Rica to make more explicit that the CSOs can intervene in cases where diffuse interest have been damaged.

<sup>5</sup> Initially used in Olaya et al. Ob Cit page 20. In the Alcatel Case not all these types of damages were argued for redress. The Graph illustrates damage actually taking place in that case as an example to illustrate the dimensions of damage.

## The dimensions of damage caused by corruption (using the example of Alcatel in Costa Rica)



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In sum, there are different types of damage arising from corruption: at the individual, collective and community (social) level. They can be material or immaterial, and can be measured in monetary terms or not. They don't exclude each other and do not overlap. In this paper we are concerned specifically with the social damage both at the material and immaterial levels, without meaning to exclude or disregard the others.

## Should the social damage caused by corruption be repaired? What for?

It is a basic principle of law that damages should be repaired. It finds its origins in the principle of good faith, another fundamental principle of law, which is the main ingredient of trust and what actually keeps societies together. However, the social and collective dimensions of damage caused by corruption have caused some people to erroneously label corruption as a "victimless crime" just because the entitlement to that reparation was either diffuse or collective or simply not specific to an individual. This has also led some to think that because of the difficulties in measuring or demonstrating public interest damage, reparation is not feasible<sup>6</sup>. The fact is the law doesn't

<sup>6</sup> Harvard Law & International Development Society (LIDS), "Issues in Combating Transnational Corruption- LIDS Global Volume 1 2013-2014". The result of a joint research effort among law students from different

differentiate collective, social or individual damage to assume that only the latter should be repaired. In principle bringing redress, repairing or compensating the damage seeks simply to undo the harm caused, and is to be understood as the obligation that emerges out of committing the corrupt conduct.

Redress also has another impact: it recognizes the value of the public good, and its protection and as such should help clarify for members of society, that the public good is indeed to be protected. This should be clearly understood by activists, lawyers, prosecutors judges, institutions and all actors seeking redress from corruption, for its effectiveness and its usefulness should not be judged by how much corruption such redress deterred, but to what extent the social trust within the community and towards the institutions was restored or created, and to what extent the process actually repaired the public good that was lost. In fact, compensating or repairing the damage coming out of corruption can't be seen as a tool to fight corruption. It may have indeed a dissuasive effect, as it lays out to the perpetrators the consequences of their doing, but that is not the goal that redress should seek.

In the context of peace and reconciliation processes and collective reparation, Katrin Sikkink explained recently the broad results of a study Harvard conducted to monitor the victim's reparation scheme of Colombia's current peace process and referred to the perspectives they gathered from victims during their study on collective redress: *"(...)victims have very mixed emotional reactions towards reparation. It surprises us that redress not only produces a welfare situation. When receiving (compensation), it is the acknowledgment of the loss the victim experienced. At the same time, the victims don't say they are satisfied, but they talk about the usefulness of reparation. They say that it is useful for the community, for the memory, for reconciliation (...)"*.<sup>7</sup> This acknowledgement is necessary when sanctioning acts of corruption, as it reinforces the value of the public good.

This also has an impact on how to define the reparation, a point I want to discuss at more length in the next section. There is a difference between injunction relief, reparation and compensation. It is different to cease the source of harm (like a conflict of interest, or nullifying a corrupt contract) than to repair or compensate the damage caused. Also, some times it is not possible to repair exactly the damage caused. This should invite us to think about creative ways of identifying and requesting feasible reparation. What is important is that compensation and reparation be used again for the public good, this entails both visibility and responsibility.

## What to do about social damage then?

The path that immediately comes to mind is seeking compensation or redress through judicial means. But if the final goal is to introduce trust and reinstate the value of the public good, other approaches are also possible, by working in trust-building processes in specific communities or with specific organisations. In fact, both possibilities are connected. This section will consider both.

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Universities. Can be found here: [http://orgs.law.harvard.edu/lids/files/dlm\\_uploads/2014/09/LIDS-Global-Initiative-Volume-I.pdf](http://orgs.law.harvard.edu/lids/files/dlm_uploads/2014/09/LIDS-Global-Initiative-Volume-I.pdf) (Last accessed on August 31, 2015)

<sup>7</sup> Interview for El Espectador, on August 22, 2015. It can be accessed here (in Spanish) <http://www.elespectador.com/noticias/elmundo/colombia-le-espera-un-camino-largo-y-dificil-kathryn-si-articulo-580907> ( Last accessed August 31 2015)

## A. Strategic litigation protecting the public interest and seeking reparation to the social damage caused by corruption: possibilities, challenges and the way forward

There is little known actual use of the concept of “social damage” as such in litigation procedures related to corruption. The country that has most used the term and the concept is Costa Rica, and there is on-going experience in Peru. There are also cases of lawyers, prosecutors and judges arguing for reparation of social consequences of corruption without calling it exactly “social damage”. Under different names, it is more often applied in environmental litigation, where the idea of collective or diffuse consequences of environmental damages has been already understood and is currently (almost always) unquestioned. What the known experiences so far indicate is that:

- (1.) It is feasible to implement and apply even without an existing explicit norm about it.
- (2.) Its implementation depends on lawyers and prosecutors actually using it, and judges understanding its implications.

In discussing some of the challenges and limitations in the next paragraphs, I also look at that existing experience so far.

- ***The legal basis and the cause of action (entitlement)***

There is an existing (even if too broad and general) international anti-corruption framework that supports redress of corruption consequences.<sup>8</sup> Perhaps the most clear are the **UNCAC’s Articles 34 and 35** that require parties to take measures on the consequences of corruption according to their national laws:

**Article 34** states in addition that (...) *“each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.”*

**Article 35** requires that *“entities or persons who have suffered damage as a result of an act of corruption have the rights to initiate legal proceedings against those responsible for that damage in order to obtain compensation”*.

Of importance is also to consider that compensation or redress is foreseen not only within domestic trials, but also through asset recovery proceedings. In this sense **Article 53. Lit b)** of the UNCAC mandates State Parties to *“Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences (...)”*.

Also **Articles 1, 3 and 5 of the Council of Europe Civil Law Convention** make explicit the need to ensure adequate compensation for the victims of corruption and requires in its Article 1 that Parties: Article 1 states that *“provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation of such damage (...)”*. Article 3 adds further detail establishing that *“Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover material damage, loss of profits and non-pecuniary loss.”* In turn, the international framework leaves it up to national legislation to decide on the actual mechanisms.

