



COMPENSATING FOREIGN VICTIMS OF CORRUPTION

Evaluating Potential Victim Compensation Mechanisms for
Canada's Anti-Corruption Laws



November 2021

Acknowledgements

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Suggested Citation

"Compensating Foreign Victims of Corruption - Evaluating Potential Victim Compensation Mechanisms for Canada's Anti-Corruption Laws." Allard International Justice and Human Rights Clinic (Vancouver: Peter A. Allard School of Law, November 2021).

Cover Page Image

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EXECUTIVE SUMMARY.

The international community's increasing recognition of corruption's harms has led to the development of new legal frameworks governing anti-corruption and asset recovery for victims of the crimes involved. However, Canada's anti-corruption regime falls short of its international legal obligations, particularly around victim compensation. Canada's anti-corruption laws currently do not contain effective mechanisms for repurposing the fines imposed upon, and assets seized from, perpetrators of corruption. This oversight is a missed opportunity to assist individuals and communities whose human rights have been violated, a serious shortcoming for a country that champions its role as a human rights protector on the international stage. Canada's legal obligations, as well as the importance of ensuring access to justice for victims of crime, suggest the state ought to take its responsibility to compensate foreign victims of corruption more seriously.

Canada's anti-corruption laws should be amended to allow for mechanisms that would redistribute assets seized from foreign corrupt officials and human rights violators towards those who have suffered most from the crimes involved. Similarly, fines levied against Canadian companies engaged in corruption abroad should be directed to compensate victims of corruption. This report provides a summary of relevant international law governing victim compensation in the foreign corruption context, an explanation of the difficulty of applying these legal standards in complex situations of systemic corruption, and a discussion of several best practices in victim compensation drawn from within Canada and abroad. The report then synthesizes this information into a set of general recommendations and offers a potential framework for effective victim compensation in Canada to enable the country to meet its legal and ethical obligations. This framework includes a dedicated victim compensation agency with control over a designated purpose fund.

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INTRODUCTION.

Corruption, an umbrella term describing the various methods by which entrusted power is abused for private gain,¹ has been described as the world's single greatest obstacle to economic and social development.² Unfortunately, addressing corruption is only becoming more complex.³ Globalization and the expansion of foreign investment activities have created tremendous incentives for individuals and entities to exploit transnational capital markets by leveraging political and economic opportunities provided by states with diminished anti-corruption laws.⁴ The rise of transnational corruption has, however, resulted in greater recognition of corruption's corrosive effects on human rights. This direct refutation of the traditional perception of corruption as a "victimless crime" has raised challenging questions of how to compensate individuals and communities who suffer the harms of corruption.⁵ The human-rights based approach to conceptualizing and addressing corruption has provided some guidance for stronger anti-corruption efforts by the international community. Notably, the UN Convention Against Corruption (UNCAC) entered into force in 2005 as the only legally binding international anti-corruption multilateral treaty. UNCAC directs Canada and other States party to the treaty to ensure procedural rights for victims and establish mechanisms for returning stolen assets or otherwise compensating victims, whether they be States parties themselves

¹ "What is Corruption?", online: Transparency International <<https://www.transparency.org/en/what-is-corruption>> [*Transparency International, Corruption*].

² "Corruption Hunters Rally for Action Against Fraud" (6 December 2010), online: World Bank <<https://www.worldbank.org/en/news/feature/2010/12/06/corruption-hunters-rally-for-action-against-fraud>>.

³ "In Search of Corruption Funds" (Fall 2016) at 1, online (pdf): Graduate Institute Geneva <https://knowledgehub.transparency.org/assets/uploads/kproducts/In_Search_of_Corruption_Funds.pdf> [*In Search*].

⁴ *Ibid* at 2.

⁵ Patrick Mutzenberg, "How UN Treaty Bodies can better address corruption and its negative impact on human rights" (September 2018), online: Universal Rights Group Geneva <<https://www.universal-rights.org/blog/how-un-treaty-bodies-can-better-address-corruption-and-its-negative-impact-on-human-rights/>>.

or other prior legitimate owners.⁶ Canada's ability to provide these procedural and compensatory rights to victims should be evaluated against its existing legal obligations.

Canada does not have a good record of combatting corruption,⁷ and compensating victims remains a critical shortcoming in its anti-corruption regime. This regime's centrepiece legislation, the *Corruption of Foreign Public Officials Act (CFPOA)*, has sustained significant international criticism for its constrained jurisdiction and inadequate enforcement.⁸ While legislative amendments strengthened the *CFPOA*,⁹ enforcement remains limited and the penalties imposed under the act have not been used to compensate victims, even where it contains explicit victim surcharges.¹⁰ Canada's new Deferred Prosecution Agreement (DPA) regime, which allows companies in violation of laws such as the *CFPOA* to defer prosecution in exchange for meeting certain specified conditions, mandates victims' participation and thus represents a promising new mechanism for pursuing compensation. However, the tool has not yet been vigorously employed by Canada, and its perception may have been tarnished due to its role in a recent major political scandal. Finally, Canada's Magnitsky law, the *Justice for Victims of Corrupt Foreign Officials Act (JVCFOA)*, is a recent addition to Canada's anti-corruption regime that allows for the sanction of foreign individuals who have committed human rights abuses or been involved in corruption by freezing their assets and instituting permanent visa bans.¹¹ While the

⁶ *United Nations Convention Against Corruption*, 31 October 2003, A/58/422 (entered into force 14 December 2005), online (pdf): <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf> [UNCAC].

⁷ Christopher Nardi, "Canada's efforts to fight foreign bribery are 'shockingly low', new report says" (October 2020), online: National Post <<https://nationalpost.com/news/politics/canadas-efforts-to-fight-foreign-bribery-are-shockingly-low-new-report-says>>.

⁸ Bruce Cheadle, "Transparency International criticizes Harper administration for not enforcing anti-bribery laws" (May 2011), online: The Huffington Post <https://www.huffpost.com/entry/canada-anti-bribery_n_866461?guccounter=1>.

⁹ John Boscariol, "Significant amendments proposed to strengthen Canada's anti-corruption regime" (February 2013), online: <<https://www.mccarthy.ca/en/insights/articles/significant-amendments-proposed-strengthen-canadas-anti-corruption-regime>>.

¹⁰ Joanna Harrington, "A plea for redress" (October 2020), online: National Magazine <<https://nationalmagazine.ca/en-ca/articles/law/opinion/2020/a-plea-for-redress>> [Harrington, *Plea for Redress*].

¹¹ Irwin Cotler and Brandon Silver, "The Case for a new and improved Magnitsky law" (September 2020), online: Policy Magazine <<https://policymagazine.ca/the-case-for-a-new-and-improved-magnitsky-law/>> [Cotler].

JVCFOA is an important new tool for Canada, it suffers from jurisdictional constraints and contains no mechanism for distributing the frozen assets of sanctioned individuals to the victims of their crimes.¹²

Canada has an opportunity to set an international example in compensating foreign victims of corruption by utilizing existing mechanisms within the *CFPOA* and adding a mechanism to the *JVCFOA* to redistribute assets to the victims that need them the most. This report sets forth a framework of principles, derived from international legal sources and Canadian legislation, for identifying and compensating foreign victims of corruption. Before presenting framework, the report discusses transnational corruption more broadly, analyzing a trio of case studies, which illustrate how the complex, collective harms of grand corruption complicate the process of victim identification. The corresponding dearth of international legislation defining the status of victims generally, or stipulating conditions for financial compensation,¹³ provides Canada with significant flexibility to set a new standard.

This report also argues that an administrative agency with authority over a specified purpose fund would have distinct advantages over judicial discretion with respect to distributing the assets generated by mechanisms contained within Canada's anti-corruption laws. Specifically, an agency could conduct more thorough research, build relationships through sustained engagement with relevant entities in international asset recovery, and employ a more consistent approach to victim compensation. This agency's mandate would be necessarily broad to provide the discretion to craft flexible remedies as required by the complexity of corruption's harms, but would require specific direction on vital aspects of the process including cooperation with domestic institutions in pursuing

¹² Cotler, *supra* note 11.

¹³ Open-ended Intergovernmental Working Group on Asset Recovery, "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V" (22 March 2019), at 2, online (pdf): "<<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2019-May-29-30/V1901853e.pdf>> [Working Group Report].

appropriate legal avenues for compensation, cooperation with multinational entities in fact-finding and asset recovery, and effective transparency and accountability procedures to maintain the system's moral legitimacy. This report details these factors, among others, that policymakers should consider integral to the success of whichever system is chosen to redistribute assets to victims. Finally, this report notes some potential limitations to the success of the contemplated system, and synthesizes the principles and information contained herein into a set of more generalized recommendations.

CORRUPTION & THE HUMAN RIGHTS-BASED APPROACH.

Bribery is the most common form of corruption and has been traditionally (and inaccurately) perceived as a “victimless crime”, largely due to the fact that it often causes indirect harms to a large group of victims—sometimes the entire society itself.¹⁴ However, increasing practice and scholarship have emphasized that corruption takes many different forms, and often imposes grave and devastating human rights violations.¹⁵ While corruption itself is not yet specifically covered by any human right or peremptory norm guaranteeing a corruption-free society, it negatively impacts many recognized rights codified by the UN human rights covenants.¹⁶ Some of the difficulty associated with fighting transnational corruption stems from the magnitude of the task; the term itself describes an extremely vast range of activities, the legality of which may differ across different jurisdictions. The complexity of corruption, as relating to the form it takes, the harms it imposes, and how governments respond to it, has made it one of the most difficult forms of crime to control.

Corruption can be defined and categorized in different ways. Corruption is most commonly equated with bribery, the act of offering, giving, or receiving of any item of value as a means of influencing the actions of an official in charge of a public or legal duty,¹⁷ but also includes kickbacks,

¹⁴ Anne Peters, “Corruption as a Violation of International Human Rights” (2019), 29:4 European Journal of International Law 1251 at 1255, online: <<https://academic.oup.com/ejil/article/29/4/1251/5320164>> [Peters].

¹⁵ *Ibid* at 1252.

¹⁶ *Ibid* at 1256.

¹⁷ “Bribery,” online: Cornell Law School Legal Information Institute <<https://www.law.cornell.edu/wex/bribery>>.

extortion, graft, embezzlement, fraud, and nepotism, along with other acts.¹⁸ Within the electoral realm, corruption also encompasses illegal campaign contributions, electoral fraud, and vote buying.¹⁹ Even lobbying practices, which are legal in many liberal-democratic states, can cross the line into undue influence and unfair competition and thus exhibit characteristics of political corruption.²⁰ In essence, there are numerous variations of the abuse of public power for personal gain, many of which are conceptualized differently throughout the world. Scholars have frequently attempted to differentiate certain types of corruption based on factors such as the institutional location of the corrupt actors and the nature of the transactions involved.²¹ As summarized by Public Safety Canada, corruption is commonly distinguished by its “public” or “private” nature, with the difference derived from the sector in which the act occurs; public corruption involves a public official as one party to the corrupt act, while private corruption involves only individuals outside the public sector.²² Within public sector corruption, “grand” and “petty” corruption distinguish corrupt activities committed by higher ranking government officials from those committed by lower level administrative officials, respectively.²³ Petty corruption, for example, includes facilitation or “grease” payments paid to expedite the performance of routine public services, such as processing government papers.²⁴ Grand corruption, on the other hand, covers the involvement of high level officials in bribery and the embezzlement of state assets;²⁵ at its gravest extent, grand corruption also includes “state capture”,

¹⁸ Stephen D. Morris, “Forms of Corruption” (January 2011) 9:2 CESifo DICE Report 10 at 10-13, online (pdf): <https://www.researchgate.net/publication/227383753_Forms_of_Corruption> [Morris]. See also Transparency International, broadly defining corruption as “the abuse of entrusted power for private gain,” and identifying over twenty forms of corruption: <https://www.transparency.org/en/corruptionary>.

¹⁹ Morris, *ibid*.

²⁰ “Lobbying in the 21st Century – Transparency, Integrity, and Access” (20 May 2021), online: OECD <<https://www.oecd.org/corruption-integrity/reports/lobbying-in-the-21st-century-c6d8eff8-en.html>>.

²¹ *Ibid*.

²² Anne-Marie Lynda Boisvert et al, “Corruption in Canada: Definitions and Enforcement” (2014), at 1, Deloitte LLP. Ottawa, ON & Public Safety Canada. [Boisvert].

²³ *Ibid*.

²⁴ Jaclyn Jaeger, “Facilitation payments now illegal in Canada” (28 November 2017), online: Compliance Week <<https://www.complianceweek.com/facilitation-payments-now-illegal-in-canada/2453.article>>.

²⁵ “Transparency International statement: Recommendations for robust action against grand corruption”, online (pdf): Transparency International <https://www.transparency.org/files/content/activity/26Oct2015_TI_StatementOnGrandCorruption_EN.pdf>.

the process by which political actors, working alongside private interests, fully commandeer the organs of the state apparatus to enrich themselves at the expense of the public.²⁶ Accordingly, corruption can also be classified on the basis of the broader pattern of corruption within a given political system: while “incidental corruption” is confined to malfeasance on the part of an isolated individual, “institutional” or “systemic” corruption occur when corruption is deeply entrenched and pervasive throughout certain institutions or an entire society, respectively.²⁷ In short, corruption takes many different forms, imposing different kinds of harm on society. Anti-corruption groups have also detailed the wide-spread political, social, environmental, and economic costs that illustrate the profound societal harms caused by corrupt activities to ensure that corruption is no longer seen as a “victimless crime.”²⁸

Increasingly, both practice and scholarship have pursued a “human rights-based” approach to conceptualizing corruption and addressing its harms,²⁹ asserting that corruption in government, institutions, and society at large is a significant obstacle to the enjoyment of human rights.³⁰ The human rights-based lens reveals many of the flaws behind the perception of corruption as a victimless crime, but raises difficult questions about how to identify and remedy situations in which corruption causes human rights violations.

²⁶ Mark Gevisser, “State capture: the corruption investigation that has shaken South Africa” (11 July 2019), online: The Guardian <<https://www.theguardian.com/news/2019/jul/11/state-capture-corruption-investigation-that-has-shaken-south-africa>>.

Read more on “state capture” in Case Study 3, below.

²⁷ *Morris*, *supra* note 18 at 12.

²⁸ *Transparency International Corruption*, *supra* note 1.

²⁹ Zoe Pearson, ‘An International Human Rights Approach to Corruption’, in P. Larmour and N. Wolanin, eds, *Corruption and Anti-Corruption* (Asia Pacific Press, 2001) 30 at 59.

³⁰ *Peters*, *supra* note 14, at 1252.



The Zuma and Gupta families were instrumental in capturing the South African state for their own private benefit, at the expense of the population. Protests erupted (pictured above) and forced President Jacob Zuma to resign in 2018. [Image Source: BBC News]³¹

The specific human right impaired by an act of corruption depends upon the nature and circumstances of the corrupt act in question. The social rights codified by the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) are most frequently violated,³² due to the frequency with which corrupt actors appropriate the public resources required to fully realize those rights. For example, acts of corruption such as embezzlement often reduce the quality of public services in the health and education sectors, impairing the right to the highest attainable standard of health (Article 12 of the *ICESCR*) and the right to education (Article 13).³³ Corruption also impacts the State's ability to use its available resources towards the progressive realization of the economic, social, and cultural rights contained within the *ICESCR* as required under Article 2(1) of that treaty.³⁴ Political and civil

³¹ Neil Arun, "State capture: Zuma, the Guptas, and the sale of South Africa" (15 July 2019), online: BBC News <<https://www.bbc.com/news/world-africa-48980964>>.

³² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993 (entered into force 23 March 1976), online: <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>>.

³³ Peters, *supra* note 14, at 1256.

