Sherpa is a non-profit association, founded in 2001. The organisation brings together a team of legal experts and advocates who use the law as a tool to combat the new forms of impunity linked to the Globalisation of economic and financial exchanges, and to defend victims of economic crimes.

As such, Sherpa has brought cases against multinational corporations for serious human rights and environmental violations in their global supply chains, as well as litigation against corporations for involvement in international corruption schemes.

The four pillars of Sherpa’s work are strategic litigation, advocacy, legal research and capacity building activities, with the aim to significantly change the legal framework in France, at the European level and internationally.
INTRODUCTION

STRENGTHENING CORPORATE ACCOUNTABILITY

Obligations and accountability of parent and instructing companies
Proposal n° 1 - Create and strengthen parent and instructing companies' obligations and civil liability regime towards groups and supply chains

Criminal liability of parent companies and contractors
Proposal n° 2 - Facilitate the criminal liability of legal persons and strengthen the arsenal of penalties for human rights, environmental and ethical violations perpetrated by economic actors

Liability of intermediaries
Proposal n° 3 - Strengthen the obligations and liability of social and environmental auditors and the various financial, legal and fiscal intermediaries who facilitate the concealment of economic crimes committed by multinationals

PREVENT RESOURCE GRABBING BY MULTINATIONALS

Tax and legal havens
Proposal n° 4 - Fight tax evasion by imposing ambitious public country-by-country reporting on multinationals and establishing public registers of beneficial owners of companies and trusts in an open format

Restitution of stolen assets
Proposal n° 5 - Ensure the restitution of stolen assets through the establishment of a transparent and independent mechanism focused on identifying victims of corruption

FACILITATING ACCESS TO JUSTICE AGAINST MULTINATIONALS

Access to information and evidence on multinationals
Proposal n° 6 - Guarantee access to information of public interest held by multinationals and strengthen jurisdictional capacities

Jurisdiction and applicable law in litigation against multinationals
Proposal n° 7 - Remove obstacles to judicial action and the application of French law in litigation involving multinationals

FIGHTING CORPORATE CAPTURE

Direct influence through lobbying and revolving doors
Proposal n° 8 - Regulate the practices of direct influence on public decision making such as lobbying and revolving doors

Indirect influence through corporate communication and CSR
Proposal n° 9 - Define and provide a legal framework for the commercial and political communication of multinationals

Privatisation of globalisation standards
Proposal n° 10 - Challenge the self-regulation of multinationals through “soft law” and establish the supremacy of international public order over international economic order

PROTECTING THE CIVIC SPACE

Reprisals against whistleblowers
Proposal n° 11 - Broadening the status and protection of whistleblowers

Legal attacks on rights defenders through SLAPPs
Proposal n° 12 - Fighting SLAPPs by amending procedural rules and strengthening sanctions against judicial practices that impede the exercise of freedom of expression

Restrictions imposed on associations' legal action
Proposal n° 13 - Amend the articles of the Code of Criminal Procedure governing the admissibility of associative action to facilitate associations’ litigation as a whole
Sherpa was born out of a fundamental observation: the gap between the political, economic and social existence of multinational companies and their legal non-existence, which is a source of impunity in a globalised world. This conclusion led to the drafting of the first edition of Sherpa’s handbook of proposals in 2010. The aim of the handbook was to highlight the obstacles to the regulation of multinationals and to formulate proposals to overcome them.

Some of these proposals have since been enacted into law. Perhaps most notably, the French parliament in 2017 adopted the law on the duty of vigilance, partly inspired by one of Sherpa’s proposals. Other proposals regarding the specialisation of jurisdictions, the restitution of assets resulting from transnational corruption and the fight against tax and judicial havens have also made an impact on law makers.

However, other proposals from the original handbook have not stood the test of time. In recent years, Sherpa’s ongoing advocacy efforts, particularly in litigation, have helped identify the limitations of certain proposals. The emphasis placed at the time on reporting on social and environmental impacts has not proven to reduce information asymmetries between multinationals and citizens, a condition *sine qua non* for access to justice. In addition, the self-regulation or co-regulation of corporate behaviour have been shown to yield little success.

This new version of the Handbook is intended to reflect these insights, as well as Sherpa’s most recent advocacy efforts. Far from aiming to be exhaustive, the Handbook identifies ongoing and emerging challenges in the fight against the impunity of multinationals. It looks back at the progress made over the last decade and draws lessons for the future, from a resolutely committed perspective.
The multinational corporation is an undeniable economic, political and social reality. However, there is no legal definition of the “enterprise”, the “group”, or the “multinational”. Generally, only individual companies are legally defined, and endowed with legal personality. Principles of legal separation of corporate entities and limited liability also shield each company composing a multinational corporate group from the potential legal consequences of the other group members’ actions\(^2\).

In this legal landscape, multinationals can act with impunity. They have strong incentives to relocate their activities abroad, where they take advantage of potentially less stringent social, environmental, and tax regulation.

Complex corporate structures prevent the coherent attribution of liability within international groups, especially when multinationals undermine the environment or violate human rights. Subcontracting and outsourcing arrangements generate further legal obstacles to corporate accountability.

Thus, despite a number of positive developments in civil and criminal law, many challenges still remain to holding multinationals accountable for environmental and human rights abuse in their global supply chains.
**OBLIGATIONS AND ACCOUNTABILITY OF PARENT AND INSTRUCTING COMPANIES**

The multinational corporate group is a group of companies, each with their own legal personality, that operates in multiple countries, and maintains varying legal relationships between each member. Generally, a parent company, “exercises control, defines policy and may even impose its decisions on the others”.

Nonetheless, the group as a whole is not legally defined, and the parent company remains largely shielded from the legal consequences of activities carried out abroad through its subsidiaries. Indeed, the legislatures and the courts only admit the existence of the group and the parent company’s liability in an exceptional, indirect and fragmented manner.

Moreover, even in the rare instances in which the group and parent company are acknowledged, the law generally fails to take into account many companies within multinationals’ value chains, including their direct and indirect suppliers and subcontractors.

Indeed, corporations outsource production and services within their international supply and subcontracting chains to avoid liability. Under these contractual arrangements, contractors at the first tier and the subcontract chain generally bear the burden for social and environmental damages.

Thus, the legal landscape of the globalised economy has allowed corporations to derive profits from the gaps in social and environmental protection between countries, and even sometimes from serious violations of international law.

Efforts to end this corporate impunity have been stymied by calls for self-regulation and the development of a so-called “soft law”, lacking any legally binding character (codes of conduct, ethical charters, private standards). The limits of such systems have been widely denounced.

**DEVELOPMENTS SINCE 2010**

The first edition of Sherpa’s handbook made similar observations and called for the creation of legally binding mechanisms to hold corporations accountable.

As a preliminary step, the handbook advocated for a definition of the corporation that factored in the public interest, the recognition of the concept of the corporate group and the adoption of a common definition for the parent company.

Numerous proposals were also made to strengthen transparency tools at national and international levels, including reporting obligations on the environmental, social and governance impacts of multinationals. These measures were aimed in particular at “encouraging self-discipline, moving beyond ‘all talk no action’” and guaranteeing third parties’ access to justice on the basis of information published by companies.