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<sup>8</sup> See Olaya et al for a detailed description.

The information we have on how exactly each country has regulated these issues under UNCAC is patchy.<sup>9</sup> However, one can assume in general, that all countries that have included the different corruption modalities under their criminal codes foresee some form of redress through those same means. In fact, the approach of the majority of State Parties has been to assume that Art. 35 did not require changes in their legislation in order to implement it<sup>10</sup> and often simply confirm that such redress mechanisms generally exist under their civil law procedures, their criminal law or both.

- **Other Experiences on Collective Redress**

Public interest litigation and collective redress mechanisms are not new. In fact, they have been of common use in other fields as: consumer law, human rights, antitrust (competition law), and environmental protection. While the mechanisms are diverse, not perfect and of uneven application in different parts of the world, their development brings light on how to apply similar mechanisms and arguments to corruption and offer also paths that can be used to seek redress in cases of corruption, even if these are still yet to be explored. There are a number of different mechanisms enabling redress of collective damages or the protection of diffuse interests: collective redress actions, class actions, and citizen actions, among others.

It is interesting to see that in its current status, on issues like consumer protection, environmental damage, competition law or discrimination, there is less doubt about the nature and existence of enforceable collective damages, although there is still some struggle with the procedures.

In the case of environmental damages for example, the Aarhus Convention adopted on June 25 1998 by the UN Economic Commission for Europe grants the public, among other things, access to justice and member States are “*obliged under the Convention to provide -adequate and effective remedies, including injunction relief- which are -fair, equitable, timely and not prohibitively expensive-.*”<sup>11</sup> In general, on environmental matters the emphasis tends to be on injunctive relief, this is to cease the damaging activity and restore the original environmental conditions. On environmental issues, legal standing is often representative (via a public authority or a representative actor like an NGO).<sup>12</sup>

In implementing the Aarhus Convention, the divergent approach within Europe to collective damages

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<sup>9</sup> The information provided in the summaries of the UNCAC reviews is general and aims at confirming the existence of redress mechanisms but it is heterogeneous and it doesn't detail the type of redress, its use or its impact. Only one summary refers to collective redress mechanisms at all, and only referring to public contracting issues. See the “Report of the Implementation Review Group on its resumed fifth session, held in Vienna from 13 to 15 October 2014” (CAC/COSP/IRG/2014/11/Add.1) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/13-15October2014/V1406930e.pdf> and the “Implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption (review of articles 30-42) . Thematic report prepared by the Secretariat” (CAC/COSP/IRG/2014/7) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/2-6June2014/V1401646e.pdf> . The UNCAC Country Review documents can be found here <https://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html> and also through the UNCAC Coalition website: [http://uncaccoalition.org/en\\_US/uncac-review/official-country-reports/#self-assessments](http://uncaccoalition.org/en_US/uncac-review/official-country-reports/#self-assessments)

<sup>10</sup>In this sense see Makinwa, Abiola O. “Private Remedies for corruption. Towards and international Framework. Eleven international Publishing. The Hague, 2013” particularly for the cases of The Netherlands, the United Kingdom and the United States (p.377).

<sup>11</sup> Hintereger, Monika. “Reconciling Multilayer interests in environmental law. Access to Justice in environmental matters in the European Union and the United States” in Wrba, Van Uytsel and Siems, 2012. p. 149

<sup>12</sup> See Gy. Bándi. “Access to Justice in Environmental Protection Cases” in Harsági, V. et al.

led the European Parliament to issue a resolution on February 2 2012 on “Towards a Coherent European Approach to Collective Redress”<sup>13</sup> seeking that principles for collective redress be applied horizontally across the EU on areas not exclusive to the environment but to all topics subject to collective redress. In facilitating its implementation, the European Commission issued on June 11 2013 a legislative proposal in the shape of a Recommendation on “Common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.<sup>14</sup> The recommendation seeks to establish basic principles under which all European Countries would take guidance in aligning their national mechanisms.

The recommendation explicitly includes among the areas where it can be applicable: consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.<sup>15</sup> And most importantly, it requests that its principles (...) *“be applied horizontally and equally in those areas (the above mentioned) but also in any other areas where collective claims for injunctions or damages in respects of violations of the rights granted under the Union law would be relevant.”*<sup>16</sup> Therefore leaving the door open to corruption cases.

The recommendation recognized that the legal standing should depend on the type of damage: when it is collective and the group of victims is identifiable, the group has in it self standing; when the damage is massive the legal standing needs to be clarified and rules need to be in place to determine who could be entitled to undertake representative actions. It thus recommend states to *“designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility”*<sup>17</sup> indicating those should be at a minimum: a non-profit character, a relationship between the objectives of the entity and the rights to be protected and sufficient capacity. The recommendation also leaves the option for member States to alternatively designate public authorities to bring representative actions. It may well be that both the recommendation and the initiative are too new to tell on what their actual impact is, and there have been some voices of scepticism.<sup>18</sup>

The use of human rights frameworks is also not only an illustrative experience but also a mechanism that can be used to seek redress in cases of corruption. Indeed, the impacts that corruption cause to communities and societies at large often consist in affecting basic collective rights protected by the Human Rights’ instruments. This means also that the regional courts have an important potential as channels to seek redress. Regional courts like the ECCJ (created through ECOWAS) have recognized their role in preserving the public interest. In this particular case, the absence of a strict charter defining those rights has presented a special opportunity for the Court to develop jurisprudence and increase rights’ protection and enforcement.<sup>19</sup> The ECCJ has already pronounced itself in cases of damage to collective and diffuse interests like in the case regarding the environmental damages caused in the Niger delta by oil spills. In this case, the Court questioned the practicality of assigning pecuniary compensation to individual victims, but mentioned explicitly this was also not a reason to

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<sup>13</sup> (2011/2089 8INI))

<sup>14</sup> (2013/396/EU)

<sup>15</sup> See Lit /7) of the Recommendation

<sup>16</sup> See Lit /7) of the Recommendation

<sup>17</sup> Section II, lit 4. Standing to bring a representative action.

<sup>18</sup> Among them, the actual Directive falling short from earlier drafts and proposals, for privileging public enforcement over private one and for protecting from abuses more than promoting collective litigation. See for example Harsági, V. and van Rhee, C.H. “Multi-Party Redress Mechanisms in Europe: Squeaking Mice?” Intersentia. 2014.