³⁴ Peters, *supra* note 14, at 1263.

rights under the International Covenant on Civil and Political Rights (*ICCPR*) can also be impaired as a result of corruption.³⁵ Violations of the right to protection from slavery and servitude (Article 8), for example, are often facilitated by bribes paid to law enforcement officials in exchange for ignoring human trafficking operations.³⁶ Bribery in the judicial system may impair the right to a fair trial without undue delay (Article 14).³⁷ Corruption's effect of draining public resources may also indirectly facilitate violations of political and civil rights, given that they also require considerable resources to uphold; for example, significant resources are required to maintain integrity in the judicial, law enforcement, and prison systems, as well as to ensure free and fair elections.³⁸ As this report details, different manifestations of corruption can impair internationally recognized human rights standards in complex ways, creating substantial challenges for policymakers seeking to compensate victims whose rights have been violated.

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION.

The globalization of corruption, and the trend towards a human rights-based approach to corruption, led the international community to become more aware of corruption's harmful effects. During the 1990s, states began to react more forcefully to corruption's increasingly transnational nature.³⁹ In 1997, the United States succeeded in persuading several states within the Organization for Economic Co-operation and Development (OECD) to adopt the Anti-Bribery Convention.⁴⁰ This was an important step for the international community, but bribery represents just one (albeit large) subset

³⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 (entered into force 23 March 1976), online: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³⁶ *Peters*, *supra* note 14, at 1256.

³⁷ *Ibid.*

³⁸ "Module 7: Corruption and Human Rights" *E4J University Module Series: Anti-Corruption*, online: UNODC <<https://www.unodc.org/e4j/en/anti-corruption/module-7/key-issues/impact-of-corruption-on-specific-human-rights.html>>.

³⁹ *Peters*, *supra* note 14, at 1254.

⁴⁰ *Peters*, *supra* note 14, at 1254.

of corruption, and a more far-reaching legal framework was adopted by the United Nations in 2003: the UN Convention Against Corruption (UNCAC).

UNCAC identifies several specific acts of corruption, such as bribery, embezzlement, money laundering, concealment, and obstruction of justice, that should be considered by every signatory state.⁴¹ Fundamentally, Article 26 calls upon States parties to establish the liability of legal persons for corruption offences.⁴² The Anti-Bribery Convention had directed signatory states to do the same, prompting Canada's passage of the *CFPOA*;⁴³ however, that instrument was restricted to only 37 OECD members,⁴⁴ while UNCAC binds 187 States parties. In addition to being more far-reaching in terms of the corrupt activities covered and the States parties bound, UNCAC also emphasizes the importance of guaranteeing rights to the victims of those crimes. Several provisions of the Convention are illustrative of these commitments. Firstly, a series of provisions guarantee various procedural rights to the victims of corruption. Specifically, Article 32 calls upon States parties to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders.⁴⁵ Article 35 is even more extensive, requiring States parties to take measures to ensure that entities and 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.⁴⁶ UNCAC, as a binding international treaty, thus provides victims with procedural rights to both initiate and participate in legal proceedings against those responsible for the acts of corruption

⁴¹ "U4 Brief September 2010:6 UNCAC in a nutshell" (May 2017), online (pdf): U4 Anti-Corruption Resource Centre <<https://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf>>.

⁴² *Ibid.*

⁴³ "Canada's Fight against Foreign Bribery: 19th Annual Report to Parliament" (2018), online: Global Affairs Canada <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-19.aspx?lang=eng>> [*Global Affairs 19th Report*].

⁴⁴ The OECD Anti-Bribery Convention also only criminalizes bribery, as previously mentioned.

⁴⁵ "Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation" (August 2016) at 2, online (pdf): UNODC <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf>> [*UNODC Good Practices*].

⁴⁶ *UNODC Good Practices*, *supra* note 45 at 2.

that caused them harm. However, many States parties to the treaty, including Canada, lack effective mechanisms to guarantee those rights to victims within their anti-corruption frameworks.⁴⁷

UNCAC also calls upon States parties to adapt their anti-corruption frameworks to better remedy the harms of transnational corruption.⁴⁸ Article 42 explicitly encourages States to expand their jurisdiction over corruption offenses, such as those committed against a State party or its nationals.⁴⁹ Further provisions in Part V of UNCAC govern asset recovery in the corruption context.⁵⁰ Article 53(b), importantly, calls upon States parties to take measures to permit their courts to order those who have committed corruption offences to pay compensation or damages to another State party that has been harmed by such an offence.⁵¹ Article 57(3)(c) conceives of redress more broadly, emphasizing the importance of States parties prioritizing the return of confiscated property to the requesting State party, its prior legitimate owners, or compensating the victims of the crime.⁵² The *travaux préparatoires* for Article 35, a provision establishing the victim's right to initiate legal proceedings for the purposes of compensation, also indicate that States parties can be considered victims and enjoy corresponding procedural and compensatory rights.⁵³ These provisions, read together, indicate that a State party's ratification of UNCAC entails a binding obligation to return assets to victims of corruption—including other states—but is left with discretion over how this will be done.

Despite an emphasis in Part V on the return of seized assets to requesting States parties, there are situations in which doing so would contravene the overarching principle of compensating the victims of corruption. The basic logic holds that when a state is under the control of a corrupt

⁴⁷ Cotler, *supra* note 11.

⁴⁸ UNODC *Good Practices*, *supra* note 45, at 2.

⁴⁹ UNCAC, *supra* note 6.

⁵⁰ UNODC *Good Practices*, *supra* note 45, at 3.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid* at 2.

government (potentially to the extent of state capture), the corrupt act in question will often have originated from public officials at the expense of the civilian population. A “sending” state — one that has confiscated the proceeds of an act of corruption — may reasonably suspect that remitting the funds to the corrupt government would result in their further embezzlement, rather than providing redress to the crime’s victims. Indeed, a lack of trust in how funds would be used if returned has been cited as an explanation for lack of restitution to victims of foreign corruption.⁵⁴ While monitoring mechanisms exist and have been implemented conjunctively with institutions such as the World Bank, these mechanisms cannot be imposed unilaterally and have often failed to prevent receiving countries from misusing funds.⁵⁵ UNCAC directs States parties to take anti-corruption and victim compensation seriously, but is limited in its ability to compel States parties to develop effective domestic solutions, particularly in instances in which the corruption itself is being perpetrated by members of another state government. However, the difficulties involved in guaranteeing that the proceeds of corruption are not re-embezzled by a corrupt government should not preclude Canada from considering new ways of ensuring that the victims of corruption are compensated, nor do they absolve Canada of its legal obligations under UNCAC to do so. Fortunately, the Convention grants signatory states the necessary discretion to pursue novel solutions to the obstacles presented by grand corruption/state capture.

Refusing to directly remit funds to a corrupt state government appears to be legal under the relevant UNCAC provisions. UNCAC Article 57(3)c directs sending states to give priority consideration to returning confiscated property to the requesting State party, its prior legitimate owners, or compensating the victims of the crime.⁵⁶ These receiving entities are listed disjunctively, giving Canada discretion on how to prioritize the return of seized assets. Furthermore, Article 53(c) directs Canada to

⁵⁴ *In Search*, *supra* note 3, at 23.

⁵⁵ “Management of Returned Assets: Policy Considerations” (2009) at 32-34, online (pdf): Stolen Asset Recovery (StAR) Initiative <<https://star.worldbank.org/sites/star/files/ManagementReturnedAssets.pdf>> [Management of Returned Assets].

⁵⁶ UNCAC, *supra* note 6.

“take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention”.⁵⁷ This implies, when read in conjunction with Article 57(3)c, that a “competent authority” or a “court” could make legal determinations about another State party’s claim as the prior legitimate owner of property acquired under sanctions. These UNCAC provisions also appear to permit such an authority or the court to make subsequent determinations about how best to exercise its discretion under Article 57(3)(c) in identifying the appropriate recipient of funds. While UNCAC does not compel States parties to develop solutions to the problem of corruption committed by public officials of a highly corrupt/captured state, it does provide the discretion to do so. This flexibility has created space for Canada to set a new international standard in compensating foreign victims of corruption.

CANADA'S ANTI-CORRUPTION REGIME.

Effective victim compensation first requires effective mechanisms by which corrupt actors are held to account. Canada’s current anti-corruption laws represent a useful contextual starting point for my discussion on the usefulness of a victim compensation agency, revealing several limitations in our legislation but also illustrating a growing appetite amongst Canadian policymakers for strengthening Canada’s anti-corruption toolbox.

Canada’s primary foreign corruption law is the *CFPOA*, which gives Canada jurisdiction over corruption-related offences committed outside of Canada if the person responsible for the act or omission is a Canadian citizen, permanent resident, or public body/corporation incorporated under the laws of Canada or a province.⁵⁸ Amendments have strengthened the *CFPOA* over time, notably

⁵⁷ *Ibid.*

⁵⁸ *Global Affairs 19th Report, supra* note 43.

through allowing the nationality-based jurisdiction described above,⁵⁹ adding an offence for falsifying books and records, and eliminating an exemption for facilitation payments to foreign public officials.⁶⁰ These legislative amendments expanded Canada's jurisdiction over foreign corruption in accordance with its international obligations under Article 42 of UNCAC, and partially addressed criticism from international bodies that Canada was undertaking "little to no enforcement" of its anti-bribery legislation.⁶¹ However, these amendments do not appear to have resulted in comprehensive enforcement of the *CFPOA*, nor the obligations imposed under UNCAC, and have failed to provide any recourse to victims. Canada has imposed significant fines under the *CFPOA* on just two occasions, both against Albertan mining firms engaged in foreign bribery—⁶² Niko Resources and Griffiths Energy International negotiated plea deals with Canada in 2011 and 2013, respectively—resulting in the payment of multi-million dollars fines, including victim surcharges of over a million dollars in both cases.⁶³ However, these surcharges were made payable to the Alberta treasury without any clear direction on how they were to be used to remunerate victims, and it now appears that most of the surcharges have gone unused and are potentially at risk for diversion.⁶⁴ The lack of direction in the

⁵⁹ Canada's jurisdiction under the *CFPOA* was previously restricted to acts of bribery in which the offence was committed in whole or in part in Canada.

"Strengthening Canada's fight against foreign bribery" (7 January 2019), online: Global Affairs Canada <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption_questions-answers-reponses.aspx?lang=eng>.

⁶⁰ Aidan Macnab, "Cracking down on corruption" (28 May 2018), online: Canadian Lawyer Magazine <<https://www.canadianlawyermag.com/practice-areas/criminal/cracking-down-on-corruption/275154>>.

⁶¹ *In Search*, *supra* note 3 at 17.

⁶² *Harrington, Plea for Redress*, *supra* note 10.

⁶³ *Ibid.*

⁶⁴ *Harrington, Plea for Redress*, *supra* note 10.

CFPOA on distributing victim surcharges/fines has thus revealed a major shortcoming in the legislative regime.



Gary Guidry, CEO of Griffith's Energy Inc., speaks to reporters in Calgary after his firm was ordered to pay \$10.35 million in fines for bribing Chadian officials for access to lucrative oil plays. The 15% victim surcharge included in the fine was never used to compensate victims in Chad. [Image Source: Jen Gerson/National Post]⁶⁵

In 2018, the Canadian federal government amended the Criminal Code to allow for deferred prosecution agreements, by which corporate actors accused of certain criminal offences of an economic character (including those prohibited under the *CFPOA*) can “defer” prosecution in exchange for considerations such as voluntary disclosure of criminal wrongdoing, implementation of internal

⁶⁵ “Judge approves \$10.35M fine for Griffiths Energy in Chad bribery case” (25 January 2013), online: Financial Post <<https://financialpost.com/commodities/energy/judge-approves-10-35m-fine-for-griffiths-energy-in-chad-bribery-case>>.

corrective measures, and proportionate penalties to deter further wrongdoing.⁶⁶ Canada's DPA mechanism is similar to the UK's, which involves substantial judicial oversight of the remediation agreement regime in requiring judicial approval to initiate negotiations, enter into a remediation agreement, and modify the terms of an existing agreement.⁶⁷ The Department of Justice's backgrounder on the legislation identified a key purpose of remediation agreements as "repairing harm done to victims or to the community, including through reparations and restitutions",⁶⁸ and sec.715.31(e) of the Criminal Code establishes that an agreement reached under the act should, among other objectives, provide reparations for harm done to victims or to the community.⁶⁹ Further mandatory obligations also make Canada's DPA regime a suitable avenue for victim compensation in the future, as discussed in this report. However, the DPA mechanism has not yet been used by Canada, and its perception may have been tarnished by its role in the SNC-Lavalin affair of 2019,⁷⁰ in which PM Trudeau was found to have improperly influenced Canada's Minister of Justice and Attorney General to offer a DPA to Quebec-based construction firm SNC-Lavalin rather than continuing with criminal prosecution.⁷¹ DPAs could become a vital component of Canada's victim compensation scheme in the future, but this potential is dependent upon Canada more actively enforcing its anti-corruption laws thereby creating opportunities to negotiate DPAs. It will also require that attention be

⁶⁶ "Canada Moves Forward with a Remediation Agreement Regime" (19 September 2018), online: Gowling WLG <<https://gowlingwlg.com/en/insights-resources/articles/2018/canada-moves-forward-with-remediation-agreement/>>.

⁶⁷ "Deferred Prosecution Agreements: Key Differences Between the US and UK" (February 2018), online (pdf): Marsh <https://www.marsh.com/content/dam/marsh/Documents/PDF/US-en/Marsh%20Insights_Deferred%20Prosecution%20Agreements.pdf>.

⁶⁸ "Remediation Agreements and Orders to Address Corporate Crime: Backgrounder", online: Canada Department of Justice <<https://www.canada.ca/en/departement-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>>.

⁶⁹ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

⁷⁰ Joanna Harrington, "Providing for Victim Redress within the Legislative Scheme for Tackling Foreign Corruption" (2020) 43:1 Dal LJ 245 at 247, online: <<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2137&context=dlj>>.

⁷¹ Jen Kirby, "Canada's ethics watchdog finds Prime Minister Justin Trudeau violated ethics law in SNC-Lavalin case" (15 August 2019), online: Vox <<https://www.vox.com/2019/8/15/20806133/justin-trudeau-snc-lavalin-ethics-report-canada-elections>>.

paid to whether victim surcharges paid as part of DPAs are actually directed towards victims, in order to avoid the issues that plagued the surcharges levied under the *CFPOA*.

Canada's Magnitsky law, the *Justice for Victims of Corrupt Foreign Officials Act (JVCFOA)*, is a significant new addition to Canada's anti-corruption toolbox and represents a promising potential avenue for pursuing victim compensation. Similar to the United States' *Global Magnitsky Act*, the *JVCFOA* authorizes Canada to sanction foreign public officials who have committed human rights abuses or been involved in corruption by freezing assets held by domestic financial institutions, criminalizing further financial transactions with sanctioned individuals, and banning the individuals from entering Canada. The law also requires Canadian financial entities to screen against designated individuals and report to regulators, with an associated criminal offence for contravening regulations.⁷² The *JVCFOA* provides the distinct advantage of directly targeting the financial assets of corrupt individuals rather than general sanctions that frequently harm civilian populations, and adds more depth to Canada's anti-corruption capacity by allowing for the sanction of foreign state officials and penalties on domestic financial institutions. Alongside the *CFPOA*'s territorially and nationality-based jurisdiction targeting Canadian corporations engaged in foreign bribery, this allows Canada to target actors participating across an entire process of corruption.