In the 2000s, the debate around multinational corporate accountability indeed took a legislative turn, in particular with the reinforcement of non-financing reporting obligations. Furthermore, French parliament moved to amend Articles 1832 et seq. of the French Civil Code on the company, as part of the debate on the PACTE law.

However, the PACTE law, which was ultimately adopted in 2019, had little impact. The law only marginally rephrased Article 1835 of the Civil Code on corporate interest, granted companies the option to declare a rather nebulous “raison d’être”, and established the concept of “entreprise à mission”, which enables economic actors to officially adopt certain values.

These legal mechanisms are mainly cosmetic, and have been widely denounced as ineffective. Just as soft legal instruments, they provide new communication tools for companies. They do not address the obstacles to corporate accountability for human rights or environmental abuses. In particular, they have not provided better access to information on multinationals.

In addition, the first version of the handbook called for the recognition of the parent company’s liability for actions undertaken by overseas subsidiaries, as well as for increased accountability with respect to its supply chains.

To this end, various due diligence and vigilance obligations have been progressively established in order to hold parent companies accountable with respect to their subsidiaries and supply chains. However, these new obligations are highly heterogeneous and questionable in several respects. Most notably, these measures do not provide a definition of the parent company nor establish consistent standards to identify multinational groups and their supply chains. Moreover, they are not applicable to all companies and rarely cover the entire value chain.

These provisions also seemingly endorse self-regulatory processes (codes of conduct, ethical commitments, etc.) or market-based regulation (audits, certifications), the limitations of which spurred the adoption of binding legislations in the first place.

While the gradual establishment of vigilance obligations reflects the growing need to fight abuses committed by multinationals, these obligations must be strengthened in order to create a comprehensive liability regime within groups.

First step: in this direction, already mentioned in the first version of Sherpa’s handbook of proposals, would be the adoption of a clear definition of the parent company and its value chain. Such a definition would make it possible to more consistently identify companies subject to vigilance obligations and the scope of these obligations within the corporate group, including its supply chain.

The definition of parent company should be broad enough to cover the corporate group beyond the sole notion of control and include customers, subcontractors and supply chains.

Furthermore, in order to overcome the misconception that these laws are merely reporting requirements, vigilance obligations must be clearly defined as legally binding obligations of prudent and diligent conduct.

Specifically, the duty of vigilance should be defined as a general obligation for parent and instructing companies to take all necessary and adequate measures to ensure that they do not profit from environmental or human rights abuses. Under this definition, the occurrence of human rights or environmental abuses in a company’s value chain will trigger these obligations.

A comprehensive liability regime for parent companies must also take into account the potential risks generated by certain activities relative to their potential beneficiaries.

Recent developments in various areas of law and proposals for civil liability reform have tended towards the establishment of strict liability and presumptions of fault. For example, these standards have been applied to the liability of the employers for acts committed by employees, the liability for the actions of things and other special liability regimes. These regimes could offer more adequate solutions for victims’ access to justice in the context of globalisation, particularly with regard to the burden of proof.

Based on this model, a parent company’s strict, vicarious liability for social and environmental harm caused by group entities, broadly defined, could be envisaged. For environmental and human rights abuses caused within the subcontracting or supply chain, parent companies should be held liable unless they can prove that they have taken all appropriate measures to prevent such harms from occurring in their subcontracting or supply chain. These obligations are indeed more often focused on compliance than on concrete harm prevention. Thus, a company’s lack of vigilance does not necessarily stem from committing, contributing to or benefiting from human rights or environmental violations, but instead lies in a company’s failure to adopt internal processes to prevent such violations.

For instance, regarding the duty of vigilance on human rights and the environment, the law is not yet applicable to all companies. Moreover, the text indirectly identifies the group over which vigilance must be exercised by referring solely to the concept of exclusive control. Thus, minority-owned companies, over which a parent company only exercises influence or joint control, fall outside a parent company’s obligation of vigilance.

With regard to the parent company’s ties to subcontractors, the legislature has chosen to refer to the notion of “established commercial relations” (“relations commerciales établies”), which has yet to be interpreted in the context of the law to ensure that it captures the full extent of the value chain.

Furthermore, the definition of the duty of vigilance by reference to the establishment and implementation of a vigilance plan has led some companies to view it as merely a reporting obligation rather than a general obligation of prudent and diligent behaviour.

Additionally, although the law on the duty of vigilance of parent and instructing companies has the merit of creating, in an unprecedented way, the liability conditions for the companies it targets, in practice those conditions face several limits. A major pitfall is the law’s reference to the general fault-based civil liability regime under Articles 1240 and 1241 of the French Civil Code. Under this standard, in order to establish civil liability a plaintiff must prove the causal link between the parent company’s lack of vigilance and the harm caused.

This requirement is inconsistent with the objective of fighting impunity and ensuring access to justice in the context of environmental or human rights abuses, as the relevant information to establish liability in such cases is largely held by the companies themselves. Moreover, parent companies create separation, or at least the appearance of separation, between themselves and environmental and human rights abuses through the interposition of corporate entities and subcontractors, precisely designed to obscure the causal link of their actions.
CRIMINAL LIABILITY OF PARENT COMPANIES AND CONTRACTORS

Growing awareness of the potentially criminogenic nature of economic activity has led to the gradual criminalisation of many business-related offences and the introduction into French law of corporate criminal liability.

Nonetheless, there are several limits to the enforcement of these laws in the context of multinationals’ activities. First, criminal liability remains subject to the principle of personal liability and to the existence of legal personality, thus exempting corporate groups from such liability.

In addition, corporate restructuring can dissolve the various legal persons within the group thus making it difficult to hold them criminally liable. In accordance with recent developments in European law, the Court of Cassation (France’s Supreme Court) now holds that in the event of a merger the acquiring company may be held criminally liable for acts committed by the acquired company prior to the merger. However, there are still several limits to the Court’s holding.

Furthermore, the criminal liability of legal entities remains to some extent linked to that of individuals. A legal person can be held criminally liable if it can be established that an offence has been committed on its behalf by its organs or representatives. However, the case law regarding the identification of the organ or representative who committed an offense has been inconsistent, based on administrative rules and scattered across environmental violations. This jumbled legal landscape results in a “de facto decriminalisation of environmental law”. The legislature has also recently created CJIP for environmental offences.

Criminal penalties related to environmental violations, are based on administrative rules and scattered across environmental offences in numerous codes. This jumbled legal landscape results in a “de facto decriminalisation of environmental law”. The legislature has also recently created CJIP for environmental offences.

One can therefore question the effectiveness of these measures in fighting against the impunity of multinationals. As one author concludes after analysing the phenomenon of decriminalisation in the corporate world, “Prevention remains an ideal, thus punishment is realistic.”

In order to better tackle the potential criminal conduct of economic actors in a globalised world, it is key to strengthen corporate criminal liability. Holding a parent company criminally liable, including for offences committed via its foreign subsidiaries, should be facilitated. This will require, among other things, reconsidering the requirement of identifying the body or representative who committed the offence on behalf of a parent company. The criminal liability of parent companies, as perpetrators or accomplices, could be based on the lack of vigilance within the corporate group or the supply chain.

The legal tools currently available should be strengthened to facilitate the prosecution of specific offences committed in the context of a corporation’s globalized activities. These tools should also be adapted to take into consideration the opacity of supply chains.