<sup>19</sup> See in this sense Muhammed Tawfiq Ladan “The Prospect Of Public Rights Litigation Before The ECOWAS Court Of Justice” Presentation Made At The Nigerian Bar Association Conference Held At Owerri, Imo State. Between 24th And 29th August, 2014, p.10. and



leave the topic aside: “(...)In case of human rights violations that affect indetermined (sic) number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes. (...)”<sup>20</sup> and demanded that the republic of Nigeria “take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta”, to prevent the occurrence of damage to the environment and to hold the perpetrators of the damage accountable. The Court also pronounced itself in terms of the standing of individuals and NGOs before the court, acknowledging that there is broad consensus in international law “that when the issue at stake is the violation of rights of entire communities, as in the case of the damage to the environment, that access to justice should be facilitated”<sup>21</sup>

In the case of Costa Rica, the Attorney general is entitled by Article 38 of the Costa Rican Criminal Procedural Code (CPC) to launch civil action in the cases of damage to collective or diffuse interests that result from criminal offenses.<sup>22</sup> In addition, the article 70 of the Costa Rican CPC recognizes the character of victims to organizations (foundations, associations and other non-profit organizations) in crimes committed against collective or diffuse interests as long as the purpose of such organization is related directly with such interests.<sup>23</sup> Despite the existence of this explicit mechanism and its current use, there have been already proposals of reform it to extend the authority of the General Attorney to cases not mediated by a criminal offence and to extend the standing explicitly to NGOs and activist organisations.<sup>24</sup>

In Costa Rica it was under the initiative of the Attorney General’s office that its standing on collective damage causes was used in a corruption cases. To do so, it resorted to the definitions issued by the Costa Rican Constitutional Court of collective and diffuse interests, which included among others, the citizen’s collective interest in good public financial management.<sup>25</sup> The existence of a public system for legal standing on collective damage in Costa Rica with its own characteristics has led, in my view, for experts and lawyers in Costa Rica to emphasize a distinction between collective damage and diffuse damage ( and even beyond) in cases of corruption, defining social damage only as the latter and not the former.<sup>26</sup> This distinction serves indeed a purpose of distinguishing legal standing in Costa Rica but is not necessary when it comes to define social damage per se, or when thinking about it in other countries. Social damage in fact could involve both collective damage and a wider or more diffuse form of damage.

When it comes to collective redress mechanisms, and looking at the different experiences in

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<sup>20</sup> SERAP v. The Federal Republic of Nigeria, Dec. 14, 2012 ECW/CCJ/JUD/18/12 ECW/CCJ/APP/08/09

<sup>21</sup> As described by Ladan, ob cit. P 22. Citing the ECCJ’s ruling of December 10, 2010.

<sup>22</sup> Article 38 of the CPC of Costa Rica states: Article 38. Civil action for social harm civil action may be brought by the Attorney General's Office, in the case of criminal offenses involving collective or diffuse interests (Unofficial translation). The Original text in Spanish reads as follows: ARTICULO 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.

<sup>23</sup> Art 70, lit d) of the Costa Rican CPC states:

“d) The associations, foundations and other entities that are subject to registration, in crimes involving collective or diffuse interests, provided that the purpose of the group is linked directly to those interests”

<sup>24</sup> Aguirre Garabito, Ana Lucia y Sibaja Irina López. Revista Judicial Costa Rica, No 101, Septiembre 2011. “El Daño Social: su conceptualización y posibles aplicaciones” P. 138-139.

<sup>25</sup> Res: 2001-8239. Sala Constitucional de la Corte Suprema de Justicia, de las 16:07 horas del 14 de agosto del 2001 and Res. N° 2006-15960 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA. San José, a las 14:53horas del 1 de Noviembre de 2006. More details on the Costa Rican experience in the case of Alcatel to be found under Olaya et al. Ob. Cit.

<sup>26</sup> Aguirre Garabito et al. Ob Cit. P. 139.

different areas, there are generally the following possible types of standing:

- Public: when only public authorities are entitled to raise the issue before the Court on behalf of the citizens. Usually, this type of standing relates to the protection of diffuse interests.
- Private/Subjective: in this case, an entitlement needs to be proven to be able to have standing. There are two types of entitlement:
  - *In a Group*: this requires that the person has a legitimate interest and concretely that demonstrates to have had bore the damages individually.
  - *Through a Representative*: an NGO or an association with concrete knowledge and expertise in the field represents the interests of all victims. Usually NGOs or experts are entitled on the basis of their knowledge and associations on the basis of the empowerment explicitly given by victims.

- **Collective Redress Mechanisms**

In general, it is good to distinguish injunction mechanisms from those who seek compensation or redress. The first, seek to stop or discontinue a damage-creating activity. The latter seek to restore or compensate for the damage already caused. In corruption cases, injunction can be provided through annulment of corruptly acquired contracts, or by changing a corrupt contract auditor willing to ignore his duties. However, injunction as necessary as it should be, does not provide redress. Debarment of companies should also not be confused with injunction or compensation, as debarment is actually a form of sanction. However, they are often confused. In fact they are altogether mentioned in the UNCAC country reviews without differentiating them.<sup>27</sup>

It is possible to pursue redress for corrupt actions and concretely the reparation of social damage under different mechanisms as will be explored below. Bearing in mind the distinctions between injunction, sanction and compensation, mechanisms that would ensure the first two are not considered.

#### *Redress in national trials*

The trials in Lesotho (Lesotho Highlands Water project), Perú (Fujimori and Montesinos) and Costa Rica (Alcatel) evidence the impact and power of trials in the countries where the events took place. There are hardly impact measurements of these but having followed those closely one certainly sees the impact on the strength and endurance of judicial institutions, on the dignity of the country and on its own stance against corruption. The immediacy to the real victims, also creates a sense of fairness and opens possibilities of redress that are more difficult (or not at hand) for cases prosecuted abroad. Here a reference to the mechanism available domestically:

- **Explicit reparation mechanisms for collective damage.** Existing laws entitling victims, or victims' associations, organizations, prosecutors or other authorities to pursue redress in cases the public interest is affected and collective or diffuse damages have occurred can be used to seek injunction and compensation.

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<sup>27</sup> The summaries also don't mention specific experiences that may be available in the full reviews. See reference on Footnote 9 above.

