Fighting corruption through the lens of civil law: the option of civil law remedies*

ANASTASIA SOTIROPOULOU
Dr., LL.M., J.S.D. Yale Law School; Adjunct Professor American College of Greece; Lawyer, Athens Bar Asssociation and NYSBA

Introduction

Although corruption has always been present in the history of mankind, it seems that nowadays countries, and particularly developing ones, are struggling with this scourge more than ever. The vast dimensions of this phenomenon have attracted the massive attention of the world community. According to World Bank estimates, more than one trillion dollars are paid each year in bribes, and this is just a rough estimate of actual bribes paid around the world, not including embezzlement of public funds or theft of public assets.[1] Transparency International, the leading non-governmental organization in the fight

* The present article constitutes an updated abstract of a report on 'Using private lawsuits to recover stolen assets – civil law remedies for corruption' initially submitted within the author's consultancy for the World Bank's Stolen Asset Recovery Initiative (StAR) that contributed to the publication of *Public Wrongs, Private Actions, Civil Lawsuits to Recover Stolen Assets*, in 2015 by StAR. The author would like to sincerely thank Jean-Pierre Brun, Senior Financial Sector Specialist World Bank and StAR, for providing sound advice and invaluable guidance throughout the preparation of the report.

[1] World Bank, *The Costs of Corruption* (Apr. 8, 2004), available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34458~pagePK:34370~piPK:34424~theSitePK:4607,00.html

against corruption, estimates that Mohamed Suharto, the former President of Indonesia, embezzled around US$15 to 35 billion; Ferdinand Marcos, the former President of Philippines, around US$5 to 10 billion; Mobutu Sese Seko, the former President of Zaire, up to US$ 5 billion; Sani Abacha, the former President of Nigeria, around US$2 to 5 billion.[2] In addition, Global Financial Integrity estimates that during the period between 1978 – 2008, Africa lost US$854 billion in illicit financial outflows.[3] The Stolen Asset Recovery (StAR) Initiative launched by both the World Bank and the United Nations Office on Drugs and Crime, assesses that every year developing countries lose approximately US$20 to US$40 billion– an amount that comes up to US$50 to US$100 million per day – due tocorrupt acts such as bribery, embezzlement and misappropriation of property or funds.[4] To grasp the magnitude of these dimensions, consider that it would take US$100 million to pay for the immunization of four million children or connect 250,000 houses to water. Numbers speak for themselves, demonstrating, without doubt, the devastating impact of corruption, signaling at the same time the need to eradicate or at least limit the phenomenon.

Fighting corruption mainly involves the use of criminal law which is found at the center of national and international policies; investigating, prosecuting, adjudicating and punishing corruption-related offenses are usually top priorities in most anti-corruption strategies; in contrast, the use of civil law remedies tends to be overlooked.[5] This, however, does not mean that their importance should be underesti-

[2] Robin Hodess, 'Introduction', in *Global Corruption Report* 11, 13 (Transparency International, 2004).

[3] Global Financial Integrity, *Illicit Financial Flows from Africa: Hidden resource for development*, available at http://www.gfintegrity.org/storage/gfip/documents/_reports/gfi_africareport_web.pdf(2009).

[4] 'Stolen Asset Recovery' (StAR), *Ten Things You Should Know*, available at http://www1.worldbank.org/finance/star_site/ten_things.html

[5] Olaf Meyer, 'The civil law consequences of corruption – an introduction', in Olaf Meyer (ed.) *The Civil Law Consequences of Corruption*, pp. 15, 18 (NOMOS, 2009).

mated. In fact, civil law remedies can prove quite successful in the fight against corruption, since the injured party can recover compensation, or avoid obligations under a contract, while the defendant may be obliged to pay damages and disgorge his/her profits.

