

First working draft of a protocol to the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC) on private civil actions against corruption with comments and background footnotes

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ABSTRACT

Corruption is an international phenomenon that continues to be at the heart of governance deficits in Africa. It impedes societal development, denies citizens access to quality infrastructure, good health facilities, affordable and quality education, and, above all, breeds political violence and insecurity. In an effort to combat this corruption, the African Union adopted the African Union Convention on Preventing and Combating Corruption (AUCPCC) in 2003. The adoption of the AU Convention in 2003, and its enforcement in 2006, gave hope to many in Africa that governments across the continent were determined to fight corruption. The convention is currently at its seventeen-year anniversary since its adoption, during which time there have been no significant or positive changes witnessed throughout the African continent.

Meanwhile, it has been a struggle for Africa to effectively fight corruption through the criminal justice system, and it is well recognized that the criminal justice system does not provide for compensation to victims of corruption for damages suffered as a result of corrupt acts. In the light of the above facts, this paper highlights the importance of private civil actions (PCAs) in our legal system if considered by the AU Head of States. This method can play an important and complementary role in the criminal justice system's efforts to fight corruption in Africa. The proposed PCA methodology is not intended to substitute a court's jurisdiction to prosecute corrupt acts through the criminal justice system. Rather, it is intended to establish the foundation for an additional method to fight corruption in Africa.

This paper concludes with a first draft of a protocol to the 2003 AU Convention that can serve as the starting point for an initiative to later successfully adopt a PCA protocol by the AU Member States. This is the first proposed protocol in Africa on the topic of PCAs against corruption. The adoption of this proposed protocol will help obtain a permanent solution to corruption in Africa.

Keywords: Private Civil Actions (PCA), African Union (AU), protocol, corruption, Africa, convention, damages, compensation

العنوان: اتفاقية الاتحاد الأفريقي لمنع ومكافحة الفساد – اقتراح أول لبروتوكول حول موضوع الإجراءات المدنية الخاصة لمكافحة الفساد

ملخص

يقبع الفساد كظاهرة دولية في قلب عجز الحوكمة في أفريقيا. بحيث يعوق التنمية المجتمعية ويحرم المواطنين من الوصول إلى البنية التحتية السليمة والمرافق الصحية الجيدة والتعليم الصحيح والميسور التكلفة، وقبل كل ذلك، فهو يولد العنف السياسي و يورث انعدام الأمن في البلاد.

اعتمد الاتحاد الأفريقي اتفاقية الاتحاد الأفريقي لمنع ومكافحة الفساد (AUCPCC) في عام ٢٠٠٣، في محاولة لمكافحة هذا الفساد. اعتماد اتفاقية الاتحاد الأفريقي في عام ٢٠٠٣، ودخولها حيز التنفيذ في عام ٢٠٠٦، أعطى الكثيرين الأمل في أفريقيا بأن جميع أنحاء القارة مصممة على محاربة الفساد. بالرغم من مرور ستة عشر عاما على اعتماد تلك الاتفاقية، لم يشهد خلالها أي تغييرات كبيرة أو إيجابية في جميع أنحاء القارة.

كانت أفريقيا تكافح من أجل مكافحة الفساد بشكل فعال من خلال نظام العدالة الجنائية. إلا أن النظام المذكور أيضا لم ينص على تعويض ضحايا الفساد عن الأضرار التي لحقت بهم نتيجة أعمال الفساد. في ضوء ما سبق، تركز هذه الورقة على أهمية الإجراءات المدنية الخاصة (PCAs) في نظامنا القانوني إذا نظر فيها رؤساء اتحاد دول أفريقيا. حيث يمكن أن تؤدي هذه الطريقة دورا مهما ومتكاملا في دعم جهود نظام العدالة الجنائية لمكافحة الفساد في أفريقيا. والجدير بالذكر أن المنهجية المقترحة لا تهدف إلى استبدال اختصاص المحكمة في محاكمة الأفعال الفاسدة من خلال نظام العدالة الجنائية، بل تهدف إلى إرساء أسس لطريقة إضافية لمكافحة الفساد في أفريقيا. تختتم هذه الورقة بمشروع أول لبروتوكول لاتفاقية الاتحاد الأفريقي لعام ٢٠٠٣ الذي يمكن أن يكون بمثابة نقطة انطلاق لمبادرة اعتماد البروتوكول بنجاح من قبل الدول الأعضاء في الاتحاد الأفريقي.

يعد هذا البروتوكول المقترح الأول من نوعه في أفريقيا حول موضوع الإجراءات المدنية الخاصة لمكافحة الفساد، والذي باعتماده سوف يساعد في التوصل إلى حل دائم للفساد في أفريقيا.

الكلمات المفتاحية: إجراءات مدنية خاصة، الاتحاد الأفريقي، البروتوكول، الفساد، أفريقيا، اتفاقية، ضرر، تعويض

1. INTRODUCTION

Corruption is a major challenge to sustainable development in Africa, which continues to negatively hamper efforts aimed at promoting democratic governance, socio-economic transformation, and peace and security in the AU Member States. Corruption is pervasive and has unfortunately become a part of everyday life. Although it can take many forms, bribery in business transactions and dealings with government officials regarding political matters is arguably the most widespread. Petty corruption may have become accepted by the general populace, but its effects fall heavily on the poorest and weakest members of society. Fortunately, a call to arms in the fight against corruption was recently made at the 30th Ordinary Session of the African Union Assembly Summit held at Addis Ababa on January 29, 2018. The summit's theme and focus was on how the AU and its member states can wage and win the war against corruption.¹ Commenting on the present situation, the former chairman of Transparency International, José Ugaz, said that:

Corruption creates and increases poverty and exclusion.

While corrupt individuals with political power enjoy a lavish life, millions of Africans are deprived of their basic needs like food, health, education, housing, access to clean water and sanitation.²

The primary international and regional instruments on corruption emphasize control of corruption by strengthening the applicable criminal laws and their enforcement. The relevant international and regional criminal legal frameworks on corruption also take the criminal law approach. These include the United Nations Convention against Corruption, the Criminal Law Convention on Corruption of the Council of Europe, the Framework Decision of the Council of the European Union on Combating Corruption in the Private Sector, the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC), and the Inter-American Convention Against Corruption.³ Meanwhile, reliance on the above legal frameworks and on the actions of the prosecutorial services and anti-corruption agencies that enforce them has not resulted in a material drop in the incidents of corruption. Corruption continues to expand in both the public and private spheres.⁴ Significantly, however, a change in strategies is slowly taking shape. As Africa struggles to fight corruption through the criminal justice system, there are ever stronger voices advocating for compensation to victims of corruption for damages suffered as a result of corrupt acts.⁵ The primary tool for securing such compensation would be through private civil actions.⁶

2. THE CONCEPT OF PRIVATE CIVIL ACTIONS

Using private civil actions (PCAs) to combat corruption is significant for a number of reasons. First, it is an alternative method of fighting corruption that can be used even when no criminal charges have been made. Second, the remedies sought by an aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered, while another may seek restitution or another type of remedial action. Third, victims of corruption who resort to civil actions become central protagonists in the fight against corruption; however, they are relegated to being mere observers of the criminal justice system over which they have little influence. Finally, in some jurisdictions, especially in jurisdictions following the common law tradition, the standard of proof required to establish the facts in a civil adjudication may be lower than for criminal proceedings.⁷ While there have been a growing number of cases in which individuals and private entities have used normal tort, equity, or civil responsibility principles to seek compensation for damages brought about by corrupt acts, there are now a number of international instruments that have called for signatory states to establish *clear procedures* under which PCAs against corruption can be made. The adoption of this proposed concept on PCAs in

1 Press Release, African Union, The 30th Ordinary Session of the African Union Assembly Concludes with Remarkable Decisions on (3) Flagship Projects of Agenda 2063 (Jan. 30, 2018), available at <https://au.int/en/pressreleases/20180130/30th-ordinary-session-african-union-assembly-concludes-remarkable-decisions-3>.