The first version of the handbook suggested clarifying the crime of concealment. As is the case with the crime of money laundering, the legislature could embed the autonomous nature of the crime of concealment by establishing a presumption of unlawfulness of the goods or products stemming from the original offence, when certain conditions are satisfied.

The first handbook suggested requiring companies to account for the value of natural resources used in the production of goods and services, as well as companies’ contribution to the enjoyment of fundamental rights. These accounting obligations for previously considered non-financial transactions, would enable the prosecution of companies that falsely report their environmental and social impacts.

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INTERMEDIARIES’ RESPONSIBILITY

Many actors play a key role as intermediaries of global economic and financial activity. These actors include accounting firms, social and environmental auditing firms, consultancy firms, particularly legal and tax consultancy firms, and business lawyers.

At the intersection of economic activity and the regulation of such activities, these actors can facilitate the commission or concealment of corruption offences or serious environmental and human rights violations. They also serve as experts or advisors to policy makers, creating a significant risk for conflict of interests in matters related to the business activity of their clients.

Recently, the “Pandora Leaks” demonstrated how banks, accounting firms, tax advisors, asset managers and lawyers have set up extensive systems of shell companies in tax and legal havens. These complex arrangements can provide the financial infrastructure for money laundering or tax evasion. The offshore structures that facilitate the international circulation of illicit financial flows could not exist without these various intermediaries and professionals.

Such scandals reveal the limits of the anti-money-laundering provisions, which in principle require these professionals monitor their clients and their funds. Some facilitators, however, escape the application of the system, which also has major shortcomings.

At the core of this obligation is a responsibility to identify the clients and beneficial owners of financial transactions. In addition, intermediaries must file a “suspicious transaction report” with Tracfin when they know or suspect that funds have been obtained through the commission of offences. After receiving a report of suspicion, Tracfin may formally object to a transaction.

Nevertheless, the transaction can be executed if no objection has been served or if, at the end of a ten-day period, no decision by the President of the Paris judicial court has been received by the author of the report extending the deadline or ordering the provisional sequestration of the funds, accounts or securities concerned in the report. Professionals may not be held criminally liable for handing stolen goods, money laundering or financing terrorism once they have properly filed a suspicious transaction report.

Given the increasing volume and frequency of financial transactions, such a system grants immunity to the very actors that the legislation was intended to regulate. Professionals are now encouraged to systematically report transactions in order to pursue their activities, as they are fully aware that they will not be held liable.

In addition to financial audits and asset management activities, the emphasis on compliance mechanisms within international value chains has also created lucrative business opportunities for facilitators. These professionals conduct environmental and social responsibility audits, advise companies on the implementation of internal risk management processes, and even certify these processes based on unambitious private standards.

The shortcomings of these practices have been widely reported. The Rana Plaza facilities in Bangladesh, which housed the subcontractors of several textile giants, were audited shortly before the building collapsed, killing over a thousand people. It would thus seem appropriate to question the role of these actors in the regulation of global supply chains.

In order to combat money laundering, the scope of the provisions should be extended to cover the role played by a wide range of intermediaries in the international laundering of the proceeds of crime.

The “suspicious transaction report” mechanism should also be amended to ensure Tracfin’s objections are more systematic, and to prohibit further transactions in the absence of a favourable decision. The immunity now extended to professionals who simply file a suspicious transaction report should also be eliminated. In addition, the failure to report suspicious activity should be subject to more severe sanctions.

Reporting requirements for aggressive tax schemes, penalties for failure to report, and sanctions for advising or assisting in the creation or use of such schemes should be strengthened.

With regard to the responsibility of auditors and other private certification bodies in social and environmental matters, it is necessary to move away from the compliance-based approach, which creates incentives for oversight dictated by and for the private sector.

Auditing and certification practices alone are not sufficient to fulfill a multinational’s obligations with regard to its supply chains and subcontractors. These actors must also be held accountable. Companies providing such services should be subject to social and environmental due diligence requirements and liability regimes ensuring access to justice for victims.

Contract clauses that prevent access to information, particularly for employees, on audits and their results should be prohibited. It should be made easier to establish the criminal liability of these various intermediaries as accomplices or co-perpetrators of offences committed by their clients and from which they benefited. Confidentiality protections should not be allowed to create an insurmountable obstacle to accountability.

Moreover, it would be possible to enthrone and strengthen the obligations of independence and incompatibility for these various professionals, in order to prevent and limit the situations of conflict of interest that concern them.

Proposal n°3

Strengthen the obligations and liability of social and environmental auditors and the various financial, legal and fiscal intermediaries who facilitate the concealment of economic crimes committed by multinationals.

Handbook of Proposals

Topic 1

Strengthening corporate accountability
Multinationals have benefited, with the consent of states, from a lack of regulation of their transnational activities to accumulate both financial and natural resources. This accumulation of resources has been at the expense of populations and states, whose capacity to create and maintain effective public services has been progressively eroded.

This hoarding of resources has been facilitated by the existence of tax and legal havens. These havens provide a number of services to economic actors, such as banking and tax secrecy, which allow them to conceal the origin or destination of illicit financial flows, such as those generated by corruption, and to bypass tax legislation or legislation aimed at protecting the environment and human rights.

Their continued existence severely undermines the capacity of states to protect tax revenues, which are the necessary counterpart to the exploitation of resources and an essential factor in the implementation of public policies for the protection of fundamental rights and the environment.

Moreover, public debt, developed in part to compensate for the erosion of the tax base in the globalised economy, is now especially vulnerable to the economic predation of vulture funds, thereby increasing the pressure on the financial resources of governments.

It is imperative to prevent these forms of resource grabbing. It is also necessary to guarantee that states and populations are effectively compensated for funds that may have been illegally misappropriated through these arrangements.
TAX AND LEGAL HAVENS

Tax and judicial havens provide individuals and companies with many services, such as banking secrecy, tax secrecy, an easier process of company creation and, more generally, opacity linked to the non-cooperative nature of these jurisdictions. Some tax and judicial havens are known for hosting industries with high technological potential, others because they offer favourable rules for the registration of ships.

Such jurisdictions are more commonly used to evade tax, environmental or social rules, in a more or less legal manner. Individuals and companies use tax havens to guarantee their impunity by concealing their identity from the tax and judicial authorities of their country of origin.

In fact, incorporating companies in these states is designed to artificially locate an economic activity outside the territory where it is actually taking place. Thus, this also allows multinationals to artificially relocate their profits to tax havens. These tax evasion strategies are expanding at an alarming rate with the development of the digital economy. The dematerialised nature of the digital economy facilitates the dissociation of production and sale and therefore the artificial transfer of profits.

Due to their opacity and uncooperative nature, tax and judicial havens are also the preferred jurisdictions for laundering the proceeds of criminal activities or concealing the sources of funds. These havens thus encourage criminal activity that undermines the rule of law, especially as such crimes often involve the misappropriation of public funds and corruption linked to resource exploitation.

The use of these jurisdictions is thus inherently linked to the evaporation of state resources and the accumulation of state resources by certain economic actors. Their use widens inequalities. These havens put a strain on the public services of countries whose resources are exploited without compensation. Due to the complexity of offshore arrangements, which rely on the expensive services of legal and accounting professionals, tax evasion is also a privilege of the super-rich.

While it is difficult to accurately assess the loss of revenue resulting from the use of these tax havens due to their opaque nature, the scandals linked to their use shed light on the extent of the phenomenon.

