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LEGAL REMEDIES FOR GRAND CORRUPTION

Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri

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This paper is the tenth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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I. Introduction

In November, 2013, the Swiss federal prosecutor's office (*Ministère Public de la Confédération*) launched an investigation into a complaint alleging that Argor-Heraeus SA, one of the world's largest refiners of precious metals, was guilty of aggravated money laundering and complicity in war crimes of pillage. The complaint, filed a few days before by the non-governmental organization TRIAL[1], alleged that Swiss-based Argor had refined almost 3 tons of gold looted from the Democratic Republic of Congo (DRC) between 2004 and 2005.

As part of the criminal investigation, the federal police also searched the refiner's premises and seized computers and documentation.[2] Although the federal prosecutor ultimately declined to file charges, the case nonetheless contributed to the current discourse on litigation against corporations involved in international crimes. It established important precedents under Swiss law that will be of value to claimants in future cases, while providing guidance to those considering bringing similar actions in the courts of other nations.

II. The Context

The vast region of Ituri is located in the northeast of the DRC, on its border with Uganda; for years, the region has been the focus of brutal conflicts fought over its natural resources—principally gold, coltan, oil, and timber.

In 1998, Ituri was swept up in the Second Congo War, a conflict involving the adjacent states of Uganda and Rwanda, as well as a plethora of local armed groups, including some functioning as proxies for Uganda and Rwanda. The United Nations Forces in the DRC noted that *"[t]he competition for the control of natural resources by combatant forces, exacerbated by an almost constant political vacuum in the region, [was] a major factor in prolonging the crisis in Ituri."*[3]

Ugandan troops were actively involved in both the violence and the pillage of the region's natural resources. As an occupying force, the Ugandan army illegall exploited

[1] TRIAL is a Geneva based NGO that litigates human rights and international crimes cases (www.trial-ch.org).

[2] The Prosecutor vs. Argor, Swiss Federal criminal court, BB.2013.173, 24 January 2014.

[3] United Nations organization mission in the DRC, Special report on the events in Ituri, January 2002 – December 2003, S/2004/573, 16 June 2004.

gold in Ituri,[4] and its role did not end with the formal withdrawal of its troops from DRC territory in 2003.

Subsequently, an armed group backed by Uganda, the *Front Nationaliste et Intégrationniste* (FNI), filled the void left by its sponsor, taking control over the Ituri town of Mongbwalu and its immense adjacent gold producing area known as "Concession 40".

The FNI quickly started to exploit the mines in a well-organised manner, copying the methods of the former state-owned concessioner, "OKIMO", issuing record books to miners there, and taxing the extraction of the gold. Forced labour was also a means for the group to extract the gold.

The export of the raw materials was later facilitated by middle-men, who shipped the gold to Uganda, from where it was exported to world markets. According to a 2005 Human Rights Watch report, the proceeds were used by the armed groups to *"sustain their war effort, including payment for recruits, weapons, landmines, and a steady supply of ammunition."*[5]

The FNI stayed in control of the Mongbwalu region at least until April 2005, when a contingent of the UN forces deployed to stabilize the situation in the Congo managed to install a military base in the town.[6] Even after this point, the FNI and its offshoots continued to exercise influence in the region.[7]

III. The Route of the Gold

In addition to stepping up the deployment of UN forces in Ituri, in 2003 the UN imposed an arms embargo on armed groups and movements operating in DRC.[8] The following year saw the UN Security Council launch an effort to monitor the embargo, establishing the UN Group of Experts (UNGE), whose members included globally

[4] International Court of Justice, Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005. The Court found that Uganda had "*by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the DRC and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of Congo under international law*."

[5] Human Rights Watch, *The Curse of Gold*, June 2005

[6] Conflict Awareness Project, *The Pillage of Eastern Congo Gold: a Case for the Prosecution of War Crimes*, November 2013, p. 5: "While the DRC government began to assert control over certain parts of Ituri in 2005, armed conflict did not effectively conclude there until 2007. By that time, overall, more than 6 million Congolese were estimated to have died as a result of nearly a decade of armed conflict in the country. Some of the most brutal atrocities occurred in Ituri."