2 Corruption in Africa: 75 Million People Pay Bribes, Transparency Int'l (Nov. 30, 2015), https://www.transparency.org/news/feature/corruption_in_africa_75_million_people_pay_bribes.

3 Anastasia Sotiropoulou, Fighting Corruption through the Lens of Civil Law: The Option of Civil Law Remedies, in ESSAYS IN HONOR OF NESTOR COURAKIS at 629 (Ant. N. Sakkoulas Publications 2017).

4 TransparencyInt'l, GlobalCorruptionReport: Education (2013), available at https://issuu.com/transparencyinternational/docs/global_corruption_report_educatio?e=2496456%252F5037959.

5 Simon Young, *Why Civil Actions against Corruption?* 16 J. Fin. Crime 144 (2009) available at https://www.researchgate.net/publication/235310574_Why_civil_actions_against_corruption

6 Williams T. Loris, *Private Civil Actions: A Tool for a Citizen-Led Battle against Corruption*, 5 World Bank Legal Rev. 437 (2013).

7 *Id.*

8 Council of Europe, Parliamentary Assembly: Working Papers Vol. 5 (1999).

our convention in Africa will support a permanent solution to corruption in Africa, following the declaration made at the 29th Assembly of the Heads of State and Government in January 2017, to dedicate the theme for the year 2018 to “[w]inning the fight against corruption: a sustainable path to Africa’s transformation.”

The first, and certainly the most extensive, legal basis for PCAs is the 1999 Council of Europe Civil Law Convention against Corruption, which complements the Criminal Law Convention on Corruption.⁸ Both the preparatory work for the convention and the European Parliament debates on the draft are instructive for other future regional initiatives seeking to establish a legal framework in this area. The working definition of corruption in Europe is found in Article 2 of the 1999 Civil Law Convention, which states that:

“Corruption” means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.⁹

Commenting on the objectives of PCAs, Article 3 states that “[e]ach Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover material damage, loss of profits and non-pecuniary loss.” Furthermore, paragraph eleven of the introductory part of Explanatory Report to 1999 Civil Convention provides that:

The Council of Europe became strongly interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles this organisation stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress. Also, because corruption is a subject well-suited for international co-operation: it is a problem shared by most, if not all, member States and it often contains transnational elements ... Therefore, one of the characteristics of the Council of Europe approach in the fight against corruption is the possibility to tackle corruption phenomena from a civil law point of view.¹⁰

Additionally, PCAs were made part of the United Nations Convention against Corruption (UNCAC). Article 35 provides that:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.¹¹

However, follow-up on Article 35 at the national level has received little attention.¹² The UNCAC is the most important international convention on corruption in terms of both its breadth and the number of state signatories. It was adopted by the United Nations

General Assembly on October 31, 2003, and enforced on December 14, 2005.¹³ As of October 3, 2017, the convention had 183 member states.¹⁴ The convention was created to respond to corruption as a global problem and addresses a wide variety of issues. Article 5 encourages the participation of society in a joint collaborative effort to fight corruption, stating that:

Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Significantly, in terms of the present paper, member states are required to implement in their respective national laws provisions that facilitate PCAs, which aim to provide a way for victims of corruption to be compensated for their losses. Unfortunately, follow-up on Article 35 at the national level has received little attention.¹⁵

The Arab Anti-Corruption Convention also plays a role in the support for PCAs against corruption. The convention was developed by the League of Arab States, which is regarded as the first official pan-Arab anti-corruption treaty. The convention obtained the signatures of ministers of the interior and minister of justice from twenty-one Arab countries, excluding Somalia, on December 20, 2010.¹⁶ The convention consists of thirty-five articles,¹⁷ which is founded on Islamic doctrine and various religious books. According to the convention’s preamble, the burden of fighting corruption is not only placed on the official authorities, but also on civil society and individuals who can also play an important role in the struggle.

The convention is an important regional legal instrument for fighting corruption in the Arab region. This heightens the importance of the Arab Convention as another possible source of law pertaining to PCAs. This is strengthened by Article 8 of the Convention, which provides that:

Each State Party shall provide in its domestic legislation that all those that suffered damage as a result of an act of corruption, under the present convention, shall have the right to bring an action for compensation for such damage.¹⁸

The convention has been a successful legal framework for PCAs against corruption. It advocates for the compensation of victims of corruption and acknowledges the role of civil societies as partners in the joint effort to fight against corruption.

Meanwhile, in Africa, the only regional convention on corruption is the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC). The convention was adopted on July 1, 2003, and enforced on August 5, 2003.¹⁹ Forty-nine out of the fifty-five African states are signatories to the convention, and

9 Civil Law Convention on Corruption, E.T.S. No. 174 (1999) available at <https://rm.coe.int/168007f3f6>

10 *Id.*

11 U.N. Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC] available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

12 H.G. Schmidt, *Private Remedies for Corruption Towards an International Framework* (2012).

13 UNCAC, *supra* note 11.

14 *Id.*

15 SCHMIDT *supra* note 12.

16 Abdelaziz Nouaydi & Saad Filali Meknassi, *A Glance at the Arab Convention to Fight Corruption*, Transparency Int'l Blog (Aug. 21, 2012),

17 <http://blog.transparency.org/2012/08/21/a-glance-at-the-arab-convention-to-fight-corruption/>.

18 Arab Convention Against Corruption (2010), available at <http://star.worldbank.org/sites/star/files/Arab-Convention-Against-Corruption.pdf>.

19 African Union Convention on Preventing and Combating Corruption (2003), available at <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.

20 African Union, Status of the Ratification of the Convention on Corruption (June 28, 2019), <http://www.auinternational.org/auac/about/category/status-of-the-ratification>.

thirty-eight member states have ratified the convention.²⁰ One of the convention's objectives is to "[c]oordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent."²¹

3. FORWARD-LOOKING ASSESSMENT FOR PRIVATE CIVIL ACTIONS (PCAS) IN AFRICA

As Africa struggles to fight corruption through the criminal justice system, there is a second way to fight this war. This involves direct or collective actions by individuals and legal entities, and in some cases even the State, seeking compensation and other remedies through PCAs. This assessment will examine how this tool (PCAs) can be developed by the AU Members States and adopted in African jurisprudence. The strengths and weaknesses of this approach will also be addressed.

This assessment was carried out through desktop research, which is structured in the following section. The background of the assessment provides the nature and scope of the assessment. It further explains the background problem and issue that the assessment intends to clarify and address by clearly expressing the working understanding of the topic and the proposed method. To guide the assessment and to better understand the topic, three major assessment questions are presented with a thorough and detailed analysis. Finally, the assessment culminates in a set of recommendations, along with a statement of the potential advantages and disadvantages of each recommendation.

3.1. Limitation of the Assessment

The assessment will be carried out as a desktop assessment. However, it will rely on consistent communications with the partner organization for this research, the Arusha-based African Union Advisory Board on Corruption (AUABC). Their office is located at 3rd Floor, AICC Complex, East Africa Road, Arusha, Tanzania. A limitation of this assessment is that there is a certain degree of information that the Advisory Board is not able to share due to confidentiality concerns.