This article aims to add a new dimension to the fight against corruption and spur the debate over a topic that has not been systematically studied. It intends to justify the choice of civil law remedies as a credible and effective option for dealing with corruption, especially when criminal law avenues are not available and well adapted to the circumstances of a given case. For these reasons, the article presents, first, the international legal framework on civil law remedies for corruption, focusing on the relevant provisions of the United Nations Convention Against Corruption and the Council of Europe Civil Law Convention Against Corruption. Second, it analyzes the remedies that are available to victims of corruption, such as compensation, restitution and contract voidability or nullity. Third, it examines the categories of persons that have standing to bring civil law claims in corruption-related cases. Fourth, it assesses the advantages of civil law remedies for corruption, while it discusses their limitations and explains how these can be overcome. In order to better understand the use of civil law remedies for corruption in real social settings, the article ends by discussing the case of the former President of Zambia Frederick Chiluba and the civil action that was brought in order to recover misappropriated assets.

International Anti-corruption Instruments that Provide for Civil Law Remedies

The vast majority of anti-corruption instruments emphasize the use of criminal law as the primary weapon in the fight against corruption. Indeed, the United Nations Convention Against Corruption,[6] the

[6] The United Nations Convention Against Corruption was adopted on October 31, 2003, opened for signature from December 9 to 11, 2003, and entered into force on December 14, 2005. By early September 2016, the Convention had 178 parties.

United Nations Convention Against Transnational Organized Crime,[7] the Criminal Law Convention on Corruption of the Council of Europe,[8] the Framework Decision of the Council of the European Union on Combating Corruption in the Private Sector,[9] the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[10] the Inter-American Convention Against Corruption,[11] and the African Union Convention on Preventing and Combating Corruption,[12] all use criminal law as the primary mechanism for the control of corruption.

On the other hand, the civil avenue is generally overlooked, yet, not entirely neglected, as it is addressed in both the United Nations Convention Against Corruption and the Council of Europe Civil Law Con-

[7] The United Nations Convention Against Transnational Organized Crime was adopted by Resolution A/RES/55/25 of November 15, 2000, opened for signature from December 12 to 15, 2000, and entered into force on September 29, 2003. It has been signed by 147 States.

[8] The Criminal Law Convention on Corruption of the Council of Europe was adopted on November 4, 1998, by the Council of Ministers, opened for signature on January 27, 1999, and entered into force on July 1, 2002. It has been ratified by 14 countries, and is also open for ratification by non-European countries.

[9] The Framework Decision of the Council of the European Union on Combating Corruption in the Private Sector 2003/568/JHA of July 22, 2003, deals with both active and passive corruption in the private sector, and posed July 22, 2005, as the deadline for transposition in the legislation of member states. The Framework Decision abolished the 98/742/JHA Joint Action on corruption in the private sector that was adopted on December 22, 1998, by the Council of Europe on the basis of Article K.3 of the European Union Treaty.

[10] The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed on 17 December 1997, entered into force on 15 February 1999 and has been signed by 41 countries.

[11] The Inter-American Convention Against Corruption was adopted by the Organization of American States (OAS) on March 29, 1996, and entered into force on June 3, 1997.

[12] The African Union Convention on Preventing and Combating Corruption was adopted on July 11, 2003, entered into force on August 5, 2006, and has been signed by 48 and ratified by 37 African countries.

vention on Corruption. This section examines the aforementioned legal instruments in more detail. For the most part, these conventions are not self-executing and establish only minimum standards that national legislations must meet. In other words, States Parties are required to enact appropriate legislation in order to comply with their obligations under these Conventions.

1. *The United Nations Convention Against Corruption (hereinafter UNCAC)*

The UNCAC is the lengthiest and most analytical international anti-corruption instrument so far that lays a quite strong framework for countries to adapt their civil law in order to ensure compensation for victims of corruption. Article 35 of the Convention provides for the right to obtain compensation when a person or entity has suffered damage as a result of corruption. States parties are, thus, required to take measures and establish appropriate mechanisms in order to ensure that entities or persons that have suffered damage as a result of an act of corruption have the right to initiate legal proceedings in order to obtain compensation.[13] This provision is mandatory and States Parties have the obligation to take legislative or other measures in order to ensure compliance with the Convention. In addition, under Chapter V on Asset Recovery, article 53 requires States Parties to ensure in their jurisdictions that other States Parties have legal standing for claiming misappropriated assets and initiating civil actions to recover illegally obtained and diverted assets.