Requiring multinationals to publish detailed country-by-country reporting on their activities in all countries of operation would help to expose profit transfers to tax havens.

Moreover, the fight against tax and legal havens and, in particular, money laundering is generally hindered by the non-cooperative nature of these jurisdictions and the opacity of shell companies set up there. Therefore, increasing the transparency of the beneficiaries of shell companies appears to be another essential element in the fight against the impunity of economic actors.

The first edition of Sherpa’s handbook recommended integrating a country-by-country reporting requirement into international accounting standards, starting with the European Union. Despite some progress, the system has not yet been completed.

Since 2013, all French banks have been required to produce country-by-country reports on their subsidiaries and activities, profits, revenues, number of employees, taxes paid and public subsidies received. This reporting as highlighted the disconnect between profits reported in tax havens and the banks’ actual activity, suggesting a potential misuse of these jurisdictions to avoid tax laws or other regulatory obligations.

In 2015, France introduced a country-by-country declaration of economic, accounting, and tax results, which must be filed electronically by certain companies, to combat tax optimisation and tax evasion. The information included in the country-by-country declaration is transmitted to the partner states with at least one entity within their jurisdiction. In 2016, the French legislature had planned to make these country-by-country reporting results public, but the Constitutional Council dismissed this proposal citing respect for the freedom of enterprise.

These reporting requirements are insufficient. The requirements do not apply to all groups and the information remains confidential, as it can only be shared between tax administrations. This confidentiality undermines the very principle of reporting as an instrument of dissuasion.

Country-by-country reporting must be implemented ambitiously. In particular, scope of reporting should be broadened, without loopholes such as thresholds and safeguard clauses and reporting should be made public. Since a single subsidiary can enable tax evasion, it is essential that public reporting covers all countries in order to analyse artificial profit transfers between subsidiaries.

Reporting must include at least the following information for all countries and financial years: revenues, taxes paid, number of employees, grants, assets, sales and purchases.

Transparency on beneficiaries should also be improved through a more extensive definition of beneficial owners and extend- ing reporting requirements, for example, to foreign entities with assets in the EU. Sanctions for failure to declare, as well as incomplete or inaccurate declarations should also be strengthened.

It is also worth questioning the effectiveness of transparency as an instrument for deterring tax behaviour if the recipients of the information are not equipped to review and process it, and even more so when the behavior disclosed remains perfectly legal.

Other measures should make it possible to punish more severely companies that use tax havens and intermediaries who facilitate the implementation of such arrangements by expanding the criteria for the abuse of rights and tax fraud to include all forms of aggressive practices. More systematic punishment for the use of tax and judicial havens is also necessary. Commercial and financial sanctions could be envisaged to prevent the use of shell companies.
In addition to the evasion of state resources via tax havens, the restitution of funds illegally placed abroad to their countries of origin is crucial. The restitution of “ill-gotten gains” is at the heart of this fight.

Like other countries such as Switzerland, France has hosted some of these assets, which often stem from corruption of foreign public officials. Indeed, the globalisation of trade and the money laundering solutions offered by tax havens have allowed the accumulation of significant wealth through the embezzlement of public money by foreign leaders.

Thus, since its founding, Sherpa has initiated numerous legal proceedings to seize and freeze such assets in France, with the hope of securing the return of these assets to the countries affected.

While these proceedings have led to the confiscation of some assets by the French government, the legislature has not created mechanisms to ensure their return to the country of origin. Normally, when French courts issue judgments of conviction, they also rule on what happens to any assets seized during the proceedings by ordering their confiscation and restitution. But in the context of corruption and transnational money laundering, the legal framework is insufficient. If money is returned, the future of those funds depends on the will of the leaders of the victim states, even though they themselves may be implicated in corruption cases.

These various proposals led to the creation of a general legislative framework in 2021 recognising the principle of asset restitution. A new law provided for the creation of a dedicated budget line to hold the funds and isolate them from the rest of the state budget, and already imposes the main lines and principles of restitution.

The adoption of this general framework for restitution is a welcomed first step. However, it is only a general framework and must be further elaborated in order to have real practical effect.

In order to ensure the restitution of assets, the creation of an ad hoc restitution mechanism for each ill-gotten gains case is necessary, through a bi-lateral dialogue between the receiving State and the restitution State. This mechanism will necessarily have to involve civil society in the state of restitution, as well as independent international bodies.

In addition, each restitution mechanism should be based on the definition and identification of the victims of corruption and misappropriation of public funds. This definition should guide the allocation of assets.

Overall, this definition should make it possible to ensure that each resolution of a case of international corruption or money laundering is accompanied by reparation for the citizens who are victims of these practices.

In order to ensure the return of the funds, the creation of a universal ad hoc international bank whose mission would be “to receive all funds of fraudulent origin apprehended abroad and claimed by certain States” and “to ensure, depending on the situation of these creditor States, that these funds are effectively made available to the populations concerned”. This bank would be placed under the control of a committee composed of representatives of NGOs and citizens’ associations from the countries concerned.

Over the last ten years, civil society proposals have developed the main principles of any restitution process and call for the adoption of regulatory and legislative mechanisms in France and internationally.

The adoption of an international Convention establishing a universal mechanism for the recovery and restitution of stolen assets. This Convention would aim to create an ad hoc international bank whose mission would be to receive all funds of fraudulent origin apprehended abroad and claimed by certain States and to ensure, depending on the situation of these creditor States, that these funds are effectively made available to the populations concerned. This bank would be placed under the control of a committee composed of representatives of NGOs and citizens’ associations from the countries concerned.

Proposals n°5 Ensure the restitution of stolen assets through the establishment of a transparent and independent mechanism focused on identifying victims of corruption

The first edition of Sherpa’s handbook recommended the adoption of an international Convention establishing a universal mechanism for the recovery and restitution of stolen assets. This Convention would aim to create an ad hoc international bank whose mission would be to receive all funds of fraudulent origin apprehended abroad and claimed by certain States and to ensure, depending on the situation of these creditor States, that these funds are effectively made available to the populations concerned. This bank would be placed under the control of a committee composed of representatives of NGOs and citizens’ associations from the countries concerned.

Over the last ten years, civil society proposals have developed the main principles of any restitution process and call for the adoption of regulatory and legislative mechanisms in France and internationally.

At the heart of these proposals is an obligation on the part of states hosting stolen assets to return the assets even without an official request from the State of origin, transparency guarantees on the repatriation and allocation of the funds, and the participation of civil society.

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Overall, this definition should make it possible to ensure that each resolution of a case of international corruption or money laundering is accompanied by reparation for the citizens who are victims of these practices.
Beyond strengthening multinationals' obligations and liability regimes, there is a need to ensure that victims have an effective access to justice to assert their rights.

Unfortunately, in the context of multinationals’ activities, there are many practical and legal hurdles to access to justice, which exist both before and after judicial action.

Among the obstacles prior to judicial action, the lack of transparency and access to information on multinationals is a major obstacle to access to justice. Indeed, the opacity that surrounds economic activity hinders the collection of evidence concerning their activities.

