



**International
Lawyers
Project**

ARGENTINA

**VICTIMS OF CORRUPTION:
DAMAGE REPARATION
AND LEGAL STANDING**

**INTERNATIONAL
DATABASE**

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**SOURCE: INTERNATIONAL LAWYERS
PROJECT**

VICTIMS OF CORRUPTION WORKING GROUP

UNCA CIVIL **Coalition**
SOCIETY

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ARGENTINA¹

SOURCE: The International Lawyers Project²

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¹ Note, we are only qualified to advise on US and UK law, and as such are not qualified in this jurisdiction.

² <https://www.internationallawyersproject.org/>

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1. Legal Standing

1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases

- Civil society organisations have legal standing in corruption-related cases.
- Individuals have legal standing in corruption-related cases

1.2 Type of Cases

- Criminal
- Civil

1.3 Legal basis under which citizens have legal standing

Legal standing in judicial review:

Argentina's judicial review requires (i) a real case or controversy where the parties have standing (i.e., injury in fact, causation, and redressability), and (ii) the case or controversy is ripe (i.e., an after-the-fact ruling on the actual enforcement of an enacted law) and not moot (i.e., not already fully resolved through extra-judicial means).

Legal standing in criminal proceedings:

Criminal investigations in Argentina are conducted by an investigative judge (and only exceptionally in certain specific provinces by public prosecutors). There are multiple avenues via which a victim of a corruption crime can participate in a criminal proceeding:

- Public action (*delitos perseguibles de oficio*):³ Certain crimes, including corruption cases, have to be initiated *ex officio* (i.e., by the public prosecutor or investigative judge). For such public crimes, however, the victim can still file a complaint (*querrela*) and give input to the public prosecutor to initiate the proceeding.⁴ Even if the victim decides to withdraw the claim, the public prosecutor will be obliged to investigate the case. While the public prosecutor

³ Article 71 of the Argentinian Criminal Code

⁴ Article 82 of the Argentinian Code of Criminal Procedure

remains the sole party with the power to seek a conviction, in the *Santillán* case,⁵ the Supreme Court of Argentina held that where a public prosecutor's investigation is based on a victim's complaint and has been brought before a judge, the victim has the right to request that the court hear the case even after the public prosecutor has decided to withdraw the criminal action.

- Claim for compensation: A victim can also choose to file a request in the criminal case to act as a civil petitioner in order to state a claim for compensation, restitution, and other civil remedies against the defendant.⁶ When the conduct that gives rise to civil liability also constitutes a crime, it is allowed to pursue both civil and criminal actions simultaneously. Despite the independence of both proceedings, the civil judge is foreclosed from reaching a decision until a judgment is passed on the criminal case. As a result, plaintiffs are unlikely to incur in litigation efforts and expenses until a decision on the existence of the crime and the defendant's participation is reached by the criminal court.

In addition to the above, the victim of a crime shall have the following rights, among others.⁷

- To be informed about their rights when making the complaint or in their first intervention in the procedure;
- To examine documents and actions, and to be informed about the status of the process;
- To provide information and evidence during the investigation;
- To be heard before each decision that implies the extinction or suspension of the criminal action, and those that provide coercive measures or the freedom of the defendant during the process, provided that it is expressly requested;
- To be notified of resolutions that may require review; and
- To request the review of the dismissal or the file, even if they had not intervened in the procedure as a complainant.

Also, in 2016, the Cooperating Witness in Cases of Corruption Act was approved, which extends the status of cooperating witness (*arrepentido*)—previously only

⁵ Santillán, Francisco Agustín s/Supreme Court recourse, 321:2021, 13/08/1998

⁶ Article 87-96 of the Argentinian Code of Criminal Procedure

⁷ Article 80 of the Argentinian Code of Criminal Procedure

available in cases of kidnapping, human trafficking, drug trafficking, and money laundering—to cases of corruption and conspiracy.⁸

Legal standing in civil proceedings:

The Argentinian Civil and Commercial Code establishes a duty to avoid causing an unjustified harm.⁹ The breach of this duty creates an obligation to compensate.¹⁰ A plaintiff seeking to claim liability must prove:

- an illicit act or omission;
- a damage;
- an adequate causation link between the illicit act or omission and the damage; and
- an attribution factor that is a sufficient cause to hold the defendant liable for the illicit act that resulted in the damage suffered (e.g., willful intention, negligence).