2. *The Council of Europe Civil Law Convention on Corruption (hereinafter Civil Law Convention on Corruption)*

This Convention is the sole international anti-corruption instrument that deals exclusively with civil law issues resulting from corruption. The Convention provides for effective remedies for persons who have suffered damage as a result of corruption. Article 1 requires States Parties to implement in their domestic legislation principles and rules that

[13] United Nations [UN], Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption,* at § 458-461 (2006).

will enable persons who have suffered damage as a result of corruption to defend their rights and interests, including the possibility of obtaining damages.[14]

By providing the right to claim compensation, these Conventions expect that corruption will no longer be considered as a victimless crime. The international community has taken action and is moving forward through multilateral agreements in order to ensure the rights of corruption victims. In fact, their participation in the broader sanctioning process has improved the dynamic of anti-corruption strategies.[15]

Types of Remedies

As a general rule, civil law remedies for persons who have suffered loss as a result of corrupt acts include compensation for damages, restitution, and contractual nullity or voidability.

1. *Compensation*

As we saw in the previous section, the right to obtain compensation for damages is provided in both the UNCAC (article 35) and the Civil Law Convention on Corruption (article 1). The latter, provides in article 3 the right of persons to initiate an action in order to obtain full compensation for damage. In this action, the plaintiff has to prove according to article 4: *i)* that the defendant committed or authorized the act of corruption, or failed to take reasonable steps to prevent it, *ii)* the occurrence of damage, as well as *iii)* the causal link between the corrupt behavior and the damage. The damage must be sufficiently characterized with regard to the particular victim.[16] A causal link must exist between the act of corruption and the damage that was suffered by the person who seeks compensation. For instance, a causal link exists, in

[14] Council of Europe [CoE], *Civil Law Convention on Corruption Explanatory Report*, at § 26 (ETS No. 174).

[15] Abiola Makinwa, 'Researching civil remedies for international corruption: the choice of the functional comparative method', 2(3) *Erasmus L. Rev.* 331, 348 (2009).

[16] CoE, *Explanatory Report*, *supra* note 14, at § 43.

the case of a competitor who demonstrates that he/she would have been awarded the contract but for bribe. In contrast, there is no causal link in the case of a competitor who incurred medical expenses because of depression due to the loss of a business deal.[17] Nevertheless, States are allowed to apply wider standards in their domestic legislation.[18]

According to article 6 of the Civil Law Convention, the plaintiff's right to full compensation may be reduced or even disallowed in cases of culpable contributory negligence.[19] The judge evaluating the victim's behavior may even decide that the plaintiff does not deserve any compensation.[20] Hence, an employer may be accused of culpable behavior if he/she leaves absolute responsibility to his/her employees without exercising any control at all.[21] In addition, an employer's claim for compensation may be reduced or rejected, if after having discovered a corrupt act, he/she failed to take the necessary measures to avoid repetition of similar incidents.[22]

The object of awarding compensation for damages is to address the monetary loss suffered by the victim as a result of the tortfeasor's act or omission. The basic rule for the determination of damages in corruption cases provides that the victim must be placed as much as possible in the circumstances in which he/she would have been but for the corrupt act that caused the damage. Therefore, all expenses or lost profits caused by an act of corruption must be compensated. Compensation for damage suffered depends on the nature of the damage, whether material or non-pecuniary. Material damage is compensated financially, whereas non-pecuniary loss may be compensated by other means, such as the publication of a judgment.[23] According to article 3

[17] Wolfgang Rau, 'The Council of Europe's civil law convention on corruption', in Olaf Meyer (ed.), *The Civil Law Consequences of Corruption* 21, 25 (NOMOS, 2009).