Further down the legal process, other obstacles make it difficult for multinationals to be brought to court. In particular, seizures of judicial action by criminal and civil courts are hampered by questions of jurisdiction and applicable law, which are inherent to the international nature of such violations.
Beyond the obstacles for the victims themselves, the opacity of transnational economic activity also limits the action of investigators and magistrates. These evasions are hampered by the weakness of international cooperation mechanisms. In particular, international letters rogatory suffer from complex procedures, depending on political considerations and with long response delays. In environmental and financial matters, the scientific or technical aspects of litigations are an additional obstacle to evidence gathering.

The first edition of Sherpa’s handbook recommended increasing the human and financial resources available to administrative and judicial bodies in charge of ensuring respect for the environment and combating economic and financial crime. Another proposal suggested setting up a mechanism for international judicial cooperation for each national court or administrative agency in charge of economic and financial cases with an international dimension. The mechanism would consist in receiving judges from the corresponding jurisdictions of other countries.

To this end, the French legislature has engaged in a process of jurisdictional specialization, with the creation of the French National Financial Prosecutor’s Office (“Parquet national financier”), a crimes against humanity division (“Pôle spécialisé dans la lutte contre les crimes contre l’humanité”) and, more recently, the designation of specialized courts for environmental matters.

The creation of the European Public Prosecutor’s Office is also a positive step forward for European judicial cooperation and the fight against impunity, but its scope remains limited to serious infringements of EU rights.

Unfortunately, the legislature has also introduced the use of negotiated justice in financial and environmental matters through the creation of judicially enforced public interest agreements (“Conventions judiciaires d’intérêt public – CIP”). These agreements allow companies involved in certain environmental or financial offences to negotiate, with no transparency, the payment of a fine in exchange for the cessation of legal proceedings.

By allowing companies to avoid a public trial, the PJAs reinforce the opacity and impunity surrounding the activities of multinationals. These negotiated settlements prevent the truth from being revealed. Investigations and contradictory debates and thus deprive the justice system of its exemplarity. It also leads to the creation of a two-tier justice system, which promotes the economic interests of the powerful.

The relationship between transparency and accountability needs to be questioned. The various vigilance obligations and liability regimes should be systematically separated from the companies’ reporting obligations. To ensure access to justice, the asymmetry of information between companies and victims should be addressed by systematically reversing the burden of proof in civil liability regimes.

In addition, a right of access to information of general public information should be implemented, including when this information is held by multinationals, as suggested in the first edition of Sherpa’s Handbook. The rules on access to environmental information that have gradually been established offer a first step in this direction, as well as the provisions concerning consumer access to information on a product’s social-manufacturing conditions. Such mechanisms should be subject to judicial appeal in the case companies refuse to comply.

Consideration could also be given to making the conditions for obtaining an in-futurum investigation under Article 145 of the French Code of Civil Procedure more flexible with regard to information of general public interest held by multinationals. The efficiency of this procedure should be reinforced by the introduction of a dissuasive sanction in case of non-compliance, with a judicial decision rendered to secure the disclosure of information.

In order to ensure that access to information is the rule rather than the exception, it seems imperative to limit the scope and effects of the law on trade secrecy, for instance especially with regard to information related to legitimate comparative advantages or to protection for profit. Negotiated justice for corporate entities needs to be put to an end, as it increases opacity and leaves the victims out of the process.

Finally, the reinforcement and specialization of investigators and jurisdictions must continue. The French judges, once judicial action begins, should be provided with the means to carry out their mission. With regard to the strengthening of judicial cooperation and court capacities, the programme made with the creation of the European Public Prosecutor’s Office should be consolidated and the scope of cooperation be extended.
In absence of an international court to try companies, access to justice against multinationals means that national courts must be given the power to rule on abuses that took place abroad, according to a law that is favorable to victims. While French law allows national courts to exercise extraterritorial jurisdiction in certain circumstances, this ability is in fact limited.

In criminal matters, several jurisdictional grounds in principle make possible French courts to address criminal reprehensible acts committed abroad: universal jurisdiction for the most serious crimes; 
active or passive personal jurisdiction when the victim or the perpetrator is a French national; and acts of complicity in France for an offence committed abroad.

In particular, the legislature has made it easier to combat corruption and influence peddling committed abroad by removing the requirement of a final decision by a foreign court in the case of acts of complicity and removing the public prosecutor’s office’s monopoly.

In tax matters, the legislature also abolished the “Bercy lock” in 2018. Previously, only the French tax administration had the right to file a complaint against individuals for tax fraud, with the approval of the Fiscal Offences Commission. Neither the public prosecutor’s office nor the civil party could act in its place. Now, fraud cases exceeding 100,000 euros are automatically forwarded to the public prosecutor’s office. However, the judiciary still cannot exceed the public prosecutor’s monopoly. This monopoly means that the initiation of public prosecution (“action publique” from Latin for “public’s action”) is reserved for the public prosecutor alone. The current status of prosecutors, who serve subject to the executive branch, renders their discretion problematic in cases that closely affect France’s economic and political interests.

In many cases, the prosecution of offenses is limited by the public prosecutor’s monopoly. This monopoly means that the initiative of public prosecution (“action publique”) is reserved for the public prosecutor alone. The current status of prosecutors, who serve subject to the executive branch, renders their discretion problematic in cases that closely affect France’s economic and political interests.

A prior complaint by the victim or an official denunciation by the proper authority of the country where the act was committed may also be needed. In some cases, offenses can only be prosecuted when they are punishable under both French law and the law of the country where they were committed, according to the double criminality condition. Under French law, complicity in an offense committed abroad usually requires the establishment of the offense by a foreign court’s final decision.

In order to combat international corporate crimes, it is necessary to continue the legislative momentum by removing the remaining obstacles to the prosecution of multinationals as perpetrators or accomplices in crimes committed abroad. The requirements of double criminality, a foreign court’s final decision or the public prosecutor’s monopoly should be eliminated.

With regard to the “Bercy lock,” confusion between the executive and the judiciary and the hindrance of the prosecution of serious offenses, call for the definitive and complete abolition of this mechanism.

As in the case of corruption or offenses affecting the interests of the European Union, the legislature has abolished the requirement of double criminality and need for a prior complaint by the victim or the authorities.

As in the case of corruption and influence peddling, the legislature has specified that French criminal law is applicable not only when the offender is French but also when the offender is “a person habitually resident or exercising all or part of his economic activity in the French territory.”

Even more recently, the legislature has simply abolished the double criminality requirement as well as the need for a foreign court’s final decision to bring prosecution of complicity by instigation in France of certain crimes committed abroad.

Despite this significant progress, limits to applicability of French criminal law remain for many offenses committed abroad by French economic actors or those carrying out economic activity in France. Thus, some offenses are still difficult to apply extraterritorially. This is particularly true of environmental offenses, which are closely linked to companies’ international activities.

In civil matters, it may be possible to obtain redress in France for damage suffered abroad, for as the French courts have jurisdiction over a defendant domiciled in France. It thus seems possible to “relocate” litigation against multinationals to France. There is also a subsidiary ground of international jurisdiction based on the denial of justice forum necessitates.

However, forum necessitates is subject to two conditions. The plaintiff must establish on the one hand that it is impossible in fact or in law to bring action before a foreign court, and on the other hand, that there is a sufficient link with France. These conditions are interpreted restrictively.