3.2. Background of the Assessment

Many of the international and regional instruments on corruption are drafted with the assumption that the detection of corrupt acts and the prosecution of the perpetrators of corruption under criminal statutes is the main tool for fighting corruption. While this research does not dispute this assumption, it seeks to analyze how PCAs can play an important and complementary role. As part of the

evaluation of a complementary mechanism in the fight against corruption, different legal systems and laws in various African states are compared to determine the extent to which the various legal systems of African countries permit the use of PCAs for this purpose. Additionally, this research also includes an examination of past and current examples of relevant instances of corruption cases. Finally, the paper will provide preliminary indications within the existing provisions of 2003 Africa Union on Prevention and Combating Corruption, which can support the extension of that agreement to bring in provisions similar to those cited in the conventions.²²

3.3. Assessment Tasks and Activities

To conduct the assessment, the following questions will guide the tasks and activities of the assessment and detailed answers will be provided accordingly.

- **To what extent does the current law in African countries permit the use of private civil actions against corruption?** The assessment will make a comparison between different legal systems in Africa to arrive at a valid conclusion on the above question.
- **Are there examples of private civil actions against corruption that demonstrate the feasibility and legal basis for such actions?** The assessment will review laws and treaties of other non-African countries on private civil actions. Additionally, there will be a review of some past and present corruption cases on private civil actions.
- **Are there any provisions in the 2003 Africa Union Convention on Prevention and Combating Corruption (AUCPC) that can serve as the basis for further development of the convention in the area of private civil actions against corruption?** Research and analysis will be undertaken on several provisions of the 2003 Africa Union on Convention Prevention and Combating Corruption to determine whether any of the convention's provisions can be used to support further extension of the convention to include provisions concerning private civil actions.

3.4. Identified Stakeholders

The major key stakeholders that may be associated with the proposed method have been identified in the assessment. They have both direct and indirect impacts on the effectiveness and success of private civil actions (PCAs) as powerful anti-corruption tools in Africa. However, Table 1 summarizes the roles of stakeholders and how they can positively influence the adoption of the newly proposed anti-corruption tool in Africa.

²¹ Ibid

²² Africa Union on Prevention and Combating Corruption, art. 2(4).

Table 1: Stakeholders' role in the effective implementation of private civil actions in Africa

S. no.	Stakeholder	Role
1.	The African Union Commission (AUC) and the African Union Member States	To take the lead role in the drafting agreement and ratification process of the proposed draft protocol on private civil actions in Africa. To encourage the AU Member States to enact and enforce laws after the signature and ratification of the proposed draft protocol on private civil actions among the member states.
2.	Parliament	To ratify and adopt in their respective national laws the proposed draft protocol on private civil actions. To amend their existing criminal laws to reflect the proposed draft protocol on private civil actions, which may assist in good governance.
3.	Judiciary and Lawyers	To make administrative arrangements and follow procedures necessary to facilitate the use of private civil actions in their respective courts and judgments. To train judges on any new laws and regulations on private civil actions against corruption and the handling of civil cases of this nature.
4.	Universities and Law Schools	To teach law students by offering coursework on private civil actions and introducing it in the school's academic curriculum. To promote private civil actions through research, colloquiums, and publications.
5.	Human Rights Activists and Bar Associations	To promote adoption and incorporation of the proposed draft protocol on private civil actions into national laws. To express the need to fight corruption in their country by promoting the use of private civil actions.
6.	Media	To raise public awareness through the dissemination of information on the new additional methods of fighting corruption through private civil actions. To educate the public through articles and programs on how private civil actions can be used as anti-corruption tools.
7.	Law Scholars and Students	To write comparative papers, articles, books, and journals on private civil actions.
8.	NGOs, CBOs, and Religious Institutions	To raise awareness of the new method of fighting corruption through private civil actions.

3.5. Assessment Analysis

The analysis and justification of the paper shall be based on three major research questions with well-detailed findings.

3.5.1. The extent to which different legal systems (i.e. civil law and common law systems) permit the use of private civil actions against corruption in Africa

There are two recognized legal systems in Africa. These are the civil law and common law systems. The civil law, or continental, legal systems are modeled on various versions of the codified law system set up by Napoleon in 1804. In that system, each area of law has been reduced to rules set out in various codes that serve as the guiding source of law on the area covered. However, the common law system was developed in England, which is founded on case law (judicial precedence). Meanwhile, the history of the civil law system can be traced back to the sixth century. It emerged from a tradition of codification that goes back to the Roman Empire -- Emperor Justinian's massive codification project and the *corpus*

juris civilis in 600 CE. However, in the nineteenth century, the civil law system became a body of law that was assembled, organized, and distributed across the continent of Europe in the form of codes.²³ France and Germany are prime examples of this codification effort.

Civil codes are organized and arranged in books and can be categorized into penal law and civil law. The penal law deals with the criminal aspects of law, while the civil law deals with non-criminal matters. The civil law is further divided into "obligations" that deal with both "contracts" and "civil responsibilities." Examples of African countries with civil law systems are Cameroon, Gabon, Togo, Tunisia, Senegal, Rwanda, Niger, Ivory Coast, Morocco, Burkina Faso, Mauritius, Mali, Madagascar, Chad, Central African Republic, Guinea, Sudan, Mauritania, Lesotho, Congo, and Benin.²⁴ African countries that were formerly colonies of France and operate under the civil law systems have a similar reflection of arrangements in their laws.

²³ Piyali Syam, *what is the Difference Between Common Law and Civil Law*, @WashU Law Blog (Jan. 28, 2014), <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/>.

²⁴ *African Countries' Names, Colonial Names, and Their Independence Days and Dates*, My Africa Now (Aug 6, 2015), <http://www.myafricanow.com/african-countries-independence-days-dates/>.

On the other hand, common law systems can be traced back to the British royal monarchy system. This involves the issuance of formal orders called “writs” for proceedings. During that period, writs could not be applied in all cases brought before the king. Therefore, the people had no option other than to start making their complaints to the king. These complaints brought about the establishment of a court of equity to hear and apply equitable principles to such complaints that could not be heard by the writs. All of these decisions were then collected and published to serve as precedent for the courts for any future cases brought before them. This was the birth of the common law system.²⁵ Examples of African countries with common law systems are Nigeria, Gambia, Zambia, Egypt, Ghana, Kenya, Malawi, Sierra Leone, Somalia, South Africa, Uganda, Zimbabwe, Botswana, Ghana, Tanzania, and Kenya.²⁶

Under the common law system, cases brought before the court are classified as either criminal actions or civil actions. Criminal actions are instituted by the State and its political subdivisions through criminal prosecution. Civil actions cover a vast area of law; basically, everything that has not been made part of the criminal law. One major area of law in this respect is the law of torts. It should be noted here that, in some cases, there are independent civil rights (fines) in criminal law under the common law system, but these are distinct from the proposed private civil actions addressed by this assessment. This is best explained by William Geldart in his book called *Introduction to English Law 146*, who stated that:

The difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue – redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.²⁷

As quoted above, the only punishment awarded against the defendant under the civil law is the payment of damages to victims for injuries. However, under the criminal law, the defendant may only be convicted by serving an imprisonment term or non-custodial punishment, which may consist of the payment of fines or community service.²⁸ The non-custodial punishment could be regarded as an independent civil right to sue in a criminal case; however, payment of fines is not certain in all cases, and, most of the time, any fines are paid to the State and not to the victims. Additionally, it is clear that in rare and exceptional cases, the court may charge a defendant with a fine in lieu of imprisonment in criminal law. Use of the independent civil right fine in criminal law is rare and differs from what private civil actions seek to establish against corruption.

