

“Applying Civil Law in an Effort to Eradicate Corruption in Egypt”*

No. 06

By: Mohamed R. Abdelsalam**

Moh.a.abdelsalam@gmail.com

Abstract

It is perceived that corruption in Egypt is a widespread phenomenon and that anti-corruption measures are weak. The system as a whole depends largely on criminal justice to combat corruption in Egypt. However, this dependence has ultimately led to a gap in the system, whereby corruption has not been deterred in a large number of institutions within Egypt, whether public or private. In response to the current situation, a reformed method of combatting corruption may be necessary. Through this paper, a newly introduced principle to combat corruption in Egypt from a private law perspective is presented. This method depends highly on a civil law mechanism rather than relying solely on the criminal justice system. The main essence of this mechanism is the possibility to seek compensation from corrupt persons. Such a mechanism guarantees the involvement of other actors who were only involved in the anti-corruption efforts in a limited manner. These include civil society organizations and ordinary persons. This mechanism is beneficial because it is highly implementable as the current legal framework facilitates the use of this mechanism without the need for significant legal reforms. It is clear from the arguments presented in this paper that civil action is an efficient, practical, and feasible anti-corruption tool in Egypt, which in turn may reduce corruption and mitigate its effects.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the PROLAW program.

This paper was submitted as part of a competitive call for papers in the context of the 4th edition.

* A significant thank you goes to Professor William T. Loris, Senior Lecturer and the Program Director of the LLM Program in Rule of Law for Development, School of Law, Loyola University Chicago, my thesis supervisor, who guided and supported me immensely throughout the process of my thesis for the Degree of Master of Laws, Loyola University of Chicago. In addition, I acknowledge his advice on the structure, arguments, editing and the critical comments on the thesis, which was the foundation for this paper.

** Mohamed R. Abdelsalam is an Egyptian judge. He holds an LLM Degree from Loyola University Chicago in Rule of Law for Development.

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I. INTRODUCTION

According to Transparency International, over six billion people live in countries with serious corruption.¹ Research conducted by the World Bank Institute estimates that more than \$1 trillion is paid in bribes every year.² The numbers clearly demonstrate the cost of corruption. Corruption is a widespread phenomenon that may never be fully eliminated as it emerges from the never-ending financial need and greed of people. However, corruption can be reduced through efficient and powerful mechanisms that aim at limiting the possibilities of corrupt practices.

When discussing corruption, criminal law is often seen as the solution to deter corrupt practices. However, civil law can also be used as a powerful tool to combat corruption. Generally, the criminal justice system is responsible for drawing the boundaries between legal and illegal acts, such as criminalizing bribes. Therefore, it is necessary to have criminal law legislation that forbids illegal acts where criminal proceedings are exclusively carried out by the state. The civil justice system also serves the purpose of protecting individuals from one another by specifying their rights and duties. For example, if a person is financially injured due to an act of corruption initiated by another person, the injured party can raise a civil claim.

However, it must be emphasized that the state cannot be solely relied upon to combat corruption. Such an initiative should also be undertaken by the general public, civil society, and public and private institutions in order to create an infertile ground for corruption. One of the essential ways to go about this is to eliminate factors that bolster a corrupt environment, such as impunity in the financial aspect of corrupt practices.

The aim of using civil law is not to replace the prosecution or court's jurisdiction under the criminal law but to open up an additional front in fighting corruption.³ An efficient anti-corruption strategy would be to use all the available legal instruments, such as utilizing both criminal and civil law simultaneously to reduce the financial profits gained from the corrupt practices.

¹ Corruption perceptions index 2015, Transparency International, available at <http://www.transparency.org/cpi2015>. (last visited July 1, 2016).

² The Costs of Corruption, World Bank, available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. (last visited July 1, 2016).

³ Meyer, Olaf. 2009. *The Civil Law Consequences Of Corruption*. Baden-Baden: Nomos.

In the majority of European countries' civil courts, victims of corruption usually have grounds to seek lump sum payments under the general principles of compensation as per the civil courts' rulings on cases of corruption, even without specialized corruption regulations.⁴ Moreover, in countries that possess a large number of legal precedents in this aspect, there is no systematic approach in civil law towards crimes of corruption.⁵ Thus, it can be argued that the use of civil remedies is not a widespread strategy in anti-corruption efforts.

As mentioned, the general principles of civil law provide grounds for compensation for victims of corruption. Therefore, there is no real need to enact a new law or pass any amendments to the existing law to utilize civil remedies against corruption. However, there is a need to increase awareness regarding the use of civil law as a mechanism to combat corruption. This research attempts to provide a guideline for using civil law to deter corruption within the current Egyptian legal framework.

I. CIVIL LAW AGAINST CORRUPTION

This section provides an overview of the application of civil law on cases of corruption, and includes the advantages of such an application.

1.1 The Concept of Civil Actions against Corruption

Although criminal actions have been the main course of action to combat corruption worldwide, civil actions have also proven to be efficient in punishing the illicit lucrative gains.⁶ Modern criminal justice systems try to ensure that victims are compensated for injuries and losses suffered at the hands of the defendant. If a victim initiates civil action to recover losses, this is indicative that there may have been a fault in the criminal justice system. In some cases, it is because the system is unable to prosecute the wrongdoers, whether due to a stay of proceeding, death, or disappearance. In other instances, the defendant is acquitted due to insufficient grounds for prosecution.

Civil actions against corruption are indicative, not necessarily of a failing criminal justice system but of the lack of alternative instruments that can be effectively practiced for the

⁴*Id.*

⁵*Id.*

⁶ Open-ended Intergovernmental Working Group on Asset Recovery Ninth meeting Vienna, 3-4 September 2015, CAC/COSP/WG.2/2015/CRP.1

<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2015-September-3-4/V1506218e.pdf> (Last visited: May 12, 2016).

recovery of damages, such as confiscation and international cooperation.⁷ Strengthening civil measures in different countries has provided national law enforcement authorities with a modern and effective system that gives them the ability to cope with the increasingly challenging transnational nature of such crimes.⁸ Thus, criminal proceedings are no longer the sole mechanism available to combat corruption worldwide.⁹ In addition, civil proceedings may provide remedies such as compensation for the damage, loss of profit, asset confiscation, fines and monetary relief, which are powerful anti-corruption mechanisms. This is because they tackle the financial aspect of corruption, which is the main factor that encourages perpetuation of this type of crime.

1.2 The Advantages of Civil Actions against Corruption

Unlike criminal proceedings, whose main objectives are punishment, deterrence and rehabilitation of the wrongdoer, civil actions provide compensation and remedies for the harm caused by the corrupt act.¹⁰ This makes civil proceedings often more appealing to the majority of victims of corruption— it provides the potential of raising a case against a likely powerful party, in order to gain compensation for the harm caused, which will in most cases be more satisfying than just punishing the wrongdoer.

The capability of civil law to curb corruption lies in several factors that must be examined and explained, in order to technically assess the advantages offered by the civil law system. The use of civil remedies in Egypt can open a new frontier in the fight against corruption by abandoning the perspective of an exclusively state led battle, to embrace the idea of a citizen led battle.¹¹ The inclusivity of *who sues* is a great advantage in favor of the civil proceedings, as it allows the empowerment of private citizens, non-governmental organizations, private sector and different legal entities to have a role in the fight against corruption rather than leaving the proceedings against corruption exclusively to the state.

Also, when the State's executive and judicial authorities do not start criminal proceedings against a crime of corruption, it does not prevent private citizens and legal entities from independently deciding to initiate civil actions against the wrongdoer.¹² This will play a significant role, especially on States after a revolution or conflict, as public, political and social

⁷ Simon N.M. Young, *Why civil actions against corruption?*, Vol. 16 Iss 2, J.F.C., 144 – 159, (2009).

⁸ *Supra* note 11. <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2015-September-3-4/V1506218e.pdf>. (last visited: June 12, 2016)

⁹ *Id.*

¹⁰ William T. Loris, *Private Civil Actions A Tool for a Citizen-Led Battle against Corruption*, (volume 5), WBLR, (2014)

¹¹ *Id.*

¹² *Id.*

stress on State authorities to start proceedings can be an effective soft power weapon against corruption.