Canada's Magnitsky legislation is legislatively and politically constrained. The *JVCFOA* does not allow for sanctions against non-state groups,⁷³ and so cannot be used against entities such as the corporations, terrorist groups, or organized crime groups that often play important roles in transnational bribery schemes. Canada has been quite cautious in exercising even this constrained

⁷² Mark Morrison et al, "New Canadian Sanctions Legislation in Effect: Sergei Magnitsky Law" (6 November 2017), online: Blake, Cassels & Graydon LLP <<https://www.blakes.com/insights/bulletins/2017/new-canadian-sanctions-legislation-in-effect-serge>>.

⁷³ Cotler, *supra* note 11.

authority, using it as a “last resort” diplomatically.⁷⁴ Canada has sanctioned officials in only 5 different jurisdictions to the United States’ 25, and hasn’t sanctioned a single Kremlin official since 2017, although they have been identified as individuals who have profited from acts of significant corruption.⁷⁵ The legislature has been encouraged to impose Magnitsky sanctions on Chinese Communist Party officials in relation to the Uighur genocide,⁷⁶ but has taken little action with respect to following the United States’ lead by imposing sanctions. A legislative amendment to allow for sanctioning non-state entities would allow Canada to use the *JVCFOA* against a broader range of corrupt actors will remain aspirational until Canadian politicians recognize the importance of the country’s binding legal obligations under UNCAC.

The *JVCFOA*, whose title references the principle of justice for victims of foreign corrupt officials, currently contains no mechanism for providing tangible compensation to victims.⁷⁷ This represents a major gap, and Canada’s Magnitsky law cannot be considered fully effective if it does not provide remedies to victims. Individuals and human rights defenders subjected to abuse of their human rights and the ills of systemic corruption feel the most direct effects of the crimes covered by the *JVCFOA*:⁷⁸ many have been mentally and physically scarred, spent years under unlawful imprisonment, and/or lost their lives or loved ones.⁷⁹ Other victims have put their lives further at risk by sharing information about these often-traumatizing experiences, which is then used by states with Magnitsky laws (such as Canada) to hold violators accountable.⁸⁰ Monetary compensation doesn’t

⁷⁴ Karen Jantzen, “How Canada Can Make Its Magnitsky Sanctions More Effective” (3 February 2020) online: IJHRC Blog <<https://blogs.ubc.ca/ijhr/2020/02/03/how-canada-can-make-its-magnitsky-sanctions-more-effective/>>.

⁷⁵ Michelle Carbert, “Canada sanctions 52 human-rights violators under new Magnitsky law” (3 November 2017), online: The Globe and Mail <<https://www.theglobeandmail.com/news/politics/canada-sanctions-52-human-rights-violators-under-new-magnitsky-law/article36825441/>>.

⁷⁶ Andy Blatchford, “Canada urged to define Uighur abuses in China as genocide” (21 July 2020) online: Politico <<https://www.politico.com/news/2020/07/21/canada-parliament-uighur-xinjiang-china-377234>>.

⁷⁷ Cotler, *supra* note 11.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

erase these experiences, but can give the victims the resources and agency needed to reclaim their lives.⁸¹ Canada's lack of effective mechanisms for guaranteeing procedural and compensatory rights to victims of corruption is a failure to meet its obligations under UNCAC towards corruption victims, but also a moral failure to provide access to justice for these victims.⁸² While victim compensation is an immensely complex dimension of fighting corruption, it is perhaps the most pertinent aspect in relation to the principle of providing justice for corruption's harms. Canada should not be deterred by complexity when trying to develop new avenues to fulfill these moral and legal obligations.

Canada's anti-corruption regime has been strengthened substantially over the last decade but remains extremely ineffective in compensating victims. While violations of the *CFPOA* have been resolved through plea deals involving victim surcharges in the past, these funds were never allocated to the victims of the corrupt acts in question. Canada's new DPA regime represents a valuable tool for prosecutors to compel Canadian firms engaged in foreign corruption to make amends for their actions, including through compensating victims, but has thus far been underutilized⁸³. Finally, the recently introduced *JVCFOA* provides Canada with the ability to directly sanction foreign individuals engaged in significant corruption and gross human rights abuse, but currently lacks any mechanism for repurposing seized assets towards victims. Generally, this represents a failure in Canada's anti-corruption regime whose rectification should be a priority for policymakers.

CASE STUDIES – THE COMPLEX HARMS OF GRAND CORRUPTION.

Victim identification is one of the most complicated tasks of a victim compensation system for foreign victims of corruption. As global will to prevent and punish transnational corruption has increased, there has been increasing scholarly and legal discussion about how to identify transnational

⁸¹ Cotler, *supra* note 11.

⁸² Cotler, *supra* note 11.

⁸³ Partially due to Canada's failure to comprehensively enforce the *CFPOA*.

corruption and impose consequences.⁸⁴ Some states have provided a general definition for victims of corruption, generally containing variations of the phrase “any person suffering damage as a consequence of a corrupt act”.⁸⁵ However, there is currently no comprehensive global system for identifying victims in the foreign corruption context or outlining what forms of damage should be compensable. The wide range of activities that fall under the umbrella of “corruption” represents part of this difficulty. The prevalence of corruption within many world governments is another. However, the nature of corruption’s harms is likely the primary explanation. Corruption’s harms are frequently dispersed across a much wider group of victims than in traditional crimes, sometimes effectively amounting to the entire population of a state. Additionally, the advent of transnational corruption has globalized the effects of these harms,⁸⁶ and has increased the difficulty of holding perpetrators accountable with their increased ability to hide money, and their person, in different jurisdictions.⁸⁷ A trio of brief case studies in corruption illustrate the nature of corruption’s collective harms, exemplifying the necessity of a discretionary, contextualized approach to victim identification.

⁸⁴ Sue Hawley, “Compensation For Victims of Corruption: Why Does It Matter?” (3 December 2016), online: UNCAC Coalition <<https://uncaccoalition.org/compensation-for-victims-of-corruption-why-does-it-matter/>>.

⁸⁵ *Working Group Report*, *supra* note 13.

⁸⁶ The globalization of corruption resulted in an eruption of corrupt activities within international financial institutions, leading organizations such as the International Monetary Fund (IMF) to take a more proactive role in fighting corruption.

James P. Jr. Wesberry, “International Financial Institutions Face the Corruption Eruption: If the IFIs put Their Muscle and Money Where Their Mouth is, the Corruption Eruption May Be Capped” (Winter 1997) 18:2 *Northwestern Journal of International Law & Business*, online:

<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1477&context=njilb>>.

Shang-Jin Wei, “Corruption and Globalization” (30 April 2001), online: Brookings Institute

<<https://www.brookings.edu/research/corruption-and-globalization/>>.

⁸⁷ This is not to say that holding corrupt public officials accountable was easy prior to globalization; several procedural and jurisdictional roadblocks to anti-corruption initiatives have existed far longer. See: standing, the Act of State doctrine, and Forum Non Conveniens.

Brian C. Harms, “Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption” (2000), 33:1 *Cornell International Law Journal* 159 at 190.

Case Study 1 – KMT mine closure in the Democratic Republic of the Congo.

In 2009, the Democratic Republic of Congo abruptly closed the KMT mine, long considered a “crown jewel” of the state’s mining assets, by revoking the license of Canadian company First Quantum Minerals.⁸⁸ That year, the mine was acquired by Israeli businessman Dan Gertler and sold to Kazakh company ENRC, with both sales far below commercial valuations of the mine.⁸⁹ Criminal investigations are ongoing in the United Kingdom, and the US Department of Justice has bluntly stated that the stripping of the license and subsequent sales were marred by corruption.⁹⁰ Rights and Accountability in Development (RAID), a UK-based NGO dedicated to exposing corporate wrongdoing, investigated and produced a report on Gertler’s corruption and its effects on communities in the Kolwezi area surrounding the mine. Their report⁹¹ and supporting documents provide a pertinent example of the complex, long-term devastation that even a localized act of corruption can inflict on society.



Managers of the KMT mine (DRC) inform workers of the mine’s forced closure, a result of bribery. [Image Source: RAID]⁹²

⁸⁸ “DR Congo Residents Come Forward as Potential Victims in SFO Corruption Investigation into ENRC” (28 January 2020), online: RAID <<https://www.raid-uk.org/victimsofcorruption>> [Raid, DRC Residents].

⁸⁹ *Raid, DRC Residents*, *supra* note 88.

⁹⁰ *Ibid.*

⁹¹ “Bribery in its purest form: Och-Ziff, asset laundering and the London connection” (January 2017), online (pdf): <http://www.raid-uk.org/sites/default/files/oz_bribery_in_its_purest_form_full_report_rev.pdf>.

⁹² *Raid, DRC Residents*, *supra* note 88.

The KMT mine's closure immediately resulted in 700 workers losing their jobs and benefits.⁹³ A manager informed workers that they would negotiate with the Congolese government and hire them back as soon as activities resumed, but this promise was empty; no workers were hired back and, in violation of Congolese employment law, they received little or no compensation.⁹⁴ The workers had lost their jobs due to Gertler's corruption; his purchase and subsequent sale of the mine were described as a "classic Gertler flip", netting him and his associates a substantial profit.⁹⁵ The scheme was subsequently investigated by the U.S. Justice Department after the hedge fund Och-Ziff pled guilty to helping facilitate Gertler's bribes,⁹⁶ and led to Gertler being designated under the United States' Global Magnitsky Sanctions program.⁹⁷

While Gertler's bribery had the immediate effect of depriving 700 Congolese citizens of income and vital healthcare benefits, the longer-term effects of the mine's closure created an even larger victim class. The initial termination of First Quantum's license meant that the firm discontinued providing social and environmental benefits for residents of the Kolwezi area, which they had been required to do by the International Finance Corporation, the investment banking arm of the World Bank who had been a key investor of the project.⁹⁸ These development projects ended overnight and the local residents were abandoned by investors and the Congolese government; the new owner, ENRC, was barely active in the area while facing down several corruption-related scandals, including an investigation by the UK's Serious Fraud Office. An estimated 32,000 Congolese residents were deprived of clean drinking water and plagued with ongoing air and water pollution, sickness, and a lack of education opportunities as a result of the closure and ENRC's corruption.⁹⁹ At face value, Gertler's bribery of key individuals in the Democratic Republic of Congo's government clearly resulted in the impairment of thousands of individuals' rights to the highest attainable standard of health and education (Articles 12 and

⁹³ *Raid, DRC Residents, supra* note 88.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ "United States of America against Och-Ziff Capital Management Group LLC" (Deferred Prosecution Agreement), Cr. No. 16-516 (NGG), online: <<https://www.justice.gov/opa/file/899306/download>>.

⁹⁷ Gertler's sanctions were essentially lifted during the final days of the Trump presidency, when he was given a special license restoring his access to the U.S. banking system for a one-year period; this license was decried by lawmakers and eventually revoked by the Biden Administration in March 2021.

Sophie Neiman, "The U.S. vs. Dan Gertler" (27 April 2021), online: World Politics Review <<https://www.worldpoliticsreview.com/articles/29605/the-u-s-magnitsky-act-vs-dan-gertler>>.

⁹⁸ *Raid, DRC Residents, supra* note 88.

⁹⁹ *Raid, DRC Residents, supra* note 88.

13 of the *ICESCR*, respectively). It is also likely that, given the extent of the devastation wrought on Kolwezi's communities, these acts of corruption could also constitute a violation of the right to life under Article 6 of the *ICCPR*. However, Gertler's victims received no compensation; RAID noted that this occurs often, with law enforcement authorities in North America and Europe rarely acknowledging those who have lost the most.¹⁰⁰

While the KMT mine closure inflicted immediate harms on a seemingly localized group of victims (the mine's workers), the full extent of Gertler and Och-Ziff's corruption were not immediately apparent. In the decade that followed, tens of thousands of residents of the Kolwezi area were subjected to a more systemic series of harms including environmental degradation and lack of work/educational opportunities. These harms will likely continue to damage local communities absent the adoption of a system to compensate them for damages suffered.

Case Study 2 – Grand Corruption in Peru.

Alberto Fujimori ruled Peru as an authoritarian dictator for nearly ten years.¹⁰¹ Throughout his tenure, Fujimori directed his close advisor Vladimiro Montesinos to facilitate numerous acts of bribery in support of his rule.¹⁰² Montesinos served as head of Peru's National Intelligence Service, where he systematically bribed politicians, judges, and the news media.¹⁰³ Montesinos was also responsible for siphoning money from state contracts and soliciting bribes from contractors in biased procurement processes,¹⁰⁴ creating a web of corruption that helped the Fujimori administration obtain around US\$2 billion.¹⁰⁵ In 2000, Fujimori's corruption (and human

¹⁰⁰ *Ibid.*

¹⁰¹ Laura Paola Villa Garcia, "Political Corruption in Peru: Fujimori" (30 August 2019), online: Streiner <http://streiner.mx/en/case_study/political-corruption-in-peru-fujimori/> [Garcia].

¹⁰² Mario Levin, "Corruption in Peru: An overview of systemic corruption and an interview with former prosecutor José Ugaz" (June 2019) Financial Crime Digest 23 at 24, online (pdf): <http://www.worldcomplianceassociation.com/noticias/noticia_doc_wca_seg_230719_860076.pdf> [Levin].

¹⁰³ John McMillan and Pablo Zoido, "How to Subvert Democracy: Montesinos in Peru" (2004) 18:4 Journal of Economic Perspectives 69 at 70.

¹⁰⁴ *Ibid* at 76.

¹⁰⁵ Fujimori was also accused of embezzling US\$600 million of this money.

Juan Forero, "Peruvians Fight Graft Case One At a Time" (5 April 2004), online: The New York Times <<https://www.nytimes.com/2004/04/05/world/peruvians-fight-graft-one-case-at-a-time.html?pagewanted=1>>.

rights abuse) caught up to him, and he fled the country in exile; he was eventually captured and convicted of several human rights violations, as well as acts of bribery and embezzlement.¹⁰⁶ Fujimori's corruption in the public procurement sector — specifically, through acts of bribery, embezzlement, and soliciting kickbacks from contractors — had farther reaching impacts on Peruvian society that illustrate the compound nature of grand corruption's harms.

During his tenure as Prime Minister, Fujimori awarded 28 government procurement contracts to Odebrecht, a Brazilian construction company later revealed to have bribed executive officials within his administration.¹⁰⁷ These contracts presented “additional costs” that inflated the cost of public contracts by 38%.¹⁰⁸ This was a direct cost of corruption represented in a loss of public funds and lower quality of public goods, and represents a common theme in corruption related to public procurement — those paying the bribes seek to recover their money by inflating prices, billing for work not performed, failing to meet contract standards, and reducing quality of work.¹⁰⁹ Montesinos, who directed several of these illicit operations, was also subsequently charged with bribery, election rigging, and amassing billions through arms deals, kickbacks, and extortion.¹¹⁰ While Fujimori and Montesinos were eventually both convicted of several crimes,¹¹¹ grand corruption usually imposes

“Global Transparency Report 2004” (7 January 2004), online (pdf): Transparency International <https://images.transparencycdn.org/images/2004_GCR_PoliticalCorruption_EN.pdf>.

¹⁰⁶ “Peru’s Fujimori sentenced to 25 years prison” (7 April 2009), online: Reuters <<https://www.reuters.com/article/bondsNews/idUSN0746237820090407>>.

“Fujimori convicted of corruption” (20 July 2009), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/8160150.stm>>.

“Fujimori pleads guilty to bribery” (28 September 2009), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/8279528.stm>>.

¹⁰⁷ Fujimori’s eldest daughter, Keiko, was also prosecuted for money laundering in association with Odebrecht. *Garcia, supra* note 101.

Manuel Rueda and Franklin Briceno, “AP Explains: The arrest of Peru powerbroker Keiko Fujimori” (29 January 2020), online: ABC News <<https://abcnews.go.com/International/wireStory/ap-explains-arrest-peru-powerbroker-keiko-fujimori-68620358>>.

