Symposium on "Supranational Responses to Corruption"

organized by ASIL's Anti-Corruption Law Interest Group, the World Bank's Office of Suspension and Debarment (OSD) and the OECD's Anti-Corruption Division

"The importance of granting legal standing to NGOs in corruption proceedings"

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I. Introduction

"*Paris, January 17, 2022 – A judicial investigation has been opened by the Luxembourg justice system following the complaint filed by the NGO Sherpa and the Collectif des Victimes des Pratiques Frauduleuses et Criminelles au Liban in December 2021. Given the terrible crisis in Lebanon and the investigations opened in France and Switzerland, the two associations expect the Luxembourg courts to identify and prosecute those responsible for the financial offences denounced*."[3]

This press release published on the Sherpa NGO's website on 17 January 2022 may at first seem unimportant, but in fact it reflects the considerable progress made in the fight against corruption by granting civil society an active role in the judicial process.

This is particularly noteworthy as the fight against corruption is often undermined by political and legal obstacles: a lack of political will to pursue corrupt actors, as well as the high legal threshold to start legal actions and for the proceeds of corruption to be forfeited and returned to the victims of corruption. The fight against corruption is also traditionally a State-to-State matter, generally requiring the looted State to prosecute offenders and recover the proceeds of corruption. However, if no such legal action is put in motion, be it for a lack of political will or lack of means, corrupt actors may go unpunished, and the proceeds of corruption remain at their free disposal.

The fight against corruption is a necessary part of the global fight to protect human rights. It requires extensive skills and knowledge in the human and social sciences and an understanding of the terrain in terms of cultural, social and economic backgrounds. In 2015, the Human Rights Council Advisory Committee prepared a report highlighting the widespread impact of corruption on the enjoyment of human rights, in particular on the enjoyment of economic and social rights, such as the right to work, the right to food, the right to housing, the right to health, the right to education, the right to public services, the right to development, the principle of non-discrimination, as well as civil and political rights, such as the right to a fair trial or the right to participate in public life.[4] It has now been established that there is a close link between the most serious blood crimes

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[3] Sherpa, A judicial investigation is opened in Luxembourg to shed light on the ill-gotten gains of Lebanese leaders, available at: https://www.asso-sherpa.org/a-judicial-investigation-is-opened-in-luxembourg-to-shed-light-on-the-ill-gotten-gains-of-lebanese-leaders (17.01.2022).

[4] Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, 5 January 2015, A/HRC/28/73.

(crimes against humanity, war crimes, torture, etc.) and monetary crimes, which result from systematic criminal activity at the highest levels of power. Such complex issues can only be partly addressed by States, all the more so when the looted State rests on fragile institutional foundations or is governed by a kleptocratic regime. In such a context, civil society serves as a vital and unequaled force of accountability. Rather than excluding them from the fight against corruption, States should acknowledge the importance of NGOs active in the fight against corruption and give them the procedural means to lead judicial actions in corruption cases.

To make our case, we begin by recalling the rights of kleptocrats' victims, which highlights the need to revisit the State-to-State approach in the fight against corruption (II). Taking the examples of Switzerland (III) and France (IV), we then demonstrate the practical efficiency of the NGOs' action in combating corruption (V) and, in conclusion, the necessity of granting legal standing to NGOs in corruption proceedings (VI).

II. The rights of kleptocrats' victims

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power enshrines rights protected under the international legal order.[5] In particular, these principles enshrine the right of access to judicial proceedings[6] as well as the right to obtain compensation for the damage suffered,[7] both essential to the recognition of victims.

Regarding the right of access to justice, these principles specify that States should, inter alia, establish and strengthen judicial mechanisms enabling victims to obtain redress through prompt, fair, inexpensive and accessible procedures.[8] To ensure that these rights are not ignored, victims must be informed of their rights to seek redress through these means.[9]

Access to justice should not remain theoretical but should lead to obligations on the part of perpetrators to make fair reparation to victims, their families or dependants, including restitution of property, compensation for harm or loss, reimbursement of expenses incurred as a result of the victimization and restoration of rights.[10] Where public officials or other persons acting in a (quasi-) official capacity have committed a criminal offence, the victims must receive restitution from the State to which the perpetrators belong.[11] The Basic Principles of Justice for Victims also recommend that States provide reparations for victims of abuse of power, including restitution and compensation.[12] In the case of serious human rights violations, the Basic Principles on Remedies and Reparation require States to investigate and take action against those responsible and, where

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[5] United Nations, General Assembly, Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly, of 29.11.1985, A/RES/40/34 (cited: "Basic Principles of Justice for Victims"). For a general overview see VAN BOVEN, 19 ff. For an overview of the international sources of victims' rights, see BASSIOUNI, 211 ff.

[6] Principles 4-7 Basic Principles of Justice for Victims.