[7] Report of the Group of Experts (UNGE) concerning the DRC, S/2014/42, 23 January 2014.

[8] Security Council resolution 1493 (2003).

recognized experts on arms trafficking and the illegal exploitation of natural resources. One of them, Kathi Lynn Austin, an arms trafficking investigator, continued her research into the illegal trading of Ituri's gold following her tenure with the UNGE. Austin and the UNGE exposed a sophisticated network of economic actors benefiting from the pillage of gold in Ituri, gathering compelling evidentiary materials in the DRC, Uganda, the United Kingdom and in Jersey, in the Channel Islands. This evidence included export and shipping documents, accounting documents and email exchanges.

The documentation showed that a significant amount of the gold looted by the FNI in the Concession 40 was exported to Uganda by Kisoni Kambale, described by the UNGE as the *"most significant gold trader of Ituri".*[9] Without any licence to export, Kisoni Kambale was nevertheless shipping the gold to Uganda through his airline Butembo Airlines (BAL), thanks to what the report called his "*almost exclusive landing rights into Mongbwalu, on the condition that BAL facilitate(d) the outward shipment of FNI gold".*[10]

Once in Uganda, the gold was sold to the Kampala-based Uganda Commercial Impex (UCI), the largest gold exporter in Uganda at that time.[11] UCI resold the gold in turn to the Jersey-based company Hussar, *"one of the key importers of Congolese gold from Kampala"* at that time, according to the UNGE.[12]

The investigation clearly showed that every single link of the supply chain was perfectly aware about the illegal origin of the gold. Hussar, for instance, continued trading the gold even after its representatives were put on notice by the UNGE and the company was mentioned in several UN reports.[13] To market the looted gold, Hussar needed to send it for refining. Until the summer of 2004 the gold was refined by South Africa's Rand Refinery, which allegedly stopped refining Hussar's gold after evidence emerged about its illicit origin.[14]

Hussar then turned to the Swiss refinery Argor-Heraeus SA, based in the Swiss canton Ticino. From July 2004 to May 2005, the investigation showed that Argor refined almost three tons of DRC looted gold, directly shipped from Uganda to Switzerland.[15]

[9] UNGE report, S/2005/436, 25 July 2005, para. 80.

[10] Ibid. para.80; Kisoni Kambale and his airline were sanctioned by the Security Council Sanctions Committee in 2007. He was killed a few months later by armed men.

[11] Ibid. para.80; Uganda Commercial Impex was sanctioned in 2007 for the breach of the UN embargo.

[12] Ibid. para. 126.

[13] Conflict Awareness Project, *Eastern Congo Gold* p.10.

[14] Ibid.

[15] UNGE report, para. 79.

Argor's involvement as the refiner of the looted gold was first mentioned in the UNGE report from July 2005. The company publicly denied the allegations in this report, maintaining that it had ceased to refine gold for Hussar's account in June 2005, after *"learning from the press regarding the disorders in the region of the DRC with potential implication for the gold trade."*[16]

This line of defence did not persuade the UNGE, which was convinced that the company could not have been unaware of the illicit origin of the gold. Consequently, the UNGE recommended that Argor be sanctioned for violating the UN Arms Embargo on the DRC, since refining this gold constituted support for the FNI.[17]

Despite this recommendation, the Sanctions Committee of the UN Security Council declined to sanction Argor, which had been defended by the Swiss government before the UN. In contrast, African businesses including both UCI and those of Kisoni Kambale were subject to robust sanctions.

IV. The Criminal Complaint against Argor-Heraeus

The Open Society Justice Initiative, part of the Open Society Foundations, had been involved in funding Kathi Lynn Austin's research work after she left the UNGE. The Justice Initiative subsequently approached TRIAL to assess the question of Argor's potential criminal liability in light of the evidence collected by Austin.[18] Consequently, TRIAL assessed the feasibility of judicial action in the light of Swiss and international law and concluded that there were sufficient suspicions of the commission of a crime to lodge a complaint ("*denunciation pénale*") against Argor. The alleged charges were a) complicity in the war crime of pillage and b) aggravated money laundering.