It is common that the burden of proof in a civil proceeding is lower than that required in a criminal proceeding. The standard of proof in civil cases requires only “a preponderance of evidence”, “probability”, “more likely than not” or a “reasonable possibility”, which are less demanding standards than the “beyond a reasonable doubt,” required in any criminal proceeding.¹³ Even though this is an advantage for the encouragement of using civil proceedings, it is not universal, and in some jurisdictions, such as in Germany, the standard of “beyond reasonable doubt” is applied in both criminal and civil proceedings.¹⁴

Although criminal trials may be dismissed on several grounds, it does not impair the use of evidence collected during the criminal trial in civil action instead. This facilitates the claimant bearing the burden of proof as was proven in the case of CIR v Fininvest in Italy.¹⁵

Moreover, shifting the burden of proof to the defendant is possible in some jurisdictions once the claimant has made a prima facie case, which may be advantageous to the claimant.¹⁶

A petty corruption case will not be an attractive and important case for the criminal executive or prosecuting authorities to initiate towards the wrongdoer; here civil action can play a great role. The private citizen can raise a civil action towards the wrongdoer to retain his or her financial rights.¹⁷ The advantage lies here in the role of ending impunity even for minor acts which are usually ignored. Civil suits can unify the victims in the form of class action suits in order to fight corruption in its smallest forms, which often allows the wrongdoer to gain huge profits illegally.

Civil action may end the impunity of corrupt crimes dismissed due to reasons such as prescription in criminal cases before civil cases in some jurisdictions, death of the wrongdoer, petty corruption crimes and a lack of evidence.

Also, civil actions raised by governmental institutions against wrongdoers may play an important role in reviving the economy of the state, especially in the countries with a long history of corruption.

Moreover, an important judicial decision, such as “CIR v Fininvest”¹⁸, is a clear example of the advantage of using civil procedures in Italy where the corruption case was

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Paola Mariani, *How Damages Recovery Actions Can Improve the Fight against Corruption: The Crisis of Criminal Law Policies and the Role of Private Enforcement in an Italian Case of Judicial Corruption*, Bocconi Legal Stud. Research Paper No. 2007241, Feb. 17, 2012.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ “CIR v Fininvest” case mentioned in detail in the fourth section.

dismissed due to the expiry of the time limit but confirmed the accused person's civil liability to pay the compensation for the harmed victims.¹⁹ This shows that civil procedures may sometimes be more powerful in ending impunity than criminal procedures. Finally, even though the death of the offender logically would essentially end criminal proceedings, this would not hinder the option of civil proceedings being raised.

Does this method of using civil law against corruption have the enforcement power and recognition in different legal systems? Yes, de facto it does. In order to better understand the mechanism of implementing this method, certain international anti-corruption conventions are discussed in the next section.

II. ANTI-CORRUPTION INTERNATIONAL LEGAL FRAMEWORKS

This section provides an overview of the main international legal frameworks supporting the use of civil law against corruption in general and in particular those provisions in international and regional agreements, which relate to the compensation of corruption victims.

3.1 The Civil Law Convention against Corruption

The Council of Europe (COE) became strongly interested in the international fight against corruption due to the fact that corruption threatens the basic principles that the COE stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress. Also, corruption is a subject well-suited for international co-operation due to the international elements involved in some corruption crimes.²⁰ The COE took the approach of fighting corruption through criminal, civil and administrative laws in order to combine all possible legal efforts to eliminate it.

In 2003, the Civil Law Convention came into force, introducing the first attempt to define common international rules in the field of civil law and corruption. Article 1 of the Convention provides that all member parties of the convention should provide in their domestic law "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage".²¹

¹⁹ *Supra* note 20.

²⁰ Explanatory Report, Council of Europe Civil Law Convention on Corruption, para. I(a)(1).

²¹ Civil Law Convention on Corruption, ETS 174 (adopted Nov. 4, 1999), available at <http://www.coe.int/en/web/conventions/full-list/>

The convention covers a wide range of issues, including compensation for damage, which may include material damage, loss of profits, and nonpecuniary loss; liability, including state liability for acts of corruption committed by public officials; contributory negligence (by the plaintiff); reduction or disallowance of compensation, depending on the circumstances; validity of contracts; protection of employees who report corruption; court orders to preserve the assets necessary for the execution of the final judgment and the maintenance of the status quo pending resolution of the points at issue; and international cooperation according to the internal laws of each country.²² The articles of this convention may definitely reduce corruption crimes if it is adopted effectively due to the nature of these crimes covered in the convention: from minor to transnational and international crimes. In addition, according to Article 14, the Group of States against Corruption (GRECO)²³ would monitor the implementation of this Convention by the States.

The GRECO system is worth studying in some detail because it may provide a model of how to ensure monitoring and reporting on the implementation of other current or future international conventions dealing with the control of corruption. For instance, certain GRECO reports highlight the lack of follow-up implementation by specific states, whereas others provide specific information on modifications to the domestic legal framework of others. At present, the Civil Law Convention is limited in application to certain countries, but it serves as a clear and inspirational example of how far states can go to promote and facilitate civil actions as a tool to fight corruption.²⁴

The backbone articles of the convention are the following:

Article 1 – “Each Party shall provide, in its internal law, for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.”²⁵

This article sets the least basic principles and rules that each member should implement in their national law, which may allow the persons who have suffered damage as a result of corruption act to ask for compensation. The word *persons* mentioned in the convention according to the Explanatory Report, refers to both natural and legal persons, and to other

/conventions/treaty/174 (accessed May 19, 2016).

²² William T. Loris, *Private Civil Actions A Tool for a Citizen-Led Battle against Corruption*, Global Corruption Report Education, Transparency International.

²³ Mechanism for the Review of Implementation of the United Nations Convention against Corruption, see: <https://www.unodc.org/unodc/en/treaties/CAC/IRG.html>, (last seen: July 12, 2016)

²⁴ *Supra* note 15.

²⁵ *Supra* note 21, art. 1.

bodies existing in some legal systems, which may engage in litigation.²⁶ The reference of persons as natural and legal persons provides a great advantage as it opens the door to the state, civil society and any institution to play a role in anti-corruption efforts. This reference forms the basis for the empowerment of civil society organizations, especially in states in transition or the states which have recently experienced conflicts or revolutions, where the state alone cannot carry out the full anti-corruption efforts on its own due to lack of expertise and political legitimacy. This article could play a role in establishing an initiative combining all the collaborating legal persons in order to associate their efforts to track corruption from the civil perspective.

Additionally, the Civil Law Convention requires that state parties ensure that victims of corruption have the right to seek compensation for the suffered damage. The actual language is as follows:

*Article 3 – Compensation for damage – “1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.
2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.”²⁷*

The explanatory report made clear that the damages are not limited only to a specific method payment, but may be determined according to the loss sustained in the particular case in any form. Punitive damages are excluded from full compensation under this convention. However, states whose domestic law provides for punitive damages are not required to exclude their application in addition to full compensation.²⁸ It is interesting that the convention provided that the minimum compensation for the persons who were affected by any corrupt act would be full compensation excluding punitive damages if national law does not provide so.

Material damage is normally compensated financially, whereas non-pecuniary loss refers to those losses which cannot immediately be calculated. Because they do not amount to calculable material financial loss, they may also be compensated by other means, such as obliging the defendant to publish the judgement on his or her expenses to compensate the competitor.²⁹ Regarding nonpecuniary losses, compensation may be decided by the courts according to variables such as member states’ legal framework and the nature of the non-pecuniary losses, which will be covered. This convention provides general principles for

²⁶ *Supra* note 20, para. 27.

²⁷ *Supra* note 20, art. 3.

²⁸ *id.*, para. 36.

²⁹ *id.*, para 38.

compensation due to the differences in member states' legal frameworks, which is an advantage for member states as it permits them to work according to their own legal frameworks.