[7] Principles 8-11 Basic Principles of Justice for Victims; see also SHELTON, 13 ff; VAN BOVEN, 22 ff.

[8] Principles 4 and 5 Basic Principles of Justice for Victims.

[9] Principles 5 and 6 Basic Principles of Justice for Victims.

[10] Principle 8 Basic Principles of Justice for Victims.

[11] Principle 11 Basic Principles of Justice for Victims.

[12] Principle 19 Basic Principles of Justice for Victims.

appropriate, to bring them to justice and punish them, making use of international cooperation and mutual legal assistance for this purpose.[13] The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,[14] updated in 2005, participates in a complementary way in the implementation of a right of access to justice and reparation.

The rights of victims to access justice and reparation are also reflected, in whole or in part, in the provisions of numerous international human rights and humanitarian law instruments[15] including Article 8 of the Universal Declaration of Human Rights, Articles 2(3) and 14 of the International Covenant on Civil and Political Rights, Article 6 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, Articles 13, 14 and 22 of the United Nations Convention against Torture, Articles 12 and 24 of the United Nations Convention for the Protection of All Persons from Enforced Disappearance, Article 3 of the Hague Convention concerning the Laws and Customs of War[16] and Article 91 of Protocol I to the Geneva Conventions. These rights are also enshrined in regional instruments such as the African Charter on Human and Peoples' Rights,[17] the American Convention on Human Rights[18] and the ECHR.[19] The rights of access to justice and reparation are also provided for in the International Criminal Court (ICC) Statute,[20] as well as by more sectoral conventions such as the United Nations Convention against Corruption,[21]

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[13] Titles I-III, V, VII-X Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (United Nations, General Assembly, Res. 60/147, 16.12.2005 A/RES/60/147 (cited: "Basic Principles on Remedies and Reparation")). These obligations are increasingly embodied in the jurisprudence of the major human rights instruments. See e.g. United Nations, Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed on States parties to the Covenant, 29.3.2004, CCPR/C/21/Rev.1/Add.13, paras 15 and 18 ff; United Nations, General Assembly, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, 14.10.2014, A/69/518, which addresses the issue of the right to reparation for victims of gross violations of human rights and serious violations of international humanitarian law; VAN BOVEN, 22 ff; BASSIOUNI, 258 ff, with further references.

[14] United Nations, Economic and Social Council, Report of the independent expert to update the Set of Principles to combat impunity, 8.2.2005, E/CN.4/2005/102/Add.1, approved by the Commission on Human Rights (United Nations, Commission on Human Rights, Res. 2005/81, 21.4.2005, E/CN.4/RES/2005/81).

[15] For a more exhaustive list of the instruments in question and numerous references to topical case law, see in particular FERNÁNDEZ DE CASADEVANTE ROMANI, 155 ff and 177 ff; BASSIOUNI, 260 ff. For the legal basis of the right of access to judicial proceedings and reparation for injury based on the international law of state responsibility as well as the 2001 International Law Commission's draft articles on responsibility of states for internationally wrongful acts, see VAN BOVEN, 25 ff; BASSIOUNI, 211 ff.

[16] Art. 3 however provides exclusively for state responsibility.

[17] See Art. 7 African Charter on Human and Peoples' Rights.

[18] See Art. 25 American Convention on Human Rights. On the advanced modalities of the right to reparation in the inter-American regime, see in particular HENNEBEL, 540 ff. HENNEBEL, 540 ff.

[19] See in particular Art. 13 ECHR.

[20] See Art. 68 and Art. 75 ICC Statute. This instrument also provides for the freezing and confiscation of assets of persons convicted as international criminals. See in this regard Art. 75 and 77(2)(b), Art. 93(1)(k) and Art 109 ICC Statute, as well as Rules 85 and 94-99 of the ICC Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1). For the practical implementation of the reparations provisions, see e.g. ICC (Appeals Chamber) 3.3.2015, *The Prosecutor v. Thomas Lubanga Dyilo (Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations"* of 7 August 2012 with amended order for reparations [Annex A] and public Annexes 1) and 2), ICC-01/04-01/06-3129; ICC (Trial Chamber II), 21.11.2016, *Prosecutor v. Thomas Lubanga Dyilo (Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations)*, ICC-01/04-01/06-3251; see also generally BASSIOUNI, 243 ff.

[21] See in particular Art. 35 and Art. 57(3)(c).

the United Nations Convention against Transnational Organized Crime[22] and its Protocol to Prevent, Suppress and Punish Trafficking in Persons[23] and the European Convention on the Compensation of Victims of Violent Crimes.[24]

The ratification of the majority of these treaties and the general consensus regarding the rights of victims to access justice and obtain reparation have given these rights a customary character.[25] They should therefore be binding on any State, regardless of whether it has ratified the relevant instruments.