A. The War Crime of Pillage

Pillage committed during times of war has long been prohibited. Already, in 1863, the Lieber Code, which established the law of war for Union Forces in the American Civil War stated that *"all pillage or sacking, even after taking place by main force are prohibited."* The prohibition of pillage was later reaffirmed in the treaties that codify the laws of war, in particular in the Hague Regulations of 1907 and in the Geneva

[16] Argor-Heraeus SA, Communiqué concernant le rapport édité par le groupe d'experts de l' « UN Security Council on the Democratic Republic of the Congo », 17 August 2005.

[17] UNGE report, S/2006/53, 27 January 2006, paras. 110-113.

[18] At that time, OSJI was already partnering with Kathy Lynn Austin and her NGO Conflict Awareness Project (CAP) on the investigation and on litigating the case of Hussar before the UK and Jersey judicial authorities.

Conventions of 1949, which bind all states.[19]

The statutes of international tribunals also consider pillage an offense and have established the prohibition as also binding upon non-state actors.[20] Thus, pillage is not only prohibited in international conflicts but also in times of civil wars[21] and the prohibition of pillage is recognised as a customary and universally binding rule.[22]

Following international standards, Swiss criminal law prohibits acts of pillage committed in international and internal conflicts.[23] This prohibition applies to Swiss citizens as well as foreign citizens present in Swiss territory (on the principle on universal jurisdiction).

The elements of the crime of pillage are not described precisely in Swiss law and no case has ever been judged in this country for this offense. Therefore, the Swiss judicial authorities will presumably draw on international law, in particular the ICC Elements of Crimes[24], which define pillage as:

- The perpetrator appropriated certain property.
- The perpetrator intended to deprive the owner of property and to appropriate it for private or personal use;[25]
- The conduct took place in the context of and was associated with an international armed conflict;
- The perpetrator was aware of the factual circumstances that established the existence of an armed conflict

In the case submitted by TRIAL, it was alleged that the FNI committed the initial illicit appropriation, exploiting the "Concession 40" for its personal benefit and against the will of its legitimate owner (the State of Congo). This appropriation was done in the frame of an internal armed conflict as defined by international law, which requires, among other conditions, a certain level of violence and an organised rebel

[19] Hague Regulations 1907, Article 28 and 47; Geneva Convention IV of 1949, Article 33, second paragraph.

[20] Statute of the International Criminal Tribunal for Rwanda, Article 4(f); Statute of the Special Court for Sierra Leone, Article 3(f).

[21] Protocol additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflict, Article 2 para. 4 litt. G.

[22] James G. Stewart, *Corporate War Crimes, Prosecuting the Pillage of Natural Resources* (Open Society Justice Initiative, 2011) para. 1 and 2.

[23] Article 108-109 former Swiss Military Penal Code (fSMP) cum Protocole II, Article 2 para. 4 litt. G. and Article 264 SCC.

[24] The Rome Statute of the ICC has been adapted in Swiss law in 2011.

[25] This requirement is controversial: it does not tally with international customary law. On this question, see Stewart, *Corporate War Crimes*, paras. 16-20.

force controlling a territory. [26] This was irrefutably the case at the time of the fact, since the FNI was an organised force controlling a vast area and carrying large-scale military operations.[27]

The doctrine, the case law and the interpretation of the ICC Elements of Crimes' wording show that "*the purchase by commercial actors of "appropriated" natural resources falls within the meaning of pillage, irrespective of whether the commercial actors were implicated in the initial extraction of the resources*".[28] Consequently, not only was the FNI committing pillage, but so were subsequent buyers, including Hussar, who knew about the illicit origin of the gold purchased.