The article specifies that compensation should represent not only the actual financial loss of the person who has suffered damages but also the profit which was expected to be gained on a reasonable basis if the corrupt crime did not occur.³⁰ This sets down an important principle for all people, institutions and governments to ask for compensation for lost opportunities. For example, if the state privatized a company and one of the three applying companies obtained the privatization agreement through a corrupted act, this would allow the two other companies to file a civil case asking for compensation for the lost profit that they would have obtained from a different agreement. This article not only helps in anti-corruption efforts in the business sector for companies, but also on the state level, as governments can file a case for the lost profit equivalent to the expected value.

Another important addition in the Civil Law Convention is that it provides the required elements for the liability to arise, which are: (i) the act of corruption (which also includes the authorizing for the act or the failure to prevent its occurrence); (ii) damage; and (iii) a causality link between the act of corruption and the damage³¹

According to the minimum standards enshrined in the convention that are further clarified by the explanatory report, the plaintiff has to prove the occurrence of the damage, whether by showing that the defendant acted with intent or negligently. This blocks the way for impunity based on negligence. Not only are the giver and the recipient of the bribe liable for damages, but also those who failed to take the appropriate steps to prevent corruption, in the light of the responsibilities that lie on them. The damages must be connected directly to the victim, but it should also not prevent parties from allowing a person other than the one who suffered damage to bring forward a claim for compensation. An example from the explanatory report was mentioned to clarify the causal link³² that must exist between the act and the damage in order for the latter to be compensated. The explanatory report stated that the damage should be an ordinary, as opposed to an extraordinary, consequence of corruption. Thus, *loss of profits* by an unsuccessful competitor, who would have obtained the contract if an act of corruption had not been committed, is an ordinary consequence of corruption and should normally be compensated. On the other hand, there would be no adequate connection if, for example, an unsuccessful competitor, in his or her anger and disappointment over the loss of business, fell

³⁰ *id.*, para 38.

³¹ *Supra* note 20, art. 4.

³² Causal Link: an element in the civil liability which means the causal relationship between the conduct (illegal act) and the result (damage).

down the stairs and broke his leg.³³

Moreover, it should be noted that parties are free to apply a wider concept of causal link in their domestic law and practice. This example was, however, provided in the explanatory report in order to avoid the exaggerated use of casual link by the damaged person while claiming their compensation. Thus, it can be concluded that as a general principle for applying this article, it is only related to direct losses which are due to the corrupt act itself, not any surrounding or interfering factors. According to the explanatory report, corruption victims may seek compensation from any one or more of the liable offenders.³⁴ Therefore, for instance an unsuccessful competitor, who would have obtained the contract if an act of corruption had not been committed, can ask for compensation not only from the bribing competitor but also from the responsible person(s) who gave the contract to the competitor.

The Civil Law Convention provides an excellent starting point for national reforms as there is a need to transform civil actions into an effective tool against corruption. The involvement of high stature academics, businesses, civil society, and legal personalities in the drafting process would provide each member state with supporting expertise that could be drawn upon for the required monitoring of the anti-corruption process.³⁵ Also, it provides a model of a regional convention curbing the corruption from a private law context that should be emulated.

3.2 The United Nations Convention Against Corruption

Inspired by the Civil Law Convention on Corruption and the United Nations Convention against Transnational Organized Crime (UNTOC) which was adopted in 2000, the General Assembly of the United Nations recognized that there is a desire for an effective international legal instrument against corruption. Thus, the UN established an ad hoc committee for negotiations which took seven sessions before finally producing the United Nations Convention against Corruption (UNCAC).³⁶

The UNCAC was adopted by the General Assembly of the United Nations on 31 October, 2003 at the UN Headquarters in New York.³⁷ With 140 signatories and 178 parties to the convention, the UNCAC achieved international significance due to its universal

³³ *Supra* note 20.

³⁴ *Id.* para. 47.

³⁵ *Supra* note 15.

³⁶ Background of the United Nations Convention against Corruption, <http://www.unodc.org/unodc/en/treaties/CAC/index.html> (accessed at 5 June 2016).

³⁷ Signature and Ratification Status as of 1 December 2015, United Nations Convention against Corruption, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, (accessed at 5 June 2016).

applicability.³⁸

The UNCAC obliges state parties to take steps towards reforming the legal framework to deal with the issue of corruption through a group of measures concerning both the public and the private sector.³⁹ The measures range from institutional reforms establishing an anti-corruption body, to codes of conduct and policies to ensure good governance, the rule of law, transparency and accountability.⁴⁰

The UNCAC recognizes both preventive and punitive measures. It also addresses the transnational nature of corruption, with provisions on international cooperation and on the return of the proceeds of corruption to states, by obliging the State members to assist each other. The UNCAC further calls for the participation of citizens and civil society organizations in accountability processes and focuses on citizens' access to information.⁴¹ By providing efficient access to information, States can enable every citizen to partake in the fight against corruption, since the hardest part of civil actions is providing evidence and having the burden of proof on the wronged party.

Generally, the provisions relevant to civil actions in the UNCAC are not as extensive as those in the Civil Law Convention on Corruption. However, the UNCAC applies to a broader range of offences, it requires States to criminalize a host of activities, including bribery of national and foreign public officials, embezzlement or misappropriation by public officials, money laundering, and obstruction of justice. It also requires State parties to consider establishing criminal offences for trading in influence, abuse of functions, illicit enrichment, bribery and embezzlement in the private sector, and knowing concealment or retention of the proceeds of crime.⁴²

Inspired by the GRECO system which monitors and reports the implementation of the Civil Law Convention against Corruption, the UNCAC included article 63 which stipulates that a Conference of the States Parties to the Convention would be established to review the implementation of the convention.⁴³ It was initiated by the Conference of the States Parties to the United Nations Convention against Corruption Resolution 3/1, where the conference

³⁸ Due to the number of the state parties that adhere to the UNCAC, it got the universal applicability by the large number of countries who recognized and signed it.

³⁹ *Supra* note 27.

³⁹ United Nations Office Drugs and Crime, *Legislative guide for the implementation of the United Nations convention against Corruption* (2012), https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf

⁴⁰ *Id.*

⁴¹ UNCAC in a nutshell. A quick guide to the United Nations Convention against Corruption for embassy and donor agency staff, Chr. Michelsen Institute, Hannes Hechler, <http://www.u4.no/publications/uncac-in-a-nutshell-a-quick-guide-to-the-united-nations-convention-against-corruption-for-embassy-and-donor-agency-staff/>

⁴² *Supra* note 7.

pp. 144 - 159

⁴³ United Nations Convention against Corruption, art. 63, 2003, 2349 UNTS 212.

adopted the terms of reference of the “Mechanism for the Review of Implementation of UNCAC” (UNCAC Review Mechanism). Also, conference members endorsed a technical assistance program to implement the UNCAC in Resolution 4/1.⁴⁴

Although the implementation review group is a great model which identifies challenges, conformity of the national law with the UNCAC and good practices, the reports have not provided a comprehensive list of recommendations to each country. Also, State parties should consider engaging civil society in the national implementation review of the UNCAC.

The backbone articles of the convention are:

Article 35. Compensation for damage – “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.”⁴⁵

The interpretative notes of the *travaux préparatoires*⁴⁶ indicate that the expression entities or persons includes States as well as legal and natural persons;⁴⁷ the mentioned notes indicate that the UNCAC was influenced by the Civil Law Convention against Corruption. The UNCAC contains the same notes that were mentioned in the explanatory report of the Civil Law Convention, which indicate that there is an intent to invite the private sector, civil society and any legal person to play a role in the fight against corruption. The interpretative notes of the *travaux préparatoires* indicate that the article intends to:

“establish the principle that States parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State party where the proceedings are to be brought). While article 35 does not restrict the right of each State party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State party in doing so.”⁴⁸

Even though this article introduces the principle of compensating victims of corruption, the intention is not to state that the UNCAC is more supreme to the national laws of State parties. It should have also included a supplementary provision to ensure the full separation of

⁴⁴ *Supra* note 23.

⁴⁵ *Supra* note 43, art. 35.