Based on the above analysis, findings have shown that African countries from civil law jurisdictions have a trace of civil actions in

their legal system found under “contracts and obligations,” whereas African countries with common law jurisdictions have this action available under the tort law. Moreover, there is a strong support for civil actions in both jurisdictions. However, the use of private civil actions is not the main anti-corruption tool in both jurisdictions because of the differences in their legal systems. Corruption, as it stands, is a criminal offence that does not provide for compensation to its victims. As a result, none of the existing laws in Africa provide a clear procedure for the use of private civil actions as a primary anti-corruption tool because corruption falls under the criminal law.

3.5.2 Jurisprudence on private civil actions (PCAs) against corruption -- the feasibility and legal basis for immediate actions

There are several court cases and situations that are frequently cited regarding private recovery in corruption cases. For example, a leading example of a PCA in Italy is the infamous case of *CIR vs. Fininvest*. In this case, the victim was awarded compensation in the amount of €560 million. The facts of the case are as follows:

In the 1980s, the head of the Mondadori Group was a holding company named AMEF. In 1988, CIR and the Formenton Family, as principal shareholders in the holding company, signed a shareholder control agreement transferring the Formenton Family’s AMEF shares (27.75%) to CIR which already owned 27.71% of the capital stock. The agreement included an arbitration clause. After a corporate raid from Fininvest, who owned a minority of the shares in the holding company (8.28%), the Formenton Family sought to rescind the shareholder agreement concluded with CIR. CIR initiated arbitral proceedings according to the arbitration clause in the shareholder agreement. The arbitration panel found that there had been a breach of contract by the Formenton Family. The arbitral award ordered the Formenton Family to sell its stocks to CIR, according to the contract. The Formenton Family raised an appeal to the Rome Court of Appeals on the grounds that the arbitral award is null and void. The court confirmed the arbitral award was contrary to public policy. Later, a settlement was made between CIR and Fininvest and Fininvest took control of the Mondadori Group. Ten years later, the Milan Criminal Court found that the Judge-Rapporteur of the chamber of the Rome Court of Appeals that declared the arbitral award null and void was in fact bribed by the Fininvest lawyer to issue a decision annulling the arbitral award which was favorable to the Formenton Family. The court had dismissed the liability against a number of persons involved in the scandal such as the director of Fininvest due to the expiry of time limitation for the criminal act. CIR raised civil action to recover damages resulting from the corruption of the Judge-Rapporteur.²⁹

In the eyes of the Italian Supreme Court, the harm suffered by CIR is regarded as damage that came from the criminal actions of Fininvest. The court found Fininvest liable for corruption, and damages were awarded to CIR in the amount of €560 million.³⁰

25 Id

26 Id

27 *Civil Law vs. Criminal Law*, Diffen, https://www.diffen.com/difference/Civil_Law_vs_Criminal_Law (last visited Apr. 18, 2020).

28 Id

29 Mohamed R. Abdelsalam, *Applying Civil Law in an Effort to Eradicate Corruption in Egypt*, available at https://www.luc.edu/media/lucedu/prolaw/documents/volume4/F.%20Applying%20Civil%20Law%20in%20an%20Effort%20to%20Eradicate%20Corruption%20in%20Egypt_Mohamed%20Abdelsalam%20M4.pdf

30 Stefano Pagliantini, *Remedy for Fraud in Cir vs. Fininvest: Damages or Specific Performance*, 1 Italian L.J. 141 (2015).

Beginning in the 1960s, there has been a trend to take the victim's interests into account in the prosecution of a crime. Examples of this support include the Victims and Witness Protection Act of 1982 and the Mandatory Victims Restitution Act of 1996, both of which represent important victories for victims' rights advocates. Furthermore, in 2004, the US Congress enacted the Crime Victims' Rights Act (CVRA) and the Foreign Corrupt Practices Act, furthering this trend.³¹ Private civil actions frequently have been used in the USA in cases involving a company's shareholders suing the directors of the company. This may be done in one of two ways. First, the officers of the company may be sued for alleged fraud, and, second, the directors may be sued for allowing the company to pay or receive bribes. In a recent case related to regime change in Indonesia, the facts are as follows:

On January 2008, a 1.5 billion USD civil lawsuit was instituted against the late former president of Indonesia – President Suharto and his son (Tommy). The former president was alleged to have misappropriated the charity scholarship fund of US\$440 million, and Tommy was involved in corrupt land exchange scheme as a result of which the country had suffered in damage of the sum of \$55million. The former president eventually escaped the criminal prosecution, after declaring himself to be mentally incapable to stand trial. Nevertheless, the Supreme Court in December 2010 announced the retrieval of 2.8 trillion rupiah which equates to approximately US\$307.440.000 at today's rates.³²

Furthermore, in cases involving a breach of trust, the principal can institute a private civil action against their agent to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their work. An example of this is the 2007 case in which the brother to Sultan of Brunei, Prince Jefri Bolkiah, was sued by the State of Brunei for misappropriating the sum of US\$13.5 billion while serving as the Minister of Finance and Chairman of Brunei Investment Agency and the Privy Council.³³

There was also a German case involving a claim brought by the Siemens Company against eleven former senior executive managers and two supervisory members, Neuburger and Ganswindt, for failure to stop a corrupt payment by the company. The managers were alleged to have paid a bribe in the range of US\$2 billion to boost the business of the corporation. Siemens later paid US\$800 million to settle the charges brought under the FCPA (Foreign Corrupt Practices Act) by the DOJ and SEC, and another US\$800 million to the German government. Siemens then filed a claim in the lower court demanding US\$18 million from former director Neuburger. Neuburger filed a counterclaim against the company when he was unable to pay the judgment. He claimed that the company owed him unpaid bonuses and stock benefits. Finally, Ganswindt settled, but the civil suit is still pending before the court in Germany against Neuburger.³⁴

Finally, in a Nigerian case, an NGO sued the government before the ECOWAS Community Court of Justice. This case was the Registered Trustees of the Social-Economic Rights and Accountability Project (SERAP) vs. the Federal Republic of Nigeria

& Universal Basic Education Commission (UBEC).³⁵ An excerpted explanation of this case is as follows:

SERAP is a Nigerian human rights NGO that raised a case against the government due to the failure of the success of the national basic education plan. The case was based on a financial reduction in the national fund that was supposed to finance the education plan due to corruption crimes and violations of Articles 1.2, 17.21 and 22 of the African Charter on Human and Peoples' Rights. These articles guarantee the human right to quality education, human dignity, and economic and social development. The applicant said that following the diversion of funds, there is insufficient money available to the basic education sector. The result was over five million children having no access to primary education.³⁵ SERAP blamed a number of factors that had negatively affected the educational system of the country, including failure to train more teachers, the non-availability of books and other teaching materials, etc., that "contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education." The court held as follows: the defendants do not contest the fact that every Nigerian child is entitled to free and compulsory basic education. What they earlier on said was that the right to education was not justiciable in Nigeria, but the court in its earlier ruling of 27th October 2009 in this case, decided it was justiciable under the ACHPR. Finally, the court ordered the defendants to take the necessary steps to provide the money to ensure the implementation of the education programme.³⁶

In the above analysis, I have been able to provide several case examples and situations of private civil actions against corruption that are frequently cited and serve as leading examples of PCAs around the world. They illustrate the success of private civil actions and demonstrate what Africa could potentially achieve if determined to fight corruption through a multi-pronged approach within the legal system. Italy and the USA were carefully studied, and it has been shown that private civil actions have been frequently used in both countries. The USA also passed the Crime Victims' Rights Act of 2004, which allows crime victims to obtain compensation, and the Foreign Corrupt Practices Act (FCPA), which makes foreign official bribery illegal for those who are subjected to American law.

