

**IMPROVING THE HUMAN RIGHTS DIMENSION OF
THE FIGHT AGAINST CORRUPTION**

**INTERNATIONAL CONFERENCE
Geneva, CIG, 19-20 February 2018**

**Session II: The concept of victims of corruption and possibility of
litigating corruption issues before the UN Treaty Bodies**

**The concept of victims under the Optional Protocol to the International Covenant on Civil
and Political Rights (OP-ICCPR) and the Optional Protocol to the
International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)**

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**A. The issue of corruption in the jurisprudence of the Committee on
Economic, Social and Cultural Rights (CESCR) and the Human
Rights Committee (HRCttee) under the individual complaint's
mechanisms**

The Optional Protocol providing CESCR with the function of dealing with individual complaints is a very recent instrument. It entered into force in 2013, has been ratified by 23 countries and, up to now, only nine cases have been adjudicated by the Committee. None of them involved issues of corruption.

By contrast, the practice and jurisprudence of the HRCttee is extensive, as the Committee has been examining individual complaints since the Optional Protocol to ICCPR entered into force in 1976. Yet, very few complaints have raised issues of corruption. Those in which the complainants refer to corruption as part of the context in which their rights were violated do not include claims specifying that the complainants were, as such, victims of it. Rather, these complaints were brought to the Committee by persons who claimed violation of their rights in the context of national proceedings in which they had been subjected to investigation under charges of corruption.² Consequently, the Committee was not required to make determinations regarding questions such as State responsibility for

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² See for instance Communications Nos. 1397/2005, *Engo v. Cameroon*, Views adopted by the HRCttee on 22 July 2009; 2155/2012, *Paksas v. Lithuania*, Views adopted by the HRCttee on 25 March 2014.

the conduct of its agents, the status of victims of corruption or the measures of reparation.

In order for the Committees to address these issues the existence of a link between an act of corruption and the violation of an individual's rights under the Covenants must be shown. The complainant must present the facts in a way so as to illustrate the existence of such link. In this connection it is important to underline that the Committees do not have the possibility to carry out their own investigations and that their examination of complaints is conducted essentially on the basis of the information submitted by the parties in the proceedings, i.e. the complainant and the State concerned.

The Committees' examination is also limited essentially to the specific claims formulated by the complainant. Thus, the Committees will not make findings regarding questions which may seem relevant in the context of the facts as presented by the complainant but which the latter did not litigate in the course of the proceedings before the Committees. For instance, in the case *Kingue v. Cameroon*³, the complainant had been elected mayor of a commune in the Department of Moungo in the Littoral Region of Cameroon. He claimed before the HRCtee that, as mayor, he had taken action to combat corruption, including by pressing for the payment of taxes by French banana companies, which had been evading tax for years with the complicity of the Government of Cameroon. In February 2008, at the time of protests known as the food riots, the complainant, who had denounce police abuse, was suspended from his duties as mayor for "irregularities in the management of public funds", arrested, placed in a solitary confinement cell and held incommunicado for 20 days. Subsequently, remand warrants issued against him in two different proceedings were declared null and void by the Supreme Court, and two proceedings against him were annulled by the Supreme Court, while the third ended in his acquittal on appeal. The HRCtee held that the arbitrary character of the complainant's arrest and detention, and his prolonged imprisonment on the basis of proceedings that were subsequently annulled by the Supreme Court or on the basis of charges that were annulled on appeal, supported the allegation that he had been targeted by the State authorities because of his activities as mayor, in particular his fight against the banana company for tax evasion. In these circumstances, the Committee considered that the author had been a victim of arbitrary and unlawful detention and that, therefore, he was entitled to compensation. Since his efforts to obtain such compensation at the national level had been fruitless, the Committee found that the complainant had suffered a violation of article 9 (5) of the Covenant. It therefore requested the State to grant such compensation.

In the above complaint we observe that the complainant did not argue the issue of corruption per se. His main claim before the Committee was that despite the fact that the charges against him had been dropped as a

³ Communication No. 2388/2014, Views adopted by the Human Rights Committee on

result of the Supreme Court's rulings he had not received any compensation for his arbitrary detention. His request was that the Committee urge the State to provide him with compensation. Should the complaint have been formulated in a different manner the Committee may have examined the facts and claims from a different perspective. However, the Committee's intervention was limited to the specific claim chosen by the complainant.