International law does not criminalize "kleptocracy" as such, nor does it criminalize being a potentate. However, the actions of a kleptocrat may constitute various offences under national, international and even transnational law, such as bribery, fraud, aggravated mismanagement, mismanagement of public interests, breach of trust, theft, money laundering and participation in a criminal organization, to name but a few.

In addition, as mentioned above, beyond the financial component of these behaviors, commentators and courts are increasingly interested in the link between the most serious blood crimes (crimes against humanity, war crimes, torture, etc.) and money crimes resulting from systematic criminal activity at the highest levels of power.[26] Among others, the Office of the United Nations High Commissioner for Human Rights has thus underlined the impact of corruption on the rights provided for in the International Covenant on Economic, Social and Cultural and the International Covenant on Civil and Political Rights.[27] The Human Rights Council Advisory Committee also prepared a report highlighting the widespread impact of corruption on the enjoyment of human rights, including economic and social rights (rights to work, food, housing, health, education, public services and development, and the principle of non-discrimination), as well as civil and political rights (e.g., the rights to a fair trial and to participate in public life).[28] In addition to the damage

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[22] See in particular Art. 25; VAN DIJK, 17 ff and 21 ff.

[23] See in particular Art. 6 para. 1, 2 and 6. See also VAN DIJK, 19 ff.

[24] Another example is the Council of Europe Civil Law Convention on Corruption, concluded in Strasbourg on 4 November 1999 (ETS 174), which allows natural or legal persons who have suffered damage as a result of acts of corruption to obtain compensation for the full amount of the damage (Art. 3). However, this Convention has not been adopted by Switzerland.

[25] BASSIOUNI, 206 ff and 211 ff; FERNÁNDEZ DE CASADEVANTE ROMANI, 120 ff; SHELTON, 32 FF; HOUÉDJISSIN, 256 ff; VAN BOVEN, 26 ff, who is, however, cautious about the customary nature of the right to individual claims for redress. As for the more advanced obligations of the Basic Principles on Remedies and Reparation, VAN BOVEN notes their strong normative value and considers that good arguments can already be made to support their customary nature (VAN BOVEN, 27 ff).

[26] *Marcos case and the proceedings initiated by victims of human rights violations in Hawaii (In Re Estate of Marcos Human Rights Litigation*, 910 F. Supp. Supp. 1460 [D. Haw. 1995], 30.11.1995); Affaire *des Biens mal acquis* initiated in France by victims of African potentates and taken up by French associations, available at: https://www.asso-sherpa.org/detournement-de-fonds-publics-corruption-et-blanchiment-dargent (23.7.2017).

[27] See in particular United Nations, Office of the High Commissioner for Human Rights, Corruption and Human Rights, available at: https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx (20.8.2017). See also MESSICK, 1 ff; FIGUEIREDO, 1 ff.

[28] United Nations, Human Rights Council, Final report on the issue of the negative effects of corruption on the enjoyment of human rights, 5.1.2015, A/HRC/28/73, (cited: Negative Effects of Corruption Report), paras 17-18. For a judicial analysis of the link between corruption and the right to education, see e.g. ECOWAS CJ, 30.11.2010, *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. President of the Federal Republic of Nigeria and others*, ECW/CCJ/APP/12/07, paras 16-20 and 28. For the background and follow-up to this case, see not. MUMUNI, 1 ff and 7 ff.

inflicted on society, this report highlights the "individual negative effects" that result from a direct or indirect violation of the human rights of a person affected by an act of corruption.[29] Noting the limitations of criminal and private law in combating corruption, the report notes that *"*[a] human rights-based approach to the effects of corruption can provide an additional dimension that places victims at the centre of the fight against corruption by highlighting the adverse consequences of corruption for the individual affected, for groups of people who typically suffer (often marginalized groups), and for society as a whole."

Some scholars go so far as to consider that "grand corruption" may constitute a crime against humanity or "other inhumane acts of a similar nature [to a crime against humanity] intentionally causing great suffering" within the meaning of Article 7(1)(k) of the ICC Statute.[30]

In light of the Basic Principles of Justice for Victims, the Basic Principles on Remedies and Reparation, and the above developments, every person who has been violated by a potentate in order to enable that potentate to get his hands on public funds (e.g., by coercion, threat, illegal detention, summary execution, enforced disappearance), as well as every person who suffers from the consequences of the plundering of public funds committed by that potentate, should in principle have the status of a victim within the meaning of international law, and benefit from the rights that derive from it. However, the recognition of this status and the implementation of these rights in national law remain a challenge.[31]

III. The Swiss legal framework

If illicitly acquired assets of a potentate – such as a head of state – enter the Swiss financial center despite its anti-money laundering regime, Switzerland strives to identify assets of criminal origin efficiently and return them to the country of origin. The Swiss legal framework essentially rests on three pillars: criminal law (which among others sanctions embezzlement and money laundering), international mutual legal assistance in criminal matters (which allows Switzerland to provide assistance to foreign States conducting criminal proceeding) and administrative law (which provides a specific regime of freezing, forfeiture and restitution of potentates' assets).