[18] CoE, *Explanatory Report*, *supra* note 14, at § 45.

[19] *Id*. at §§ 52, 53.

[20] Rau, *supra* note 17, at 25.

[21] CoE, *Explanatory Report*, *supra* note 14, at § 57.

[22] *Id*. at § 58.

[23] CoE, *Explanatory Report*, *supra* note 14, at § 37.

paragraph 2 of the Civil Law Convention, compensation may cover material damage, loss of profits, and non-pecuniary loss. Material damages refer to the actual reduction in the economic situation of the person who has suffered the damage. Loss of profits represents the profit that could reasonably have been expected but was not gained due to corruption. Non-pecuniary loss is related to the losses that cannot be immediately calculated, as they do not amount to a tangible material economic loss.[24] An example of non-pecuniary loss is the reputational damage sustained by a competitor who has been defrauded. This kind of loss may be compensated financially or by the publication of a judgment at the cost of the defendant.[25]

2. *Restitution*

A claim for restitution is different from a claim for damages, since it does not aim at compensating the claimant for a harm that he/she has suffered. The purpose of restitution is to restore a person "to his or her original position prior to loss or injury, or […] the position he/she would have been, had the breach not occurred."[26] Its objective is, thus, to divest the defendant of the benefit he/she received, and prevent unjust enrichment.[27] Restitution is another effective remedy that can be used in the fight against corruption, since it attacks its economic base by forcing the defendant to disgorge his/her profits. It should be noted, however, that restitution should preferably be used in combination with other remedies, as it might be inadequate by itself to deter corruption; simply requiring bribers or bribed agents to disgorge ill-gotten profits does not have a strong deterrent effect.

[24] *Id*. at § 38.

[25] *Id*.

[26] *Black's Law Dictionary*, at 1313 (1990 ed.).

[27] Donald Harris, David Campbell & Roger Halson, *Remedies in Contract and Tort* 231 (2nd edn, Cambridge: Cambridge University Press, 2005).

3. *Contractual nullity and voidability*

It is generally accepted that the contract between the briber and the bribed agent is null and void as its purpose is to funnel bribes.[28] According to article 8 paragraph 1 of the Civil Law Convention, contracts or clauses of contracts providing for corruption, shall be null and void.[29]

While the invalidity of the contract between the bribed agent and the briber is beyond dispute, there exist various views in theory and jurisprudence with regard to the consequences of bribery for the main contract, that is, the one entered to as a result of the bribe. This contract may be completely null and void, or voidable, or it may be maintained by adjusting the obligation and counter-performance equilibrium.[30] Both the Civil Law Convention on Corruption and the UNCAC agree that the presence of corruption should affect the validity of the main contract. The former provides in article 8 paragraph 2 that a contract which has been undermined by corruption, can be declared by the court void. Alternatively, parties may also choose to abide by the contract.[31] The latter provides in article 34 that corruption may be considered as a factor for annulling or rescinding a contract.

Who Has Standing?

A wide array of parties who have a specific legal interest in a case of corruption are entitled to bring an action before civil courts. The pool of potential claimants includes States, principals/employers, competi-

[28] Olaf Meyer, *The Formation of a Transnational Order Public against Corruption – Lessons for Arbitral Tribunals,* at 9, paper prepared for the Bellagio Workshop (June 13-17, 2010).

[29] This is also the rule in the list of transnational principles "TRANS-LEX", published by the Center of Transnational Law. Under IV.7.2(a): "Contracts based on or involving the payment or transfer of bribes ('corruption money', 'secret commissions', 'pots-de-vin', 'kickbacks') are void". Available at http://www.trans-lex.org/output.php?docid=938000. Cited by Meyer, *supra* note 28, at 9.

[30] Meyer, *supra* note 28, at 11.

[31] CoE, *Explanatory Report*, *supra* note 14, at § 64.

tors and civil society organizations.