In the case of Costa Rica, as mentioned before, the Criminal Process Code entitles the Prosecutors' Office explicitly to request redress on behalf of the citizens in the case the public interest has been affected and collective or diffuse damage has been caused. The norm has been interpreted by the Prosecutors, and in time accepted by the Courts, to include corruption cases as damaging the public interest on the basis of the Constitutional mandate (right) for a good environment, which includes a good institutional environment and a sound public financial administration, which is free of corruption.

It is possible that such mechanisms could be used, even if they don't mention explicitly social damage out of corruption cases as such.

- **Other mechanisms including class actions, or actions oriented to defend diffuse rights and other public interest litigation mechanisms** -depending on their restrictions on entitlement- these could also potentially be used to channel petitions of reparation of social damage.

Sometimes class actions, or other collective redress mechanisms are referred to the protection of concrete public interests affected or existing rights. This bears the question on each specific country case, on whether the citizens have a specific right to corruption free public institutions (or like in the case of Costa Rica, to a corruption free environment) and if such right is needed as a basis for action, or whether it suffices that the public interest is affected by corrupt acts to give ground for such action.

The argument of an existing right to a corruption-free institutional system could give way to initiate action, while the recognition of an injured legitimate interest, may require the confirmation that such interest is legally protected and has been damaged by corruption.

- **Civil law mechanisms**, particularly Tort Law or Extra-contractual law present also opportunities to seek redress whether linked to a criminal procedure or not. The ground for action is the existence of the damage. These mechanisms are more likely available for identifiable groups of victims.
- **Criminal Law.** In many countries, criminal procedures envision not only imposing sanctions but also redress to the victims of the crime and entitle victims to take part of the proceedings to seek compensation. The systems to entitle victims may differ from country to country, but is common to find that Prosecutors are entitled to represent the citizens as victims. It is less so the case for NGOs, organisations or third parties representing victims of collective damage.

The use of this mechanism requires however, of prosecutors proactively arguing about collective damage and providing measurements for it. In Perú for example, an approach that is starting to be tested by prosecutors is to simply claim redress for social damages based on the existing laws and mechanisms and innovating on how to measure the damage to provide for proper compensation in cases of corruption.<sup>28</sup>

It is unfortunate that the UNCAC signatories do not always publish the complete results of the convention reviews, as experience in this field and revealed in those reviews would be helpful for

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<sup>28</sup> See "Manual de Apoyo para el Cálculo de Reparaciones civiles en los Delitos contra la Administración Pública" by Julio Arbizu González and Soledad Arriagada Barrera ( draft, undated, unpublished). According to my conversation with Julio Arbizu, this document has been elaborated for USAID within their Technical Cooperation Framework in Perú and has been used by the Prosecutor's office as input for their work.

other countries and practitioners.

- **Constitutional Law.** Constitutional law offers two complementary opportunities for redress. On the one hand, as it makes explicit government’s duties, requirements of good governance and sets priorities on the public interest. These can be used as a basis (cause) to undertake legal action and to shape and describe the type of damage infringed through corruption. On the other hand, in some countries there are also mechanisms to directly (and often under subsidiarity) enforce Constitutional rights when they have been violated. These mechanisms also provide means for both injunction and redress.
- **Administrative Law.** In corruption cases involving public officials it is possible to derive state responsibility and claim compensation for damages so caused by the conduct of the public official(s).

There are cases in France where the Courts have decided to issue compensation to the State institutions for the loss of reputation and trust accrued through the corruption of their officials. In these cases, the States and not the citizens have been recognized as the victims, but the arguments used, acknowledging the public interest and collective damage, might as well apply to citizens as a whole.<sup>29</sup>

#### *Redress in international trials*

Extraterritorial anti-corruption legislation and regional courts enable prosecutions to take place elsewhere, often in the home countries of the perpetrators. These have provided a good alternative for inaction or lack of capacity by domestic courts and are crucial to cease with impunity of transnational crime. Redress is also a crucial topic for proceedings abroad and on asset recovery processes, and since they take place away from the actual victims, this needs to be a crucial concern and point of attention.

- **Asset Recovery Proceedings and Trials Abroad.** The UNCAC Art 57 lit c. on asset restitution and in its Art 53 lit b. on asset recovery include the obligation to adopt necessary measures to compensate the victims and the other State Party. There are a few reported cases where the non-state victims overseas have been considered for compensation but the obligation exists and should be argued for. The reality is somewhat different though: as the Star-OECD 2011 Report indicates, of a “total of USD 1.225 billion assets [that] were frozen between 2006 and 2009” only “USd 277 million assets were returned to the country of origin”<sup>30</sup>. If estimates are correct, had all stolen assets been recovered and used to repair the damage caused, they could have covered most of the identified additional aid needed to achieve the Millennium Development Goals by 2015, which was estimated to be between \$40 and \$60 billion a year.<sup>31</sup> With worldwide financial

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<sup>29</sup> See Cour de Cassation, Chambre criminelle, du 10 mars 2004, 02-85.285 in a case where state agents incurred in trading in influence and favouritism ( Accesible here <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007071292>, last accessed August 31, 2015). Or Cour de Cassation, Chambre criminelle, 8 févr. 2006, n° 05-80.488 for a case where the city of Cannes requested compensation for damages in ist reputation due tot he conviction of ist mayor for corruption.

<sup>30</sup> Tracking Anti-Corruption and Asset Recovery Commitments A Progress Report and Recommendations for Action. OECD and the International Bank for Reconstruction and Development/The World Bank, 2011 [http://www1.worldbank.org/finance/star\\_site/documents/AccraReport/Report/Accra%20Commitments.pdf](http://www1.worldbank.org/finance/star_site/documents/AccraReport/Report/Accra%20Commitments.pdf)

<sup>31</sup> The World Bank estimated that, if countries improve their policies and institutions, the additional foreign aid required to reach the Millennium Development Goals by 2015 would have been between \$40-\$60 billion a year”

difficulties and limited development funds, the issue of restitution and reparation is even more important.