¹⁰⁸ *Garcia, supra* note 101.

¹⁰⁹ Preventing Corruption in Public Procurement” (2016) at 7, online (pdf): OECD <<http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>> [OECD Procurement].

¹¹⁰ Anthony Faiola, “Peru Prepares to Indict Fujimori” (10 March 2001), online: The Washington Post <<https://www.washingtonpost.com/archive/politics/2001/03/10/peru-prepares-to-indict-fujimori/ef939697-92a2-4007-9144-d912c8c28a48/>>.

¹¹¹ Jacqueline Fowks, “Former Peru spy boss sentenced to 22 years for 1993 murders” (29 September 2016), online: El Pais <https://english.elpais.com/elpais/2016/09/29/inenglish/1475151653_989543.html>. Simon Romero, “Peru’s Ex-President Convicted of Rights Abuses” (7 April 2009), online: The New York Times <<https://www.nytimes.com/2009/04/08/world/americas/08fujimori.html>>.

harms that far outlast the tenure of a single corrupt administration. Furthermore, many of the harms imposed by this form of corruption impact the population even more indirectly than a more localized event such as the KMT mine's closure.



Alberto Fujimori (right), with the help of his advisor Vladimiro Montesinos (left), led a regime which obtained roughly US\$2 billion by misappropriating Peruvian state assets and soliciting bribes. [Image Source: InSight Crime]¹¹²

Of the billions obtained by the Fujimori administration during his time in power, up to \$600 million was stolen from the state treasury.¹¹³ Many of the operations that facilitated this theft took place in the public procurement sector. OECD has identified a number of indirect costs associated with corruption in public procurement, including distortion of competition, limited market access, and reduced business appetite for foreign investors, estimating that between 10 and 30 percent of investment in publicly funded infrastructure projects may be lost due to corruption.¹¹⁴ These effects

¹¹² Marguerite Cawley, "Montesinos is Gone, But Peru's Narco-Political Brokers Continue Tradition" (20 October 2014), online: InSight Crime <<https://insightcrime.org/news/analysis/peru-drug-traffickers-political-broker-vladimiro-montesinos/>>.

¹¹³ Stephanie McNulty, "The Fujimori Effect: Political Instability and Paralysis in Peru" (29 December 2017), online: NACLA <<https://nacla.org/news/2017/12/29/fujimori-effect-political-instability-and-paralysis-peru>> [McNulty].

¹¹⁴ The report also noted that the exact percentage of investment lost is impossible to calculate due to the "hidden nature" of corruption. *OECD Procurement*, *supra* note 109 at 7.

were exemplified in Peru, which (over 20 years later) continues to struggle to attract foreign investment due to negative perceptions concerning its investment climate,¹¹⁵ and has suffered from a low intensity of local competition.¹¹⁶ Economic prosperity has remained relatively low as a result, and large segments of the population continue to lack access to basic needs while dealing with high unemployment and income inequality.¹¹⁷ Specifically, Peru has maintained a weak education system and an inadequate health care system,¹¹⁸ two sectors which have been subject to substantial corruption¹¹⁹ and which track to human rights standards that Peru is legally obligated to fulfill.¹²⁰ Furthermore, Fujimori's attempts to strengthen illicit patronage networks and weaken anti-corruption institutions contributed to creating a corrupt political culture in Peru,¹²¹ with subsequent administrations marred by similar corruption investigations.¹²² This political culture of impunity also helped to facilitate numerous gross human rights violations committed by his administration, such as violations of the right to life via the commission of extrajudicial killings, abductions, and forced disappearances.¹²³ The legacy of Fujimori's corruption continues to pervade Peru's public sphere, with

¹¹⁵ "Peru – Country Commercial Guide – Market Challenges" (10 October 2020), online: International Trade Administration <<https://www.trade.gov/knowledge-product/peru-market-challenges>>.

¹¹⁶ *Ibid.*

¹¹⁷ Michael E. Porter, "Competitiveness: A New Economic Strategy for Peru" (30 November 2009), online (pdf): Harvard Business School <https://www.hbs.edu/ris/Publication%20Files/20091130_Peru_7abdf2f2-94cc-4f45-b262-347e24423ddf.pdf>.

¹¹⁸ *Ibid.*

¹¹⁹ It is important to note that corruption in Peru's health care sector, while problematic and a hindrance to the realization of ICESCR article 12 (see note 120), was noted as lesser than in many other public institutions. Jennifer Hunt, "Bribery in Health Care in Peru and Uganda" (April 2007), McGill University, online (pdf): <<http://ftp.iza.org/dp2757.pdf>>.

"U4Brief – Corruption-free education" (March 2008), online (pdf): Chr. Michelsen Institute <<https://www.u4.no/publications/corruption-free-education-lessons-from-a-state-and-civil-society-joint-initiative-in-peru.pdf>>.

¹²⁰ Peru is a signatory state to the ICESCR, committing itself to the progressive realization of the right to education and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

¹²¹ McNulty, *supra* note 113.

¹²² Odebrecht was also involved in bribery schemes with the Toledo, Garcia, Humala, and Kuczynski administrations.

Levin, *supra* note 102.

¹²³ "Peru: Revoke Fujimori Pardon" (1 February 2018), online: Human Rights Watch <<https://www.hrw.org/news/2018/02/01/peru-revoke-fujimori-pardon>>.

the majority of Peru's population viewing corruption as the worst problem facing the country.¹²⁴ Fujimori's corrupt activities illustrate the compound harms of grand corruption, creating "a vicious cycle of instability and uncertainty that [often] persists for decades—with tragic consequences".¹²⁵

In cases such as the grand corruption committed by Fujimori's administration, identifying a clear victim class is extremely difficult—it is nigh impossible to clearly identify who in the population suffers, especially in the long term, as a result of distorted markets, lost profits, and inefficient allocation of the state budget, even where certain sites of corruption (e.g., the education sector, public procurement) can be identified. In this kind of situation, the victim class might even be identified as the entire civilian population of the state. The public procurement context is particularly relevant to anti-corruption initiatives, given that public procurement represents around 30% of government expenditure among OECD countries and is one of the government activities most vulnerable to corruption.¹²⁶ Furthermore, more than half of foreign bribery cases occur to obtain a public procurement contract, and can yield substantial advantages across markets; for example, Odebrecht was later revealed to have paid bribes to several Latin American governments (as well as the Peruvian governments succeeding Fujimori's administration), helping the firm become the region's largest construction conglomerate.¹²⁷ While Odebrecht and its executives have since been subject to several criminal investigations,¹²⁸ bribery in the public procurement process continues to represent a

¹²⁴ "7 de cada 10 peruanos opinan que la corrupción aumentó en el país en los últimos 5 años" (27 September 2017), online: Ipsos <<https://www.ipsos.com/es-pe/7-de-cada-10-peruanos-opinan-que-la-corrupcion-aumento-en-el-pais-en-los-ultimos-5-anos>>.

¹²⁵ McNulty, *supra* note 113.

¹²⁶ OECD Procurement, *supra* note 109 at 5-6.

¹²⁷ Odebrecht was investigated for paying bribes in 10 countries, including Argentina, Colombia, Ecuador, Brazil, and Venezuela.

Daniel Gallas, "Brazil's Odebrecht corruption scandal explained" (17 April 2019), online: BBC News <<https://www.bbc.com/news/business-39194395>>.

Vinita Srivastava, "Peru's House of Cards: Odebrecht scandal has engulfed the country's political class" (27 June 2019), online: The Conversation <<https://theconversation.com/perus-house-of-cards-odebrecht-scandal-has-engulfed-the-countrys-political-class-118793>>.

¹²⁸ *Ibid.*

substantial share of foreign corruption cases, and can create outcomes in which the harms of corruption are spread across different states and different administrations through time.

Case Study 3 – State Capture in South Africa.

A similar example of grand corruption occurred in South Africa roughly a decade later. In June 2021, South Africa's former President Jacob Zuma was sentenced to 15 months' imprisonment for refusing to give evidence to the Zondo Commission, a public inquiry into allegations of corruption during Zuma's nine years in power.¹²⁹ The Zondo Commission's inquiry revealed that South Africa had been subjected to state capture, a term describing the "extraordinary tactics" by which certain powerful, private firms and individuals used to influence government policy in order to maintain market dominance.¹³⁰ The phenomenon of state capture, therefore, is essentially a form of grand corruption in which corporate actors and politicians conspire to influence a country's decision-making processes to advance their own interests, including through strategically weakening the state's anti-corruption laws and institutions.¹³¹ In order to do so, the private firms and the government officials they conspire with must be able to control the entire policy-making structure of the state.¹³² Zuma's Presidency exemplifies the process of state capture and the extent of its societal harms.

Jacob Zuma was elected as President of South Africa in 2009.¹³³ Zuma assumed the Presidency after having weathered several criminal investigations, including for corruption; most notably, a prominent financial advisor of Zuma's during his tenure as Deputy President (1999-2005)

¹²⁹ "Jacob Zuma: South Africa's former president hands himself over to police" (8 July 2021), online: BBC News <<https://www.bbc.com/news/world-africa-57758540>> [BBC News, Zuma Arrested]

¹³⁰ Neil Arun, "State capture: Zuma, the Guptas, and the sale of South Africa" (15 July 2019), online: BBC News <<https://www.bbc.com/news/world-africa-48980964>> [BBC News, State Capture].

¹³¹ *Ibid.*

¹³² BBC News, *State Capture*, *supra* note 130.

¹³³ BBC News, *Zuma Arrested*, *supra* note 129.

was found to have solicited a bribe for Zuma in return for influencing a defence contract.¹³⁴ Zuma was relieved of his duties as Deputy President, but escaped conviction on procedural grounds after it was found that the charges had been timed to advantage Zuma's political rivals.¹³⁵ Zuma was also charged with and subsequently acquitted of rape in a high profile trial which caused severe division within Zuma's party, the African National Congress (ANC), particularly over Zuma's disparaging comments towards his victim and his spreading of misinformation regarding the nature of HIV transmission.¹³⁶ Against this controversial backdrop, Zuma became President and began instrumentalizing state institutions to enrich himself and his associates, a process which took several years to complete.¹³⁷ Zuma began by helping a number of private individuals gain control over state assets by reorganizing state-owned enterprises and weakening their governance structures, including through replacing qualified civil servants by persons more willing to follow the commands of private interests.¹³⁸ The most prominent of these private actors were the Gupta brothers, a trio of Indian-born brothers who made a fortune in the information technology sector before expanding into mining, air travel, energy, and media; two of Zuma's children were employed as directors of the Guptas' numerous companies.¹³⁹ Once individuals such as the Guptas had consolidated control over state institutions, regulations were manipulated to provide them with greater control over the state budget.¹⁴⁰ With the state budget under

¹³⁴ Andrew Fowler, "Is Zuma fit to lead South Africa?" (8 April 2009), online: ABC News <<https://www.abc.net.au/foreign/is-zuma-fit-to-lead-south-africa/1645868>>.

¹³⁵ "Mpshe reveals contents of Ngcuka, McCarthy tapes" (6 April 2009), online: Mail & Guardian <<https://mg.co.za/article/2009-04-06-mpshe-reveals-contents-of-ngcuka-mccarthy-tapes/>>.

¹³⁶ Vicki Robinson et al, "23 days that shook our world" (28 April 2006), online: Mail & Guardian <<https://mg.co.za/article/2006-04-28-23-days-that-shook-our-world/>>.

¹³⁷ "A decade of 'state capture' has damaged South Africa's institutions," (Apr 2019), online: The Economist <<https://www.economist.com/special-report/2019/04/25/a-decade-of-state-capture-has-damaged-south-africasinstitutions>>.

Marianne Merten, "State Capture wipes out third of SA's R4.9-trillion GDP – never mind lost trust, confidence, opportunity," Daily Maverick (Mar 2019), online: <<https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity/>> [Merten].

¹³⁸ Merten, *supra* note 137.

¹³⁹ "The Guptas and their links to South Africa's Jacob Zuma" (14 February 2018), online: BBC News <<https://www.bbc.com/news/world-africa-22513410>>.

¹⁴⁰ *Ibid.*

their control, these individuals came to exercise significant control over public procurement decisions and the state intelligence and security bodies.¹⁴¹ At this point, South Africa's state capture was essentially complete, with a shadow state exercising policy-making power while undermining formal state institutions. Zuma's presidential appointment powers, particularly over the boards of state-owned enterprises and the leadership of law enforcement agencies, were noted as key to the success of the conspiracy.¹⁴²



Ajay and Atul Gupta played instrumental roles in the state capture of South Africa, exercising powerful influence over the Zuma administration's policymaking. [Image Source: Lowvelder]¹⁴³

In 2016, South Africa's Public Protector launched an investigation into the intensifying accusations of corruption against Zuma and the Guptas, eventually resulting in the establishment of the ongoing Zondo Commission. Zuma's corrupt network eventually unravelled, largely due to pressure

¹⁴¹ *Ibid.*

¹⁴² *BBC News, State Capture, supra* note 130.

¹⁴³ "Former director-general tells Zondo commission she did not attend 2013 Gupta wedding" (16 October 2019), online: Lowvelder <<https://lowvelder.co.za/Inn/811734/former-director-general-tells-zondo-commission-she-did-not-attend-2013-gupta-wedding>>.

from financial institutions, both within South Africa and globally.¹⁴⁴ Zuma resigned in February 2018 when faced with a parliamentary motion of no confidence,¹⁴⁵ and the Gupta brothers fled South Africa just days later.¹⁴⁶ In years since, South Africa has made substantial efforts to investigate the allegations of state capture and fraud, strengthen its democratic institutions, and hold perpetrators accountable.¹⁴⁷ Domestic initiatives have been reinforced through global sanctions programs, including Magnitsky;¹⁴⁸ the IJHR Clinic itself made submissions under the Global Magnitsky Act recommending sanctions for numerous powerful South African individuals based on extensive evidence of corruption. Despite these efforts, South Africa has a perilous road ahead in attempting to remedy the malfeasance of the Zuma administration.

While Zuma's arrest and the Guptas' flight were celebrated as an achievement of South Africa's robust democracy and independent judiciary,¹⁴⁹ their decade-long capture of the state had serious impacts on the population. Most noticeably, the state capture created serious perilous economic loss for South Africa. Former Finance Minister Pravin Gordhan estimated that the Zuma administration's corruption had cost the state nearly 250 billion rand (US\$17 billion),¹⁵⁰ and South African Reserve Bank economist David Fowkes estimated that the state's capture had likely reduced

¹⁴⁴ BBC News, *State Capture*, *supra* note 130.

¹⁴⁵ "South Africa's Jacob Zuma resigns after pressure from party" (15 February 2018), online: BBC News <<https://www.bbc.com/news/world-africa-43066443>>.

¹⁴⁶ Prabhaskar K. Dutta, "How Gupta Brothers of Saharanpur caused turmoil in South Africa" (15 July 2021), online: India Today <<https://www.indiatoday.in/india/story/gupta-brothers-saharanpur-turmoil-south-africa-1828545-2021-07-15>>.

¹⁴⁷ Paolo Mateus, "Lessons from South Africa's State Capture Commission: the importance of whistle-blowers and their protection" (25 May 2021), online: Control Risks <<https://www.controlrisks.com/our-thinking/insights/lessons-from-south-africa-state-capture-commission>>.

¹⁴⁸ "South Africa: Freedom House Applauds US Sanctions on Gupta Family for Corruption" (9 October 2019), online: Freedom House <<https://freedomhouse.org/article/south-africa-freedom-house-applauds-us-sanctions-gupta-family-corruption>>.