Even before criminal proceedings have been initiated to provide legal clarification of the origin of potentially illicitly acquired assets, suspicious assets can be frozen to prevent their withdrawal. Their illicit origin must be proved in legal proceedings either in the country of origin or in Switzerland. International mutual legal assistance in criminal matters is a pivotal instrument in this context, amongst other things enabling States to exchange evidence. Once a final legal ruling has been delivered on the confiscation of illicitly acquired assets of potentates, Switzerland and the other countries concerned look for ways of returning these assets. Switzerland takes great care to

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[29] United Nations, Human Rights Council, Report on the negative effects of corruption, para. 20.

[30] BANTEKAS, 474 ff; STARR, 1301; CARRANZA, 328; EBOE-OSUJI, 130; BLOOM, 627 ff; African Legal Aid, Cairo Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective, 21.10.2002, Princ. 4, available at: http://www.africalegalaid.com/download/policy_document/Policy_Document.pdf (23.7.2017), which requires that acts of pillage and illegitimate appropriation of public resources be subject to universal jurisdiction. See e.g. Global Organization of Parliamentarians Against Corruption (GOPAC), Prosecuting Grand Corruption as an International Crime, 2013, available at: http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf (13.8.2017).

[31] For a general overview of the state of the rights of kleptocrats' victims see GIROUD.

ensure that the returned assets are used to benefit the population concerned and that they do not flow back into illicit channels. This general legal framework has however been inapt for dealing with certain cases of assets looted by a kleptocrat, particularly when the looted State was unable or unwilling to request the return of such assets, as in the Duvalier and Mobutu cases.[32]

In this context, Switzerland enacted the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA) in 2015.[33] The FIAA governs the freezing, confiscation and restitution of assets held by foreign PEPs or their close associates, where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or other felonies. "Foreign politically exposed persons" are defined in the FIAA as "individuals who are or have been entrusted with prominent public functions in a foreign country, for example heads of State or government, senior politicians at the national level, senior government, judicial or military officials at the national level, important political party officials at the national level and senior executives of State-owned corporations of national importance".[34]

In applying the FIAA, the Swiss government *may* order the freezing in Switzerland of the above-mentioned assets primarily to support future cooperation within the framework of mutual legal assistance proceedings with the country of origin (Art. 3 FIAA). The Swiss authorities are thus authorized to freeze assets located in Switzerland over which foreign politically exposed persons or their close associates have a power of disposal, under the conditions that (a) the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable, (b) the level of corruption in the country of origin is notoriously high, (c) it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies, and (d) the safeguarding of Switzerland's interests requires the freezing of the assets.[35] Secondly, the FIAA allows for freezing of foreign assets in the event mutual legal assistance proceedings fail (Art. 4 FIAA), i.e., where the requesting State is unable to meet mutual legal assistance requirements due to "the total or substantial collapse, or the impairment, of its judicial system".[36] This basis for freezing assets is conditioned on the existence of a provisional seizure order, made by the requesting State, and on the condition that "the safeguarding of Switzerland's interests requires the freezing of the assets".[37]

As an extension of these provisions, the Swiss government may instruct the Federal Department of Finance to take legal action before the Federal Administrative Court for the confiscation of frozen assets. The confiscation of these assets allows the opening of restitution proceedings, through

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[32] For a general description see GIROUD-ROTH SANDRINE/MOREILLON LAURENT.

[33] The Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons is referenced in Swiss official legislation compilation under 196.1. An unofficial English version of the law is available at: https://www.admin.ch/opc/en/classified-compilation/20131214/index.html.

[34] Art. 2(a) FIAA.

[35] Art. 3(2) FIAA.

[36] Art. 4(2) FIAA.

[37] Art. 4(2) FIAA.

which foreign States that are victims of corruption will have the opportunity to participate through the agreements that can be concluded with the Swiss government (Art. 18(2) FIAA).