1. *States*

States' right to bring a civil action before foreign civil courts seeking the recovery of stolen assets has been recognized in the above mentioned international anti-corruption instruments. More specifically, article 53 of the UNCAC requires States Parties to have in place a legal regime allowing other states to bring civil actions for asset recovery, or to intervene, or appear in courts to enforce compensation claims. This is an innovative provision, as it departs from the notion that proceeds from corruption can only be recovered on confiscation grounds. Additionally, States are also allowed to initiate civil proceedings under the Civil Law Convention on Corruption, since the word "persons" who have suffered damage as a result of corruption, provided for in article 1, covers both natural and legal persons, or other bodies existing in national legal systems, which are able to engage in litigation.

2. *Principals/employers*

The most frequently-used model to explain corruption, and particularly its basic form bribery, is the principal-agent model which involves three parties: the principal, the agent who acts on behalf of the principal, and the client. An agency relationship could be characterized as a contract under which the principal assigns the agent the performance of a service on his/her behalf and delegates him/her the necessary decision-making power. By accepting the bribe, the agent no longer solely represents the principal's interests alone but undertakes to serve the client's as well, ensuring that the latter is either preferred to potential competitors or receives a better contract. The agency relationship also applies to employment contracts. If the employee violates the fiduciary duty owed to his/her employer, a well-recognized principle in most common law systems, the employer, as a victim, may raise a claim against him/her on the basis of the breach of the employment contract, and the duty of loyalty owed. The briber may also be held liable to the principal.

3. *Competitors*

Another category of potential claimants consists in non-bribing competitors, who can also claim damages for a business deal they lost due to the bribery of the awarding agent by another competitor. In practice, however, it is difficult to determine who has suffered a direct injury due to an act of bribery. In other words, it would be difficult to prove that, but for the bribe, the competitor would have been awarded the contract. The greater the number of potential competitors, the more complicated it is to prove the causal relationship. Despite the concerns associated with bringing such claims, competitors have incentives to sue and in fact they are doing so.[32]

4. *Civil society*

Under the Civil Law Convention on Corruption, States may allow a person other than the one who has suffered damage to bring a claim for compensation. Likewise, under the UNCAC, States Parties could recognize in practice asset recovery claims initiated by public international organizations as the legitimate owners of property, although such claims are not explicitly mentioned in article 53.[33] Chambers of commerce may also be permitted to bring civil actions or restraining orders in cases involving corruption.

---

[32] In the United States, civil suits brought by competitors who were not successful in being awarded a foreign government contracts are common. In the case of Kirkpatrick & Co. v. Environmental Tectonics, Environmental Tectonics Corporation was an unsuccessful bidder that brought RICO, Robinson-Patman Act and state anti-racketeering actions, claiming damages from competitors that had allegedly obtained a construction contract from the Nigerian government by bribing Nigerian officials. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. 493 U.S. 400, 110 S.Ct. 701, (U.S.N.J.,1990).

[33] That was the case of the "Bien Mal Acquis" in France. The French Chapter of Transparency International was a civil party in criminal proceedings brought against three presidents, namely, Denis Sasssou N'Guesso (Congo-Brazzaville), Omar Bongo-Ondimba (Gabon) and Teodoro Obiango Mbasogo (Equatorial Guinea). This case constitutes an excellent example of civil society organizations' participation in corruption trials as civil parties.

Advantages and Limitations of Civil Law Remedies

In the fight against corruption, the use of criminal or civil law remedies serve different primary goals: criminal law expresses society's disapproval of the corrupt act and aims at punishing the perpetrator, while civil law focuses on victims' interests and aims at compensation and restitution.[34] This section explores the advantages and the limitations of the use of civil law remedies in corruption cases.