Compensation will be granted in the following cases:

- for damages that have a sufficient connection with the relevant illicit conduct; and
- for damages that are the immediate consequence or foreseeable mediate consequence of an illicit act or omission.¹¹ Immediate consequences are those that normally occur in the natural and ordinary course of events, while mediate consequences are connected with a different event.

A lawsuit for compensation of damages can be brought against all persons that participated in a conduct that breached an obligation or caused an illicit harm (or in limited cases, against third parties). Moreover, legal entities are liable for the harm caused by their directors and administrators while performing their duties. Plaintiffs have the burden of proof all the elements of their claim, unless they can resort to a legal presumption. As to the extent of the compensation, they will be

⁸ Law 27,304, Amendment to the Penal Code. Cooperating Witness Act, 2016

⁹ Article 1710 of the Argentine Civil and Commercial Code

¹⁰ Article 1716 of the Argentine Civil and Commercial Code

¹¹ Article 1726 of the Argentine Civil and Commercial Code

able to claim direct loss or diminution of their assets, loss of future – and objectively foreseeable– profits, and loss of chance.

Legal standing of CSOs:

The definition of “victim” is extended to associations or foundations in cases of crimes against humanity or grave breaches of human rights, provided that their statutory objective is directly linked to the protection of rights which have been affected.¹²

- CSOs representing collective interests:

Argentinian law allows an organization to sue to vindicate the interests it was designed to protect, without requiring that the organization is acting as a representative of individual members who would have standing to sue for their own rights based on the concrete personal injury. In other words, the usually strict requirement of a particular, non-ideological, non-abstract injury is not applied to CSOs in Argentina, even though it is applied to individual plaintiffs. Also, it is not required to obtain the consent of individual victims, because it is not seen to represent (in legal terms) an individual victim or victims, but to safeguard collective interests.

The objective of collective representation is not to displace the individual victims. In fact, all of the individual victims also have the possibility of intervening in the case as *querellantes*, autonomously. If there are a large number of *querellantes*, the court will order unification of the individual *querellas* (depending on the magnitude of the case, this may result in a sole unified *querella* or several groups of *querellas*). Where a collective victim is involved, the victim and the association representing collective interests may join as one party if they wish, or may continue to be represented separately. In practice, therefore, if an association’s intervention is not compatible with the views of individual victims, this will be made clear in the proceeding, and it will not be given significant weight.

Although Argentinian law recognized this possibility only for violation of human rights cases, an important Argentine case expanded its interpretation to include corruption cases. An anti-corruption group (*Fundación Poder Ciudadano*) acted

¹² Article 82-bis of the Argentinian Criminal Procedure Code

as criminal complainant in a corruption case. The defendants objected that the law only allows civil society groups to intervene as complainants in cases of crimes against humanity or grave human rights violations. The Federal Court disagreed, finding that since corruption affects a wide range of human rights, and the organization was set up to deal with corruption, the requirements of the statute were met.¹³ As a complainant, the organization could participate in the proceedings, call witnesses, and make sure that the case moved forward.

- CSOs representing the victims' interests:

Argentina has also introduced provisions allowing victims to delegate the representation of their individual interests in proceedings to associations. The association must be (i) registered in accordance with the law, (ii) focused on the protection and assistance to victims, on the defence of diffuse or collective interests, and/or on the defence of human rights, or (iii) specialised in public interest actions. Once this representation is formalised, the association will exercise all the rights of the victims, keeping them informed of the status of the proceeding.