Moreover, if access to the French courts is possible under the conflict of jurisdictions rules, the conflict of laws rules in principle designate the foreign law as the law applicable to the litigation. These rules could prevent the application of the laws relating to the social responsibility of a parent company in its country of origin. Indeed, Article 4 of the European Regulation on the law applicable to non-contractual obligations (Rome II) establishes the principle of the application of the law of damages, which, if it does not provide for the parent company’s liability or is less favourable in social or environmental matters, may thwart the objective of making parent companies accountable and providing access to justice for victims.

Thus, the enactment of new obligations and rules governing the civil liability of companies does not in itself remove these difficulties for access to the courts, unless they are considered as overriding mandatory laws, applicable independent of the conflict of laws rule.

The first edition of Sherpa’s handbook recommended reducing these various obstacles to the prosecutions of multinationals for acts committed abroad. In order to reduce the role of the public prosecutor’s office and provide victims with means of recourse, it was suggested that the requirement that the offense be established by a foreign decision be removed for acts of complicity committed in France.

Some legislative developments in this direction are worth noting. In particular, the legislature has made it easier to combat corruption and influence peddling committed abroad by removing the requirement of a final decision by a foreign court in the case of acts of complicity and removing the public prosecutor’s office’s monopoly.

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Some legislative developments in this direction are worth noting. In particular, the legislature has made it easier to combat
Multinationals have acquired a capacity to influence public debate and decision-making known as corporate capture. This influence tends to enshrine the interests of these multinationals to the detriment of the public interest. Corporate capture enables multinationals to thwart attempts at regulation that target them.\(^\text{135}\)

Lobbying and revolving doors constitute a primary form of direct influence. There also are more indirect forms of influence on academic or scientific discourse or public opinion through advertising and marketing. This secondary form of indirect influence has grown particularly strong in the digital age with the development of targeted advertising and “surveillance capitalism”.\(^\text{136}\)

Another manifestation of the influence of multinationals is the privatisation of the norms of globalisation, which they have achieved with the consent of States. Companies tend to create their own rules to regulate the internationalisation of their activities, while keeping State regulation out of the picture.

Investment treaties and arbitration tribunals enable companies to manage their international disputes according to the rules they choose. In this context, State law tends to become merely a product in the market of legal services at the disposal of economic interests.\(^\text{137}\)

The creation of “soft law”, i.e. non-binding law, is another manifestation of this phenomenon of privatisation of norms. As an instrument to make capitalism socially acceptable, soft law enables multinationals to define their responsibilities, either by “adhering” to principles drawn up by States within a multilateral body framework or by producing soft law themselves, individually (codes of conduct, ethical charters) or within multi-stakeholder bodies.\(^\text{138}\) The ineffectiveness of these tools, which serve corporate communications and public relations functions more than victims’ access to justice, has been widely denounced.
 DIRECT INFLUENCE THROUGH LOBBYING AND REVOLVING DOORS

Given the porous overlap between the political and economic spheres, multinationals now have a direct and privileged capacity to influence public decision-making 

Lobbying refers to the action of groups, individuals, and organisations on behalf of private interests to influence public decision-making and the enactment of norms, directly with decision-makers. Lobbying can take different forms (e.g., conferences, meetings, position papers, amendment proposals, etc.) and occurs throughout the entire decision-making process, from policy development to decisions before the Constitutional Council 

Lobbying and by and for private companies should be distinguished from advocacy, which, for example, is carried out by public interest groups to influence public decision-making. There is a fundamental difference between lobbying and advocacy not only as to the nature of these activities, but also as to resources and means available to pursue objectives and access decision-makers 

“Revolving doors” refers to a phenomenon specific to the French system, in which public officials are allowed to switch from public to private sector positions, and vice versa, for a period of time after leaving government service. This is especially true of the system put in place in 2016 to counteract conflicts of interest, and thus avoid the need to bribe public officials down-wards or to pay off companies to create a legal environment favourable to their interests. The few mechanisms that have been put in place to combat revolving doors, such as gift-making and remuneration for participation in conferences, have been insufficient, and public officials often fail to respect the deadlines imposed 

With regard to conflicts of interest linked to revolving doors, the law criminalises illegal interest-taking and favouritism, and punishes public officials when they advance personal interests ahead of the public interest 

Furthermore, the legislature has enacted a system to prevent conflicts of interest but, here again, the system is limited and largely based on transparency, ethics, and legal incompatibilities. Indeed, corporations now have a direct and privileged capacity to influence public decision-making by shaping public debate and perception of issues. Regarding lobbying, it is necessary to broaden and clarify the definition of “interest representatives” in view of the wide variety of natural and legal persons who may engage in or who may be targeted by lobbying activities directly or indirectly (on their own behalf or on behalf of other organisations). In particular, a large portion of indirect lobbying expenditures are not accounted for, even though they influence public policy decision-making by shaping public debate and perception of corporate practices. The reporting and transparency obligations on lobbying activities should be rethought to enable the useful traceability of the public decisions, as well as to ensure, on the one hand, balanced access to public decision-makers for all citizens and, on the other hand, a plurality of expertise for all decision-makers. Transparency obligations should be extended to decision-makers themselves. The content of reporting requirements should also be updated and improved. The subject of communication and exchanges, the public policy decisions, and the positions advanced by lobbyists and their beneficiaries should be made public. The frequency of reporting should also be adapted.

There is a need for obligations to diversify and balance the interests consulted in public decision-making. Certain prohibitions could also be envisaged. For instance, the WHO Framework Convention on Tobacco Control provides that States Parties must ensure that their public health policies are not influenced by the tobacco industry’s commercial interests. Similarly, one could consider preventing key regulations related to fundamental rights or environmental protection from being influenced by economic interests.

Regarding the prevention of conflicts of interests, reporting obligations as well as prohibitions and legal incompatibilities should be strengthened and widely extended to all public decision-makers, officials, and their staff. In particular, the HATVP’s ethical oversight and enforcement of revolving doors should be strengthened and expanded for a maximum number of actors. The scope of prohibitions should be broadened.
The corporate capture of lawmaking and regulatory processes also appears in more diffuse and indirect practices, such as influencing public opinion through communication in the broadest sense, whether advertising, marketing, or corporate communication. Television or internet advertisements, posters and displays in public spaces, and sponsored content in the press, sports, music, or entertainment are all forms of communication internal or external to a company, and have multiple targets.

This communication does not simply state the facts, but rather seeks to influence behaviours and preferences, and gain acceptance. The substantial investment of companies in communication can thus be explained by its impact on two levels: firstly, the impact it has on consumer practices, and, secondly, its impact on public opinion.

In addition to commercial communication and advertising regarding goods and services, corporate communication also consists of political messaging about a company's structure and objectives, as well as its social or environmental role. Corporate communication and CSR communication allow companies to create a virtuous image of themselves and influence the general public's perception of their activities and products, despite the damage they may cause. This constitutes a form of soft power that makes it possible for companies to thwart attempts to impose regulations on their activities.

Furthermore, the line between corporate communication and legitimate news is blurred by the monopolisation of the media and a dependence on advertisers. Sponsored content, for example, gives visibility and journalistic credibility to promotional and commercial practices that are themselves environmentally harmful, such as the use of polluting media like digital screens, or the capture of influencing methods which are themselves environmentally harmful, such as the use of polluting media like digital screens.