Argor's representatives have always claimed that the company did not itself buy the pillaged Congolese gold. Even if true, Argor could have aided and abetted the commission of the crime, for Swiss criminal law defines an accomplice as *"any person who wilfully assists another to commit a felony or a misdemeanour"*.[29] Swiss case law and doctrine consider the assistance punishable when it actually favours the commission of the crime.[30] The contribution of the accomplice might be realised through a *material* or a *psychological* assistance to the perpetrator. The psychological accomplice contributes to the infraction when the accomplice strengthens the perpetrator's will to commit the crime. Such is the case, for example, when the accomplice suggests an opportunity or promises assistance after the commission of a crime, for instance if he helps to dispose of or sell the loot.[31] Subjectively, the accomplice has to know or accept the possibility that he is assisting in the perpetration of a crime.[32]

In short, TRIAL alleged that Hussar would not have been able to commercialise the looted gold without Argor's refining support. This assistance was indispensable to Hussar, because the transformation of the gold from raw to standardised gold bars was the (only) way to penetrate the legal market. Hence, it is likely that without Argor's readiness to refine the gold, Hussar's acts of looting would have been seriously hampered: Hussar would potentially not have been able to sell the looted gold.

For its part, Argor, with its own compliance department, could not have been unaware of the conflict in the DRC and the illegal trade in gold that had been going

[26] In particular Common Article 3 of the Geneva Conventions as well as Additional Protocol II, Article 1.

[27] The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Pre-trial Chamber I, Decision on the confirmation of charges (January 2007), para. 237.

[28] Stewart, *Corporate War Crimes,* paras. 40-49.

[29] Article 25 Swiss Criminal Code.

[30] Swiss Supreme Courts rulings ATF 132 IV 49 c. 1; ATF 121 IV 109 c. 3a and ATF 129 IV 124 c. 3.2.

[31] *Basler Kommentar Strafrecht I,* (Stämpfli, 2007), Article 25 N 23-24; Philippe Graven, *L'infraction pénale punissable,* (Stämpli, 1995) par. 309.

[32] Swiss Supreme Courts rulings ATF 119 IV 289, c. 2 and ATF 113 IV 90.

on for several years in the Great Lakes region and which had been the subject of intense media coverage.[33] It was also well-known (especially by gold experts) that gold exported from Uganda, which itself produced negligible quantities of the metal, had been most probably looted in the DRC. Moreover, Argor-Heraeus continued to refine gold from Hussar after January 2005, despite the fact that Hussar and UCI had been identified for their role in gold pillage by a broadly publicised UNGE report.[34]

As a consequence, TRIAL asked the Swiss judicial authorities to determine if Argor was responsible for complicity in the war crime of pillage.

B. Aggravated money laundering

According to Article 305bis Swiss Criminal Code (SCC), money laundering is defined as the act of preventing the "*identification of the origin, the discovery or the confiscation of assets when the author knows, or should know that they are the proceeds of a crime*." Laundering can involve any act that is aimed at preventing the establishment of a link between a preceding crime (in this case, the war crime of pillage) and the assets resulting from it (in this case, the gold), or keeping these assets away from the control of the relevant authorities.

By turning this illegally obtained gold into ingots, Argor made it impossible to identify the criminal origin of the gold, and, in doing so, could have perpetrated the act of disguising the identification of the gold's origin, as defined in article 305bis SCC. TRIAL alleged that this act of laundering should be considered as aggravated (article 305bis, section 2 SCC), because of the gravity of the preliminary crime (a war crime) and the quantities of gold involved.

TRIAL also asked the authorities to analyse the company's criminal responsibility in its capacity as a financial intermediary, subject to the Swiss law on money laundering, and in its capacity as a refiner, under the Swiss law on precious metals.[35] These laws appear to require companies to clarify the origin of any raw materials that are of doubtful origin, and if unable to do so, to hold them until the proper authorities establish their provenance. TRIAL alleged that the gold coming from DRC had clearly doubtful origins and that as such, Argor should have kept it in a safe place until the authorities decided it fate. By failing to do so, the company could be held responsible for money laundering by omission to act, according to Swiss Supreme Court case law.[36]

[33] Confidential annexes to the complaint.

[34] UNGE report, 25 January 2005, S/2005/30, par. 126.

[35] Loi sur le blanchiment d'argent (LBA) and related ordinances; Loi et Ordonnance sur les métaux précieux.

[36] Swiss Supreme Court, ATF 134 IV 255 c. 4.2.1.