3.5.3. Are there any provisions in the 2003 Africa Union Convention on Prevention and Combating Corruption that can serve as the basis for further development of the convention in the area of private civil actions (PCAs) against corruption?

A protocol relates to the amendment of a treaty or convention. It cannot stand on its own without an existing convention that it intends to amend, fill in the gaps, or complement. The proposed draft protocol on PCAs is intended to complement the 2003 Africa Union Convention on Prevention and Combating Corruption (AUCPCC). This seems to be the only existing convention on corruption in Africa. Article 2(4) of the Convention states that: "[p]romote socio-economic development by

31 Crime Victims' Rights Act: A Summary and Legal Analysis of 18 U.S.C. §3771 available at <https://www.everycrsreport.com/reports/RL33679.html>

32 Mohamed Suharto, Case ARW-127 (2010), available at <http://star.worldbank.org/corruption-cases/node/18554>.

33 Conal Walsh, 'Fixer' Files £5.2m Suit against Brunei Royals, Observer (June 17, 2006), <https://www.theguardian.com/business/2006/jun/18/theobserver.observerbusiness2>.

34 Richard L. Cassin, *Siemens Settles Recovery Suit with Last of Eleven Execs from 2008 Bribery Case*, FCPA Blog (Dec. 16, 2014), <http://www.fcpablog.com/blog/2014/12/16/siemens-settles-recovery-suit-with-last-of-eleven-execs-from.html>.

35 Serap v. Nigeria, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010), available at http://www.worldcourts.com/ecowascj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm.

36 Supra

removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.”

The above provision encourages member states to remove obstacles that may impede social, economic, developmental, and any other hindrance that prevents citizen enjoyment of civil and political rights. Meanwhile, corruption has been identified as one of the obstacles to social and economic development. To enjoy meaningful and sustainable development in Africa, corruption must be eliminated. A plethora of evidence illustrates on how government funds and revenue meant for social and economic development have been siphoned by the economic and political elite. Corruption has wreaked havoc on and directly damaged the development of Africa. In addition, the enjoyment of civil and political rights by African citizens has obstructed as a result of corruption. A prominent example of this in practice is the case of election rigging, which

prohibits citizens from exercising their liberty to choose their desired representatives. Therefore, to remove the obstacles and tackle corruption, PCAs should be introduced into the laws in Africa. This can only be achieved by adopting a protocol rooted in the provision of Article 2(4) of the AUCPCC.

Finally, the first proposed draft of the protocol will serve as the starting point of an initiative that will hopefully result in the adoption of the said protocol by the AU Member States. Consequently, this would serve as the first protocol in Africa in the area of PCAs against corruption. The adoption of this protocol on PCAs could serve as part of a permanent solution to corruption in Africa, followed by the declaration made at the 29th Assembly of the Heads of State and Government in January 2017 to dedicate the theme for 2018 on how the AU and its member states can wage and win the war against corruption.

4. FIRST WORKING DRAFT OF A PROTOCOL TO THE 2003 AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION (AUCPCC) ON PRIVATE CIVIL ACTIONS AGAINST CORRUPTION WITH COMMENTS AND BACKGROUND FOOTNOTES

PREAMBLE: The Member States of the African Union.

RECOGNIZING corruption as one of the most serious challenges to the further development of the African Continent; and that corruption affects people’s lives daily, from poor roads to unequal access to health care and medicine, to crime and violence in our communities and across borders, and, finally, to political choices distorted by money and greed.

WHEREAS failing to address corruption inhibits sustainable long-term growth and undermines human development, especially of vulnerable populations, including the financial suffering of the poor and the unequal power and gender dynamics affecting women and girls.

WHEREAS on July 11, 2003, the African Union (AU) Heads of State and Government adopted the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC)³⁷ and the AUCPCC entered into force on August 5, 2006, and signaled the political commitment of African leaders to fight and combat the [cancerous] scourge of corruption on the African continent.

[Alternate reference to the AUCPCC] DETERMINED to build a corrupt-free African continent, the forty-nine (49) Member States of the African Union agreed upon the text of the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC) and thirty-seven (37) African countries have ratified/acceded to the convention, while most of the other member states have taken steps to domesticate the provisions of the AUCPCC in their national laws.

RECALLING the resolution adopted at the 29th Assembly of the Heads of State and Government in January 2017, the Head of States recognized that if corruption is not dealt with in Africa, the Africa Agenda 2063 and its first ten-year action plan, the 2030 global

plan for sustainable development, and the Vision 2020 on silencing the guns may not yield the expected results.

FURTHER RECALLING as part of its efforts to prevent and fight corruption, the AU during its 30th Assembly of Heads of State and Government held in January 2018, in Addis Ababa, Ethiopia, launched 2018 as the African Anti-Corruption Year. This followed the declaration made at the 29th Assembly of the Heads of State and Government in January 2017, to dedicate the theme for 2018 to “[w]inning the fight against corruption: a sustainable path to Africa’s transformation.”

WHEREAS the Member States of the African Union wish to encourage private entities and the citizens of the African States to join with the member states in an intensified battle against corruption.

RECOGNIZING the fact that Africa has been struggling to fight corruption through the criminal justice system, and that the criminal justice system does not provide for compensation to victims of corruption for damages suffered as a result of corrupt acts.³⁸

AWARE that private civil actions can play an important and complementary role in the criminal justice system to fight corruption in Africa.³⁹

CONVINCED that private civil actions are not intended to substitute the court’s jurisdiction to prosecute under the criminal justice system, but intended to establish the basis for an additional method to fight corruption in Africa.⁴⁰

37 The Member States of the African Union adopted the convention at the Second Ordinary Session of the Assembly of the Union held in Maputo, Mozambique on July 11, 2003. The convention came into force on August 5, 2003, thirty days after the deposit of the fifteenth instrument of ratification. The convention has twenty-eight articles. COMMENT: One of the objectives of the convention is to coordinate and harmonize the policies and legislation between state parties for the purposes of prevention, detection, punishment, and eradication of corruption on the continent. One of the reasons behind this provision is that, in private civil actions, a private party may initiate a civil action independently even when the state authorities decide not to press criminal charges. The ability of private citizens and legal entities to decide independently whether to initiate private actions limits the circumstances in which a jurisdiction’s executive and justice institutions can politically afford to remain inactive.

38 COMMENT: The primary international and regional instruments on corruption emphasize control of corruption by strengthening criminal law and its enforcement. The reliance on criminal legal frameworks and on the actions of the prosecutorial services and anti-corruption agencies has not resulted in a material drop in the incidents of corruption. Corruption appears to be continuing to expand in both the public and private spheres.