Beyond their influence on the content of public debate, these communication practices have a direct impact on the environment and fundamental freedoms. Corporate communication, in terms of both its commercial and political dimensions, needs to be legally defined in order to identify limits and ensure the free-flow of useful information is at the centre of these practices. The French Consumer Code and case law on misleading commercial practices provide an initial basis for this definition as well as the characteristics of lawful advertising.

In order to strengthen the prevention of abuses of commercial and corporate communication and highlight the impact of these abuses, companies could be required to declare all expenses and activities related to influence campaigns to the HATVP. As already mentioned, the directory of interest representatives created in 2016 is based on a limited view of lobbying and influence activities, which does not include communication activities and expenses that indirectly influence decision-makers.

In order to address developments in online advertising, it is imperative to specifically rethink the market for online advertising, and to strengthen and facilitate the protection of personal data and respect for informed consent. It is also necessary to reconsider the rules on media ownership in order to guarantee their independence and emancipation from advertisers.

Corporations and research institutes that rely on a colossal infrastructure and complex tools of mass surveillance, data capture, and the exploitation of an individual's attention at the cost of privacy, freedom of choice, and freedom of conscience.

In both cases, consideration should be given to ensuring that the statute would apply broadly to any communication emanating from a corporate company.

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Educational and research independence should also be strengthened not only to prevent the misuse of science for commercial purposes, but also to limit overlap between political and economic circles.

Once again, these preventive measures must be coupled with sanctions that have a real deterrent effect. In particular, image laundering must be subject to criminal sanctions. If the numerous ongoing litigation efforts to sanction image laundering turn out to be unsuccessful, consideration should be given to either reforming the offence of misleading commercial practices to clarify its scope or to creating a separate offence for image laundering. In both cases, consideration should be given to ensuring that the statute would apply broadly to any communication emanating from a corporate company.

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The first edition of Sherpa's handbook suggested eradicating false advertising related to sustainable development.

Currently, the criminalisation of misleading commercial practices is mainly aimed at the economic and technical aspects of the promotion of products and services. With regard to a company's ethical and political propaganda, the criminal code has not yet made it possible to penalize "reputation laundering" through corporate or traditional media.

Even worse, the legislature has increased opportunities for companies to engage in such laundering by adopting numerous pieces of legislation favouring communication over accountability.

Several examples include the "PACTE" law, the creation of the "entreprise à mission" status, and the prevalence of reporting measures, which have become the cornerstone of CSR communication to the detriment of corporate accountability.

In addition, the development of targeted advertising has greatly increased the influence of certain digital giants. Targeted advertising relies on a colossal infrastructure and complex tools of mass surveillance, data capture, and the exploitation of an individual's attention at the cost of privacy, freedom of choice, and freedom of conscience.

Beyond their influence on the content of public debate, these communication practices have a direct impact on the environment and fundamental freedoms.
Beyond the influence multinationals have over public opinion and decision-making, multinationals have, with the consent of state actors, largely privatized the norms of globalization through the consecration of “soft law” and recourse to arbitration.

The “soft law” refers to voluntary standards and commitments that are not binding. This alternative legal system has filled a regulatory vacuum left wide open by states. However, it has neither the democratic legitimacy of law or its effects.

The existence of “soft law” is also used as an argument by companies to defeat attempts at more binding regulation. It allows multinationals to demonstrate their social responsibility by “adhering” to principles drawn up by States within the framework of multilateral bodies, or by producing principles themselves, either individually (codes of conduct, ethical charters) or within multi-stakeholder bodies, if not totally private.

Many of these mechanisms encourage the development and use of non-judicial remedies for abuses by multinationals and rely on a so-called media sanction.

Among these soft law texts are the OECD Guidelines for Multinational Enterprises (hereafter the “OECD Guidelines” or “Guidelines”). The Guidelines require member and adhering states to establish government-supported entities, National Contact Points (hereinafter “NCPs”), whose essential task is two-fold: first, to enhance the Guidelines’ effectiveness through advocacy and, second, to handle complaints, known as “specific instances”, against companies that have violated the Guidelines.

To achieve these objectives, the OECD Guidelines include a “Procedural Guidance” which calls on states to ensure that their NCPs meet the basic criteria of visibility, accessibility, transparency, and accountability. States should also ensure that their respective NCPs are equipped to handle complaints in an impartial, predictable, fair and consistent manner with respect to the Guidelines.

Association and communities that have contacted the French contact point have recognized the failure of this supposed system of privatized and negotiated justice, and acknowledge that the power relations between the system have revealed that abuses by multinationals and rely on a so-called media sanction.

There has been much criticism of these mechanisms. They give foreign companies the right to avoid state justice and access a parallel justice system in public interest cases. Third party stakeholders are denied the right to assert their rights in this context. The vagueness of treaty provisions protecting investors, and the interpretation that has sometimes been given to them by arbitration tribunals, allows multinationals to challenge government decisions taken in the public interest.

Arbitration and investor-state dispute resolution mechanisms (ISDS) are further evidence of the extent of the rights granted to multinationals, and their power to influence public decisions. These mechanisms are included in the several thousand bilateral (BITs) and multilateral treaties (such as the Energy Charter) protecting foreign investments. These agreements allow foreign investors to challenge government decisions that they believe are incompatible with the provisions of these treaties before an arbitration tribunal, claiming compensation from the state for the damage suffered.

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SUBORDINATION OF GLOBALISATION STANDARDS

The adequacy of self-regulation and co-regulation in the field of corporate social and environmental responsibility must be challenged. The priority should be shifted away from voluntary commitments and out-of-court procedures for the settlement of disputes regarding fundamental rights and the environment.

The role of independent administrative and public authorities should also be limited in order to restore the judiciary’s traditional role in protecting fundamental freedoms and sanctioning behaviour that undermines society’s values.

A second step is the subordination of the international economic order to an international public order. This can take two forms: firstly, negotiation and adoption of an international treaty on multinationals requiring states to reassert their role in the governance of globalisation and its effects on fundamental freedoms. The abdication of states in the face of multinationals must not be allowed to continue.

Development since 2010

The first version of Sherpa’s handbook suggested converting National Contact Points into true arbitration structures.

Having been in place for decades, the system has revealed its flaws and inefficiencies. NCPs do not meet their basic criteria and the Guidelines’ principles for handling complaints. Observers, and especially users of the system, have widely criticized NCPs for failing to provide effective access to remedies for human rights and environmental abuses by multinationals.

Sherpa Handbook of Proposals

* Sherpa Handbook of Proposals

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Proposal n°10 Challenge the self-regulation of multinationals through “soft law” and establish the supremacy of international public order over international economic order

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Subordination can also be achieved by amending the Rome Statute to allow for the prosecution not only of individuals, but also of legal entities before the International Criminal Court.

Finally, subordination must involve a strict framework for international arbitration, so as to no longer allow companies to settle their disputes without any consideration of social or environmental factors. The finalization of BITs could be prohibited when they contradict the provisions of the UN Treaty on Business and Human Rights or other treaties on the protection of fundamental rights.

There is a general need for states to denounce, either unilaterally or through negotiation, existing investment treaties and, pursuing their termination, to adopt rules on interpretation to prevent companies from suing states in disputes involving human rights and the environment.
As freedom of association and expression are sine qua non conditions for the realisation of the rule of law and the protection of fundamental freedoms, the protection of civic space must be ensured in the face of increasing attacks, particularly from private actors.