This doesn't mean it is easy. For example, in the case pursued by the SFO in the United Kingdom against the UK printing company Smith and Ouzman for bribery in acquiring contracts with the electoral authorities in Kenya and Mauritania for the printing of election materials,<sup>32</sup> the judge refused to consider taking evidence of damage caused in Kenya to Kenyans when issuing sanctions and enforcing confiscation in the case. In this case both Corruption Watch UK and Kenyans for Peace with Trust and Justice (KPTJ)<sup>33</sup> had raised the issue before the SFO arguing "(...)The Kenyan people are the ultimate victims of this offence and that the money that the company and its Directors must disgorge as part of sentencing and confiscation should properly go to the Kenyan people(...)"<sup>34</sup>. "(...) When Smith and Ouzman bribes officials of a national election management body to obtain contracts for printing election materials, the country not only incurs in financial loss due to the inflated price it pays for the materials, it ultimately pays a much higher price in terms of the loss of the integrity of the electoral body and the subsequent instability and political uncertainty that that loss brings (...)"<sup>35</sup> and requested the compensation be paid to the Kenyan Ethics and Anti-corruption Commission (EACC) to avoid the funds from returning to the Government who had done so far nothing to prosecute and punish those involved on the Kenyan side. The SFO's answer to CWUK doesn't deny the existence of the damage and rather indicates that since trial already took place, and the request to take further evidence after trial is possible but unusual, suggesting that the request may not have been well timed. The answer also leaves the merits of both KPTJ and CWUK unquestioned.<sup>36</sup> In sentencing the judge didn't consider the request and while he may have not been explicit about the reasons, one can speculate it may have to do timing. The request simply came too late, and requested the incorporation of additional evidence just before the sentencing phase and after all evidence had been already incorporated.<sup>37</sup>

– **Human rights instruments in Regional Courts.**

The NGO Socio-Economic Rights and Accountability Project (SERAP) has been pursuing public interest litigation in Nigeria, and has argued before ECOWAS and the Nigerian courts on the broader (social and collective) damages caused by corruption. In a case involving the Universal Basic Education Fund (UBEF) and the mismanagement of funds originally aimed at basic

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([http://www1.worldbank.org/finance/star\\_site/documents/AccraReport/Report/Accra%20Commitments.pdf](http://www1.worldbank.org/finance/star_site/documents/AccraReport/Report/Accra%20Commitments.pdf))T his paper summarizes the results of a World Bank Policy Research Working Paper, "Development Goals: History, Prospects and Costs," by Shantayanan Devarajan, Margaret J. Miller, and Eric V. Swanson. In 2002

<sup>32</sup> See SFO's conviction announcement on December 2014: <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx>. The case is particularly relevant as it is the first conviction in the UK for bribery overseas under the UK Anti-Bribery Act.

<sup>33</sup> See here description of the case and reference to all submissions by Corruption Watch UK: „No room at the witness stand. February 23 2015 <http://www.cw-uk.org/2015/02/13/no-room-at-the-witness-stand-kenyan-groups-raise-the-question-of-victims-of-corruption-in-the-uk-courts-2/> ( last visited August 31, 2015)

<sup>34</sup> Letter from CWUK to the SFO, February 2, 2015. Available through Corruption Watch UK <http://www.cw-uk.org/wp-content/uploads/2015/02/Letter-from-CWUK-to-David-Green-2-February-2015.pdf>

<sup>35</sup> Letter from KPTJ, January 30, 2015. <http://www.cw-uk.org/wp-content/uploads/2015/02/Letter-from-KPTJ-to-David-Green-30-January-2015.pdf>

<sup>36</sup> SFO's answer to CWUK. February 4 2015. <http://www.cw-uk.org/wp-content/uploads/2015/02/Letter-from-SFO-to-CWUK-4-February-2015.pdf>

<sup>37</sup> See description by CWUK above.

education in ten States, which was investigated by the Independent Corrupt Practices Commission, SERAP argued before ECOWAS on the link between that case, large scale corruption and a general violation of the right to education.<sup>38</sup> While the Court refused the argument on various grounds<sup>39</sup>, the Court did issue a form of injunction to cease the damage emerging from this particular case: *“Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”*<sup>40</sup>

In sum the entitlement, whether explicit or implicit, is often closely related to the mechanisms. Civil procedures are often restricted to individual victims or identifiable groups. While constitutional mechanisms or open “class actions” may enable a broader entitlement, prosecutors may explicitly or implicitly always have the authority to raise the issue during criminal proceedings as representatives of the public interest and the issue may be only that of arguing for the recognition of the social damage, without needing a new or an explicit legal basis for it. The actual practice indicates that the usual redress mechanisms in corruption cases are more prepared to deal with individual damage than with social or collective damages. This needs to change. That there have been already cases is a good indication that it is not always necessary an explicit law to pursue redress. However, in the absence of an explicit cause or entitlement, it is a matter of doctrine and judicial development to promote and establish the argument and to make it feasible.

The details on how to use each of these avenues escape the scope of this paper, but an exchange on the experience up-to-date is a necessary task in developing this issue further. The task is now to map for each country what mechanisms each legal framework opens for public interest legislation, and to actually pursue it.

# DRAFT

- **Damage Measurement and Defining Redress**

Damage measurement and defining the redress are closely related topics. One the one hand because measuring the damage is part of identifying it and therefore part of the evidence “burden” of every litigation procedure. So one difficulty consists of measuring the damage in ways that can be meaningful for legal purposes. On the other hand, because in defining redress we need to ask ourselves whether the damage can be so repaired that the situation can be brought back to its stand before the damage, and whether in the particular instance it makes sense to reduce it to a pecuniary amount or not. This marks a difference with other forms of collective damage, for example environmental damage, as it can well be that reparation is actually not possible and only compensation is feasible.

Measurement of the damage emerging from corruption is difficult and particularly when it comes to social damage as discussed here. However, this difficulty can’t lead people to think, that damage

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<sup>38</sup> SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission, ECW/CCJ/JUD/07/10 Can be found at [http://www.worldcourts.com/ecowascj/eng/decisions/2010.11.30\\_SERAP\\_v\\_Nigeria.htm](http://www.worldcourts.com/ecowascj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm)

<sup>39</sup> Among them the lack of evidence to derive from this sole case a general judgment on a violation to the right to education, the absence of a judicial decision asserting the facts, and indicated problems in the argument’s logic of attribution.