For starters, it is worth mentioning that civil law remedies may be considered a credible option in the fight against corruption due to the broad standing to bring civil law claims. The pool of potential plaintiffs is rather large, including states whose public resources have been misappropriated by corrupt leaders, politicians and high-level government officials; employers whose companies have suffered loss because their employees engaged in corrupt or fraudulent activities; competitors who have lost business deals as a result of secret payments by their rivals; civil society organizations and chambers of commerce. It is believed that victims who have suffered losses from corruption may be more determined to bring the offender to justice than an employee of a state prosecution authority who lacks any personal involvement. In fact, in countries where prosecution authorities are not sufficiently staffed, financially supported and adequately trained in handling corruption-related offenses, the pursuit of justice through civil law procedures may be more effective.[35]

Civil law remedies against corruption can be an easy and effective choice when criminal law means are not available. Indeed, there are cases where a criminal prosecution may not be initiated or continued, when, for example, the perpetrator has died, or has escaped the jurisdiction, or is protected by immunity, or when the evidence is weak.[36] In

[34] David Kraft, 'English private law and vorruption: dummary and duggestions for the development of European private law', in Olaf Meyer (ed.), *The Civil Law Consequences of Corruption* 207, 207 (NOMOS, 2009).

[35] Meyer, *supra* note 5, at 17.

[36] UNCAC Legislative Guide, *supra* note 13 at § 708; John C. Coffee, Paradigms

addition, civil law remedies can be a good alternative when the offender is a corporation and it is difficult to find the particular individual behind the corrupt act.[37] Since the remedies that are available in a civil trial are multiple, including compensation, restitution, disgorgement of profits and cancellation of contract, they may increase chances of achieving effective deterrence by attacking the economic base of criminality and ensuring that crime does not pay.

Civil law remedies also have procedural advantages. In contrast to a number of procedural guarantees recognized in criminal trials, such as proof of guilt beyond reasonable doubt and *in dubio pro reo*, only moderate safeguards apply in civil proceedings. Standards of proof are lower, such as proof on the balance of probabilities, while discovery is broader. In addition, the privilege against self-incrimination, which is fundamental in criminal proceedings, does not apply in civil ones. While the judge or the jury in a criminal trial cannot draw adverse inferences from a defendant's decision to invoke this privilege, it has been suggested that in a civil trial, a defendant's failure to answer questions during discovery can be used against him/her by a skillful civil plaintiff.[38]

While the advantages of civil law remedies justify the interest in the topic, there are also several limitations. A major obstacle to the fight against corruption through the means of civil law is the lack of political will which may include unwillingness to initiate a civil action, or cooperate with foreign authorities.[39] This is usually the case when those

lost: the blurring of the criminal and civil law models and what can be done about it', 101(8) *Yale L. J.* 1875, 1887 (1992).

[37] Laura Kerrigan, 'The decriminalization of administrative law penalties – civil remedies, alternatives, policy, and constitutional implications, 45 *Admin. L. Rev*. 367, 379-380 (1993).

[38] Moscarino George J., Laura Tuell Parcher & Michael R. Shumaker, 'To fisclose or not to fisclose: if that is the question what is the answer?, 7(4) *J. Fin. Crime*, 308, 312 (2000).

[39] OECD and StAR, 'Tracking anti-corruption and asset recovery commitments, a progress report and recommendations for action', at 45 (2011), available at http://star.worldbank.org/star/publication/tracking-anti-corruption-and-asset-

who diverted the assets are still in power and will oppose the idea of asset recovery.[40] In addition, the cost of tracing assets and the legal fees in obtaining court orders can be high and difficult to predict in advance.[41] Length of proceedings and unexpected delays associated with formalities, processing times and appeals can also increase costs.[42] Victims of corruption might, thus, hesitate to bring civil actions afraid of losing time and money.[43] Another obstacle could be the lack of investigative tools such as access to intelligence that is available to public authorities, as well as low level of expertise, especially in developing countries. Moreover, ineffective legal frameworks that do not provide for the use of civil law remedies against corruption, as well as lack of mutual legal assistance conventions or agreements turn cross-border cooperation impossible.