B. Elements of the concept of victim in the jurisprudence of the Committees

Representation

The individual who brings a complaint before a committee claims to be a victim of a violation by the State concerned of any of the rights set forth in the respective Covenant. Normally, the complaint should be submitted by the individual (alleged victim) personally or by that individual's representative (a lawyer, an ngo, a family member, etc), in which case written consent must be signed by the alleged victim. A complaint submitted on behalf of an alleged victim without written consent may be accepted when it appears that the individual in question is unable to provide it. An explanation in this regard must be given (for instance, the person is in prison without access to the outside world).

It is not necessary to have a lawyer prepare the case, though legal advice may improve the quality of the submissions and increase significantly the prospect of success.

Proceedings before the Committees are free of charge. However, the United Nations does not provide legal aid under these procedures.

The Committees welcome the submission of third party interventions. Guidelines on such submissions have been developed by CESCR.⁴

Contents of the complaint

The complainant must explain why he or she considers that the facts described constitute a violation of the Covenant in question. In this respect, it is highly recommended that complainants specify the provisions and Covenant rights alleged to have been violated. It is also advisable to indicate the kind of reparation that the complainant would like to obtain from the State, should the Committee conclude that the facts before it disclose a violation. Such indication may guide the Committee in identifying the most appropriate reparation for the victim, although the Committee is not obliged to follow the victim's requests in this regard.

Identification of the victim

The complaint must show that the alleged victim is personally and directly affected by the law, policy, practice, act or omission of the State

⁴ <http://www.ohchr.org/Documents/HRBodies/CESCR/Guidance3rdPartyInterventions.doc>

party which constitutes the object of the complaint. It is not sufficient simply to challenge a law or State policy or practice in the abstract (so-called *actio popularis*), without demonstrating how the alleged victim is individually affected.

The person who submits the complaint must be an “individual” and not a “legal entity”. The HRCttee has developed extended jurisprudence on this question. For instance, in case *Mariategui v. Argentina*⁵ the Committee noted that the complainants had submitted the complaint, claiming to be victims of violations of their rights under the Covenant on Civil and Political rights, because of the alleged failure of the State to redress the damages caused to them as owners of a company arising from the alleged violation of four contracts for the construction of public works in which the company acted either as the main creditor or as cessionary of the creditor. However, the Committee considered that the complainants were essentially claiming rights that allegedly belonged to a private company with an entirely separate legal personality, and not to them as individuals. The Committee thus concluded that the complainants had no standing under article 1 of the Optional Protocol and that the complaint was inadmissible *ratione personae* under that provision.

The complaint can be submitted not only by an individual complainant but also by a group of persons with similar or identical claims. However, the members of the group must be clearly identified by their names and circumstances. If no clear link is shown between the facts amounting to an alleged violation and the specific damage caused to those who submit the complaint the case will be declared inadmissible.

OP-CESCR and corresponding rules of procedure specify that complaints may be submitted by or on behalf of individuals or groups of individuals. When submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author/s can justify acting on their behalf without such consent. In its current practice, CESCR seems to follow the jurisprudence of the HRCttee regarding the need for members of a group to be clearly identified. Thus, in *Alarcon Flores et al v. Ecuador*⁶, the complaint was submitted by 117 individuals, all of which were identified by their names in the Committee’s final decision.

Burden of proof

Very often complainants build their cases on general assertions based, for instance, on information from the press or in the public domain, but without necessarily showing the existence of a link between the events described and the breach of their individual rights under the Covenants. This type of claims can easily lead to a conclusion by the Committees that the complaint is inadmissible for lack of substantiation, or that the information

⁵ Communication No. 1371/2003, *Mariategui v. Argentina*, Inadmissibility decision of 26 July 2005.

⁶ Communication No. 14/2016, Inadmissibility decision of November 2017.

provided is not detailed enough for the complaint to be registered and transmitted to the State concerned for observations.

Likewise, States often respond to the allegations of the complainants also in a very general manner, or even merely denying the allegations. In these situations the Committees give credit to the allegations of the complainant, provided that these allegations are sufficiently substantiated. The burden of proof, therefore, is shared by both parties. Both must provide the Committee with sufficient elements allowing it to reach an informed decision.

C. Measures of reparation

The HRCttee has developed guidelines specifying that when a complaint reveals violations of the Covenant it sets out measures designed to make full reparation to the victims (restitution, compensation, rehabilitation and measures of satisfaction), as well as measures aimed at preventing the reoccurrence of similar violations in the future (i.e. guarantees of non-repetition).⁷

When deciding which measures of reparation are appropriate, the Committee takes into consideration elements such as the position of the parties in the complaint in question, or the specific circumstances. The tendency in the jurisprudence is to be as specific and targeted as possible when identifying the measures.