39 COMMENT: Using private civil actions to combat corruption is significant for a number of reasons. First, it is an alternative method of fighting corruption which can be used even when no criminal charges have been brought. Second, the remedies sought by an aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered, while another may seek restitution or another type of remedial action. Third, victims of corruption who resort to civil actions become central protagonists in the fight against corruption and not mere observers of the criminal justice system over which they have little influence. Finally, in some jurisdictions, especially in jurisdictions following the common law tradition, the standard of proof required to establish the facts in a civil adjudication can be lower than for criminal proceedings. As part of the evaluation of the complementary role of civil actions in the fight against corruption, different legal system and laws in various African states have been examined to support this new method

40 COMMENT: Private Civil Actions are not intended to substitute the court’s jurisdiction to prosecute under the criminal justice system. It is intended to establish the basis for an additional method to fight corruption in Africa. In preparation of the document, considerable inspiration has been derived from the 1999 Council of Europe Convention on Civil Actions against Corruption. However, it is recognized that further development of the document will need to be done to make it an African document.

RECALLING THAT Aspiration 3 of AU Agenda 2063 for Africa's Transformation recognizes that good governance is one of the necessary preconditions for a prosperous and peaceful Africa, and that it seeks to instill a universal culture of good governance, democratic values, gender equality, respect for human rights, justice, and the rule of law.⁴¹

RECALLING ALSO that Aspiration 4 of AU Agenda 2063 recognizes that the above principles are necessary preconditions for a peaceful and conflict-free continent.⁴²

RECALLING that Article 2, Subsection 4 of the African Union Convention on Preventing and Combating Corruption in Africa (AUCPCC) encouraged the member states to remove obstacles that impede social, economic, developmental, and any other type of hindrance that prevents the enjoyment of citizens' civil and political rights.⁴³

BEARING IN MIND the increased international interest in the use of private civil actions against corruption [in various African and other jurisdictions] and that the fight against corruption is a collective responsibility of all African citizens.

[TAKING INTO ACCOUNT] as relevant precedent Article 3 and Article 5 of the 1999 Council of Europe Civil Law Convention against Corruption, which is the first and the most extensive international convention on private civil actions against corruption.⁴⁴

[FURTHER TAKING INTO ACCOUNT] that Article 35 of the United Nations Convention against Corruption (UNCAC) provides that State Parties to that Convention shall take such measures as may be necessary, in accordance with principles of its domestic law, to

ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage to obtain compensation through private civil actions and that most of the AU Member States are States Parties to that Convention.⁴⁵

[TAKING INTO ACCOUNT ALSO] as a relevant precedent Article 8 of the Arab Anti-Corruption Convention that heightens the importance of private civil actions as another possible source of law pertaining to the fight against corruption in the League of Arab States, of which some African countries are members.⁴⁶

UNDERTAKING to establish the basis for an alternative and additional method to fight corruption in Africa and implement clear procedures under which private civil actions can be used to fight corruption.

RECALLING the resolutions adopted at the 29th Assembly of Heads of State and Government in January 2017, as well as at the 30th Assembly of Heads of State and Government held in January 2018, in Addis Ababa, Ethiopia, regarding assessing the impact of corruption in Africa.

NOW THEREFORE THE PARTIES HAVE AGREED AS FOLLOWS:

Chapter I

MEASURES TO BE TAKEN AT THE NATIONAL LEVEL

Article 1 – Objective of the Protocol

Each Member State of the African Union will undertake to provide in its domestic law effective compensation for aggrieved entities or persons who have suffered damage as a result of acts of corruption and the right to initiate legal proceedings against those

41 COMMENT: Aspiration 3 Agenda 2063: Africa shall have a universal culture of good governance, democratic values, gender equality, respect for human rights, justice and the rule of law. We aspire that by 2063, Africa will: (a) be a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice, and the rule of law are entrenched; and (b) have capable institutions and transformative leadership in place at all levels. The continent's population will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favour. Corruption and impunity will be a thing of the past Africa will be a continent where the institutions are at the service of its people. Citizens will actively participate in social, economic and political development and management. Competent, professional, rules and merit-based public institutions will serve the continent and deliver effective and efficient services. Institutions at all levels of government will be developmental, democratic, and accountable.

42 [COMMENT: Aspiration 4 of AU 2063 Agenda says that by 2020 all guns will be silent. Mechanisms for peaceful resolution of conflicts will be functional at all levels. A culture of peace and tolerance shall be nurtured in Africa's children and youth through peace education. Africa will be a peaceful and secure Continent, with harmony among communities starting at the grassroots level. The management of our diversity will be a source of wealth, harmony, and social and economic transformation rather than a source of conflict. It is aspired that by 2063, Africa shall have: (a) an entrenched and flourishing culture of human rights, democracy, gender equality, inclusion and peace; (b) prosperity, security and safety for all citizens; and (c) mechanisms to promote and defend the continent's collective security and interests. It is recognized that a prosperous, integrated and united Africa, based on good governance, democracy, social inclusion and respect for human rights, justice and the rule of law are the necessary pre-conditions for a peaceful and conflict-free continent. The continent will witness improved human security with sharp reductions in violent crimes. There shall be safe and peaceful spaces for individuals, families and communities. Africa shall be free from armed conflict, terrorism, extremism, intolerance and gender-based violence as a major threat to human security, peace, and development. The continent will be drugs-free, with no human trafficking, and where organized crime and other forms of criminal networks, such as the arms trade and piracy, are ended. Africa shall have ended the illicit trade in and proliferation of small arms and light weapons. Africa shall promote human and moral values based on tolerance and rejection of all forms of terrorism irrespective of their motivations. By 2063, Africa will have the capacity to secure peace and protect its citizens and interests, through a common defense, foreign and security policy.]

43 Article 2 (4) of the African Union Convention on Preventing and Combating Corruption states that the objectives of this Convention are to Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.

44 [COMMENT: The first, and certainly the most extensive, treaty on private civil actions is the 1999 Council of Europe Civil Law Convention against Corruption, which complements the Criminal Law Convention on Corruption. The convention was adopted on November 4, 1999, by the European Union member states. The convention is divided into three chapters with twenty-three articles. The convention advocates for measures to be taken at the national level and with international collaboration. It also provided for monitoring and implementation measures to be taken by the member states at each level and ends with the final clauses.]

The working definition of corruption in Europe is found in Article 2: "[c]orruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof." Commenting on the objectives of private civil actions, Article 3 states that "[e]ach Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. 2. Such compensation may cover material damage, loss of profits and non-pecuniary loss." Finally, Article 5 states that "[e]ach Party shall provide in its internal law for appropriate procedures for persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to claim for compensation from the State or, in the case of a non-state Party, from that Party's appropriate authorities."]

45 [COMMENTS: The UNCAC is the most important international convention on corruption, both in terms of its breadth and the number of state signatories. It was adopted by the United Nations General Assembly on October 31, 2003 and entered into force December 14, 2005. As of October 3, 2017, the convention has 183 member states. The convention was created to respond to corruption as a global problem, and it addresses a wide variety of issues. Significantly, in terms of the present protocol, member states are required to implement in their individual national laws provisions facilitating private civil actions aimed at providing a way for corruption victims to be compensated for their losses. This is provided for in Article 35 of United Nation Convention against Corruption, which states that "each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." Unfortunately, follow-up on Article 35 at the national level has received little attention.]