¹⁴⁹ Dewa Mavhinga, "A Victory for Rule of Law in South Africa" (8 July 2021), online: Human Rights Watch <<https://www.hrw.org/news/2021/07/08/victory-rule-law-south-africa>>.

¹⁵⁰ "R250bn lost to state capture in the last three years, says Gordhan" (23 September 2017), online: The Citizen <<https://citizen.co.za/news/south-africa/1651069/r250bn-lost-to-state-capture-in-the-last-three-years-says-gordhan/>>.

GDP growth by around 4% a year.¹⁵¹ The financial drain of Zuma's corruption caused neglect in providing healthcare, education, employment programs, housing, roads and security.¹⁵² These programs are vital to a country like South Africa, where nearly 20% of the population lives below the poverty line and 33% are unemployed.¹⁵³ By diverting funds from the provision of necessary public services, corrupt individuals within the Zuma administration impaired various human rights, such as the *ICESCR* rights to education, the highest attainable standard of health, and an adequate standard of living (including housing). It is very likely that such a significant drain on social services also impaired the right to life under Article 6 of the *ICCPR*. These impacts may appear indirect when presented in this way, but in fact often involve more direct causal linkages. South Africa's energy sector under Zuma is illustrative. Only 66% of rural South African households have access to electricity, and millions of South Africans live through rolling electricity blackouts daily due to insufficient generation capacity.¹⁵⁴ However, South Africa's public electricity utility— Eskom Holdings Ltd— was thriving in the years before Zuma became President, being described as “providing the world's lowest-cost electricity, while at the same time making superior technological innovations [and] increasing transmission system reliability”.¹⁵⁵ Under Zuma, Eskom was subsequently host to a myriad of corruption schemes, largely associated with the Guptas,¹⁵⁶ started providing substantially lower-quality services,¹⁵⁷ and is now

¹⁵¹ Khulekani Magubane, “Damage from state capture ‘worse than suspected’” (6 June 2019), online: News24 <<https://www.news24.com/fin24/Economy/damage-from-state-capture-worse-than-suspected-sarb-20190606>>.

¹⁵² Evangelos Mantzaris, “Why Growing Corruption is a Threat to South Africa's National Security” (14 March 2017), online: The Conversation <<https://theconversation.com/why-growing-corruption-is-a-threat-to-south-africas-national-security-74110>>.

¹⁵³ “The World Bank in South Africa” (10 October 2019), online: World Bank <<https://www.worldbank.org/en/country/southafrica/overview>>.

“Update 1-South Africa's unemployment rate reaches new record high in first quarter” (1 June 2021), online: Reuters <<https://www.reuters.com/article/safrica-economy-unemployment-idUSL2N2NJ0NV>>.

¹⁵⁴ “Eskom Load Shedding Jumps to Stage 4 on Friday” (6 December 2019), online: Business Tech <<https://businesstech.co.za/news/energy/360466/eskom-load-shedding-jumps-to-stage-4-on-friday/>>.

¹⁵⁵ Pieter du Toit, “1922-2019: The Rise and Fall of Eskom” (13 February 2019), online: Fin24 <<https://www.fin24.com/Economy/1922-2019-the-rise-and-fall-of-eskom-20190213>>.

¹⁵⁶ Claudi Mailovich & Genevieve Quintal, “Former Eskom Executives to Appear in Court Over Alleged Kusile Corruption” (19 December 2019), online: Business Live <<https://www.businesslive.co.za/bd/national/2019-12-19-former-eskomexecutives-to-appear-in-court-on-corruption-charges/>>.

¹⁵⁷ Unathi Nkanjeni, “Stages 6 to 8 Load-Shedding: What it Means and How it Affects You” (10 December 2019),

being severed into separate entities in order to manage its huge debts and poor reliability.¹⁵⁸ This energy crisis has had a catastrophic impact on South Africa's economy, and has also caused human rights impairments; in fact, President Ramaphosa specifically categorized electricity as a basic human right when speaking about the crisis, due to its fundamental importance to the dignity, safety, health, and well-being of the population.¹⁵⁹ South Africa's state capture is a reminder of the fact that corruption, while often appearing victimless, frequently causes numerous, obscured human rights violations across an entire population. With that said, the crisis in South Africa's energy sector shows that, by examining the circumstances of grand corruption, more direct linkages between perpetrators and victims can be uncovered. Finding these linkages will be vital for developing effective, appropriate reparations strategies for victims.

The cases of the KMT mine, Fujimori's grand corruption, and South Africa's state capture illustrate several characteristics of high-level political corruption, as well as the difficulties associated with identifying and compensating its victims. One overarching characteristic simultaneously represents one of the greatest difficulties of victim compensation: the social harms of corruption are so widespread and complex that the victim class will often be large and situated at different "distances" from the corrupt act itself. The size of a victim class is a more straightforward factor. Where corruption is practiced to the extent of state capture, the victim class— for example, the millions of South Africans lacking access to basic services such as electricity— may encompass millions of people. This makes compensation, which is generally based on some form of causal nexus, extremely complicated. However, causal linkages can often be found by examining the underlying circumstances

online: Times Live <<https://www.timeslive.co.za/news/south-africa/2019-12-10-stages-6-to-8-load-shedding-what-itmeans-and-how-it-affects-you/>>.

¹⁵⁸ Mike Cohen & Paul Burkhardt, "Why Eskom's Power Crisis in South Africa's Top Risk (19 November 2019), online: The Washington Post <https://www.washingtonpost.com/business/energy/why-eskoms-power-crisis-is-south-africas-toprisk/2019/11/19/6ab27332-0aba-11ea-8054-289aef6e38a3_story.html>.

¹⁵⁹ Andile Sicetsha, "Human Rights Day: 'We will overcome Eskom crisis' – says Ramaphosa" (21 March 2019), online: The South African <<https://www.thesouthafrican.com/news/human-rights-day-overcome-eskom-crisis-says-ramaphosa/>>.

of grand corruption, such as with South Africa’s energy sector. The “distance” from the corrupt act is a more complicated consideration, describing the varying levels of causality through which corruption harms its victims. Even where a victim class might seem clearly identifiable at the outset, such as with the workers displaced from the KMT mine due to bribery, the long-term effects of corruption often indirectly impose consequences on a much wider group, with disadvantaged groups and persons often suffering disproportionately due to their reliance on public goods and services and limited ability to find private alternatives.¹⁶⁰ This dispersed nature does not only make the victim class hard to identify; damages themselves are often nigh-impossible to calculate, especially with regard to profits not gained due to corruption and indirect or non-pecuniary damages.¹⁶¹ Additionally, the scale at which grand corruption operates, and the globalized nature of our world, means that there are often spillover effects into other jurisdictions. Notably, the Gupta family’s corruption was recently linked to HSBC, one of Europe’s largest financial services holding companies. The allegation— that HSBC discovered and failed to properly disclose a Gupta money laundering network— was only revealed after the London-based NGO, Shadow World Investigations, provided evidence to South Africa’s Zondo Commission relating to HSBC’s knowledge of the operation.¹⁶² While this report does not contemplate compensation for the ways in which foreign corruption corrodes western financial institutions, it is important to note that corruption’s harms are not only dispersed within a foreign state; they often also undermine liberal-democratic institutions, rotting societies like Canada from within.

The dispersed, widespread nature of corruption’s harms can make it difficult to find direct human rights violations as a result of corrupt acts; this is because corrupt actors often utilize private institutions as vehicles to facilitate and hide their crimes, indirectly hindering a society’s realization of

“Corruption and human rights”, online: OHCHR <<https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/Corruption.aspx>>.

¹⁶¹ *UNODC Good Practices*, *supra* note 45 at 12.

¹⁶² Kalyeena Makortoff et al, “HSBC faces questions over disclosure of alleged money laundering to monitors” (28 July 2021), online: The Guardian <<https://www.theguardian.com/business/2021/jul/28/hsbc-faces-questions-over-disclosure-of-alleged-money-laundering-to-monitors>>.

collective rights such as economic and social rights (i.e. education and the highest attainable standard of health) rather than political and civil rights, which are more individualized, attract more discrete violations, and are less affected by corruption manifesting in the private sphere.¹⁶³ Far from being a “victimless” crime, corruption often victimizes entire populations over a long period of time. These inferences raise existential questions for policymakers tasked with finding ways to identify and compensate victims of corruption. For Canada, any efforts to compensate victims must address these questions.

A VICTIM COMPENSATION FRAMEWORK.

This report now presents a framework through which these questions might be addressed, as well as different potential compensation mechanisms and factors that should be taken into account by policymakers when evaluating potential options. Several sources, from the United Nations and Canada itself, outline valuable principles for such a framework.

The increased international interest in addressing transnational corruption has resulted in the formation of several guiding principles for victim identification and compensation. These can form a useful framework for Canadian policymakers seeking to add compensation mechanisms to Canada’s anti-corruption laws. The Implementation Review Group for the Open-ended Intergovernmental Working Group on Asset Recovery (“Working Group on Asset Recovery”), a subsidiary body within the UNCAC regime, outlined a series of points regarding victim compensation, including that:

- Compensation of victims represents the essence of justice and victims should be empowered to present their views and seek remedies;

¹⁶³ This distinction between political/civil rights and economic/social/cultural rights is also reflected in the way the international community codified the obligations of states to adhere to human rights standards; ICCPR signatories are charged with promoting and observing the rights contained therein, which were immediately operative, while ICESCR signatories are charged with the progressive realization of the rights contained within that covenant.

- While the Convention does not provide a definition of who is a victim of corruption, it is important to adopt a broad and inclusive approach, recognizing that individuals, entities and States can be considered victims of corruption;
- Compensation should not be based on a narrow interpretation of damage, but on a full analysis of the broader harm caused by an act of corruption. This should include recognition of collective damage or social harm.¹⁶⁴

The UNCAC regime thus calls for a broad and inclusive approach to identification in which individuals, entities, and states can be considered victims. States are also encouraged to fully analyze broader, systemic harms when evaluating the appropriate compensation for victims of corruption; while not expressly mentioned in UNCAC itself, these harms may include damage to the environment, to the credibility of institutions, or to collective rights such as health, security, peace, education, or good governance.¹⁶⁵ The UNCAC principles indicate that complexity alone is not a justification for taking a narrow approach to victim identification. However, the Working Group on Asset Recovery's points on victim compensation are phrased rather ambiguously, and other international human rights norms provide more specific advice on identifying victims, compensable damages, and articulating victims' rights.

Further interpretive guidance on the process of victim compensation can be found in 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 ("Basic Principles on the Right to a Remedy"), adopted by the United Nations General Assembly in 2005.¹⁶⁶ While corruption itself is not mentioned in the resolution, corruption's corrosive effects on numerous human rights makes the Basic Principles on the Right to a Remedy extremely relevant. Finally, the definition of victims under section V of the Basic Principles has a broad construction; while it pertains to victims of "acts or omissions that constitute gross violation of international human rights law, or serious violations of international humanitarian law", it explicitly includes victims of "collectively suffered harm" and, where appropriate, the immediate family or dependents of the victims

¹⁶⁴ UNODC *Good Practices*, *supra* note 45 at 4.

¹⁶⁵ Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Washington DC, World Bank, 2015) at 96-98.

¹⁶⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (2005) 64th Plenary Meeting. A/RES/60/147, online: <<https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>> [Basic Principles].

as well.¹⁶⁷ Given the broad scope of corruption's harms and its interrelation with various other human rights abuses, the Basic Principles on the Right to a Remedy provide useful guidance for considering effective methods of compensating victims of corruption. Section VII of the resolution asserts victims' rights to the following:

- Equal and effective access to justice;
- Adequate, effective, and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.

More specific guidance can be found in section IX, which concerns reparation for harm suffered.¹⁶⁸ Article 20 states that compensation should be provided for any economically assessable damage as appropriate and proportional to the gravity of the violation and circumstances of each case.¹⁶⁹ This damage can include physical or mental harm, lost opportunity (including employment, education and social benefits), material damages and loss of earnings (including loss of earning potential), moral damage, and costs required for legal, medical, or social services.¹⁷⁰ This broad conception provides useful guidance for creating a framework of compensable damages in the foreign corruption context.

Procedural guidance can be found in Section VI, relating to the treatment of victims. In Article 10 of that section, the resolution notes that states should ensure that their domestic laws provide a victim that has suffered violence or trauma with special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.¹⁷¹ In Article 24, states are called upon to develop means of informing the public of all available services to which victims may have a right of access.¹⁷² It also entitles victims to seek and obtain information on the causes leading to their victimization; in the words of the resolution, an entitlement to "learn the truth in regard to these violations".¹⁷³

¹⁶⁷ *Basic Principles*, *supra* note 166 at art 8.

¹⁶⁸ *Ibid* at sec IX.

¹⁶⁹ *Ibid* at art 20.

¹⁷⁰ *Ibid* at art 20.

¹⁷¹ *Basic Principles*, *supra* note 166 at art 10.

¹⁷² *Ibid* at art 24.

¹⁷³ *Ibid*.

Finally, guidance can be found in Canada's own approach to providing restitution for victims of domestic crimes. Since 1988, provincial compensation schemes for those injured by crimes have been operative in all Canadian provinces.¹⁷⁴ At the federal level, the *Canadian Victims Bill of Rights* ("Victims Bill of Rights") was enacted in July 2015 and specifically provides statutory rights to victims of crime in four main areas:¹⁷⁵

- Information
- Protection
- Participation
- Restitution¹⁷⁶

While the Victims Bill of Rights has itself been subject to substantial limitations, the delineation between the types of rights protected is useful for the foreign corruption context. As noted above, UNCAC and the Basic Principles on the Right to a Remedy create numerous obligations for states to respect and uphold the rights of victims. These obligations could be fulfilled and usefully categorized under a similar umbrella as the Victims Bill of Rights. For example, Article 24 of the Basic Principles on the Right to a Remedy, which calls upon states to inform victims of the compensatory services to which they may have a right of access, would be categorized as a right to information under the Victims Bill of Rights' categorization.¹⁷⁷ Similarly, provisions under UNCAC Section IX, which provides for reparations for harm suffered, would be categorized as rights to restitution. Policymakers might find it useful to scrutinize the obligations provided for under UNCAC and the Basic Principles and translate them into rights under a similar categorical framework.

¹⁷⁴ Alan N. Young, "The Role of the Victim in the Criminal Process: A Literature Review – 1989 to 1999" (7 January 2015), online: Government of Canada <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr00_vic20/p3.html>.

¹⁷⁵ *Canadian Victims Bill of Rights*, S.C. 2015, c 13 at s 2 [*Victims Bill of Rights*].

¹⁷⁶ "Progress Report: *The Canadian Victims Bill of Rights*" (November 2020), online (pdf): Government of Canada - Office of the Federal Ombudsman for Victims of Crime <https://www.victimfirst.gc.ca/res/pub/prcvbr-reccdv/40-061B%20FOVC%20Progress%20Report_EN_web.pdf> [*Victims Bill, Progress Report*].

¹⁷⁷ It is important to note that where the Basic Principles on the Right to a Remedy impose an obligation on states to inform victims, the Victims Bill of Rights instead provides for a positive right for victims to request information about the programs available to them. This has been identified as a weakness in the Victims Bill of Rights (see note 176).