Measures of **restitution** aim at restoring rights that have been violated. For example, the victim's reinstatement in employment that was lost as a result of the violation committed.

The Committee considers whether the reparation should include the means for as full a **rehabilitation** as possible. If so, the Committee indicates, for instance, that the State should provide the victim or his or her family, as appropriate, with medical or psychological treatment, or the funds to pay for such treatment.

In a high percentage of cases where the Committee has found violations it has requested the State to provide appropriate **compensation** to the victim. However, the Committee does not specify sums of money. The appropriateness of the amount granted will be evaluated by the Committee at a later stage, through the follow-up procedure.

⁷ Adopted by the Committee at its 118th session (17 October-4 November 2016) following the Committee's discussion on the report submitted by Committee member Fabián Omar Salvioli on the specification of measures of redress within the scope of individual communications considered by the Committee. See also A/69/40 (Vol. I), para. 70. This section reflects the contents of the guidelines.

As for **measures of satisfaction** examples in the jurisprudence are the following: that the Committee's finding that a violation of the Covenant has occurred constitutes in and of itself a form of reparation; that the State concerned conduct prompt, thorough and impartial investigations and that the perpetrators must be brought to justice; that the State take measures to commute, reduce or not enforce a sentence; or that the State issue a public apology, particularly in cases of grave or systematic violations where the injury cannot be fully redressed by restitution or compensation only.

Guarantees of non-repetition are general in scope and are essential in order to prevent subsequent human rights violations of the type that gave rise to the specific complaint considered by the Committee. Examples of such guarantees are: When specific laws or regulations or certain provisions in them are found to be at variance with Covenant obligations, the Committee may request their repeal or amendment to bring them into accordance with the Covenant, while identifying the proper international legal standards applicable. If the violation stems from the absence of certain legal provisions, the measures of reparation should include the adoption of the necessary laws or regulations; improvements in conditions in places of detention, in accordance with international standards; changes in specific official procedures and practices; and measures for training and raising the awareness of the authorities responsible for the violations, including law enforcement officers, members of the judiciary, medical and administrative personnel, etc., in order to avoid repetition of violations such as those that gave rise to the communication in question.

Final remarks

OP-ICESCR sets up additional procedures, absent under OP-ICCPR, which could be interesting to explore for victims of corruption. First, CESCR may facilitate the friendly settlement of individual complaints submitted to it, at any time of the procedure and before a final decision on the merits has been reached. The friendly settlement procedure would be conducted on the basis of consent of the parties and would be confidential. According to its rules of procedure the Committee may terminate its facilitation of the procedure if it concludes that the matter is not susceptible to a resolution; or if any of the parties does not consent to its application, or decides to discontinue it, or does not display the requisite will to reach a friendly settlement based on respect for the obligations in the Covenant. Once both parties have expressly agreed to a friendly settlement, the Committee shall adopt a decision with a statement of the facts and of the solution reached. In all cases, the friendly settlement must be based on respect for the obligations set forth in the Covenant. If no friendly settlement is reached, the Committee shall continue the examination of the complaint in accordance with the normal procedure.

Second, OP CESCR also provides for an inquiry procedure, which can be resorted to when the Committee receives information indicating grave or

systematic violations by the State of any of the rights set forth in the Covenant. Individual victims do not need to be identified under this procedure, which is rather designed to examine practices affecting a large number of persons. When an inquiry is conducted the Committee may hold hearings and visit the country concerned to gather first hand information. The Committee's findings and recommendations under this procedure would be transmitted to the State and made public.

NGOs wishing to submit complaints to the Committees may identify cases involving conducts related to corruption by public servants irrespective of considerations as to whether those servants were acting as "private persons" or in their "official capacity". This will provide the Committees with the opportunity to develop its jurisprudence on the scope of State responsibility under the human rights treaties and the circumstances under which an act can engage the responsibility of just the individual who committed it or contributed to its commission, or the responsibility of the State which the individual in question "represented".⁸ Submitting complaints may also provide the Committees with an opportunity to examine whether legal notions such as "indirect malice" or "acts of abstract danger" could be used in human rights law with a view to establish the responsibility of the state and protect victims of corruption.

In selecting cases for international litigation NGOs may focus not only on the substantive issue but also on any possible breach of the State obligation to provide victims of human rights violations with an effective remedy determined by competent authorities and that such remedies are enforced when granted (an obligation enshrined in article 2.3 ICCPR.).

⁸ For a discussion on how to attribute corrupt conduct to the State see: Anne Peters, "Corruption and Human Rights", Basel Institute on Governance, Working Paper Series 20, September 2015.