⁴⁶ *Travaux préparatoires* are the official records of the negotiations for the elaboration of the United Nations Convention against Corruption, adopted by the General Assembly in its resolution 58/4 of 31 October 2003.

⁴⁷ United Nations Office on Drugs and Crime, *Travaux Préparatoires*, art. 35, available at <http://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html> (Last visited: July 23, 2016).

⁴⁸ *Id.*

the civil responsibility from the criminal responsibility. Some legal systems consider that the burden of proof is inferior in a civil court versus a criminal court, which only accepts evidence that is beyond a reasonable doubt. In Bulgaria, for example, the civil proceedings would be suspended until the criminal court renders its decision, and then the civil court would be able to issue an order.⁴⁹ The same applies in Egypt. This hinders the usage of civil procedures as an efficient anti-corruption tool.

A suggested proposal to empower civil actions, as per article 35 of the UNCAC, would be to establish civil action–focused regional conventions.⁵⁰ The regional convention would mainly be favorable for the involvement of the stakeholders and the public in the form of a coalition. The idea of a regional convention is a doable tool and has a history in the human rights arena such as the Universal Declaration of Human Rights of the UN which implemented similar instruments in various regions. This includes the African (Banjul) Charter on Human and Peoples' Rights.⁵¹

Thus, the model of the civil law convention, which is currently more detailed and practical to Europe's legal framework regarding civil actions against corruption, could be used as a role model for creating other regional conventions.⁵² This solution could more practically be adopted by regional organizations, such as the league of Arab States and the African Union. This will not happen except with the presence of member states' political will. This idea is more favorable as it may include solutions for legal problems such as the dependency of civil actions on the criminal aspect of the case. The prescription for such an idea to come into application is through the lobbying of civil society, UNCAC coalition, law practitioners, business parties and international organizations.

Furthermore, article 51 asserts that the return of assets through cooperation and assistance is a fundamental principle. Thus, even if the doer of corrupt practice had been declared liable in front of the civil court and his/her wealth is overseas, this does not impair the ability of the victims to track the respective assets throughout the territories of State members of UNCAC.

Also, Article 53 indicates that each state shall, in accordance with its domestic law, permit its competent authorities to give effect to an order of confiscation issued by a court of another State, as it may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or

⁴⁹ *Supra* note 3.

⁵⁰ *Supra* note 15.

⁵¹ *Id.*

⁵² *Id.*

absence. This in an effective way of proving the power and advantage of using civil actions as a stronger sanctioning tool in cases where there is no ability to prosecute the offender. This article sets down an important effect, especially for the Middle Eastern and African States that suffer from corrupt officials. This will allow for an easier and more effective way to return the funds to their nations than a lengthy and ineffective procedure.

Finally, as already emphasized, the UNCAC enjoys the universal applicability and it possess the power to introduce new legal principles in the national and international arena, which will be clarified in the next section on how the UNCAC encouraged the Arab states to issue a regional anti-corruption legal instrument.

3.3 Arab Convention against Corruption

The League of Arab States (LAS), inspired by the UNCAC, was convinced that corruption affects not only the economy and politics of a state but also its social and moral values.⁵³ In 2010, the LAS issued and adopted the first official anti-corruption legal instrument, the Arab Convention against Corruption (ACAC), which came into force in December 2013.⁵⁴ According to the preamble, the ACAC was issued due to the commitment to the religious and moral principles of the monotheistic religions, including those enshrined in *Islamic sharia*, and the principles of the Charter of the League of Arab States and the United Nations Charter as well as the international conventions against corruption including the UNCAC.

The ACAC possess the recognition and the political support in the region by the ratification of 12 out of the 22 Arab countries including Algeria, Egypt, Iraq, Jordan, Kuwait, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan and the United Arab Emirates.⁵⁵

According to article two, the aim of the ACAC is to prevent and fight all corrupt practices, foster integrity and the rule of law, facilitate the Arab cooperation in preventing and fighting corruption, especially in stolen asset recovery, and to encourage civil society and the individuals to take a role in the fight against corruption. The ACAC affirmed its respect to the sovereignty of each state member, where no state member is allowed to interfere in the internal affairs of another state. Also, no state may assume the ability to function jurisdictional or exclusive actions of another state.

⁵³ Preamble of the ACAC, see: <http://www.lasportal.org/ar/legalnetwork/Documents/الاتفاقية%20العربية%20لمكافحة%20الفساد>.pdf, (last seen: July 12, 2016).

⁵⁴ ratification list of the ACAC, see: <http://www.lasportal.org/ar/legalnetwork/Documents/التصديق%20على%20الاتفاقية%20العربية%20لمكافحة%20الفساد>.pdf (last seen: July 12, 2016).

⁵⁵ *Id.*

Article 4 of the ACAC lists an array of conduct and states that each state should adopt the necessary legal measures to criminalize such conducts according to the national legal framework, including bribery of national and international public officials, corruption in public and private sectors, money laundering, illicit enrichment, embezzlement of property in the private and public sectors and abuse of power within public office.

The ACAC asserts the right of corruption victims to resort to civil actions. The actual language is as follows:

Article 5: Liability of legal persons – *“Each State Party shall adopt the necessary measures, in accordance with its domestic legislation, to determine the criminal, civil or administrative liability of any legal person for the offences stipulated in the present Convention, without prejudice to the criminal liability of physical persons.”*⁵⁶

Article 8: Compensation for damage – *“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.”*⁵⁷

Article 15: Victim support – *“1- Each State Party shall lay down appropriate procedural rules to provide victims of the offences included in the present Convention with the means to obtain compensation and remedy.
2- Each State Party shall give, subject to its domestic legislation, the chance for victims to air their views and for those views to be taken into account at the appropriate stages of the criminal proceedings instituted against offenders, without prejudice to the rights of the defense.”*⁵⁸

Although the mentioned articles assert the right of victims of corrupt practices to ask for compensation from the wrongdoers within jurisdictional domestic law, the ACAC did not provide any addition over the articles of compensation from corrupt conducts in the UNCAC, which is signed and ratified by the majority of the Arab States. It would be valuable if the LAS considers issuing particular articles covering the civil law aspects of corruption crimes, such as the burden of proof and evidence.

Furthermore, the ACAC requires that state parties ensure that necessary measures are taken to facilitate the civil society participation. The actual language is as follows:

Article 11 Civil society participation – *“Each State Party shall take appropriate measures to encourage civil society organizations to participate effectively in the prevention and combating corruption and shall support such participation by measures like:*

I. raising awareness among society on the fight against corruption, the causes and seriousness of corruption and the threat it represents to the interests of society at

⁵⁶ Arab Convention against Corruption, art. 63, 2003.

⁵⁷ *Id.*, art. 8.

⁵⁸ *Id.* at art. 15.

large.

II. conducting media campaigns to reject corruption as well as awareness programs, including school and university curriculum.

III. informing people about the competent anti-corruption agencies referred to in the present Convention and providing them with means to contact those agencies so as to inform them of any incidents which may be seen as constituting an act criminalized by the present Convention."⁵⁹

This article is worth studying as it possesses significant legal consequences on state members. It considers civil society as a major player in the anticorruption efforts, which may encourage states to amend their laws to facilitate their work. Even though the examples of empowerment of civil society mentioned in Article 11 were a beneficial addition to the article to ensure state commitment to the basic standards of support to civil society, the essence of the examples is only awareness. It would be more valuable if the LAS considered adding legal aid and civil actions into the examples list, as it is one of the important ways to combat corruption for the poorest sectors of society as well as vulnerable groups from a private law perspective.

Moreover, according to Article 14, ACAC urges state parties to ensure necessary protection of informers, witnesses, experts, whistleblowers and victims who gave testimony or evidence related to the acts criminalized in the ACAC. The actual language is as follows:

Article 14 – Protection of informers, witnesses, experts and victims- *“State Parties shall provide the necessary legal protection to informers, witnesses, experts and victims who give evidence relating to the acts criminalized by the present Convention. This shall include protecting their relatives and those closely connected to them from any possible act of revenge or intimidation. Such means shall include:*

1- Providing protection in their places of residence.