The “Once Station” case in Argentina is particularly important for victims’ representation. The leaders of the Ministry of Transportation in charge of running and maintaining commuter trains embezzled maintenance budget over several years, leading to dilapidated and unsafe trains. In February 2012, a train crashed, killing 51 people and injuring 789. The courts found the state officials guilty of fraudulent administration and sentenced two ex-Ministers of Transportation, among others, to prison. The representatives of various classes of victims of the crash participated in the proceedings.¹⁴

1.4 Citizens or civil society’s intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc)

¹³ N° CFP 6089/2016/4 (Reg. Int. 9543), caratulado “Incidente de falta de acción” CAMARA FEDERAL DE LA PLATA - SALA II, Nov. 1, 2018. See also <https://poderciudadano.org/en-un-fallo-sin-precedente-la-justicia-permitio-a-poder-ciudadano-ser-querellante-en-causa-de-corrupcion/>.

¹⁴ Tribunal Oral en lo Criminal Federal 2 Cfp 1188/2013/TO1; TOCF nro.2, causa nro .2127/2186 CÓRDOBA, MarcoAntonio y otros s/inf.arts.196, inc. 1y2y173, inc.7°en función del 174 del CP”, Registro de sentencias nro.1753 (March 30, 2016)

See above.

1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens.

In recent years, Government authorities have been relevant actors in the investigation of alleged corruption. In particular, the Financial Intelligence Unit (Argentine FIU) and the Anti-Corruption Office led several investigations against former government authorities for corruption and money laundering, and both acted as a private prosecutor (*querellante*) in criminal proceedings against former public officials.

1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens

No foreign governments or foreign-based non-governmental institutions have legal standing to bring corruption cases on behalf of Argentinian citizens

2. Cases

2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens.

There are corruption-related cases brought to Court by civil society organisations, journalist of citizens. Please refer to the replies in Section 1 above.

3. Collective Damage

3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field (environmental damages, human rights, corruption, among others)

With respect to environmental damages, the Argentinian Constitution¹⁵ and Argentinian environmental laws have established express norms of responsibility in order to achieve the reparation of these environmental damages and have also foreseen the existence of collective insurance and funds. The Argentinian General Law of the Environment has regulated, in various articles, the so-called environmental damage of collective incidence or collective environmental damage.¹⁶

3.2 Procedures for advancing class-actions.

The Argentinian case law and legislation recognize the judicial protection of the collective rights.¹⁷ The rights are divisible but the cause of the injury is homogeneous, which is why a single process with extension of *res judicata* is allowed. The rights of collective incidence (*incidencia colectiva*) belong to the social sphere, are not indivisible and legitimacy corresponds to an indeterminate plurality of people (i.e., to the community as whole). Argentinian Civil and Commercial Code also recognizes both (a) individual rights and (b) rights of “collective incidence” (*derechos de incidencia colectiva*),¹⁸ providing that there is damage when a right or an interest is injured, which has as its main subject a person, assets, or a right of “collective incidence” (*derechos de incidencia colectiva*).¹⁹

The *Halabi* ruling²⁰ was particularly important in the interpretation of the difference between individual and collective rights and also established the requirements for collective actions: (i) there must be a single fact that caused injury to a plurality, (ii) the claim is based on homogeneity of interests, and (iii) it is not possible to sue for individual interests, because the protection is granted to the community as a whole. In addition to the above, for collective actions, it is required that (a) the group or community offended by the violation is clearly identified, (b) whoever intends to assume their representation is suitable to cover this role, (c) the claim involves questions of fact and laws that are common and

¹⁵ Article 41 of the Argentinian Constitution

¹⁶ Article 30 of the Argentinian General Law of the Environment

¹⁷ Article 43 and following of the Argentinian Constitution

¹⁸ Article 14 of the Argentinian Civil and Commercial Code

¹⁹ Article 1737 of the Argentinian Civil and Commercial Code

²⁰ *Halabi*, Ernesto c/ P.E.N. - Law 25.783 - dto. 1563/04 s/ - Law 16.986

homogeneous to the entire group or community, and (d) those who have an interest in the collective action are duly notified and informed of the proceeding (to avoid filing related to the same subject matter).