V. Subsequent Judicial Decisions

On the 1st November 2013, a few days after the complaint was filed, it was announced that a criminal investigation had been opened by the Swiss Federal Attorney. Argor was formally accused of complicity in the war crimes of pillage and aggravated money laundering. The prosecutor also searched Argor's premises and seized several computers and documents.[37]

The company challenged the investigation before the Swiss courts, asserting that that there was insufficient evidence to justify the opening of a criminal investigation, and that the search of its offices and seizure of material were not justified.

The Swiss Federal Criminal Court rejected Argor's appeal and noted that it was based on "credible" and "plausible" evidence sufficient to justify an investigation. Moreover, the court considered the measures taken by the prosecuting authority (search and seizure) as fully justified. The decision also pointed out contradictions in the company's behaviour, among them the fact that while it publicly stated its eagerness to collaborate with the authorities the company was at the same time trying to get back the seized documentation.

This decision gave the Swiss federal prosecutor's office the power to continue its investigation.

VI. Outcome of the Case

In March 2015 the federal prosecutor announced that it would not proceed with prosecution of Argor-Heraeus under the complaint. However, the investigation concluded that:

- Argor-Heraeus did indeed refine three tons of dirty gold pillaged by Congolese rebels;
- numerous reports linking the armed conflict in the DRC and the Congolese origin of dirty gold had been published at the time of the events;
- proceeds from the refining of such gold were a key element of the war effort in eastern DRC; and
- the company violated a regulation it had itself adopted in order to meet the requirements of the Law on Laundering and the Law on the Control of Precious Metals—the violation of an anti-laundering regulation can lead to a criminal conviction.

[37] The Prosecutor vs. Argor, Swiss Federal criminal court, BB.2013.173, 24 January 2014.

According to the prosecutor, indications of the origin of the gold "should have raised Argor's suspicions….It failed to clarify the origin of the gold although its internal regulations required it to do so if there were any doubts as to the origin of the raw material for refining."

Nevertheless, the prosecutors concluded that "it is not clear … that the defendants had any doubts as to, or concealed any evidence of, the criminal origin of the gold."

For those who brought the complaint, the decision marked a disappointing end to the proceedings (and a puzzling end, given the prosecutor's findings). But the Argor case still marked an important step forward in the battle against resource corruption.

First, it threw a spotlight on the role of western intermediaries in the trade and processing of pillaged resources. Within Switzerland, and beyond, the case attracted significant media coverage[38], including coverage in trade and mining publications, hopefully acting as a deterrent against similar practices in the future.[39]
Secondly, we believe the legal strategy adopted in the case could also inspire individuals and NGOs seeking to litigate cases of pillage and related crimes: the legal construct of money laundering should not be underestimated, as companies have often no direct activity abroad (or are acting through a corporate veil often hard to pierce) but might process or trade goods that could stem from international crimes. Practitioners should keep this powerful approach in mind when analysing the activities of companies dealing with products originating from conflict zones. By targeting western intermediaries, as well as actors in the zones of conflict, such actions also reinforce the broad, international effort to address conflict based grand corruption as a global issue in which actors in the developed world are implicated.

In Switzerland, the case also served to stimulate the on-going discussion about corporate responsibility for human rights abuses. Switzerland is indeed home for a myriad of multinational corporations and numerous companies involved in the business of raw materials. At the announcement of the case, Swiss human rights organisations active in promoting corporate accountability pointed out the fact that it highlighted the need for a comprehensive legal framework that could effectively prevent raw materials of illicit origin to enter Switzerland. By raising the prospect of legal sanction, the litigation has increased pressure on industry and regulators to ensure an end to Swiss involvement in the processing of illegally-acquired conflict-zone resources.[40]

[38] For instance, coverage was given by the Financial Times, New York Times, Forbes, Washington Post, Wall Street Journal, Bloomberg, Le Temps, Tages Anzeiger, TV5 Monde, Radio Okapi and Jeune Afrique.

[39] For instance Mining.com, Mining Examiner and Forex talk.

[40] Droit sans frontière, "*Droit sans frontières examine la possibilité d'une initiative populaire*", Press release, 5 November 2013, and Déclaration de Berne, *Une procédure ouverte contre une raffinerie helvétique montre l'acuité de la problématique du blanchiment des matières premières sales*", Press release, 5 November 2013.

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