2- Not disclosing information relating to their identity or location.

3- Informers, witnesses, experts and victims giving evidence in a fashion that ensures their safety, such as by the use of communications technology.

*4- Taking punitive measures against anyone who discloses information relating to the identity or location of informers, witnesses, experts or victims.”*⁶⁰

This article is important as it could be the seed for a comprehensive efficient protection law in some countries which do not already have it, which may help in overcoming the fear of vulnerable people from participating in legal proceedings against corruption due to the reprisals from the wrongdoers.

It seems that the GRECO in the Civil Law Convention on Corruption and the implementation review group in the UNCAC inspired the ACAC, therefore article 33 creates a Conference of States Parties to the ACAC, to ensure its implementation and its monitoring

⁵⁹ *Id* at art. 11.

⁶⁰ *Id* at art. 14.

of application by State members. This is done through a call by the Arab League Secretary General to governments, the first Session of the conference was concluded in the LAS headquarters in Cairo, where The ministers and heads of national authorities representing the 12 States Parties, and two observers, attended the session.⁶¹ The conference adopted the internal rules of procedure and established an open-ended governmental group for the follow up of the ACAC implementation.⁶²

Though this is a step forward by the Arab States in efforts to combat corruption, more participation from the local non-governmental stakeholders in the implementation and monitoring mechanisms is needed. This may help in building national ownership for all the Arab civil society organizations and parties to the ACAC. This may be reflected through the implementation of all Articles of the ACAC in the form of issued laws in Arab states, such as the witness protection law, which needs political will, lobbying and support from all stakeholders.

Finally, the ACAC provided major success factors for using civil remedies against corruption by insuring the right of victims of corruption to compensation, admitting the role of civil society, encouraging State Parties to empower civil society, and guaranteeing protection for vulnerable people who fight corruption.

IV. THE RISE OF CIVIL REMEDIES AGAINST CORRUPTION

The recognition of civil law actions as a valuable tool against corruption initially took place in the international law arena. Within the international field, awareness of civil actions spread as a way to overcome traditional anti-corruption schemes, which were otherwise based mostly on domestic criminal and administrative law provisions. It was through the UNCAC, which was applicable to all Member States of the UN, that the concept of compensatory damages gained traction. The UNCAC was inspired by the Civil Law Convention against Corruption. However, since the Civil Law Convention against Corruption limited its membership, the recognition of potential compensatory damages was also limited and was not recognized worldwide until the introduction of the UNCAC.

This Section provides an overview of some worldwide civil actions which have risen to tackle corruption through civil law with a financial perspective in order to emphasize the

⁶¹ Cairo hosts first Session of States Parties to the ACAC: <http://www.undp-aciac.org/resources/ac/newsDetails.aspx?nid=1219>, (last visited: July 12, 2016).

⁶² First Conference of States Parties to the ACAC, <http://www.alanba.com.kw/ar/kuwait-news/614386/29-12-2015--الوزير-الصانع-يعلم-اختيار-الكويت-لرئاسة-المؤتمر-العربي-الأول-للاتفاقية-العربية-لمكافحة-الفساد> (last visited: July 12, 2016).

feasibility of using civil law against corruption.

4.1 CIR v Fininvest (Italy)

CIR v Fininvest is one of the leading cases on compensation for victims of corruption in Italy, where EUR500 million was awarded as damages. Two judgements by merit courts found that a judge was corrupt in a dispute over the control of the Mondadori Publishing Group.⁶³ Later, it was confirmed by a judgment of the Italian Supreme Court which took up the damages claim.⁶⁴The facts of the case are the following:

“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.”⁶⁵

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. The Supreme Court (*Corte di Cassazione*) of the Court of Appeal’s decision declared Fininvest’s liable and awarded damages of EUR560 million to CIR.⁶⁶

⁶³ Bonell, Michael Joachim and Olaf Meyer. *The Impact Of Corruption On International Commercial Contracts*, (Volume 11).

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶ *Id.*

This case raises legal issues that are worth noting:⁶⁷

- The civil liability of the accused person found innocent due to expiry of the limitation period, which supported in ending the impunity;
- The use of evidence collected in criminal proceedings in a civil proceeding, which is an important advantage to overcome the issue of the burden of proof;
- The identification and quantification of corruption damages, where the court adopted a *causation ex post* method. The Court assessed the hypothetical outcome if the judge had not been bribed.

This case represents a clear example of how civil action may be a better alternative than criminal proceedings to combat corruption; by ending impunity and punishing the wrongdoers.

4.2 Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)

The facts of the case are the following:

“Pertamina - an Indonesian state-owned enterprise whose principal business was the exploration, processing, and marketing of oil and natural gas - sought to recover bribes paid to the Pertamina executive, Haji Achmad Thahir, by contractors hoping for better contractual terms and preferential treatment. The bribes were deposited by the executive in the Sumitomo Bank branch in Singapore. Pertamina learned about the bank accounts (owned jointly by Thahir and his wife Kartika Ratna Thahir) in Singapore after the death of the executive and brought a civil action in Singapore claiming entitlement to the funds.”⁶⁸

The court of first instance ruled that the bribes and all earned interest were held by the executive as a constructive trustee. However, the judgement of the Singapore High Court stated that, the total amount of deposits including the interest, gained by Thahir, which was US \$81,757,260.74, should be returned to Pertamina.⁶⁹

This case represents another example of how civil action may be a better alternative than criminal proceedings to combat corruption. As mentioned, this is done through ending impunity and punishing the wrongdoers even after their death thereby sending a message to each corrupt official that his/her family may not enjoy the illegal financial gains. Also this case raised important issues such as:

⁶⁷*Id.*

⁶⁸ Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara, see: <http://star.worldbank.org/corruption-cases/node/18567>, (last seen: July 14, 2016).

⁶⁹ *Id.*

- The civil liability of the deceased, which supported the ending of impunity;
- The ability of the victim's company to use civil proceedings to track the money gained from bribes from Thahir's common account to his wife.

Finally, the fact that the previous civil actions were represented by law firms who possess all the resources cannot be ignored. This does not mean that it is exclusive mechanism to the wealthy parties. Therefore, an example from the civil society civil actions should be illustrated as follows.

4.3 The *Zambian Government v. the former Zambian President, Frederick Chiluba (United Kingdom)*

In 2003, Frederick Chiluba was criminally charged with corruption crimes related to State funds. Later in 2004, the Attorney General of Zambia filed a civil lawsuit against Chiluba in the United Kingdom on behalf of the people of Zambia on the basis that Chiluba, along with former governmental officials, misappropriated State funds.⁷⁰ The Zambian authorities decided to bring the civil lawsuit against Chiluba in the United Kingdom to recover the laundered money by a British court order. The court in London found Chiluba liable in misappropriation for stealing US \$46 million.⁷¹ Zambia also brought a civil lawsuit against two English solicitors and their respective law firms (Iqbal Meer, of Meer Care & Desai, and Bimal Tacker, of Cave Malik) for providing dishonest assistance to misappropriation.⁷² At the lower court level, the court found that the two English solicitors dishonestly assisted Chiluba and the Zambian defendants in their misconduct and had conspired intentionally to misappropriate monies from the Zambian State.⁷³ The court ordered Mr. Meer and the law firm to pay to Zambia US \$ 11 million reasoned on the "constructive trust for dishonest assistance" theory.⁷⁴ Even though the higher court reversed the decision and the lower court's order was dismissed, the legal precedent remained. This case represents another example of how civil action may be a better alternative than criminal proceedings to combat corruption, especially when the stolen funds are not in the state where the crime has been committed.

Finally, the fact that the previous civil actions were represented by legal representatives who possess all the resources cannot be ignored. This does not mean that it is exclusive

⁷⁰ Public Wrongs, Private Actions, Civil Lawsuits to Recover Stolen Assets, Stolen Asset Recovery Initiative, 2015.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

mechanism to the wealthy parties. Therefore, an example from the civil society civil actions should be illustrated as follows.