Some guidance can also be drawn from the specific provisions of the Victims Bill of Rights. Section 3, for example, permits a victim's spouse, relative, or dependent to exercise the victim's rights under the Bill if the victim is dead or incapable of acting on their own behalf.¹⁷⁸ A Canadian mechanism for compensating victims of corruption should contain a similar provision, reflecting the fact that grand corruption takes lives. Section 8 provides victims with a right, on request, to information about the offender or accused, including regarding hearings related to an accused's conditional release or fitness to stand trial.¹⁷⁹ While sanctions obviously differ from domestic criminal proceedings, they do involve procedural matters (e.g., the JVCFOA's review process) that should, where appropriate, be described to victims upon request. Within these procedures, victims' views should be better represented and could help Canada's sanctions bodies meet the necessary evidentiary thresholds. Section 15, which provides the victim with a right to present a victim impact statement to the appropriate authorities and to have it considered,¹⁸⁰ could be repurposed to codify a right for foreign victims of corruption to provide statements related to the harm resulting from corruption that they experienced. This could assist Canada's sanctions bodies in meeting evidentiary thresholds,¹⁸¹ foreign NGOs in obtaining more information about corruption,¹⁸² and foreign victims in providing a formal outlet for them to share their experiences.¹⁸³ Finally, the Victims Bill of Rights allows victims to make a complaint if they feel their rights have been infringed or denied,¹⁸⁴ a necessary provision that weakens the possibility of the rights contained therein being watered down in practice.

¹⁷⁸ *Victims Bill of Rights*, *supra* note 175 at s 3.

¹⁷⁹ *Ibid* at s 8.

¹⁸⁰ *Victims Bill of Rights*, *supra* note 175 at s 15.

¹⁸¹ The JVCFOA, for example, authorizes sanctions only where corruption amounting to an act of *significant* corruption is shown [emphasis added].

¹⁸² Victims would be more likely to adduce information about their experiences if it is guaranteed that Canada's authorities will consider it, and potentially provide them with restitution as a result.

¹⁸³ Similarly, victims would have the opportunity to contribute to a system that could potentially both punish the individuals responsible for their suffering and provide restitution for them and other victims.

¹⁸⁴ *Victims Bill of Rights*, *supra* note 175, at s 6.

The Victims Bill of Rights provides a useful reference point for a compensation mechanism for victims of corruption but suffers from shortcomings that policymakers should avoid repeating. As noted in the 2020 Progress Report on the Victims Bill of Rights, putting victims first is an easy concept to understand that becomes far more difficult in practice.¹⁸⁵ The report, which was produced by the Office of the Federal Ombudsperson for Victims of Crime, details a series of issues with the law's operation, many of which would likely be exacerbated in the foreign corruption context. Most prominently, the report stated that the Victims Bill of Rights lacks clearly defined roles and responsibilities to victims.¹⁸⁶ Specifically, the law does not task any specific officials with informing victims of their rights or explaining how protections will be delivered, how they can participate, and how to collect restitution.¹⁸⁷ Instead, victims must rely on the goodwill of officials within the criminal justice system to provide them with the information and support that the law, on paper, provides. This has been problematic for compensating Canadian victims of domestic crime, despite their potential access to several “points of contact” with the Canadian justice system.¹⁸⁸ For foreign victims of corruption, these conventional contact points would not necessarily be available,¹⁸⁹ meaning that any compensation mechanism must determine the most appropriate officials to share information with victims regarding protection and support.¹⁹⁰ This responsibility would be strengthened if the onus were placed on these public officials to communicate this information, rather than on victims as is the case with the Victims Bill of Rights.¹⁹¹ The officials' fulfillment of this responsibility would certainly have to be evaluated on a systematic standard, given the nature of corruption as discussed prior; individual officers should not be punished for failing to inform every foreign victim (of a class of potentially thousands) of their right to restitution in Canada, but there should be some form of official responsibility in which the responsibility to adequately inform a victim class is realized via top-down

¹⁸⁵ *Victims Bill, Progress Report*, *supra* note 176 at 3.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ There are six main points of contact: the police, Crown prosecutors, the courts, review boards for special sentencing, Correctional Service Canada, and the Parole Board of Canada. *Victims Bill, Progress Report*, *supra* note 176 at 5.

¹⁸⁹ Unless provided for by law; see discussion of potential compensation mechanisms with Canada's anti-corruption legislation below.

¹⁹⁰ This would involve evaluating whether any current public officials could appropriately handle these responsibilities and, if not, creating new positions. A victim compensation agency (discussed below) could be the institutional actor tasked with doing so.

¹⁹¹ The 2020 Progress Report also recommended that this change be made to the Victims Bill of Rights. *Victims Bill, Progress Report*, *supra* note 176 at 4.

accountability.¹⁹² This is underpinned by my belief that it is even more problematic to shift this onus to foreign victims of corruption, who may lack the necessary knowledge of Canada's laws and face other logistical complications to pursuing their rights.¹⁹³ This logistical shortcoming of the Victims Bill of Rights provides useful guidance to policymakers tasked with translating victim compensation guidance into structured action through mechanisms contained in Canada's anti-corruption legislation, as many of the procedural difficulties arising in the domestic context would also be present for foreign corruption.



The UK's Serious Fraud Office has required several firms to pay compensation to victims of their foreign corruption and has consolidated a series of General Principles outlining its approach to victim compensation. [Image Source: The Wall Street Journal]¹⁹⁴

A victim compensation scheme in Canada must determine how best to operationalize the principles embodied within the various anti-corruption and victim oriented legal sources discussed

¹⁹² Specifically, higher ranking officials should be responsible for ensuring that their employees understand their roles within whichever legislative scheme is proposed, and that adequate training is provided.

¹⁹³ These limitations, of course, cannot be fully bridged by placing all responsibility on Canadian public officials. The participation of local NGO actors would be vital, as discussed below under the section "Coordination with existing global anti-corruption efforts."

¹⁹⁴ Mengqi Sun, "Serious Fraud Office Concludes Deferred Prosecution Agreement with ICBC Standard Bank" (30 November 2018), online: The Wall Street Journal <<https://www.wsj.com/articles/u-k-serious-fraud-office-concludes-its-first-deferred-prosecution-agreement-in-standard-bank-case-1543617627>>.

above. The United Kingdom provides useful guidance. The United Kingdom's Serious Fraud Office (SFO), an agency that tackles serious and complex fraud, bribery, and corruption, has adopted the General Principles to Compensate Victims ("General Principles"),¹⁹⁵ a series of principles for compensating overseas victims of corruption.¹⁹⁶ The General Principles require the agency and other departments to identify overseas victims in all relevant corruption cases and to seek compensation for them using available legal mechanisms, including confiscation orders, compensation orders, deferred prosecution agreements, and other non-conviction based asset recovery channels.¹⁹⁷ The Principles also require cooperation with other departments, such as the treasury, to identify victims, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process is transparent, and identify suitable means by which compensation can be paid to avoid the risk of further corruption.¹⁹⁸ Direction is also provided concerning multinational cooperation and transparency.¹⁹⁹

The General Principles provide a codification of the steps taken during the SFO's attempts to hold a pair of U.K. firms accountable for corruption committed in Tanzania. In 2010, the SFO entered into a settlement agreement with weapons manufacturer BAE Systems Plc pertaining to accounting fraud in the sale of a radar system to the Tanzanian government.²⁰⁰ In forming the agreement, the SFO acknowledged the overseas victims of the corruption by requiring BAE Systems to make an *ex gratia* payment for the benefit of the people of Tanzania, amounting to £30 million. The SFO worked with other departments through this process; notably, the U.K. Department For International Development

¹⁹⁵ Please note that these General Principles are distinct from those contained in the Victims' Bill of Rights discussed prior. The General Principles are principles adopted by a UK government agency. The Victims Bill of Rights is a Canadian statute.

¹⁹⁶ "Compensation Principles to Victims Outside the UK", online: Serious Fraud Office <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/compensation-principles-to-victims-outside-the-uk/>> [*General Principles*].

¹⁹⁷ *General Principles*, *supra* note 196.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Sam Hickey, "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach" (January 2021), 21:2 Chicago Journal of International Law 367 at 385 [*Hickey, Remediation*].

helped broker the arrangement and, with its existing presence in Tanzania, was able to play a monitoring role to ensure that the funds were used for their intended purposes.²⁰¹ While the BAE Systems settlement was an important example of acknowledging foreign victims when addressing corporate wrongdoing, the SFO's subsequent negotiation of a DPA with Standard Bank Plc in 2015 shows flexibility as well. In that situation, Standard Bank was found to have paid bribes in connection with a public contract obtained in Tanzania.²⁰² After the payments were discovered, the SFO evaluated the wrongdoing and assessed that the Tanzanian government was the appropriate victim given the consequences of the corruption. In finding that the government would have received US\$6 million but for the corrupt scheme (that resulted in the funds instead being paid to a shell consulting company), the SFO ordered that Standard Bank pay that sum, plus interest, to Tanzania itself.²⁰³ The SFO made direct reference to these settlements at release of the General Principles,²⁰⁴ unsurprisingly; the agreements formed with BAE Systems and Standard Bank, like the General Principles themselves, indicate that the basis of a good compensation scheme are a diverse legislative toolset for holding corruption violators accountable, mechanisms to funnel seized assets and penalties to victims, and cooperation with other governmental and multinational entities.

UNCAC, the Working Group on Asset Recovery's points, and the Basic Principles on the Right to a Remedy all provide useful guidance on victim compensation from international legal sources. Collectively, these sources describe the following principles of an effective victim compensation scheme accordant with current international legal standards:

- Compensating victims represents the essence of justice.
 - An effective compensation system will provide victims with rights to information, protection, participation, and appropriate restitution.

²⁰¹ *Ibid.*

²⁰² Hickey, *Remediation*, *supra* note 200 at 386.

²⁰³ Hickey, *Remediation*, *supra* note 200 at 386.

²⁰⁴ "New joint principles published to compensate victims of economic crime overseas" (1 June 2018), online: Serious Fraud Office <<https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>>.

- The definition of “victim” should be broadly constructed.
 - Individuals, entities, and states are all victimized by acts of corruption.
 - The definition should account for situations in which a victim is deceased or incapable of acting on their own behalf by allowing for immediate family members or dependents of the victim to exercise the same rights.
- Victims should be empowered to present their views and access relevant information concerning violations and reparations mechanisms.
 - States should develop means of informing victims of their rights, as victims will often lack the resources to do so themselves.
 - In addition to procedural information about their restitution claims, victims should be entitled to request information about the offender or accused’s legal proceedings in Canada.
- Damage should be interpreted broadly and should include all economically assessable loss as appropriate to the gravity of the violation and circumstances of each case.
 - This assessment should include physical or mental harm, lost opportunity, material damages and loss of earnings, moral damage, and costs required for legal, medical, or social services.
- Victims should be treated with special consideration and care throughout their participation in the Canadian legal system, in order to avoid their re-traumatization.
- An effective complaint mechanism should be established for victims who feel that any of their rights under this framework have been impaired.

The above principles provide guidance as to the logistic framework for implementing relevant laws in support of victim compensation. Furthermore, the General Principles developed by the Serious Fraud Office, as well as the shortcomings of Canada’s Victims Bill of Rights, provide the following overarching guidance:

- Measures should be implemented to give public officials clearly defined roles.
- Training should be provided to help officials responsible for victim compensation understand their responsibilities to victims, such as informing victims of their legal rights and clarifying the steps victims must take to collect restitution.
- The primary department tasked with handling victim compensation should be empowered to cooperate with other governmental departments in order to identify victims, assess the case for compensation, obtain evidence, ensure transparency, and determine suitable means for paying restitution.

MECHANISMS FOR VICTIM COMPENSATION.

There is clearly domestic political interest in amending Canada's anti-corruption legislation to allow for victim compensation mechanisms. In 2018, the Canadian federal budget committed 22.2M dollars toward strengthening Canada's sanctions regime.²⁰⁵ In 2019, the Foreign Affairs Minister's mandate letter directed him to develop a "framework to transfer seized assets from those who commit grave human rights abuses to their victims",²⁰⁶ specifically with regard to the JVCFOA regime. That year, Senator Ratna Omidvar sponsored Bill S-259, which would have given provincial superior courts the power to redistribute assets frozen under the JVCFOA with the goal of rebuilding and responding to the needs of communities impacted by human rights abusers, particularly those affected by forced displacement.²⁰⁷ While the bill died at prorogation, it indicated some promising political support for taking Canada's legal and moral obligations more seriously through sanctions. Furthermore, Global Affairs Canada committed itself in its 2020-2021 Departmental Plan to operationalizing a framework for transferring seized assets from human rights violators to victims.²⁰⁸ However, it has provided little information with respect to tangible actions that the department plans to take.

²⁰⁵ Cotler, *supra* note 11.

²⁰⁶ *Ibid.*

²⁰⁷ Cotler, *supra* note 11.

²⁰⁸ "Departmental Plan 2020-2021", online: Global Affairs Canada <https://www.international.gc.ca/gac-amc/publications/plans/dp-pm/dp-pm_2021.aspx?lang=eng>.



In 2019, Senator Omidvar introduced Bill S-259 to repurpose frozen assets to help victims forced to run for their lives and seek safe haven. [Image Source: Ratna Omidvar]²⁰⁹

Legislation such as Bill S-259 would represent an important and logical evolutionary step for Canada's Magnitsky law. As it stands, the frozen assets of individuals designated under the *JVCF*OA for significant corruption or gross human rights violations remain immobile and without purpose.²¹⁰ As Senator Omidvar explained,²¹¹ the next step is to reach beyond and, through court order, seize their assets in order to repurpose them back to help victims. This is a step that is also being discussed in the United States for their Global Magnitsky Act,²¹² and Canada has an opportunity to set a new standard in compensating victims for Magnitsky regimes elsewhere. Furthermore, Canada already has

²⁰⁹ "Q&A with Canadian Senator Ratna Omidvar: Refugee Women and Girls" (8 December 2020), online: Ratna Omidvar <<http://www.ratnaomidvar.ca/qa-with-canadian-senator-ratna-omidvar-refugee-women-and-girls/>>.

²¹⁰ Cotler, *supra* note 11.

²¹¹ Ratna Omidvar, "Opinion: To Make Corrupt Leaders Pay, We Should Seize and Repurpose Frozen Assets" (2 December 2019), online: <<http://www.ratnaomidvar.ca/to-make-corrupt-leaders-pay-we-should-seize-and-repurpose-frozen-assets/>>.

²¹² Beth Van Schaack, "Reauthorizing and Strengthening the Global Magnitsky Act" (14 April 2021), online: Just Security <<https://www.justsecurity.org/75659/reauthorizing-and-strengthening-the-global-magnitsky-act/>>.

avenues for repurposing the fines levied against Canadian companies for engaging in corruption abroad (see below) and allowing the same to be done for assets seized from corrupt foreign public officials would ensure that victims could be compensated from both sides of perpetrators in a corrupt activity. A judicial discretion mechanism as contemplated by Bill S-259 would have been an important step for Canada in meeting its UNCAC obligations and should be reconsidered in the future. However, there are other existing avenues for Canada to utilize if it is serious about compensating victims.

Canada's recently introduced DPA regime is especially suitable to compensate victims, for several reasons. Importantly, Canada's DPA regime is distinct from other regimes worldwide in that it mandates the courts to fully consider victims' perspectives and their compensation entitlements.²¹³ Furthermore, victims must generally be notified prior to a DPA being presented to the court for approval, and the court must consider any victim impact statement presented in connection with the approval hearing as well as whether appropriate provisions had been made for reparations to victims within the agreement.²¹⁴ This differs from previous plea deals negotiated after violations of the *CFPOA*,²¹⁵ and the strengthened mandate for victim participation makes it less likely that victim surcharges would fail to be transferred to their intended recipients. However, there are potential complications with the new regime. As mentioned, Canada's DPA regime was implemented via amendment of the Criminal Code, and thus retains that statute's relatively broad definition of "victim" as *"against whom an offence has been committed...and has suffered or is alleged to have suffered...property damage or economic loss"*.²¹⁶ The broad nature of this definition has led commentators to note that "victims" accounted for by deferred prosecution agreements might conceivably include foreign governments, local community members, state-owned entities, or private

²¹³ "Government introduces 'made-in-Canada' Deferred Prosecution Agreement framework" (11 April 2018), online: Dentons LLP <<https://www.dentons.com/en/insights/alerts/2018/april/11/government-introduces-made-in-canada-deferred-prosecution-agreement-framework>> [Dentons, DPA]

²¹⁴ Dentons, DPA, *supra* note 213.