To date, Switzerland has been able to restore to the countries concerned more than two billion dollars of funds embezzled by potentates. The most emblematic cases include Duvalier, Haiti, ongoing proceedings (USD 6.5 million); Abacha II, Nigeria, 2017 (USD 321 million); Kazakhstan II, 2012 (USD 48 million); Angola II, 2012 (USD 43 million); Kazakhstan I, 2007 (USD 115 million); Salinas, Mexico, 2018 (USD 74 million); Angola I, 2005 (USD 24 million); Abacha I, Nigeria, 2005 (USD 700 million); Ferdinand Marcos, Philippines, 2003 (USD 684 million); Vladimiro Montesinos, Peru, 2002 (USD 93 million). These figures must however be considered in context, since Switzerland had assets under management totaling CHF 7,878.7 billion at the end of 2020, 51.9% of which is attributed to foreign customers.[38]

While Switzerland has been at the forefront of the discussion on the fight against potentates' assets and has introduced innovative legislation such as the FIAA, it has also been too complacent about the results of its efforts and has failed to critically assess its system and address its shortcomings. Some of these flaws were recently identified by the Swiss Federal Audit Office in its evaluation of the Swiss strategy for the restitution of illicit assets,[39] which highlighted in particular the lack of involvement of civil society.

A closer review of the FIAA highlights some of the conceptual positions taken by Switzerland in the fight against kleptocrats' assets which have limited if not jeopardized such action.

Firstly, while the FIAA allows the temporary freezing of politically exposed persons' assets under certain conditions, it is subject to several conditions, including that such freezing would ensure the safeguarding of Switzerland's interests. This is a political condition which may or may not trigger the freezing of the considered assets. Moreover, the FIAA's application is conditioned to the existence of a mutual legal assistance request from the State from which the assets were looted. If no such request is made within a certain deadline, even if defective, the freezing will be lifted. As such the FIAA does not address the case of so-called "failing States" which are unable or unwilling to send a mutual legal assistance request, situations which the FIAA is only able to address temporarily.

Secondly, the application of the FIAA remains within the framework of an interstate relationship between Switzerland and the State of origin. Only States and/or State-related entities have standing as plaintiffs in corruption cases and, as a consequence, can claim compensation for their damage arising from the corrupt acts, on the understanding that the damage is usually equivalent to the total amount of bribes that have been paid, i.e., the direct damage suffered as a result of the offence.

[38] SwissBanking, Banking Barometer 2021, p. 34-35, available at: https://publications.swissbanking.ch/economic-trends-in-the-swiss-banking-industry/banking-barometer-2021/ (3.02.2022).

[39] Swiss Federal Audit Office, Evaluation – Strategy for the restitution of illicit assets – Federal Department of Foreign Affairs, available at https://www.efk.admin.ch/en/publications/security-and-environment/international-relations/4263-strategy-for-the-restitution-of-illicit-assets-federal-department-of-foreign-affairs.html (3.02.2022).

States and/or State-related entities are unlikely to be entitled to claim for loss of profits or non-pecuniary losses, as these are likely to be considered as indirect damages.

This latter consequence should be read alongside with the notion of "private claimant" under Swiss law defined by Art. 118 of the Swiss Criminal Procedural Code ("SCrPC") as "a *person suffering harm*", which in turn is defined as a natural or legal person whose rights have been directly violated by the offence (Art. 115 SCrCP). Under the relevant case law, a "person suffering harm" is the holder of the rights/interests protected by the provision infringed by the offence.[40] The holder of such rights can be easily identified when said rights/interests are individual ones (for instance property rights). By contrast, when the infringed provision protects primarily a collective interest such as the proper administration of justice, which is for instance the case for money laundering, a private person can nevertheless be considered as suffering harm if his/her private interests are also directly affected by the offence.[41]

Conversely, persons suffering *indirect* harm as a result of the infringement do not have the status of injured parties and are therefore considered as third parties without access to the status of party to the proceedings. For instance, when a property offence is committed against a company, only the latter shall be the holder of the interest/right protected; neither the shareholders, the beneficial owners, nor the creditors will be considered as plaintiffs, as they are not holders of the interest/right protected and will only be considered indirect victims of the offence committed against the company.[42]

As regards corruption offences, Swiss law protects different rights/interests, depending on the type of corruption, e.g., public bribery offences (Art. 322ter to Art. 322^{septies} SCrPC) and private bribery offences (Art. 322^{octies} and Art. 322^{novies} SCrPC). The offences punishing *public* bribery aim to protect the objectivity and impartiality of the State in its decision-making process. In this respect, and according to the existing case law, when it comes to public corruption, only the State and/or affected State-related entities have a protected interest.[43]

As a result, anticorruption NGOs cannot play a dominant role in the conduct of these criminal proceedings but may only have an active role as experts. For instance, the Basel Institute on Governance created a specialized division in 2006, the International Centre for Asset Recovery ("ICAR"). Through a global network made up of former prosecutors, lawyers and financial investigators, ICAR advises and assists, in the public and private sectors around the world, practitioners on asset recovery cases. ICAR's case advisory work includes long-term programs in Ecuador, Kenya, the Kyrgyz Republic, Malawi, Mozambique, Peru, Sri Lanka, Tanzania, Uganda and Ukraine.