<sup>40</sup> Ob. Cit.

can't be repaired.<sup>41</sup> Assuming that only damage that can be calculated in monetary terms can be redressed, is like assuming that only monetary damage can be caused. It is also not the case. Most jurisdictions are used to acknowledge and adjudicate reparation and compensation for non-pecuniary damages ( as is the case of death, for example).<sup>42</sup> Repairing trust in society or trust in the institutions doesn't need to take place exactly where the damage occurred. For example, measures directed toward establishing (or re-establishing) trust in the institutions, or to foster collaboration and participation can take place outside of the situation that caused the distrust in the first place. Let's take the case for example of the Election Commission in Kenya and the damage caused to the trust in those institutions, which led to KPJT to make a link to the violence that erupted in the 2010 elections.<sup>43</sup> The type of actions that would be required to re-establish (or establish a new) trust in the electoral institutions in Kenya and to ensure its independence would be closer to its reform, the assurance on the integrity of its members and its accountability, and also a clear communication about these changes. In this sense, it is not always necessary to measure the damage to order measures to repair it, in a similar way as non-pecuniary damage is redressed in courts in other cases. The Courts can order proper substitute action, or injunction or even alternative activities that would benefit the public interest instead.

I am also convinced these difficulties can be overcome. For that purpose we need to consider different aspects of measurement:

- a. On the one hand, the proof of damage is already a form of measurement. It should suffice to know it exists, particularly when it comes to social damage as it concerns the public interest, which is in essence diffuse. The dilemma is on whether the damage can be proven without it being measured?
- b. The experience of measuring immaterial or moral damage is not new. Courts in different jurisdictions have already assumed standards for this knowing that there are certain types of damages that can hardly be reduced to a financial measure, or measured for integral reparation, or where the resulting situation can't be reinstated as it was before. These same principles, techniques and standards could be applied to reparation of social damage.
- c. In defining redress, it is also important to understand that things are not always re-built in the same way they are destroyed. (Re)-gaining trust in institutions takes more than paying a fine for having bribed them.

Having said this, damage measurement in ways that are meaningful for the courts is unquestionably a challenge. There are already a few examples and experiences we can start working from, that are different enough to offer different options to suit different situations.

In Costa Rica, the approach taken by the prosecutors with the support of econometricians, was to quantify the impact of that particular corruption case was two fold: one value whose calculation was based on the link between corruption and foreign investment in Costa Rica, by measuring the reduction in investment due to a reduction in the investor's trust in the Costa Rican Government. The

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<sup>41</sup> This is a position that although not widespread, is somewhat pervasive. For example see Harvard Law & International Development Society (LIDS), "Issues in Combating Transnational Corruption- LIDS Global Volume 1 2013-2014". The result of a joint research effort among law students from different Universities. Can be found here: [http://orgs.law.harvard.edu/lids/files/dlm\\_uploads/2014/09/LIDS-Global-Initiative-Volume-I.pdf](http://orgs.law.harvard.edu/lids/files/dlm_uploads/2014/09/LIDS-Global-Initiative-Volume-I.pdf) (Last accessed on August 31, 2015)

<sup>42</sup> Germany is said to be one of the few exceptions. See See O. Meyer (ed) *The Civil Law Consequences of Corruption* (Nomos, 2009).

<sup>43</sup> See above Footnotes 34 and 35.

other approach was to measure corruption's impact into the political system by tracing the abstention levels in the 2006 elections and using these as proxy to reputation and trust loss in the government institutions. This made sense in that case because it involved a foreign company (investor) who bribed local (high level) officials. Although the judges accepted the arguments,<sup>44</sup> it is unclear how they would have actually used that measurement methodology as the Alcatel case was settled by the prosecutors and not finally defined by the court.<sup>45</sup>

In Peru, a methodology has been proposed to the prosecutors that considers the same criteria prosecutors use to classify cases according to the importance. It uses this same method as an estimation of its impact by assigning a fixed value to each case according to its degree of relevance to then ponder it with the impact variable.<sup>46</sup> It is unclear whether at the moment this methodology will actually be tested on trial in Perú, but it indicates another possible approach.

Defining redress has another challenge and it is the practicalities of how to implement that restoration. In the case of pecuniary compensation, funds paid to the State face credibility challenges: how to ensure the funds reach the real victims? That are well used? How to avoid "feeding the beast" by paying back to the government involved in corruption in the first place? The decision by Justice Bean to compensate the citizens of Tanzania in the BAE case in the UK for the involvement of an agent in Tanzania to secure a radar contract through bribery faced these challenges. The final settlement between the SFO and BAE included the compensation. The original idea was to allocate those funds (£29,5 million which correspond to the original value of the contract minus the fine) to strengthening the primary school system in Tanzania by procuring and distributing books to all primary schools (called PEPS)<sup>47</sup>. Implementing the compensation faced several delays and it was questioned whether it made sense to pay the money to the government of Tanzania or allow BAE to get involved in the implementation of the compensation scheme (both for the same reasons). This resulted in the involvement of DFID as facilitator, but this was also questioned for lack of transparency.<sup>48</sup> There is little information I could find on the impact of the programme, but the website "Radar change" was created to report about the use of the funds,<sup>49</sup> at the moment of writing it is still working and reported delivery of 91.7% of the initial target number of books, reaching 8,016,118 pupils in about 15 thousand schools.<sup>50</sup> Looking quite objectively, the scheme chosen by which BAE controls that the funds are allocated and DFID facilitates the interaction with the government and helps with implementation is not necessarily wrong,<sup>51</sup> but the results signal that we

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<sup>44</sup> The same methodology had been used in a previous case, the Fischel-CSS case, where the judges had also accepted the concept of social damage but dismissed the estimate resulting from the initial calculation provided using the methodology and awarded damages in a lower amount. See Olaya et al Ob.Cit.

<sup>45</sup> See Barranes Moreno, Gerardo. Informe. Evaluación del Daño Social por Casos de Corrupción en Costa Rica: Caso Alcatel-ICE. Costa Rica, Febrero 2007. Page 62. and Olaya et al Ob.Cit.

<sup>46</sup> This methodology is described in an unpublished document commissioned by USAID and written by Julio Arbizu González y Soledad Arriagada Barrera "Manual de Apoyo para el Cálculo de Reparaciones Civiles en los Delitos contra la Administración Pública" (Undated).