4.4 The registered trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)

SERAP is a Nigerian human rights non-governmental organization that raised a case against the government and a governmental body that was set up to ensure 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 national basic 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 (ACHPR). These articles guarantee the human right to quality education, the right to human dignity, the right of peoples to their wealth and natural resources, and the right of people to economic and social development.⁷⁵ The financial losses which resulted from the corrupt act resulted in over five million Nigerian children having no access to primary education.⁷⁶ 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”.⁷⁷ The court finally referred to the fact that the embezzlement of part of the funds allocated for the basic education sector would affect the performance of the education sector negatively. This is a predictable consequence; that any shortage of funds will constrain the sector from performing the expected tasks which were supposed to be carried out under the allocated budget. Even though the criminal proceedings are currently in progress, the court ordered the government to provide money to cover the fund shortfall to ensure the achievement of the fund’s objectives.

After briefing some worldwide civil actions which have risen to tackle corruption through civil law, an overview on the Anti-Corruption Egyptian legal framework in general and civil law in particular is within the next section.

⁷⁵ SERAP v. Nigeria, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010)

⁷⁶*Id.*

⁷⁷*Id.*

V. Anti-corruption remedies in Egyptian Civil Law

Egypt faces a high level of corruption within its institutions. Egypt's score in the 2015 Corruption Perceptions Index decreased one point compared to the previous year, with a score of 36/100, placing 88th out of 168 countries.⁷⁸ This ranking raises a red flag showing that Egypt is not moving towards combating corruption efficiently. Therefore, it is recommended that all national stakeholders reconsider the Egyptian legal framework that is responsible for ensuring that corruption does not occur. Moreover, stakeholder should also consider the efficiency of the anti-corruption institutions as well as the current national efforts towards eradicating corruption undertaken over the last few years.

Since the revolution in 2011, Egypt has been undergoing a promising period of citizen empowerment. However, in 2016, a survey conducted by Transparency International found that only 20 percent of Egyptians believe that ordinary people can take actions to curb corruption.⁷⁹ A change needs to be made where the citizens of Egypt feel empowered to rise up and lead the battle against corruption through civil action. This section will provide an overview of the Egyptian legal system and framework. It will analyze the civil law framework in order to explore how civil actions against corruption may work in accordance with the current domestic laws.

5.1 Legal Framework

The legal framework in general and some civil law provisions in particular are significant in the understanding of the mechanism to seek compensation resulted from corrupt practices. As stated by the first article of the Egyptian constitution (E.CON), Egypt has a democratic republican system that is based on citizenship and the rule of law.⁸⁰ Belonging to the civil law systems, the Egyptian legal system is based mostly on codified laws. E.CON is the supreme law; every national law can be considered valid and effective only if it is in conformity with the Constitution and its principles. Despite being considered a civil law system, in which judicial precedents are not binding, decisions coming from the higher Courts, such as the Court of Cassation and the Supreme Administrative Court, do express a *de facto* authority in courts decisions.

5.1.1 Constitutional Principles

⁷⁸ *Supra* note 1.

⁷⁹ *Supra* note 27.

⁸⁰ Egyptian (EG) Const. art. 1.

In order to understand the phenomenon of anticorruption within the Egyptian legal framework and judicial system, some constitutional principles must be considered, which are briefly explained herein. According to Article 218 of the E.CON, the State and the competent control agencies and organizations should coordinate their activities in combating corruption. The actual language is as follows:

Article 218: Fighting corruption – *“The state is committed to fighting corruption, and the competent control bodies and organizations are identified by law. Competent oversight bodies and organizations commit to coordinate with one another in combating corruption, enhancing the values of integrity and transparency in order to ensure sound performance of public functions, preserve public funds, and develop and following up on the national strategy to fight corruption in collaboration with other competent control bodies and organizations, in the manner organized by law.”*⁸¹

This article could form the basis for the issuance of an array of anti-corruption and complimenting laws to guarantee the application of constitutional principles.

Furthermore, article 97 of the E.CON states that litigation is a safeguarded, inalienable right for all citizens exercisable through accessible and rapid adjudication system.⁸² This principle may be applied to ensure that each victim of corruption has the ability to seek compensation from the wrongdoers. Also, this article would be a safety net against any law or regulation that could complicate or delay the litigation process for citizens.

Additionally, according to Article 151 of the E.CON, all ratified international conventions that are published in the Official Gazette shall acquire the power of law, without the need for legislative intervention, as long as it does not contradict the provisions of the constitution.⁸³ Therefore, in the next section, it is important to go through the international obligations of Egypt, which are derived from the treaties that Egypt signed and ratified supporting the use of civil actions against corrupt practices.

5.1.2 International obligations

After the Constitution, a source of obligation in taking action against corruption is derived from international agreements or treaties that Egypt has been part of. International agreements not only create obligations that countries must incorporate into their domestic laws but also generate international exposure that has an impact on the reputation of the country in the achievement of the goals set out in those provisions. Egypt signed and ratified the UNCAC

⁸¹ *id.*, art. 218.

⁸² *id.*, art. 97.

⁸³ *id.*, art. 151.

in 2003 and 2005 respectively.⁸⁴ It also signed and ratified the ACAC in 2010 and 2014 respectively.⁸⁵ Therefore, the UNCAC and the ACAC have acquired the power of the law since their publication in the Official Gazette in 2005 and 2015 respectively. As per Article 35 of the UNCAC and Article 8 of the ACAC, in accordance with national law, the Egyptian government should take the necessary measures to ensure the right of entities or persons who have suffered damages as a result of corrupt practice to initiate legal proceedings against the responsible persons and seek compensation. Therefore, an analysis of the anti-corruption national legal framework is provided in the next subsection.

5.1.3 Anti-Corruption's Legal framework

The Egyptian legislator was the initiator in criminalizing all the crimes listed in the UNCAC even before its issuance.⁸⁶ It is worth mentioning that, corrupt conducts are criminalized separately in provisions that form part of a number of laws in particular the Penal Code, the Code of Criminal Procedure, the Illicit Gains Act, and the Anti-Money-Laundering Act different codes in which they are defined and set out their elements of legal liability.⁸⁷ Although, corruption is not defined in the domestic national code, corrupt practices such as bribery are defined.

Also, Egypt's anti-corruption legal enforcement authorities includes several mechanisms and institutions such as the Administrative Control Authority, the Department of Illicit Gains of the Ministry of Justice (MOJ), the Directorate General for Combating Financial Crime of the Ministry of the Interior, the Unit for Combating Money-Laundering and the Financing of Terrorism and a number of specialized prosecutor's offices. Also, Egypt has a National Coordination Committee against Corruption.⁸⁸

Even though, Egypt possesses a large number of laws and institutions to combat corruption, the authorities never pointed to the civil actions as an efficient way to fight corruption. Therefore, in the next subsection, an analysis of the Egyptian civil law is required to understand how the mechanism can be implemented.

⁸⁴ Implementation Review Group Resumed sixth session, ,St. Petersburg, Russian Federation, 3-4 November 2015, Item 2 of the provisional agenda, Review of implementation of the United Nations Convention against Corruption, see: <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1503752e.pdf>, (last visited: July 16, 2016).

⁸⁵ ratification list of the ACAC, see:

<http://www.lasportal.org/ar/legalnetwork/Documents/الفساد/20%لمكافحة%العربي%20%الاتفاقية%20%على%20%التصديق.pdf>(last seen: July 12, 2016).

⁸⁶ Abd el Magid Mahmoud, Anti-Corruption General Rules: In the Light of the United Nations Convention Against Corruption and the Egyptian Criminal Law 218 (2014).

⁸⁷ Implementation Review Group Resumed sixth session, ,St. Petersburg, Russian Federation, 3-4 November 2015, Item 2 of the provisional agenda, Review of implementation of the United Nations Convention against Corruption, see:

<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1503752e.pdf>, (last visited: July 16, 2016).