[40] Decision of the Swiss Supreme Court 1B_201/2011 of 9.06.2011; ATF 126 IV 42.

[41] Decision of the Swiss Supreme Court ATF 138 IV 258; ATF 129 IV 95.

[42] Decision of the Swiss Supreme Court 1B_9/2015 of 23.06.2015.

[43] Decision of the Swiss Supreme Court 6B_908/2009 of 3.11.2010; decision of the Swiss Federal Criminal Court BB.2014.168 of 30.06.2015.

IV. The French legal framework

The position in France lies in contrast to that in Switzerland. France has been able to bring notorious cases to justice – as in the case of Teodorin Obiang of Equatorial Guinea – and forfeit the accused's assets as a result of legal proceedings initiated by NGOs having legal standing under French law.

Since 2013, under the terms of Art. 2-23 CPP/F56 (i.e., the Code of Criminal Procedure) French law allows any certified association that has been registered for at least five years on the date of filing a civil action and whose statutes include the fight against corruption to exercise the rights granted to a civil party in criminal proceedings with regard to the following offences: a breach of the duty of probity; corruption and influence peddling; concealment; money laundering; and certain electoral offences. Approval is granted by order of the Minister of Justice for a period of three years, renewable under the same conditions as the initial approval. To date, only three associations have been approved: Sherpa, Transparency International France and ANTICOR.

French law, like Swiss law, provides in principle for the inadmissibility of collective interest actions by associations. In other words, unless an exception is provided for by law, an association may not initiate or intervene in a legal action, since the interests it defends merge with the general interest already defended by the public prosecutor. The exception granted to certified associations is considered justified because the interest they defend is a portion of the general interest that has been assigned to them by the legislator and for which their members have joined together. Articles 2-1 to 2-24 of the CPP/F56 thus authorize some twenty categories of associations to act as civil parties. These include, in particular, associations combating racism and assisting victims of discrimination based on national, ethnic, racial or religious origin (Art. 2-1 CPP/F56), associations combating crimes against humanity or war crimes or defending the moral interests and honor of the Resistance or deportees (Art. 2-5 CPP/F56), or associations combating discrimination based on sex or morals (Art. 2-6 CPP/F56).

Opponents usually argue that allowing associations to bring civil suits undermines the opportunity principle[44] – an argument that is irrelevant to Switzerland, which applies the legality principle of prosecution[45], with a few exceptions – and would lead to a clogging of the criminal courts. On the other hand, the supporters of the associations' right of civil action insist on their essential contribution to criminal justice. Harmful for some, necessary, on the contrary, for others, this right has finally become established in France and has continued to grow over the years.

In August 2021, France also adopted the Programming Act 2021-1031 on inclusive development and the fight against global inequalities.[46] Where ill-gotten gains have been confiscated in France, French law allows the State of origin of the funds to seek their return by making a request for

[44] The opportunity principle (prosecutorial discretion) gives the public prosecutor the right not to initiate, or conduct criminal proceedings against a person despite there being the legal conditions for such a criminal prosecution.

[45] The legality principle establishes an obligation to prosecute where there are grounds for suspicion that an individual prosecutable criminal offence has been committed or that a certain person has committed a criminal offence prosecutable ex officio.

[46] The Programming Act 2021-1031 of 4 August 2021 on inclusive development and the fight against global inequalities is referenced in French official legislation compilation under nº EAEM2019665L. A French version is available here: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043898536/.

mutual legal assistance. This State may also bring an action before the French courts to establish a right of ownership or to claim compensation: by bringing a civil action before the French courts if the case has given rise to a criminal investigation in France (notably for money laundering), or by initiating separate civil proceedings. In the absence of such steps by the authorities of the foreign State concerned, the funds definitively confiscated by the French justice system are automatically paid into the French State budget, in accordance with Art. 131-21 al. 10 of the French Criminal Code. The Law 2021-1031 of 4 August 2021 on the programming of solidarity development and the fight against global inequalities therefore set up an innovative mechanism aimed at returning these sums to the populations that were deprived of them, through cooperation and development actions.

These considerable advances in the fight against corruption would not have been possible without the involvement of specialized and independent NGOs – with full knowledge of the field and the issues at stake – which supported this project until the adoption of Law 2021-1031 of 4 August 2021.

V. The "*Biens mal acquis*" French and Swiss proceedings

The so-called "*biens mal acquis*", or "ill-gotten gains," case refers to the proceedings initiated in 2007 on the basis of a criminal complaint by the associations Sherpa, Survie and Fédération des Congolais de la diaspora to the Paris Public Prosecutor's Office for the handling of misappropriated public funds involving several African heads of state and members of their families.[47] According to the complainants, these leaders and their entourage amassed considerable assets abroad, during or after the exercise of their functions, which their official salaries alone could never have financed, while their countries were plagued by widespread corruption.