²¹⁵ See prior discussion of the deals agreed to by Griffiths Energy International and Niko Resources.

²¹⁶ *Criminal Code*, *supra* note 69 at s 2.

actors, potentially creating an “unparallel” level of participation by parties claiming victim status.²¹⁷ This is positive in that it expands access to compensation to a wide array of potential victims in accordance with the broad construction required under international law, but could potentially create an influx of communications with potential to overwhelm our court system, especially if DPAs are pursued more rigorously in our justice system. While the Criminal Code could be amended to provide a variant definition of “victim” for the foreign corruption context, it would be difficult to strike an appropriate balance between the broadness required to allow the full range of potential different parties to apply for restitution, and the narrowness required to substantially lessen the workload of the courts.

Canada’s primary anti-corruption laws, the *CFPOA* and *JVCFOA*, are important, largely untapped sources of potential reparations for foreign victims of corruption. With Canada’s new DPA regime, prosecutors now have an additional tool for forming agreements with Canadian firms engaged in foreign bribery (as criminalized under the *CFPOA*) that mandates the participation and restitution of victims. This avenue for reparations already exists, but its potential has not come close to realization and will require greater political will to fight corruption, as well as a better system for actually distributing the funds marked for victim compensation. The *JVCFOA*, however, currently lacks a mechanism to redistribute frozen assets to the victims of sanctioned individuals. Legislation should be reintroduced in Canadian parliament to rectify this shortcoming and allow Canada to repurpose those assets. Questions remain, however, as to how those assets should be administered.

²¹⁷ *Dentons, DPA, supra* note 213.

THE CASE FOR A VICTIM COMPENSATION AGENCY.

Amending the *JVCFOA* to provide for judicial discretion over asset seizures would create a similar mechanism as the one currently contained within Canada's DPA regime, essentially providing the courts with substantial discretion over assets (seized under the *JVCFOA* or negotiated with a company under the DPA regime) under the justification of punishing corruption, and with the goal of compensating victims. This discretion would be larger in the *JVCFOA* context, given the unilateral nature of asset seizures after a sanction designation has been made.²¹⁸ While giving this power to the courts is more straightforward, and likely a more cost-effective option in the short-term, a dedicated victim compensation agency would provide a more appropriate mechanism in the long term for distributing funds and assets to victims in accordance with the principles outlined in this report. There are several reasons for this. With respect to providing a fair process of compensation, having a single entity making fund allocation decisions makes it easier to ensure relatively uniform application of applicable principles, where allowing for considerable judicial discretion might lead to uneven application between judges, across jurisdictions, and between different sources of victim compensation funds (e.g., a victim surcharge contained within a DPA vs an asset seizure under a revised *JVCFOA*, see above). This may be less of a problem in situations in which procedural evidence, such as in the *JVCFOA* submissions process, produces a clearly identifiable victim class, (which is often the case in meeting the high evidentiary threshold required by that legislation).²¹⁹ However, if Canada's anti-corruption regime becomes more robust, it will encounter more situations of complex grand corruption²²⁰ in which the victim identification process and the evaluation of compensable damages are more difficult. In these situations, procedural evidence may be useful but may also raise more questions than answers with respect to which victims should be compensated. These questions

²¹⁸ As opposed to a DPA which, as the result of a negotiation, could conceivably involve input from the Canadian firm engaged in foreign bribery on how victims should be compensated.

²¹⁹ *Cotler, supra* note 11.

²²⁰ Such as those discussed in the case studies for Fujimori in Peru and Zuma in South Africa.

concerning *locus standi*— the legal standing to pursue compensation— for cases of complex corruption have been partially addressed by some other states, who have allowed class actions or collective interest actions by foreign organizations, or by prosecutors/attorney generals acting on behalf of a victim state.²²¹ A victim compensation agency would be better suited to address these questions of *locus standi* under a more standardized process, which might include considering whether Canada should draw from the practices adopted by foreign states.

As mentioned, governments are less likely to remit funds back to a state that has experienced state capture, due to a lack of trust and transparency in how they would be used.²²² It might be more appropriate in these circumstances to send the funds to local NGOs or other programs who are more likely than a corrupt state government to use the funds to compensate victims and prevent further corruption. A Canadian victim compensation agency could be empowered by Parliament to act as a “competent authority” under UNCAC Article 53(c) by giving it the legislative mandate and resources to appropriately distribute seized assets and victim surcharges arising from the enforcement of its anti-corruption legislation. With a mandate from the Canadian government, this agency could investigate instances of state capture, or other circumstances under which remitting funds to a state government appears nonsensical, to determine whether non-state recipients could better advance the goals of compensation and anti-corruption.

Prioritizing non-state actors as recipients of recovered funds over states, the central actors in the international system, requires legitimacy in addition to formal legality. The legitimacy of prioritizing non-state actors in the return of funds could be strengthened by drawing parallels between the corrupt act in question and any covenant rights that have been violated as a result (explained further below). This would situate Canada’s decision to allocate funds elsewhere within the context of human rights

²²¹ *Working Group Report*, *supra* note 13 at 3.

²²² *In Search*, *supra* note 3 at 23.

defense and serve as a partial safeguard against allegations of arbitrariness. The standardization of a victim compensation agency over a patchwork judicial system would make that approach seem less arbitrary, and the relative unison enjoyed by an agency would also make it better suited to address questions concerning the legitimacy of its decisions.

An administrative agency's research capacity could help it better develop reparations strategies that center around a nexus with the corrupt act in question.²²³ This is easier where there is a more identifiable victim class. For example, the proposed reparations for a corrupt act involving the pillage of an education budget could center around funding programs/organizations advocating for the right to education and providing supplies and support to schools. Similarly, reparations for victims of the Guphas' corruption in South Africa might hypothetically be partially directed towards rebuilding the country's public energy sector. Without an identifiable victim class, establishing an appropriate nexus might necessitate working with other departments, institutions, or NGOs to determine the best approach for helping impacted communities. For example, the £4.4M recovered by the SFO during its investigations into corruption committed by Griffiths Energy in Chad was transferred to the UK's Department for International Development to invest in humanitarian anti-poverty programs.²²⁴ Finally, there may be circumstances under which neither the state nor local organizations are viable, trustworthy recipients of recovered funds. A victim compensation agency's capacity would allow it to evaluate these situations develop alternative strategies for compensation, also based upon a nexus with the corrupt act in question (to the extent possible). For example, it might be more appropriate to direct funds towards general anti-corruption initiatives in the state's region, or to work with international institutions to ensure that the funds are used in furtherance of compensation and anti-

²²³ Sam Hickey, "Providing Reparations to the Victims of Foreign Bribery: What Criteria Are Appropriate?" (13 May 2019), online (blog): Global Anti-Corruption Blog
<<https://globalanticorruptionblog.com/2019/05/13/providing-reparations-to-the-victims-of-foreign-bribery-what-criteria-are-appropriate/>> [Hickey].

²²⁴ *Ibid.*

corruption initiatives. As noted by researchers from the UNCAC coalition,²²⁵ reparation is an area particularly ripe for collaboration with civil society to generate ideas that provide for sufficient, relevant accountability measures to ensure that reparation reaches those that need it the most. It was also emphasized that collaboration with civil society can allow experimentation with reparation measures in furtherance of transforming the situation that led to corruption in the first place.²²⁶ Finally, it was argued that resourcing anti-corruption efforts is laudable, but must be done in conjunction with reparations that lead to tangible improvements in the well-being of citizens in order to fulfill the restorative purpose of restitution and to avoid the perception of anti-corruption groups working primarily for self-serving purposes.²²⁷

The larger capacity of an administrative agency, as opposed to a patchwork system of judges, makes it a more appropriate body for pursuing justice for victims through existing Canadian anti-corruption avenues. Its legislative mandate could build upon the SFO's General Principles, which direct the UK's primary anti-corruption office to work with relevant departments to identify potential victims, assess the case for compensation, obtain evidence, and identify suitable means by which compensation can be paid to avoid the risk of further corruption.²²⁸ In Canada, the agency could do the same by working with relevant government departments, such as Global Affairs and the RCMP, to develop good restitution practices. As referenced, the agency's greater capacity would also allow for more substantive, long-term engagement with international institutions and multinational entities that are central to the process of asset recovery. As will be discussed further, these multinational relationships are crucial to the process of asset recovery. This sustained engagement would also make

²²⁵ Dr. Juanita Olaya Garcia, "Arguments or Excuses? Common Reasons I Hear to Avoid Reparations For Corruption Cases" (11 May 2020), online: UNCAC Coalition <<https://uncaccoalition.org/arguments-or-excuses-common-reasons-i-hear-to-avoid-reparations-for-corruption-cases/>>.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *General Principles*, *supra* note 196.

the agency better equipped to evaluate the most appropriate legal avenues for pursuing justice where harms cut across legal areas.

A final important advantage of a victim compensation agency is its authority over a specified purpose fund, which would enable the agency to craft more flexible and appropriate compensation strategies. The Canadian Environmental Damages Fund (EDF) provides useful guidance as an institutional model. The EDF is a specified purpose fund administered by Environment and Climate Change Canada which direct funds received from fines, court orders, and voluntary payments to priority projects that benefit Canada's natural environment.²²⁹ A victim compensation purpose fund could be administered by the agency and work analogously to the EDF by directing funds received from assets seizures and penalties imposed under Canada's anti-corruption legislation towards returning assets to their rightful owners, compensating victims, and fighting corruption. An important difference is that where the EDF funnels penalties/funds projects contained mostly within Canada, a victim compensation agency's outputs would be directed towards foreign victims. This raises additional jurisdictional and operational obstacles (as discussed below) and necessitates that attention be paid to the perceived legitimacy of the process.

FACTORS TO CONSIDER.

This report submits that a victim compensation agency would be the most appropriate actor for distributing, to victims, the assets generated by existing/potential mechanisms in Canada's anti-corruption laws. When considering what the most appropriate methods for compensation would look like, policymakers should keep the following in mind:

²²⁹ "Environmental Damages Fund" (November 2020), online: Government of Canada <<https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/environmental-damages-fund.html>>.

- Prioritize Legitimacy.
- Ensure a Robust Source of Funding.
- Coordinate with Existing Global Anti-Corruption Actors.
- Implement Effective Monitoring Mechanisms.
- Ensure Transparency & Accountability.
- Create an Ombudsperson Position.

Prioritize Legitimacy.

Sanctions regimes frequently raise serious ethical quandaries about their use as a coercive tool against human rights abusers due to collateral effects on civilian populations.²³⁰ While Magnitsky laws partially sidestep this concern by targeting the private assets of corrupt individuals, the process of seizing a private official's assets and redistributing them amongst a victimized population is still somewhat unfamiliar ground and requires that the process be seen as legitimate. One vital aspect of this legitimacy is the ability to broadly compensate victims in accordance with UNCAC's call for a broad approach to compensation. A judicial discretion mechanism without a specified purpose fund leaves open the possibility that all relevant assets might be distributed, only to later find a class of victims in need of remuneration and have no ability to obtain it. With authority over a specified purpose fund, by contrast, a victim compensation agency could determine a system for allowing victims to apply to the fund even when the assets directly related to the corrupt act in question had already been distributed. This might require some financial commitment by Canada, which could demonstrate its dedication to victim compensation by implementing a mechanism akin to that of the South Australia Victims of Crime Act 2001, which provides that any deficiency in the associated Victims of Crime Fund is met from general government revenue.²³¹ The establishment of specified purpose fund with this security of

²³⁰ Marcus Boomen, "The Effectiveness and Ethics of Economic Sanctions" (16 July 2014), online: Seven Pillars Institute <<https://sevenpillarsinstitute.org/effectiveness-and-ethics-of-economic-sanctions/>>.

²³¹ Kym Kelly and Adam Graycar, "Report to Transparency International: Using Compensation Funds to support anti-corruption interventions" (January 2016) at 17, online (pdf): <https://knowledgehub.transparency.org/assets/uploads/kproducts/Using_compensation_funds_to_support_anti-corruption_interventions.pdf>.

funding would allow Canada to better compensate the victims of corruptions situated at a further temporal distance from the act in question, and change the international community's perception of Canada's commitment to fighting corruption. By allowing for individual claimants, this kind of system could help Canada meet its UNCAC obligations related to procedural rights of victims while sidestepping the obstacle of proving causality that often results in their claims being rejected by the Canadian criminal law system.²³² While a vast influx of applications would also likely follow from the establishment of this mechanism, the agency would have discretion to decide the most appropriate filtering thresholds related to causality/gravity. The potential of overwhelming a more singularly focused administrative system would also present less institutional risk than potentially overwhelming the court system.

Ensure Robust Funding.

The victim compensation purpose fund's survival and success would also largely depend upon a robust stream of funding provided by Canada's anti-corruption legislation. In addition to the assets seized from sanctioned individuals, s. 11(b) of the *JVCFOA* regime creates a mechanism for fining persons contravening or not complying with s. 4 orders and regulations (the screening and reporting obligations imposed by the act) up to \$25,000.²³³ Legislative amendment to allow for courts to order that these financial penalties, as well as seized assets, be distributed to a specified purpose fund for compensation would help the *JVCFOA* live up to its foundational principles as an avenue for justice for victims, help fulfill Canada's legal obligations, and even support the existing *JVCFOA* regime—an effective scheme of victim compensation accompanied by legislative amendment might provide both moral legitimacy and increased jurisdiction necessary to motivate political will to use sanctions more proactively against human rights violators.

²³² Cotler, *supra* note 11.

²³³ *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, S.C. 2017, c. 21.

Legislative amendment to the *CFPOA* to also bring that regime within the victim compensation fund's umbrella could allow for victim surcharges involved in plea deals or DPAs to be placed in a specified purpose fund under the discretion of the agency. By amending s.715.34(1) of the Criminal Code, which governs the distribution of assets, penalties, reparations, and victim surcharges as identified in the DPA,²³⁴ to allow for the direction of assets to the fund where appropriate, the newest *CFPOA* enforcement mechanism could be amended to bring the legislation within the umbrella of a larger victim compensation system. Updating the *CFPOA* in this way would be an important step towards fulfilling Canada's obligations, and drawing assets from both *CFPOA* and *JVCFOA* penalties would provide some depth to the system by ensuring that the agency redistributes both asset seizures from corrupt officials abroad under Magnitsky and victim surcharges paid/negotiated by Canadian companies under the *CFPOA*. This would result in victim compensation being funded by all perpetrators of the corruption process—the corrupt officials, bribing corporations, and complicit financial entities would all be contributing to compensation for the victims of the acts in question.

The agency would have legal authority to use a portion of the seized assets to fund its own operation—UNCAC Article 57(4) allows the sending State party to deduct reasonable expenses incurred in investigations, prosecutions, or judicial proceedings leading to the return or disposition of confiscated property.²³⁵ Canada would likely incur significant expenses in setting up the system, but as its anti-corruption regime expands and more assets are funnelled through the agency, it would become more capable of funding itself. A potential future that involves freezing the assets of a greater number of corruption violators would, under a judicial discretion mechanism, give judges substantial authority in a fund allocation role, which results in judges assuming more work and responsibility while also potentially inviting criticism about the judiciary's role in Canada's separation of powers.

²³⁴ *Criminal Code*, *supra* note 69 at s 715.34(1).

²³⁵ *UNCAC*, *supra* note 6 at art 57(4).