46 [COMMENTS: The Arab Convention against Corruption was developed by the League of Arab States. It is regarded as the first official pan-Arab anti-corruption treaty. On December 20, 2010, the convention obtained signatures of ministers of the interior and ministers of justice from twenty-one (21) Arab countries, apart from Somalia. The convention has thirty-five (35) articles and is founded on Islamic doctrine and various religious books. According to the convention's preamble, the burden of fighting corruption is not only placed on the official authorities, civil society and individuals also play an important role in the struggle. Article 2 is an agreement to prevent and eradicate any form of corruption with the help of League of Arab States, especially in the recovery of stolen assets. Article 4 lists and describes thirteen actions that are categorized as corruption. Some of these include corruption in the private and public sectors, bribery of national and international public officials, money laundering, abuse of functions, illicit enrichment, trading in influence, embezzlement of property in the private and public sectors, and obstruction of justice. Finally, Article 8 addresses private civil actions stating that: "Each state party shall provide in its domestic legislation that all those that suffered damage as a result of an act of corruption, under the present convention, shall have the right to bring an action for compensation for such damage."]

responsible for that damage in order to obtain such compensation [and secure other legal and equitable remedies].

Article 2 – Definition of Corruption

For the purpose of this protocol, “corruption” means the acts and practices, including related offences, prescribed by the 2003 African Union Convention on Preventing and Combating Corruption.⁴⁷

Article 3 – Sanctions for Acts of Corruption

Each Member State of the African Union shall, in accordance with its domestic legislation, adopt measures to punish corruption. In this context, State Parties may take into account corruption as an important factor when taking legal steps to cancel or revoke a contract, withdraw a concession or other similar arrangements, or taking any other remedial measure.

Article 4 – Compensation for Damage

1. Each Member State of the African Union shall make available in its domestic law for aggrieved entities and persons who have suffered damage as a result of corruption the right to institute an independent action to obtain full compensation for such damage.⁴⁸
2. Such compensation may cover material damage for entities and persons who wish to recover loss of profits and non-pecuniary loss in terms of restitution or remedial action.⁴⁹
3. The right of entities and persons to initiate legal proceedings referred to in this Article shall not be conditioned upon the initiation of an investigation or of the prosecution of alleged corruption by state authorities or upon the outcome of such investigation or criminal prosecution.

Article 5 – Liability

1. Each Member State of the African Union shall provide in its domestic law for the following conditions to be satisfied for the aggrieved entities or persons who are entitled to receive damages or compensation:
 - i. the defendant has committed or authorized the act of corruption or failed to take reasonable steps to prevent the act of corruption;
 - ii. the entities or persons have suffered damage; and
 - iii. there is a connecting bond between the act of corruption and the damage.

2. Each Member State of the African Union shall provide in its domestic law that if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

Article 6 – Obligation of State Parties

Each Member State of the African Union shall provide in its domestic law for appropriate separate procedures for entities or persons who have suffered damage as a result of an act of corruption by its public officials in the exercise of their functions to make a claim for compensation against the State or, in the case of a non-State Party, from that Party’s appropriate authorities.⁵⁰

Article 7 – Limitation Periods

Each Member State of the African Union shall provide in its domestic law for proceedings for the recovery of damages to be subject to a limitation period of not less than [three] years from the day the entities or persons who have suffered damage became aware or should reasonably have been aware that damage has occurred or that an act of corruption has taken place, and of the identity of the responsible person. However, such proceedings shall not be commenced after the end of a limitation period of not less than [ten] years from the date of the act of corruption.⁵¹

Article 8 – Validity of Contracts

1. Each Member State of the African Union shall provide in its domestic law for any contract or clause of a contract providing for corruption to be declared invalid.
2. Each Member State of the African Union shall provide in its national law for the possibility for parties to a contract whose consent has been damaged by an act of corruption to be able to seek remedies in court for the contract to be annulled, while nevertheless still maintaining their right to bring a claim for compensations.

Article 9 – Protection of Employers/Employees of a Company

1. Each Member State of the African Union shall provide in its domestic law appropriate measures to prevent cases involving a breach of trust; the principal or officers of the company may sue or be sued for paying or receiving bribes on behalf of or within the company.⁵²

47 [COMMENT: We shall be relying on the definition of corruption and other related definitions related to corruption as provided for under the 2003 African Union Convention on Preventing and Combating Corruption.]

48 [COMMENT: The reason behind this provision is that one of the advantages of private civil actions is that a private party may initiate a civil action independently, even when the state authorities decide not to press criminal charges. The ability of private citizens and legal entities to decide independently whether to initiate private actions limits the circumstances in which a jurisdiction’s executive and justice institutions can politically afford to remain inactive.]

49 [COMMENT: The remedies sought by the aggrieved plaintiff can be crafted to fit different situations. One plaintiff may wish to receive compensation for losses and harm suffered. Another may seek restitution or another type of remedial action].

50 COMMENT: A recent case example that has to do with public officials being sued in the exercise of their functions is an Indonesian from January 2008. In this case, a USD \$1.5 billion civil lawsuit was instituted against the late former president of Indonesia – President Suharto and his son, Tommy. The former president was alleged to have misappropriated a charity scholarship fund of USD \$440 million, and Tommy was involved in a corrupt land exchange scheme as a result of which the country suffered damages in the sum of USD \$55 million. The former president eventually escaped criminal prosecution by declaring himself to be mentally incapable to stand trial. Nevertheless, in December 2010, the Supreme Court announced the retrieval of 2.8 trillion rupiah which equates to approximately USD \$307,440,000 at today’s rates.

51 COMMENT: In cases involving breach of trust, the principal can institute civil actions against their agents to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their works. The case of CIR vs. Fininvest is an example in which compensation in the amount of €560 million was awarded to the victim within the ten-year limitation period. In the 1980s, the head of the Mondadori Group was a holding company named AMEF. In 1988, CIR and the Formenton family, as principal shareholders in the holding company, signed a shareholder control agreement transferring the Formenton family’s AMEF shares (27.75%) to CIR, which already owned 27.71% of the capital stock. The agreement included an arbitration clause. After a corporate raid by Fininvest, which owned a minority of the shares in the holding company (8.28%), the Formenton family sought to rescind the shareholder agreement concluded with CIR. CIR initiated arbitral proceedings according to the arbitration clause in the shareholder agreement. The arbitration panel found that there had been a breach of contract by the Formenton family. The arbitral award ordered the Formenton family to sell its stocks to CIR according to the contract. The Formenton family raised an appeal to the Rome Court of Appeals on the grounds that the arbitral award is null and void. The court confirmed the arbitral award was contrary to public policy. Later, a settlement was made between CIR and Fininvest, and Fininvest took control of the Mondadori Group.

Ten years later, the Milan Criminal Court found that the Judge-Rapporteur of the chamber of the Rome Court of Appeals that declared the arbitral award null and void was in fact bribed by the Fininvest lawyer to issue a decision annulling the arbitral award, a decision that was favorable to the Formenton family. The court had dismissed liability against a number of persons involved in the scandal including the director of Fininvest due to the statute of limitations for the criminal act. CIR brought a civil action to recover damages resulting from the corruption of the Judge-Rapporteur.

In the eyes of the Italian Supreme Court, the harm suffered by CIR is regarded as damage, which came out from the criminal act of Fininvest. However, the Italian Supreme Court found Fininvest liable for corruption and damages was awarded against it in favour of CIR for the sum of €560 million.

52 COMMENT: This can arise in cases involving breach of trust. The principal can institute civil actions against their agents to recover all illicit benefits obtained or losses suffered in breach of trust while in the course of their works. An example case is 2007 lawsuit in which the brother of Sultan of Brunei, Prince Jefri Bolkiah, was sued by the State of Brunei for misappropriating the sum of USD \$ 13.5 billion while serving as the Minister of Finance and Chairman of the Brunei Investment Agency and the Privy Council.