Among those directly targeted by this procedure is Teodoro Nguema Obiang Mangue (nicknamed "Teodorín" or "Teddy"), the eldest son of the president of Equatorial Guinea, Teodoro Obiang Nguema Mbasogo, who since 1979 has been at the head of a notoriously corrupt authoritarian regime and whose entourage is said to have illicitly enriched itself with a fortune estimated at between 500 and 700 million dollars.[48] In particular, Teodorín Obiang, then Minister of State for Agriculture and Forestry of Equatorial Guinea (he is now Vice-President), is accused of having resorted to corruption in the awarding of public contracts under his ministry and of having used Equatorial Guinean front companies to channel these illicit funds to Europe, where other companies, notably Swiss ones, reinvested them in the real economy.[49]

The Obiang case deserves to be studied in detail, as it includes a French (A.) and a Swiss (B.) component, the comparison of which is rich in lessons on the issue at hand.

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[47] For a detailed chronology of the whole affair, see Transparency International France, Biens mal acquis : les dates clefs, available at: https://transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/dates-clefs (26.09.2021).

[48] Sherpa, Biens mal acquis – Guinée équatoriale, available at: https://www.asso-sherpa.org/ill-gotten-gains-equatorial-guinea.

[49] GRANDAUBERT, 49 ff.

A. The French proceedings

After the first complaint in 2007 was dismissed on the grounds that the offence was not sufficiently serious, the association Transparency International France filed a new criminal complaint at the end of 2008, together with a civil action against three foreign leaders, including Teodorín Obiang. Various proceedings followed on the admissibility of the complaint, which was finally declared admissible in 2010 by the criminal chamber of the Court of Cassation, opening the way to prosecutions focusing mainly on the sumptuous movable and immovable assets that Obiang had built up in France between 1997 and 2011. Luxury vehicles and buildings belonging to him were seized in September and October 2011.

At the end of January 2012, Transparency International France filed a new criminal complaint with a civil claim to allow the investigation of new facts discovered in the course of the investigation, after a supplementary indictment was refused in the context of the ongoing proceedings. In July 2012, following Obiang's refusal to appear before the judges, an international arrest warrant was issued against him. In 2014, he was indicted by the Paris Tribunal de Grande Instance. The investigation was completed in September 2015 and the case was brought to trial.

On 27 October 2017, Teodorín Obiang was found guilty of money laundering, misappropriation of public funds, breach of trust and corruption. In absentia, he was sentenced in the first instance to three years in prison and a EUR 30 million suspended fine, as well as the criminal confiscation of all his seized assets, with an estimated value of EUR 150 million.[50] On 10 February 2020, the Paris Court of Appeal confirmed the three-year suspended prison sentence and the confiscation of all his assets on French territory. As for the suspended fine imposed in the first instance, the Court of Appeal confirmed the amount (EUR 30 million euros) and moreover declined to suspend it.[51] On 28 July 2021, the Court of Cassation confirmed the sentence handed down on appeal.[52]

This decision was only possible because of the decisive action of civil society and the NGOs which initiated the proceedings and pushed them forward. In its judgment, the Paris Court of First Instance stressed "the driving role played by civil society".[53] This illustrates how allowing associations to take civil action is essential in the fight against corruption and crimes against the community.

In addition, the French courts made an essentially factual and common-sense analysis, based on a pragmatic interpretation of money laundering and the predicate offence from which it arises. They first recalled the autonomous nature of money laundering in relation to the predicate offence,[54] that is, that the accused need not be convicted of the underlying crime. They rejected Obiang's argument that an Equatorial Guinean judgment had recognized the absence of a predicate offence, finding that there was no identity of facts and parties. They then established that (1) the companies used by Teodorín Obiang to finance his Parisian lifestyle had been used contrary to their social purpose,

[50] Decision of the Paris High Court of 27.10.2017 (08337096017).

[51] Decision of the Paris Court of Appeal no. 19 of 10.02.2020 (18/07428).

[52] Decision of the Court of Cassation no. 918 of 28.07.2021 (20-81.553).

[53] Decision of the Paris High Court of 27.10.2017 (08337096017), p. 91.

[54] *Id*., p. 65 ff.

rendering him guilty of misuse of corporate assets or breach of trust, and (2) he had lent his assistance to operations of investment, concealment or conversion of funds resulting from misuse of corporate assets and breach of trust, thereby leading to his conviction for money laundering. The link between the looted funds and the confiscated funds is logical and supported by the facts. The courts ruled without stopping at formal doctrinal debates. One can read between the lines that the evidence of the crime and the laundering of the resulting proceeds imposes the judge's sanction without this judgment being constrained by an overly rigid legal framework that would prevent justice from being done.