The procedural aspects of class actions have never been regulated by statute but the following are the main elements of a class action:

- Class actions can be filed in relation to (i) consumer claims; (ii) collective claims to protect collective goods; and (iii) collective claims to protect homogeneous individual interests;
- The opt-out mechanism applies, which means that a judgment declaring a class action admissible applies to all consumers other than those who state that they wish to opt-out before the judgment;
- The Argentinian Supreme Court's General Rule 32/2014 created the Public Registry of Class Actions, which prevents the replication of class action claims on the same subject matter; and
- Class actions generally have the same structure as ordinary commercial proceedings, save for the fact that (a) the complaint must include evidence that the representative claimant is qualified to act on behalf of class members; and (b) before serving the complaint on the defendant, the court must obtain information from the Public Registry of Class Actions. If there is a registered proceeding relating to substantially similar claims, the court can order the referral of the case file to the court before which the earlier proceeding was brought; otherwise, the court must issue a resolution ordering the provisional registration of the case with the Registry.

4. The Role of the victims of corruption

4.1 Definition of victims of corruption or common definition used by the courts in this country

Please refer to Section 1 above.

4. 2 Cases that recognize the role of victims

Please refer to Section 1 above.

4. 3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or non-identifiable groups of victims to repair the damage caused by the corruption offense

Please refer to Section 1 above.

4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases

Please refer to Section 1 above.

5. Available Information

5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions

- The enactment of sanctions
- The grounds for sanctioning or acquitting (the case)

5.2 Feasible access to information on ongoing or concluded cases

Argentinian criminal proceedings are oral and public, though the court may decide, even *ex officio*, that it has to be totally or partially carried out behind closed doors when the publicity affects morality, public order, or security²¹. However, the Argentinian Supreme Court has ruled that citizens have a right to

²¹ Article 363 of the Argentinian Criminal Code

access public information (including access to court decisions and rulings, provided that due care is given to data protection).²²

Victims who participate as *querellantes* can request the prosecutor, prior to the formalisation to the preparatory investigation, to provide information on the facts that will be analysed during the investigations, on the investigative steps carried out and investigative steps still to be taken.²³ Moreover, the indictment must also be shared with the victim.

With respect to access to information by organizations, the Argentinian courts have stated that civic anti-corruption organizations may access the case file so long as doing so does not implicate privacy concerns of the parties or reveal details of the Public Prosecutor's strategy. In the "Bribes in the Senate" case,²⁴ the courts prosecuted former President Fernando de la Rúa and other high-ranking government officials for politically-related bribery, and two anti-corruption CSOs petitioned for access to the case file. The federal court found that organizations defending collective interests are in a position analogous to those of an individual with respect to their legal interests—*i.e.*, they are, at a minimum, potential victims of the crimes. However, this interest was limited to the court documents in the case and did not extend to personal information about the defendants.

In addition to the above, the publication of a court decision is one of the ancillary sanctions provided by the Argentinian Criminal Code. In particular, in a slander or libel trial, the publication of the judgment may be ordered, at the request of a party, in the manner that the court deems appropriate, at the defendant's expense.²⁵

²²Acordada n. 15/13, Expte n. 2629/13

²³Article 80 of the Argentinian Code of Criminal Procedure

²⁴ Cantarero, Emilio y otros s/ cohecho", causa 9900/00, Feb. 1, 2006, Juzgado Nacional en lo Criminal y Correccional No. 6, Buenos Aires, Argentina -

http://cipce.org.ar/sites/default/files/2016/11/casos2198_7.pdf

²⁵ Article 431 of the Argentinian Criminal Code

5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed.

Citizens can have access to legal decisions at the following website:
<https://www.cij.gov.ar/inicio.html>.

6. Supplementary information

6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases.

Please refer to Section 2 above.

6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption.

N/A