2. Each Member State of the African Union shall provide in its domestic law for appropriate measures that will protect and allow the employees of a company to institute civil actions against their employers to recover all illicit benefit obtained or losses suffered in breach of trust while in the course of their work.
3. Each Member State of the African Union shall provide in its domestic law for appropriate protection against any unfair or baseless sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

Article 10 – Accounts and Audits

1. Each Member State of the African Union shall in its domestic law take any necessary measures for the annual accounts of companies to be drawn up clearly and give a true and fair view of the company's financial position.
2. With a view to preventing acts of corruption, each Member State of the African Union shall provide in its domestic law for auditors to confirm that the annual accounts present a true and fair view of the company's financial position.⁵³

Article 11 – Acquisition of Evidence

Each Member States of the African Union shall provide in its domestic law for effective procedures for the acquisition of evidence in civil proceedings arising from an act of corruption.

Article 12 – Protection of Informers, Witnesses, Experts, and Victims

Each Member State of the African Union shall provide the necessary legal protection to informers, witnesses, experts, and victims who give evidence relating to corrupt acts referred to by the present protocol. This shall include protecting their relatives and those closely connected to them from any possible act of revenge or intimidation. Such means shall include:

- i. providing protection in their dwelling places;
- ii. not disclosing information relating to their identity or location;
- iii. informers, witnesses, experts, and victims giving evidence in a manner that ensures their safety, such as by the use of communications technology;
- iv. taking disciplinary measures against anyone who discloses information relating to the identity or location of informers, witnesses, experts, or victims.

Article 13 – Interim Measures

Each Member State of the African Union shall provide in its domestic law for such interim court orders as are necessary to protect the rights and interests of interested parties during civil proceedings arising from an act of corruption.

Chapter II

INTERNATIONAL CO-OPERATION AND MONITORING OF IMPLEMENTATION

Article 14 – International Co-operation

The parties shall co-operate effectively in matters relating to civil proceedings in cases of corruption, especially concerning the service of documents, obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgments, and litigation costs, in accordance with the provisions of relevant international

instruments on international co-operation in civil and commercial matters to which they are party, as well as with their internal law.

Article 15 – Monitoring

The African Union Advisory Board on Corruption (AUABC) shall monitor the implementation of this protocol by the parties.

Chapter III

FINAL CLAUSES

Article 16 – Signature and Entry into Force

1. This protocol shall be open for signature by members of the African Union (AU) General Assembly of the Heads of State and Government that have participated in the elaboration of this protocol and who are the signatories of the 2003 African Union Convention on Preventing and Combating Corruption.
2. The protocol shall enter into force thirty (30) days after the date of the deposit of the fifteenth instrument of ratification or accession. The instruments of ratification shall be deposited with the Chairperson of the African Union Commission, who will notify all the members of the names of those who have ratified. The Chairperson shall transmit certified copies to each of the signatory governments.
3. For each State Party ratifying or acceding to the protocol after the date of the deposit of the fifteenth Instrument of Ratification, the protocol shall enter into force thirty (30) days after the date of the deposit by that State of its instrument of ratification or accession.

5. RECOMMENDATIONS

After thorough research and based on the above analysis and findings, it seems accurate to say that the criminal side of the law alone has not been effective in the fight against corruption. To attempt to remedy the situation and bring about available legal recourse from both the criminal and civil sides of the law, the following recommendations are suggested for the African Union (AU):

- The African Union (AU) should launch an information campaign. The advantage of this method is that it has a very low cost and does not require significant manpower. This campaign entails the AU making a concerted effort to raise awareness by talking about available remedies wherever it can, including in meetings and on social media. The AU can also allocate funds to quickly initiate this campaign. The potential disadvantage of this method is that uncertainty may continue in our legal system, as informational awareness alone may not be sufficient to move people into action.
- Private Civil Actions (PCAs) should be integrated into African law school curriculums. The AU should work with law schools to develop plans to teach students about PCAs as part of their foundational academic curriculum. The advantage of this method is that future lawyers and policy-makers will be equipped with a better understanding of this approach and will be prepared to use it on behalf of their clients or constituents once it becomes part of the law. However, we should note that it may be an extended period of time before the PCA framework is integrated into the legal system, meaning that students

53 COMMENT: In a German case that involved a claim brought by the Siemens Company against eleven former senior executive managers and two supervisory members— Neuburger and Ganswindt—for failure to stop a corrupt payment by the company. The managers were alleged to have paid a bribe in the range of USD \$2 billion to boost the business of the corporation. Siemens later paid the USD \$800 million to settle the charges brought under the FCPA by the DOJ and SEC, and an additional sum of USD \$800 million to the German government. Siemens then filed a claim in the lower court demanding \$18 million from the former director, Neuburger. Neuebuger also filed a counter-claim against the company when he was unable to pay the judgement. He claimed that the company also owed him unpaid bonuses and stock benefits. Finally, Ganswindt settled, but the civil suit is still pending before the court in Germany against Neuburger.

would be learning about provisions of the law that are not yet in place, and, in the meantime, corruption goes on and keeps expanding.

- The AU may work through local NGOs to start promoting the idea of private civil actions among the people in Africa.
- The AU may also try to improve the legal framework in Africa on a country-by-country basis. The advantage here is that this method may work well in bringing about change on a country-level basis. However, this approach may also be the most labor-intensive because of the different legal systems of each individual country. Therefore, there is also the possibility that this method may be met with different levels of resistance in each country.
- The AU should adopt a protocol for the 2003 Africa Union on Prevention and Combating Corruption. This method, if negotiated and ratified by the AU General Assembly of Head of States, will serve as an alternative and independent tool to the old method of fighting corruption through the domain of criminal law. Additionally, it will also compensate victims of corruption for the harm they have suffered as a result of corruption. However, this requires a substantive effort, as it may not be easy for the AU to convene all African countries in a roundtable to seriously start negotiating and adopt a protocol due to the political efforts and pressures that such an approach may require. Notwithstanding these drawbacks, this seems to

be the most effective method to fight corruption in Africa and is aligned with the emphasis made at the 30th ordinary session of the African Union Assembly summit held at Addis Ababa on January 29, 2018, which focused heavily on winning the fight against corruption.⁵⁴

6. CONCLUSION

As demonstrated in this study, the use of private civil actions against corruption is not well defused in Africa. It is not one of the main anti-corruption tools because of the different legal systems, different colonial past experiences, and very low understanding of both the public and legal professionals about the possibility of compensation for criminal corruption acts being provided to victims through private civil actions. Therefore, Africa has recognized the need to address the epidemic of corruption and is determined to build a corrupt-free African continent. However, it is high time we stopped limiting the fight against corruption to the criminal justice system. It is time that Africa should recognize and implement the role of private civil actions in this struggle. This method is a powerful anti-corruption tool that should not be neglected in Africa, and the proposal contained within this paper is a first step toward integrating this tool into the legal framework for combating corruption.

⁵⁴ Press Release, African Union, the 30th Ordinary Session of the African Union Assembly Concludes with Remarkable Decisions on (3) Flagship Projects of Agenda 2063 (Jan. 30, 2018), available at <https://au.int/en/pressreleases/20180130/30th-ordinary-session-african-union-assembly-concludes-remarkable-decisions-3>.