<sup>47</sup> See [http://www.baesystems.com/article/BAES\\_045048/bae-systems-completes-payment-to-tanzania/baeSessionId=6QezNMywQFJ45ZviMJD2ZXeyBR4oGqclv6wq-3bofiQmz7C9wbW8!1366545504?\\_afrLoop=2416847710552000&\\_afrWindowMode=0&\\_afrWindowId=ull#!%40%40%3F\\_afrWindowId%3Dnull%26\\_afrLoop%3D2416847710552000%26\\_afrWindowMode%3D0%26\\_adf.ctrl-state%3D19cc8kmur6\\_4](http://www.baesystems.com/article/BAES_045048/bae-systems-completes-payment-to-tanzania/baeSessionId=6QezNMywQFJ45ZviMJD2ZXeyBR4oGqclv6wq-3bofiQmz7C9wbW8!1366545504?_afrLoop=2416847710552000&_afrWindowMode=0&_afrWindowId=null#!%40%40%3F_afrWindowId%3Dnull%26_afrLoop%3D2416847710552000%26_afrWindowMode%3D0%26_adf.ctrl-state%3D19cc8kmur6_4) ( Last accessed on August 2015)

<sup>48</sup> See for example here: <http://mtega.com/2013/12/freedom-of-information-on-dfids-role-in-bae-project-in-tanzania-bado/>

<sup>49</sup> <http://mtega.com/2013/11/bae-radar-change-website-transparent-accountability/>

<sup>50</sup> <http://pesptz.org/index.php/home?lang=english> ( Last accessed on August 2015)

<sup>51</sup> A description of the scheme can be found here: "Few and Far: The Hard Facts on Stolen Asset Recovery" page 5.



still need to think about better ways to implement those in credible and accountable way; and that it is possible.<sup>52</sup> For example, in addition to further requests of transparency on the MoU signed between the Tanzanian Government and DFID, there were CSO concerns about the lack of involvement of CSO organisations<sup>53</sup>. Certainly, other corruption scandals have tainted Tanzania afterwards (once called a „donor darling“), but it would be naive to consider this alone as a ground to doubt the impact of addressing redress in this case.

- **Containing Abuse and Limitations**

This is hardly a one-size-fits-all approach. It may also not work in every country in similar ways. Different legal systems and traditions may offer different opportunities to pursue redress for social damage out of corruption cases. This is also why work needs to be done both nationally and internationally to understand and develop the most effective channels to deal with and manage the consequences of corruption for the benefit of its victims. It is also inevitable, that this approach will only be used after it has been used. This is, it will be refined and tested and spread only when lawyers, prosecutors and judges actually try it out.

According to OECD figures, 61% of foreign bribery cases are settled out of court.<sup>54</sup> With settlements being a daunting reality, particularly in common law foreign jurisdictions, careful thought needs to be given by the parties involved in the settlement on how to include redress to the actual victims.<sup>55</sup>

There are perhaps two main risks of abuse of victim’s redress:

- That redress actually doesn’t reach the real victims
- That is used/seen as source of funding for institutions and organizations enabled to seek redress.

The discussion on the appropriate use of the funds is also taking place in the field of asset recovery and runs for some time on issues of confiscation of illegal assets. Experience shows, this is indeed a risk and needs to be addressed properly, which means thinking through the necessary transparency and accountability to undertake it: how to fund public interest litigation, what information needs to be shared, by whom and where? To what degree is it reasonable for the parties to the corrupt agreement to be involved in redress? What other parties should be involved in monitoring redress schemes? What roles can the victims play? It is likely that there is no single effective model, each reality will require a different emphasis.

The risk of abuse by claimants is real. The first time I presented this topic at a Conference and said straightforward that people should not see redress a way to finance State entities or NGOs, there was an icy silence in the room and quite a few nodding heads. Certainly pursuing redress for social damage involves costs and efforts that need to be covered. Appropriate, reasonable and transparent means to fund those need to be further tested and explored.

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<sup>52</sup> See “Donors freeze aid to Tanzania” DW, 16.10.2014 can be found here:

<http://www.dw.com/en/donors-freeze-aid-to-tanzania/a-17999275> ( Last accessed on August 2015)

<sup>53</sup> In this sense, see for example see the contribution by the University of Dar es Salaam, Tanzania to the “Issues in Combating Transnational Corruption- LIDS Global Volume 1 2013-2014” on Page 37.

<sup>54</sup> OECD analysis of foreign bribery cases concluded between 15.02.1999 and 01.06.2014.

<sup>55</sup> See some interesting and relevant reflections on this “Left out of the Bargain- Settlements in Foreign Bribery Cases and Implications for Asset recovery” STAR, 2014.

Redress is not a tool to fight corruption. The impact and success of seeking redress for social damage should be sought and measured in terms of how much citizens value and protect the public good and the public interest. How much more do we worry about the impact to our actions on others. Perhaps a good side effect of that is that corruption actually diminishes, and it very likely would, but it should not be the goal.

## **B. Focusing on the public interest: building trust and awareness of the public good**

Some may say that strategic (public interest) litigation to seek redress for social damage out of corruption cases is actually only feasible in countries with a strong judiciary. This is not a good reason for inaction. Even within weak judiciary systems there are strong prosecutors, lawyers and judges that can exercise leadership and bring forward these arguments. There are more reasons to insist than to give up. There are also alternative ways that can be pursued, using the same logic. This section will explore these two ideas.

### *1) Why Insist? Defining success: Why litigating despite of the outcomes may produce results*

Pursuing legal action to repair the social damage can be difficult: restrictive procedural laws that exclude key actors from initiating action, lack of initiative by those with actual standing, difficulties in measurement and providing evidence, negative precedents where judges have refused and all the other challenges mentioned above. In addition, weaknesses and corruption in judicial systems may make this avenue seem fruitless. However, if the cases that have been pursued so far (and with some success), one pattern you will find is that it has taken time and insistence for cases to go through. There are therefore benefits of insisting and pursuing this road even if litigation results are not always what is expected, for the following reasons that I pose for our discussion:

- 1) It opens the way for future success. Only by trying, testing and debating the arguments they can become of use. This is what has been observed in the experiences in Costa Rica and Peru. This opens the space for reflection and can promote jurisprudence and doctrine that eventually will be supportive of the arguments in court.
- 2) Insisting helps to focus the public discussion on what matters and can inspire and promote more social engagement in fighting corruption.
- 3) Using the judicial system is a way of strengthening it. So precisely the argument that there are weaknesses is a reason to pursue this way.