B. The Swiss proceedings

The Swiss justice system also took up the issue of Teodorín Obiang's assets, with the Geneva Public Prosecutor's Office opening proceedings on 31 October 2016 for money laundering and disloyal management of public interests, while the Federal Public Prosecutor's Office remained inactive.[55]

The Geneva proceedings were closed by order of 7 February 2019, following an agreement reached between Equatorial Guinea and the prosecuting authorities, in return for the payment by the African State of CHF 1.3 million to the State of Geneva as sequestration costs, in order to recover the yacht Ebony Shine with an estimated value of over CHF 100 million. Equatorial Guinea also agreed that the 25 vehicles sequestered in the proceedings, as well as a valuable watch, would be sold and that the proceeds from their sale would be allocated to a "program of a social nature in the territory of Equatorial Guinea" implemented in a transparent and efficient manner by an international entity with the necessary expertise to monitor the program, in accordance with an international agreement negotiated by the Federal Department of Foreign Affairs.[56]

Some people were surprised that the legal proceedings were stopped by a dismissal order under Article 53 of the Criminal Code, which allows the authority to refrain from prosecution if the offender has made reparation for the loss.[57] The lack of cooperation from the Equatorial Guinean authorities and the cost of maintaining the property sequestered in Switzerland apparently dictated the Geneva authorities' decision to agree on such an outcome with the offender. However, one cannot help but notice the gap between the results obtained on either side of the Franco-Swiss border.

VI. Conclusion

The French case of "*biens mal acquis*" regarding Equatorial Guinea's potentate stands in contrast with its Swiss twin case and illustrates how NGOs can play an important role in tracking down the assets of potentates, if authorized to do so.

In the recent example of Lebanon, a State ravaged by an unprecedented economic and financial crisis and whose governmental elite is openly accused of corruption and embezzlement of public

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[55] *Le Temps*, Le Ministère public genevois saisit 11 voitures appartenant à Teodorin Obiang (03.11.2016).

[56] Geneva Prosecution Office, Dismissal order of 7.02.2019 (P/20342/2016).

[57] *Public Eye - Le Magazine, Yves Bertossa: 'Le législateur ne nous donne pas suffisamment d'outils pour être efficaces contre la corruption'*, no. 31, Sept. 2021, p. 29.

funds, notably to Switzerland, the Swiss Federal Prosecutor's Office has opened proceedings against Riad Salamé, Governor of the Central Bank of Lebanon, for aggravated money laundering.[58] Certain NGOs have tried to join this procedure by filing a criminal denunciation for corruption and money laundering.[59] As Swiss law currently stands, however, these associations will only have the rights relative to their status as whistle-blowers, limited to the possibility of inquiring about the follow-up given by the authorities to their denunciation. At the same time, the association Sherpa and the *Collectif des victimes des pratiques frauduleuses et criminelles au Liban* (Collective of victims of fraudulent and criminal practices in Lebanon) have filed a complaint in France before the National Financial Prosecutor's Office in a new case of Lebanese "*biens mal acquis.*"[60] This complaint is a variation of the first complaints filed by Sherpa and other associations in 2007, such as the one already examined concerning Teodorín Obiang or the one concerning the Syrian Rifaat al-Assad, who was sentenced by the Criminal Court of Paris to four years' imprisonment and the confiscation of his assets located in France, estimated at nearly EUR 90 million.[61]

This clearly shows the driving role of civil society, which has distinguished itself in Switzerland and even more so in France. We can only hope that Switzerland, along with other countries, will soon recognize in these forces a real tool in the fight to remediate corruption through the confiscation of potentates' illicit assets. As for the scepticism that this prospect will not fail to arouse in some, the French example shows that fears can easily be allayed by the establishment of appropriate safeguards, such as conditions of approval.

This development should be the natural and concrete implementation of States' engagement to fight corruption as recommended in Article 35 of the United Nations Convention against Corruption whereby 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. States can and must do better in the fight against corruption and potentates' assets, in particular by granting legal standing to the NGOs which aim to defend our collective interest to eliminate corruption.

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[58] *Le Temps*, La justice suisse sur la piste des millions du puissant gouverneur de la Banque du Liban (13.04.2021).

[59] *Tribune de Genève*, Le « système » libanais dénoncé à la justice suisse (13.04.2021).

[60] Sherpa, Press Release, Sherpa alongside the Collectif des Victimes des Pratiques Frauduleuses et Criminelles au Liban file a complaint before the French National Financial Prosecutor's Office in a Lebanese Ill-Gotten Gains case (03.05.2021).

[61] This sentence was confirmed by the Paris Court of Appeal on 9 September 2021; see Sherpa, Press Release "Rifaat al Assad « Ill Gotten Gains » Case: The Paris court of appeal confirmed the condemnation decision rendered in first instance in 2020, (9.09.2021).

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