Most importantly, since corruption is by its nature secretive, plaintiffs may encounter great difficulties in obtaining the evidence required to prove the bribe, the corrupt deal, the amount of damages or the causal link. Furthermore, bank secrecy laws might prohibit civil plaintiffs from acquiring information necessary to meet burdens of proof, while they might only allow disclosure of bank records upon consent to the release.[44] The bank customer's right to confidentiality is usually protected in national statutes, while in some countries the right to pri-

---

recovery-commitments.

[40] Basel Institute on Governance, 'Capacity building in asset recovery', at 5 (2011), available at https://www.baselgovernance.org/sites/collective. localhost/files /publications/capacity_building_in_asset_recovery.pdf.

[41] *Id*.

[42] Brun Jean-Pierre, Larissa Gray, Clive Scott & Kevin M. Stephenson, *Asset Recovery Handbook, A Guide for Practitioners,* at 26, The World Bank (2011), available at https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf

[43] Council of Europe, Committee of Ministers, Multidisciplinary Group on Corruption, Working Group on Civil Law, *Feasibility Study on the Drawing of a Convention on Civil Remedies for Compensation for Damage Resulting from Acts of Corruption* (1996).

[44] Moscarino, *supra* note 38, at 307.

vacy is granted constitutional protection. Banks are, thus, expected not to disclose to third parties information about their customers' accounts and transactions.[45]

These difficulties could be met by enacting legislation that provides for civil law remedies as a route for dealing with corruption and encouraging the adoption of instruments that will facilitate cooperation with other states. Litigation costs can be addressed by breaking them down into different stages and using the money recovered in one action to fund the next one. Lack of experience and expertise can be met with trainings and expert meetings in order to ensure familiarity with the civil process and improve the skills that are required when dealing with corruption cases. With regard to bank secrecy laws, states need to adopt appropriate mechanisms in order to overcome any obstacles that may arise out of their application.[46]

The Case of Frederick Chiluba

Recent success stories of asset recovery via civil proceedings demonstrate that the use of civil law remedies in the fight against corruption cannot be overlooked. This section offers a better understanding of the notorious case of Frederick Jacob Titus Chiluba and the civil action that was brought by the Attorney General of Zambia for and on behalf of the Republic of Zambia before British courts.

Frederick Chiluba served as the President of Zambia from 1991 to 2002. In February 2003, he was charged along with his former intelligence chief, Xavier Chungu, and several former ministers and senior officials, with 168 counts of theft of more than $40 million, at a time when the vast majority of Zambians were struggling to live on $1 a day. The allegations involved assets that were diverted from the Ministry of Finance into an account held at the London branch of the Zambia

[45] International Center for Asset Recovery, *Tracing Stolen Assets: A practitioner's handbook*, at 33, Basel Institute on Governance (2009), available at https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing_web-version_eng.pdf

[46] See Article 40 of the UNCAC.

National Commercial Bank (Zanaco) between 1995 and 2001. The Zambian government claimed that the account was used to meet Chiluba's and Chungu's personal expenses while the latter argued that the account was used by Zambia's intelligence services to fund operations abroad.[47]

The Attorney General of Zambia for and on behalf of the Republic of Zambia brought a civil case against Chiluba and nineteen of his associates to the British civil courts to recover sums that were transferred by the Ministry of Finance between 1995 and 2001.[48] The Attorney General of Zambia acknowledged that some sums were transferred in order to pay debts owed by the Government, but most of them were not used for that purpose.[49]

The action was brought in London for a number of reasons: First of all, significant defendants were based in London and large amounts of the allegedly stolen money were passed through accounts held by them onward to other destinations both in Europe and elsewhere.[50] Second, defendants had a strong nexus with London, since they were both Zambian based and UK based.[51] Third, bringing the action to British Courts instead of Zambian ones, would allow orders to be enforced.[52] Fourth, Zambia lacked any bilateral or multilateral agreements, procedural safeguards, capacity and experience necessary to collect evidence and enforce confiscation orders across Europe.[53] Last, most of the funds diverted from Zambia had passed through law firms and bank accounts in the UK.[54]

---

[47] Brun Jean-Pierre *et al.*, *Public Wrongs, Private Actions, Civil Lawsuits to Recover Stolen Assets*, StAR (2015) available at http://star.worldbank.org/star/sites/star/files/9781464803703_0.pdf

[48] Attorney General of Zambia for and on behalf of the Republic of Zambia (Claimant) and – Meer Care & Desai (a firm) & Ors [2007] EWHC 952, at § 1.