⁸⁸ *Id.*

5.1.4 Civil Law Treatment

The right to compensation for a person who suffered damages as a result of corruption is recognized in Egypt, both in the light of international and national laws. It is necessary now to see the ways in which such a result can be technically accomplished. Civil action to be compensated from illegal acts are generally applied in one of two ways: (i) action initiated in the criminal court and then referred to the civil court if there are grounds for civil liability after the issuance of the criminal judgment, or (ii) action initiated in the civil court and then transferred on identification of the criminal aspect to the public prosecutor for investigation and then later the criminal court, wherein the civil action is suspended until the issuance of a verdict from the criminal court.

Additionally, the claimant must also be the person actually harmed by fault of the respondent, i.e., the claimant is “the harmed, every harmed, and no one but the harmed”.⁸⁹ This creates great difficulty on civil society or public organization in initiating civil proceedings on behalf of the claimant against the corrupt persons. A proposed solution may be that the NGOs and public organization obtain a legal power of attorney from the victims of corrupt practices to be able to represent them. Also, according to Article 125 of the ECC, any act of fraud or deception practiced by one of the parties or by his representative renders a legal instrument void.⁹⁰

The right of victims of corruption to obtain compensation is not questioned under Egyptian law. Thus, theoretically there is nothing that would hinder the courts from applying the general rules contained in the Civil Code on tort (wrongful act; in Arabic: العمل غير المشروع). Article 163 of the ECC provides the general principles for civil actions to recover losses resulting from illegal acts, which may be applied on the corruption crimes due to the illegal nature of the corrupt conducts. The actual language is as follows:

Article. 163: *“Every fault which causes injury to another imposes an obligation to make reparation upon the person by whom it is committed.”*⁹¹

According to this article, Three elements are required for the liability to arise: (i) a fault (which may be either an act or a failure to act); (ii) damage (*le Prejudice*); and (iii) a causality link between the fault and damage (*La lien de causalite*).⁹² Therefore, corrupt practices can be

⁸⁹ Farouk, Dalia and Youssef, Lamia, Egypt, Climate Change Liability: Transnational Law and Practice 263 (Cambridge 2011).

⁹⁰ EG Civil Code, article 125, 1948.

⁹¹ *Id.*, art. 163).

⁹² Al- Sanhuri, Abed Al- Razeq, Al- Waseet (mediator) in explaining the New Civil Code 656 (Al-Nahdah Publication House 2006)

tackled from a private law perspective if the plaintiff is able to prove the damage, unlawfulness of the act, and the link between the damage and the corrupt unlawful act. Since the element of liability are required to compensate for any harm due to corrupt practices. Therefore, an analysis of the elements of liability is provided in the next subsection for the understanding of the requirements of compensation within the elements of liability in accordance to the Egyptian law.

5.1.4.1 The elements of the liability:

The above mentioned elements of civil liability are worth further analysis in order to have a comprehensive overview of the technical requirements that should be met if one is willing to claim compensation for damage suffered. The Egyptian legal doctrine and jurisprudence have added further significance to the liability provisions that can now be explained as follows:

(i) Fault:

In general, fault refers to when someone has not observed a certain standard of care.⁹³ Egyptian courts apply the objective test while adopting the normative approach which evaluates the reasonable behavior of persons in similar circumstances.⁹⁴ This test invoke questions such as: what would the wrongdoer, as a reasonable person know about the wrongfulness of the act? What are the necessary measures to avoid it? The Egyptian doctrine concludes that the fault exists when there is an objective element (material) and a subjective element (consciousness)

1. Objective Element (Material)

The Egyptian Legal doctrine and the courts adopt the objective element in testing the wrongful act by focusing on the conduct of the wrongdoer not his/her personal status.⁹⁵ This implies comparing the wrongful act to the act of a reasonable person, i.e. a person who is neither the most careful nor the most negligent. In Roman law this is known as the conduct of the head of a family in charge of his family (*bon père de famille*). Thus, if the act was not divergent from the act of a reasonable person, then it is not wrongful.⁹⁶

In exceptional situations, the ECC may permit the unlawful act or reduce or eliminate its legal effect. These cases are (a) legitimate defense (*état de défense légitime*); (b) performance

⁹³ Walaa Arakeeb, Theory of obligation under Egyptian Civil Code 16 (Abaza Publication House 2008)

⁹⁴ *Id.*

⁹⁵ *Supra* note 92, 662.

⁹⁶ Bernard-Maugiron, Nathalie and Baudouin Dupret. 2002. *Egypt And Its Laws 10*. London: Kluwer Law International.

of an order issued by an official superior (*execution d'un ordre emanant d'un superieur hierarchique*); and (c) necessity (*état de necessité*).

2. Subjective Element (Consciousness)

The Egyptian legal doctrine and courts also adopt the subjective element in testing fault which is mainly related to the person's culpability. Article 164 of the ECC stipulates that every person in possession of discretion is responsible for their unlawful acts.⁹⁷ In principal, a natural person will not be liable for their wrongful acts unless they are conscious of their acts or negligence. In most corruption crimes, there would be no application of this article as the corrupt practices are usually done by people who possess discretionary powers. On the other hand, a juristic person may be liable, in case the legal representative committed the unlawful act during the legal representation.⁹⁸

(ii) Damage (*le Prejudice*):

Damage is a general requirement for liability and Egyptian case law has developed some requirements for damages, which include that the damages were suffered in a legitimate interest and that it was certain, direct, and personal to the claimant.⁹⁹

The material damage requires two elements to occur; financial damage which includes damages against the victim's financial right or interest or/and damages which may affect the financial capacity of the victim, and that the damage needs to be certain. Therefore, in principle, material damages include *loss suffered* and *missed gains*, which include the total or partial loss of a chance. Claims will not be veiled unless the damage caused is actual and not potential damage that could occur in the future.¹⁰⁰

(iii) A causality link between the fault and damage (*La lien de causalite*)

The causal link between the fault and the damage is the third element of liability, which is independent of the other elements. There must be a direct link between the act and the loss or damage suffered, and in the event that this crucial link is missing, there will be no liability.¹⁰¹ An example may be useful to clarify its meaning: a construction bidding went to "X" company, due to corrupt practices. "Y" and "Z" were bidders and lost the bidding. "Y" lost due to the

⁹⁷ *Supra* note 90, art. 164.

⁹⁸ *Supra* note 93, 24.

⁹⁹ *Supra* note 92, 656.

¹⁰⁰ *Id.*

¹⁰¹ *Id* at 750.

failure to submit the administrative fees on time. This failure was due to procedural error in the bidding process, while “Z” lost due to the corrupt practice, because he would be the one to receive the bidding if there were no corrupt practices in the bidding process. In this case, only “Z” can claim a compensation for the harm caused by the corrupt bidding due to the causal link between the corrupt practice (wrongful act) and the suffered loss (damage). On the other hand, there is definitely a lack of causality between wrongful act and damage in the case of “Y”. Egyptian courts and doctrines apply the “*conditio sine qua non*” test, which means that under certain conditions the damage would not have occurred.¹⁰²

According to Article 165 of the ECC, there are cases where there is no liability due to lack of causation or due to foreign causes of the damage, such as the fault of the victim, a third party in contributing to the damage, or force majeure events. In the case of the fault of the victim, it does not guarantee the amnesty for the wrongdoer, but in this situation, the court will decide which fault is harsher; the fault of the victim or the fault of the wrongdoer and the responsibility will lie upon the faultier act.¹⁰³ This is a valid point because it impairs corrupt persons to gain impunity if the victim contributed in the damage caused to them. This happens especially if the corrupt person enjoys powerful authorities and may play a role in involving the victim in the corrupt practice itself.

After going through the elements of liability, an analysis of the legal consequences of the proof of the civil liability will be cleared in the next subsection in order to understand the value of the elements of the liability in the compensation proceedings.

5.1.4.2 Effects of the Liability:

The legal consequence of the presence of the required elements of the tortious civil liability raise an obligation of compensation upon the defendant. The following articles of the ECC govern the general principles for providing compensation based on the evidence of civil liability. The articles actual language is as follows:

Article 169 – “When several persons are responsible for an injury, they are jointly and severally responsible to make reparation for the injury. The liability will be shared equally between them, unless the judge fixes their individual share in the damages due.”¹⁰⁴

Article 170 – “The judge shall decide, in accordance with the provisions of articles 221 and 222 and in the light of the circumstances, the extent of the damages for the loss suffered by the victim. If the judge is not in a position at the time of the judgment

¹⁰² *Supra* note 93, 30.