In words of Landa, in explaining the importance of public interest litigation before the ECCJ (In ECOWAS): *“(...) the value of litigation should not only be judged in terms of how a case fares in court (success in the narrow sense), or whether the terms of the Judgment are compiled with (immediate impact). It is as important to look at the (systemic impact) broader impact of the litigation process on social policy, directly and through influencing public discourses on public rights and the development of Jurisprudence nationally and internationally.(...)”*<sup>56</sup>

In addition, when it comes to trials overseas, it is currently a trend in the US and in the UK to go for

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<sup>56</sup> Muhammed Tawfiq Ladan August 24, 2014 “The Prospect of Public Rights Litigation Before the ECOWAS Court of Justice“ Accessible under [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2547441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547441)

settlements or DPAs (deferred penalty agreements). It is therefore crucial also to think how can the social damage argument be brought to those settings, where the judge will not take part in defining the situation. If you don't ask you don't get, and the plea for redress of social damage needs to be made early enough in the process and even outside the courts, through the media and resorting to public opinion to grab awareness about it and see that also compensation of the actual victims be considered.

## 2) Alternative action

It is also possible to work on social damage redress in parallel to, instead of and even complementing strategic litigation. I will call this here simply *alternative action*. The main goal of alternative action is to build trust and to build awareness on the value of the public good and demand for respect, dignity and for the protection of the public good.

Trust is a very weak and unstable aspect of human relations. It can be easily broken and it takes effort and time to build. Trust among members of a social group is a decisive element of survival, and trust in the institutions is crucial for their effectiveness. Action to enhance trust and to build awareness of the public good is therefore not a one-time effort, nor a click on an App. I propose here two avenues for reflection: a) Addressing reparation immediately to enhance trust; b) Develop activities that enhance trust by building on existing social norms.

### a. Addressing reparation Immediately

In the face of a corruption case it is often clear what its impact was (embezzled funds, schools not built, bad quality construction work, etc.). The criminal, civil and administrative procedures seek to establish individual responsibilities and the corresponding sanctions and reparation duties, but are not necessary to acknowledge the damage created. In addition, the judicial proceedings take time. In contrast, the executive authorities (finance ministries, expenditure ministries or heads of implementing agencies, for example and generally agencies with spending authority), and also supreme audit and control entities, can within their powers and authority decide to act immediately on the damage caused by corrupt behaviour. In fact they can explicitly seek to a) Stop the consequences from continuing or spreading (as when a contract is cancelled, nullified or put on hold); b) Address the failure to correct it and repair the damage. Once the judicial proceedings have established responsibility, those determined as responsible will be liable to cover from the reparation. In other words, the reparation of the damage doesn't need to wait until a judicial decision can be enforced.

This is not only a matter of fairness, but it has an important signal effect. It helps protecting and enhancing trust for the institutions and among citizens and government. Such a measure, communicated also effectively, can help regain some credibility in the institution, or at least prevent it from eroding further.

### b. Building trust from existing social norms

Social norms are strong and effective in ruling human behaviour. They also serve as guides for those interested in social change, to find paths to leverage such change. There are examples of this that can be drawn from anecdotal experiences in our own daily lives. Cases where communities or groups of people join efforts for their common benefit. Here I suggest a few ideas in the hope to stir more creative ideas for readers to think what could work in their own countries.

- Closely knit societies – knit them closer: create small, contained but effective spaces for

participation, where stakeholders involved address and solve a problem together. In essence, it is the same process as creating a community or tightening community bonds, something local community leaders are experts of.

- At the essence of trust is consistency between what is said and what is done. In striving for more and more transparency we are forgetting that the content is also important. How to show the value of “walking our talk”?
- Show what are public goods for and lead by example. How to realize the value of something that belongs to you if you don’t know it does? Often stories and cases of incredible change start with one person doing as they are supposed to.
- Promote discussions, academic work, presentations about the topic of social damage among lawyers, prosecutors, judges and law students. Promote thought, reflection and activity on this topic. Work with prosecutors and judges to discuss avenues, to hear test and try different arguments. Involve experts from other fields (economists, political scientists, social scientists) to think through creative ways to measure the damage and impact of corruption to use this in addressing reparation.

## Conclusion

Parochialism is the word sociologists use to define the phenomenon by which a group of people or individuals worry only about themselves or their next of kin or their group members, but not about the others, outside the group.<sup>57</sup> Corruption is one of the most acute forms of parochialism. Addressing the consequences of corruption and seeking redress aims at showing to societies the value of and the need to protect the public goods, and the public interest.

Corruption generates impacts at different levels, individual and collective. To a certain extent both criminal and civil law systems are more comfortable with individual damages. While it may be useful to devise new explicit mechanisms to address social damages and the collective consequences of corruption, for the great part it may not be necessarily so, and existing instruments may be enough. What we certainly need to do is to argue for it and help in this way, change the mental barriers that are keeping our societies under the idea that corruption may still pay off.

Throughout the document, I have identified a few challenges that need further effort on our side from us in order to advance more in this topic, and that I propose here as work streams as follows:

Work stream 1. We need to improve our understanding of actual experiences and use of the different mechanisms to seek redress and support the exchange among practitioners: lawyers, judges, and prosecutors. Along these lines, to map for each country what mechanisms each legal framework opens for public interest legislation, and to actually pursue it.

Work stream 2. We need to pull together the minds of measurement experts and lawyers, prosecutors and judges to explore further different ways of measuring social damage in ways that are relevant for the courts, and to learn from each other.

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<sup>57</sup> “Understanding Social Action- Promoting Human Rights” Ed. Ryan Goodman, Derek Jinks and Andrew Woods. Cap 8. “Parochialism as a result for Cognitive Bias”. Oxford University Press. December 2012

Work stream 3. Certainly pursuing redress for social damage involves costs and efforts that need to be covered. We need to discuss and explore appropriate, reasonable and transparent means to fund those and to seek ways to minimize possible abuses.

Work stream 4. We also need to put some thought on appropriate mechanisms to address the risks associated with redress and particularly to ensure that it reaches the intended victims. These discussions are already taking place in the context of domestic and international confiscation and asset recovery proceedings, and could be extended to include social damage compensation schemes.

Work stream 5. We need to explore how international efforts can help to make victim's redress for social damage more effective, and the role that spaces like the UNCAC and its review mechanism can play.

This is also a subject in permanent evolution. Do you have other ideas or are already implementing some? Let us know about them and write to ([JuanitaOlaya@gmail.com](mailto:JuanitaOlaya@gmail.com)) and we will publish those more representative and with the most potential [HERE](#) (Link: <https://juanitaolaya-impacttools.com/corruptions-social-damage/>)

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