The wide discretion afforded to this potential victim compensation agency and fund is necessary to address the complex consequences of corruption, but the fund must be administered in accordance with the purposes of UNCAC and the international norms around victim compensation to ensure the system's legitimacy. Outside of legitimacy and a robust source of funding, the two most important dimensions that would determine the survival and success of a victim compensation agency are multinational cooperation and transparency/accountability.

Coordinate With Existing Global Anti-Corruption Actors.

As previously discussed, global anti-corruption initiatives have proliferated rapidly to combat the challenges of globalized corruption.²³⁶ Consequently, one of the most important aspects of effective victim compensation is the agency's "fit" within the existing anti-corruption landscape—in other words, its ability to cooperate and coordinate with multinational actors. The Working Group on Asset Recovery, amongst its other points concerning victim compensation, noted the important role that civil society and NGO's play in ensuring that victims are represented in corruption proceedings, helping them to report crimes, give evidence, or bring public interest litigation.²³⁷ A number of international institutions govern this process of asset recovery. The UNCAC anti-corruption framework heavily emphasizes the recovery of stolen assets as a priority in fighting corruption, and directs states under Articles 54 and 55 to establish mechanisms for recovery of property acquired through international cooperation for the purposes of confiscation.²³⁸ International bodies such as the International Centre for Asset Recovery, the Financial Actions Task Force, and the Stolen Asset Recovery Initiative (StAR) assist countries in operationalizing these obligations, providing training and helping build capacity for collecting evidence, preparing indictments, and obtaining convictions

²³⁶ "International Co-operation dealing with Economic Crime, Offenders and Recovery of Stolen Assets" (2020) at 6, online (pdf): OECD
<http://www.g20.utoronto.ca/2020/Scoping_Paper_on_International_Cooperation_04092020_V4_final.pdf> [International Co-operation].

²³⁷ UNODC *Good Practices* *supra* note 45 at 4.

²³⁸ UNCAC, *supra* note 6.

(among other functions).²³⁹ These efforts have created rudimentary channels for mutual legal and administrative assistance that a victim compensation agency would be suited to engage with, and would be particularly useful in situations in which the agency determined the State party to be an appropriate victim.

Multinational cooperation would take on a different role in potential situations where the victim compensation agency has made an informed decision that a state's capture means that funds would likely be re-embezzled. In these situations, the agency would make determinations on how best to allocate the funds to victims, likely via cooperation with a local or regional NGO. This may be problematic in the state capture context, as national legislation usually controls how NGOs are set up and how they operate.²⁴⁰ The presence of domestic legislation governing local NGO activities is an important consideration when determining the best compensation strategy. Integral factors to consider for the utility of the NGO's proposed initiatives would include the potential accessibility of the NGO's financial, care, and support services, with minimal delay, to the victim class.²⁴¹ It would also be useful to consider the NGO's projected distribution timeline in consideration of the fact that often long-term provision of services will be required to meet victim's needs,²⁴² raising the associated need to understand the cost effectiveness of the proposed services and ensure that only a reasonable amount of funds would be put towards the continued administration of the NGO.²⁴³

²³⁹ *International Co-operation*, *supra* note 236.

²⁴⁰ "The role of civil society in the development of victims' rights and delivery of victim services" (November 2018) at 19, online (pdf): Victim Support Europe <<https://www.mdtfjss.org.rs/archive//file/The%20role%20of%20civil%20society%20in%20the%20development%20of%20victims%E2%80%99%20rights%20and%20delivery%20of%20victims%20services.pdf>> [*Role of Civil Society*].

²⁴¹ *Role of Civil Society*, *supra* note 240 at 21.

²⁴² *Ibid* at 22.

²⁴³ *Ibid* at 23.

Implement Effective Monitoring Mechanisms.

Monitoring the use of assets is the final stage of the multinational cooperation process of asset recovery and is central to ensuring that the principles behind compensation are fulfilled. History has shown the necessity of monitoring mechanisms for states with a history of corruption.²⁴⁴ For example, when funds previously laundered during Ferdinand Marcos's dictatorship were remitted to the Philippines Treasury, audits indicated that a significant portion of the recovered assets were used to finance excessive, unnecessary expenses unrelated to the agreed upon purpose of the remittance (agrarian reform).²⁴⁵ A similar problem occurred in Peru after funds laundered under Fujimori were remitted.²⁴⁶ The implementation of effective monitoring mechanisms would loosen the gravity of the decisions made by the agency about whether funds should be remitted back the state, and likely improve the perception of the system which is currently hampered by reasonable fears that returned assets would be further misappropriated. It's important to note that monitoring states in the context of UNCAC/StAR can only take place on a voluntary basis,²⁴⁷ which might actually provide legitimacy to the agency's decisions—if a state refuses to comply with monitoring measures, it legitimizes the victim compensation agency's choice to send funds elsewhere. Monitoring in the asset recovery process appears to largely have been conducted on an *ad hoc* basis, but there are situations in which institutions like the World Bank have performed these functions.²⁴⁸ This type of monitoring arrangement is preferable to a state conducting its own monitoring, which was the case in the Philippines and Peru.²⁴⁹ Monitoring should also be required for partner NGOs in foreign countries to ensure that funds are being directed towards appropriate purposes and are meeting the necessary standards for accessibility of services, timeline for services, and cost effectiveness. Monitoring is an

²⁴⁴ *Management of Returned Assets*, *supra* note 55 at 25-26.

²⁴⁵ *Role of Civil Society*, *supra* note 240 at 25.

²⁴⁶ *Ibid.*

²⁴⁷ *Role of Civil Society*, *supra* note 240 at 24.

²⁴⁸ *Ibid* at 25.

²⁴⁹ *Ibid* at 25-26.

important aspect of procedural transparency and is vital to the success and survival of a victim compensation scheme.

Ensure Transparency & Accountability.

A Canadian victim compensation agency's survival would depend largely upon domestic and international perception, which would be enhanced by prioritizing transparency and accountability. Domestic support is extremely important—this project is ambitious and would require a high degree of political capital. International perception, on the other hand, is important because of the multinational cooperation required for the project's success. Perception of the agency's distribution of funds as overly arbitrary or serving the interests of a neoliberal elite could hinder its operation, particularly if that perception were true. The agency should work pursuant to mechanisms that protect its role and perception as a transparent, accountable decision maker. The global principles developed at the 2017 Global Forum on Asset Recovery (GFAR) provides some emphasis on the importance of transparency in how seized assets are returned.²⁵⁰ GFAR Principle 4 considers Transparency and accountability, which should be guaranteed by both transferring and receiving countries during the disposition of recovered assets.²⁵¹ This principle also emphasizes that information regarding the transfer and administration of returned assets should be made publicly available to people in both the transferring and receiving country, and that the use of unspecified or contingent fee arrangements should be discouraged.²⁵² GFAR Principle 8 notes that transparency might be best facilitated by case-specific arrangements agreed upon by both the transferring and receiving state.²⁵³ These global principles indicate the dual importance of making procedural information available to the public and to other

²⁵⁰ Global Forum on Asset Recovery, "GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases" (December 2017), online (pdf): <<https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf>> [GFAR Principles].

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

states. Policymakers contemplating a victim compensation agency must consider which procedural mechanisms would be most appropriate for providing this information.

Create An Ombudsperson Position.

An effective first step towards making procedural information available would be the establishment of an ombudsperson office to act as an intermediary between the agency and those seeking information about its mandate and operations. An effective ombudsperson would require independence and the authority to compel the agency to release all relevant information when doing so would not harm or prejudice victims. Canada should take lessons from its failures in the establishment of the Canadian Ombudsperson for Responsible Enterprise (CORE), established in 2018 as a watchdog for the potential human rights/corruption abuses of Canadian corporations abroad.²⁵⁴ CORE was formed through an Order in Council rather than legislation, rendering it unable to compel the release of relevant information from the companies in question and greatly limiting its effectiveness as a meaningful investigatory organ.²⁵⁵ An ombudsperson for a Canadian victim compensation agency should be created under its own statute and given the necessary authority to avoid repeating this problem. To avoid overburdening the office, the agency should make all its decisions and associated reasoning publicly and freely available on a public database, only restricting information where victims might be prejudiced. Public hearings would also be appropriate in situations where there is wide public interest in a certain issue; this would also ease the burden on the ombudsperson and convey the importance of the agency's responsiveness and accountability to the public. An ombudsperson could also be an appropriate official for investigating complaints of victims who feel their rights have been infringed, a provision in the Victims' Bill of Rights that, as previously mentioned, could help prevent victims' rights from being distilled.

²⁵⁴ Abeni Steegstra, "Will the Canadian Ombudsperson for Responsible Enterprise (CORE) have the powers to do her job?" (4 March 2020), online: IJHRC Blog <<https://blogs.ubc.ca/ijhr/2020/03/04/will-the-canadian-ombudsperson-for-responsible-enterprise-core-have-the-powers-to-do-her-job/>> [Steegstra].

²⁵⁵ *Ibid.*

LIMITATIONS AND CONCLUSION.

An administrative agency dedicated to victim compensation would be an ambitious step for Canada, a country with a weak record of combatting corruption. While a judicial oversight mechanism such as Bill S-259's might serve as a useful step towards the eventual establishment of such an agency, many of the advantages that an agency holds over a judicial oversight mechanism only become pertinent if enforcement of Canada's anti-corruption regime becomes more comprehensive. The *CFPOA*, for example, has produced only two convictions in 10 years from which victim surcharges had to be allocated.²⁵⁶ The FCPA in the US, by contrast, produces numerous convictions every year.²⁵⁷ Political will is an aspect of this relative lack of enforcement, making it important to stress Canada's legal and moral obligations, as well as potential geopolitical advantages, in advocating for a more proactive use of its current anti-corruption legislation. However, the legislation itself presents additional limitations, such as the *JVCFOA*'s inapplicability to non-state individuals or groups. Legislative amendment would be required not only to implement mechanism to distribute funds to victims, but also to address the constraints discussed concerning the *JVCFOA* and *CFPOA*'s jurisdictions. Other limitations to consider are the constitutional questions associated with allowing individual claimants to apply for compensation,²⁵⁸ and the potential sluggishness of operationalizing the *CFPOA*'s new DPA mechanism in light of the SNC-Lavalin political scandal.

The international community's increasing recognition of the complex, collective harms of corruption has led to the emergence of a framework governing anti-corruption and asset recovery in

²⁵⁶ *Harrington, Plea for Redress*, *supra* note 10.

²⁵⁷ "SEC Enforcement Actions: FCPA Cases" (2020), online: U.S. Securities and Exchange Commission <<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>>.

²⁵⁸ Allowing for individual claimants in these situations may raise constitutional questions linked to jurisdiction; that is, the extent to which Canada is able to provide legal avenues and compensation mechanisms to foreign individuals. See more: "Justice for Victims of Terrorism Act", online: Courthouse Libraries BC <<https://www.courthouselibrary.ca/how-we-can-help/legislation-case-law/guides/tricky-legislation/justice-victims-terrorism-act>>.

Cotler, *supra* note 11.

that context. UNCAC imposes binding legal obligations on member States, including Canada, to establish jurisdiction over corruption offences and to provide procedural/compensatory rights to victims of corruption. Despite these obligations, Canada's anti-corruption legislation contains no effective mechanisms to distribute penalties/seized assets back to victims of the acts in question. While there has been political movement towards amending the *JVCFOA* to allow for a mechanism to give judges discretion to distribute seized assets, a future of comprehensive enforcement of Canadian anti-corruption legislation might necessitate the establishment of an agency for victim compensation with authority over a specified purpose fund. This agency could draw guidance from domestic institutions such as the Environmental Damages Fund and from foreign agencies such as the UK's Serious Fraud Office. The UK's Compensation Principles would provide a useful framework for the agency's mandate, directing it to pursue all relevant avenues for compensation, collaborate with other governmental departments as appropriate, and to engage in multinational cooperation with relevant entities. An agency, as opposed to the judicial discretion mechanism, would bring the advantages of greater consistency, greater capacity for research and cooperation with relevant entities, and more appropriate situation within Canada's separation of powers. An agency's greater capacity would make it more appropriate for crafting appropriate, flexible remedies for corruption's complex, long term harms by this allowing for an agency to establish a more consistent approach to situations of state capture and, in situations where the remittance of funds to the receiving state are untenable, for establishing an appropriate nexus between the acts in question and the proposed compensation scheme. An agency would also have the capacity to build sustained relationships with the international and foreign institutions/organizations relevant in asset recovery, relationships that are particularly integral to the monitoring process for distributed funds. However, vesting broad discretion in the agency would require robust transparency and accountability mechanisms and the agency's ability to be effective would be predicated upon its perceived legitimacy, which underscores the necessity to establish independent investigatory and review mechanisms. Legislative constraints, low political will, causality thresholds in Canadian criminal law, and the inherent complexity of corruption impose

significant limitations on Canada's ability to implement mechanisms within its anti-corruption legislation to allow for compensation to the broad victim classes of grand corruption. However, Canada's international legal obligations and the moral imperative of ensuring access to justice for victims of corruption are compelling reasons to craft avenues for these individuals and communities to pursue compensation.

RECOMMENDATIONS & FRAMEWORK.

Recommendations

1. Implement a mechanism for repurposing assets frozen under the *JVCFOA* to help victimized individuals and communities.
2. Pursue deferred prosecution agreements more rigorously with companies suspected of violating the *CFPOA* and ensure that each DPA involves the payment of compensation to victims.
3. Adopt a framework of principles for compensating foreign victims of corruption, based on best practices adopted elsewhere. The framework synthesized in this report is noted below.
4. Establish a victim compensation agency, with control over a designated purpose fund, empowered to distribute funds generated through the enforcement of Canada's anti-corruption laws (specifically, through the mechanisms described in recommendations #1-2) in accordance with the framework resulting from recommendation #3.
5. Consider the following six factors when contemplating the function and responsibilities of a victim compensation agency.
 - Prioritize the moral legitimacy of the agency and its decisions.
 - Ensure a robust source of funding.
 - Coordinate with existing international institutions and NGOs involved in the fight against corruption.
 - Implement effective, long-term monitoring mechanisms for distributed funds.
 - Ensure transparency and accountability to victims and the public.

- Create an ombudsperson's office to monitor the agency's adherence to its mandate and act as an intermediary for individuals seeking information about the agency's operations.

Framework: Principles for compensating foreign victims of corruption.

- Compensating victims represents the essence of justice.
 - An effective compensation system will provide victims with rights to information, protection, participation, and restitution.
- The definition of "victim" should be broadly constructed.
 - Individuals, entities, and states are all victimized by acts of corruption.
 - The definition should account for situations in which a victim is deceased or incapable of acting on their own behalf by allowing for immediate family members or dependents of the victim to exercise the same rights.
- Victims should be empowered to present their views and access relevant information concerning violations and reparations mechanisms.
 - States should develop means of informing victims of their rights, as victims will often lack the resources to do so themselves.
 - In addition to procedural information about their restitution claims, victims should be entitled to request information about the offender or accused's legal proceedings in Canada.
- Damage should be interpreted broadly and should include all economically assessable loss as appropriate to the gravity of the violation and circumstances of each case.
 - This assessment should include physical or mental harm, lost opportunity, material damages and loss of earnings, moral damage, and costs required for legal, medical, or social services.
- Victims should be treated with special consideration and care throughout their participation in the Canadian legal system to avoid their re-traumatization.
- An effective complaint mechanism should be established for victims who feel that any of their rights under this framework have been impaired.
- Measures should be implemented to give public officials clearly defined roles. Training should be provided to help them understand their responsibilities to victims with respect to informing them of their rights, relevant legal procedures, and how to collect restitution.
- The primary entity tasked with handling victim compensation should be empowered to cooperate with other governmental departments to identify victims, assess the case for compensation, obtain evidence, ensure transparency, and determine suitable means for paying restitution.

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