¹⁰³ *Supra* note 92, 750.

¹⁰⁴ *Supra* note 97, Art. 169.

to fix definitely the extent of the injury, he may allow the victim a delay within which he may claim reassessment of the damages."¹⁰⁵

This is an interesting point specifically because there are several people involved in the corrupt act, as it grants the plaintiff the privilege of receiving compensation from any of the wrongdoers without the burden of filing a case against each individual wrongdoer. However, there are conditions which must be fulfilled: (i) each wrongdoer must have committed a fault; (ii) each fault must have caused harm; and (iii) the harms resulted from each fault.¹⁰⁶ The third condition is difficult in applying because the applicant must show that the harm done is the same between all the wrongdoers.

Furthermore, the court decides the method of payment, according to Article 171 of the ECC, which states that, in compliance with the practicality and circumstances of each case, such as payment by installments, periodical payment, restoration of the original position, or by the performance of something that has a connection with the unlawful act.¹⁰⁷ However, it must be noted that the main compensation awarded by the court is usually financial and the exception is compensation through performance or restoration.¹⁰⁸

The judge fixes the amount of damages in accordance with Article 221 of the ECC, including the losses suffered and profits of which the claimant has been deprived.¹⁰⁹ Also, the compensation for moral injury is defined according to article 222 of the ECC. The decision to establish the amount of compensation is fully granted to the civil court, without any supervisory power from the cassation court in the case of appeal.¹¹⁰

Finally, the decision of the judge is based on his/her own belief to the evidence presented plaintiff, which plays the main role in the court's decision, thus a glance through the burden of proof and evidence is required to understand more the process of civil litigation.

5.1.4.3 Burden of Proof

The two main obstacles in civil actions against corruption is the burden of proof and evidence., This section briefly analyzes the principles on burden of proof within the Egyptian legal framework. As mentioned in the ECC, the burden of proof lies on the claimant who has to provide the court with any form of evidence in order to prove it.¹¹¹ The claimant may prove

¹⁰⁵ *Id.*, Art. 170.

¹⁰⁶ *Supra* note 89, 265.

¹⁰⁷ *Supra* note 90, article 170.

¹⁰⁸ *Supra* note 92, 828.

¹⁰⁹ *Supra* note 97, Art. 221.

¹¹⁰ *Supra* note 92, 832.

¹¹¹ *Id.*

the elements of the liability based on the rules related to the proof regarding civil and commercial matters, detailed in the Egyptian Law of Evidence No. 25 of 1968.

According to the Court of Cassation, the civil court enjoys full discretionary power to weigh out each piece of evidence in accordance with the rules stipulated in the law without any supervisory power from the Court of Cassation in the case of an appeal.¹¹²

The methods of proof, as stated in the law, are written proof, testimony of witness, questioning and cross examining the parties, expert evidence, proof by oath, inspection, and *res judicata*¹¹³. Even though the use of evidence collected during the criminal proceedings is advantageous in civil actions to overcome one of the main obstacles that hinders the efficiency of civil actions against corruption, the civil court is not bound by the criminal courts judgment except in the case of matters that are considered cornerstones for the criminal liability itself.¹¹⁴

Since, the evidence collected during the criminal proceedings may be used in the civil actions, the effects of the criminal judgement on the civil action deserves to be highlighted in this paper to understand the proofing process fully.

5.1.4.4 Effects of the criminal judgment on the civil judgment

Corruption related crimes usually fall under the ambit of criminal prosecution, which means that the cases will be under the jurisdiction of the criminal courts and then referred to the civil court if there are grounds for civil liability after the criminal court issues a judgment. The civil proceedings are suspended until the final judgment from the criminal court regarding the criminal aspect is issued.¹¹⁵

Usually the criminal judgment is made prior to the civil judgment, which results in the civil court being constrained by the judgment of the criminal court.¹¹⁶ In exception cases, the judgment of the civil court is issued prior to the identification of the criminal aspect in front of the criminal court, but this hardly occurs in a corruption case due to the assured criminal nature of corruption crimes.

It is important to note that the civil court is only constrained by the criminal court's decision regarding the facts of the case, not by the legal characterization of the conducts.¹¹⁷ For example, if a car driver accidentally killed a person, the criminal court may consider the driver

¹¹² El Meligy, Osama, Evidence System: A comparison between evidence in Civil and Criminal Code 85. (Al-Nahdah Publication House 2012).

¹¹³ *res judicata*: A case in which there has been a final judgement and is no longer subject to appeal.

¹¹⁴ *Supra* note 92, 809.

¹¹⁵ *Id.* at 656.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

innocent as there is no criminal legal characterization for the drivers' conduct, since the driver did not do anything criminal while he/she was driving. On the other hand, the civil court may consider the driver guilty, due to the presence of the elements of liability from fault, damage, and causality.¹¹⁸

Another important point on which further light should be shed is the exemption granted under Article 107 of the Egyptian penal code. This article states that the giver and the mediator shall be exempt from penalty if they notify the crime to the authorities or admit to the crime even after the bribery has been committed. Even though this article was issued due to practical considerations related to the difficulty of proving bribery crimes and the aim of punishing the public officials, it contributed to the impunity to the givers and the mediators. This provided them with guaranteed amnesty pending the confession of the crime if they were caught by the authorities. Civil action in this case could represent a valid instrument to overcome the criminal system weaknesses - due to a legislative policy that prefers disclosure of bribery acts rather than ensuring their punishment - and imposition a form of responsibility on the wrongdoer by punishing him financially. In case of the issuance of a judgment of innocence of the briber before the criminal court, since he admitted the crime to the authorities, and for the consequent application of the amnesty), this would not hinder civil action being raised. In that case, civil action can be conducted according to the rules of tortious liability, opening a door for the empowerment of the action of private citizens in the fight against corruption.

In conclusion, it is clear that the constraints on the civil judgments are not absolute. The civil court is constrained only to the extent of the approved facts of the case. Even if the criminal court considered the defendant innocent, this would not impede the civil court's ability to compensate the plaintiff if the elements of the liability are present within the facts, law, and circumstances of the case.

VI. Conclusion

Civil actions can serve as a significant deterrent tool against corrupt practices that may contribute in Egypt's national efforts to combat corruption. The aim of this paper is to facilitate the use of civil remedies mechanisms to build a new generation of non-governmental corruption fighters in Egypt.

In some instances, corruption stems from a financial need; therefore, the best way to eradicate such conduct is to tackle the drive behind the corrupt practices. The proposed mechanism would achieve this by compensating victims of corrupt acts within the current

¹¹⁸ *Id.*

domestic legal system in accordance to the international obligations, allowing the state to achieve concrete results against corruption.

The Transparency International survey reflected that a significant amount of people believe that their involvement in combatting corruption would not lead to tangible achievements to combat corruption nationally was disappointing.¹¹⁹ This shows that there is a need to establish and promote a mechanism that would encourage a citizens' role in fighting corruption in accordance with national law. Through this paper, the cost and benefits principle was adopted to raise the awareness that the benefits of resorting from civil actions against corruption are higher than the cost incurred by the victims to undertake such an action. Also, it is apparent that the principle of using civil remedies is an empowerment tool for citizens and civil society organizations to retaliate against corrupt practices and seek compensation.

This paper has identified the nature of the civil remedies to combat corruption, international legal frameworks that backed it, the practical motivations behind it and its legal framework in detail within Egypt. Although, it must be noted that in order to effectively adopt this mechanism, the current legal framework would need to be modified to include several complementary laws such as witness protection laws and information laws.

¹¹⁹ Transparency International, People and Corruption: Middle East and North Africa Survey 2016, see: http://www.transparency.org/whatwedo/publication/people_and_corruption_mena_survey_2016, (Last visited: July 16, 2016).