[49] *Id*.

[50] *Id.* at § 15.

[51] *Id.* at § 16.

[52] *Id.*

[53] Brun, *supra* note 42, at 16.

[54] *Id.* at 17.

The case fell into 3 distinct parts: The first claim arose out of the transfer of about $52,000,000 from Zambia to a bank account allegedly operated outside ordinary governmental processes, the Zamtrop Account, held at Zambia National Commercial Bank Limited in London ("The Zamtrop Conspiracy"). The second claim was associated with a UK registered property company called MOFED Ltd owned by the Zambian government ("MOFED Claim") and related solely to the Fifth Defendant Atan Shansonga. The third claim related to payments of about $20,000,000 made by Zambia pursuant to an alleged arms deal with Bulgaria and paid into accounts in Belgium and Switzerland while at least some of those funds were traced in London ("The BK conspiracy").[55]

The defendants in the case fell into 3 categories: The "Zambian defendants" including Chiluba, the "participating defendants" who fully participated in trial, and the "non-participating defendants" who did not take part in the trial.[56] The Zambian defendants did not participate in the trial. Their participation earlier in the action was in order to seek dismissal of the action claiming that the trial should be postponed until the conclusion of criminal proceedings in Zambia and that they could not attend proceedings in London due to the terms of their bail. The first challenge was dealt with the prohibition of the release or use of any material revealed in the civil trial. The second challenge was addressed by sitting in Zambia and hearing the evidence of the Zambia based defendants.[57] Although the defendants challenged the decision to make the ring fencing order, it was never suggested that the proceedings were inappropriately brought in London.[58]

The Court, after considering all the evidence and submissions of the

[55] *Id*. at § 2.

[56] Attorney General of Zambia for and on behalf of the Republic of Zambia (Claimant) and – Meer Care & Desai (a firm) & Ors [2007] EWHC 952, Executive Summary § 6.

[57] *Id.* at §§ 8-14.

[58] Attorney General of Zambia for and on behalf of the Republic of Zambia (Claimant) and Meer Care & Desai (a firm) & Ors [2007] *EWHC* 952, at § 27.

defendants found them liable in tort. In particular, according to the Court's Judgment, the Zambian defendants had conspired to misappropriate $25,754,316 under the Zamtrop Conspiracy and $21,200,719 under the BK conspiracy.[59] The defendants were held liable for the value of misappropriated assets plus damages. The most serious revelation in this case was "the cynical and unjustified misappropriation of funds for the private purposes of Government officials."[60] However, as far as the criminal proceedings are concerned Chiluba was eventually acquitted in Zambia.

Concluding Remarks

Despite the boom in corruption and anti-corruption literature and research that has been noticed during the last two decades, the topic of civil law remedies has not been systematically addressed. However, this article has demonstrated that civil law remedies can prove a credible option to deal with corruption, especially where criminal law means are unavailable or inadequate. Civil law is rich in remedies, as it offers compensatory damages, and restitution, while it provides for invalidity and voidability of a contract. The right of persons who have suffered damages as a result of corruption to seek civil redress is recognized both on national and international level, while in recent years, national courts have been dealing with civil actions brought by rejected bidders and betrayed employers. Anti-corruption strategies should therefore examine the relationship between criminal and civil law remedies that are insufficient to eradicate corruption on their own.

[59] *Id.* at §§ 1120, 1132.
[60] *Id.* at § 57.