Associations, trade unions, activists, indigenous representatives, whistleblowers and journalists can serve as “rights defenders”, whose existence and actions are not only consistent with the realisation of the rule of law and other fundamental freedoms, but also with the protection of the environment. However, these actors are now seeing their activities hampered and their very existence occasionally called into question by multinationals and government authorities. Every year, hundreds of rights defenders, particularly those working to protect the environment, are victims of murder and violence. This shrinking of civic space is happening around the world as well as in Europe. France is no exception.

Although France has adopted a general whistleblower statute to protect whistleblowers, this protection remains very incomplete. Moreover, SLAPPs (Strategic Lawsuit Against Public Participation), which aim to stifle the exercise of freedom of expression through judicial intimidation, are frequently used by companies and institutions against rights defenders when they denounce corporate practices. Despite numerous warnings from civil society, this issue of SLAPPs has still not been addressed by the legislature.

Another illustration of the mistrust of associations is the legislative and judicial tendency to limit their opportunities to take legal action. As is often the case, for example, when associations denounce environmental violations by companies or ethics violations involving the private and public sector.
Whistleblowers are individuals or organisations that reveal or report facts or behaviours that pose a risk to the public interest. In a complex globalised world dominated by corporate secrecy and opacity, whistleblowers play a fundamental democratic role in highlighting risks as well as violations of ethics, fundamental rights, health, and the environment.

It is therefore imperative to legally enshrine the status and protection of whistleblowers. This is not an acknowledgement of powerlessness in the face of opacity, but rather a recognition of the complexity and imbalances of our societies, in which key information on issues relating to the public interest is largely controlled by multinationals.

Yet whistleblowers are still too often subject to suspicion and even reprisals, including judicial intimidation and other forms of harassment. The financial, professional, and psychological consequences of such retaliation are considerable. In France, the legal protections afforded to whistleblowers have long been scattered, unclear, and limited.

The first edition of Sherpa’s handbook advocated for strengthening the protection granted to whistleblowers, and suggested, in particular, creating an international statute protecting whistleblowers and entrusting an ad hoc institution in each country with the task of applying it.

The French legislature established a general whistleblower status and protection regime in 2016. Although this legislation was widely welcomed, its progress is still limited.

First of all, the protection rationae personae, i.e. with regard to the legal standing of the whistleblower, excludes many potential actors from the scope of protection. This is the case in particular for legal persons, such as associations and trade unions, or persons who have had indirect knowledge of the facts or behaviours that are the subject of the whistleblowing.

The inclusion of subjective criteria in the law also draws a line between good and bad whistleblowers, such as those acting in a disinterested manner or whether the disclosure is necessary and proportionate to benefit from criminal immunities. The requirement to comply with a strict three-tiered procedure, which, with rare exceptions, must include internal whistleblowing, deter potential whistleblowers and forces others to face the people most likely to retaliate against them by themselves in an uncertain and unequal procedure.

Furthermore, the statutory text limits the protection offered rationae materiei, i.e. with regard to the content of the alert. In particular, the text requires that the disclosures or warnings must concern a ‘serious and manifest’ violation of an international commitment or ‘a serious threat or harm to the public interest’. These requirements impose a threshold in terms of harm to the public interest and protect only those disclosures which are made at a relatively late stage of risk, despite the very principle of whistleblowing and the interest in debate on certain issues of public concerns.

In 2019, the European Union adopted Directive 2019/1937 on the protection of persons who report breaches of EU law. This represents an opportunity to overcome the limitations of French legislation and eventually create a genuine, universal whistleblower status as well as a comprehensive protection regime.

Firstly, it is imperative to harmonise protection regimes to achieve maximum protection for whistleblowers, broadly defined, in order to protect all natural or legal persons, in particular associations and trade unions who reveal information of public interest.

In addition, the whistleblowing regime should be truly harmonised and whistleblowing facilitated. In particular, it is imperative to facilitate and protect public whistleblowing by ensuring the anonymity of whistleblowers and safeguarding the individuals and organisations that relay the whistleblowing. Consideration must be given to strengthening the protection and arrangements for whistleblowing related to defence and national security.

Whistleblower protections should include strengthened mechanisms for preventing reprisals, providing psychological and financial support for whistleblowers, and punishing offenders of these protections. In particular, immunity from prosecution should be broadened, especially for whistleblowers and those who assist them in obtaining and keeping the data and documents necessary for whistleblowing, and not only in the context of their disclosure.

There should be a mechanism for reversing the burden of proof and the prompt procedural handling of cases where retaliation is suspected as a result of whistleblowing.

Finally, sanctions for those who, in any way, hinder or retaliate against whistleblowers or those close to them should be strengthened.
LEGAL ATTACKS ON RIGHTS DEFENDERS THROUGH SLAPPs

SLAPPs consist of companies, institutions, or public persons taking or threatening to take legal action against individuals or organisations that denounce or criticise their activities in order to hinder their ability and willingness to intervene in the public debate.

These lawsuits are multifaceted in nature. They are based on a wide variety of legal grounds, both civil and criminal. Numerous initiatives in France and abroad have made it possible to identify the various cases that have been described in law, by researchers and in public opinion, as SLAPPs. These initiatives have enabled researchers to identify the common characteristics of SLAPPs.

Firstly, SLAPPs are lawsuits that target “watchdogs of democracy” in response to their efforts to inform public opinion and fuel a public debate regarding the activities of the perpetrator.

Secondly, the purpose of these lawsuits is not judicial victory, but censorship. Their purpose or effect is to obstruct the legitimate exercise of freedom of expression in all its dimensions, and thus to permanently obstruct the democratic role normally played by rights defenders. SLAPPs force their targets to devote resources to their legal defence, diverting them away from their missions. These lawsuits also generate widespread self-censorship within civil society.

This characteristic is reflected in the disproportionate and unbalanced nature of the lawsuits. Initiated by powerful actors, SLAPPs regularly involve the introduction of nearly simultaneous lawsuits on several grounds and against multiple defendants. They are also often accompanied by demands that are disproportionate to the financial capacities of the persons concerned. They thus undermine equality of resources and erode trust in the judiciary and its auxiliaries by subverting the purposes of justice.

Under these circumstances, it does not matter that by the influence of the European Court of Human Rights in particular, a good number of SLAPPs result in acquittals. It also does not matter that some of these lawsuits may be withdrawn, nor that they result in the claimant being condemned for filing a frivolous claim.

These solutions, although favourable to defendants, are not likely to resolve the devastating effects that SLAPPs have on the rule of law, which are caused by burdensome procedures played out on unequal terms despite the important public interest in the debate they muzzle.

Australia, Canada, and some American states have already adopted legislations to prevent the proliferation of SLAPP lawsuits and sanction those who bring them.

It is imperative to strengthen the mechanisms that restore an even playing field in SLAPP lawsuits and also to effectively sanction these abuses.

In addition to extending the status and protections of whistleblowers, which would bolster the fight against SLAPPs, it is necessary to create a mechanism, particularly a procedural mechanism, to prevent and punish these practices.

First and foremost, it is important to offer solutions to rapidly stop these lawsuits in order to avoid the financial and psychological drain they cause. To this end, it would be possible to allow the targeted parties and judges to raise these abuse more broadly from the outset of proceedings, when their effect is to limit the exercise of freedom of expression in public interest debate. It is also necessary to reverse the burden of proof in SLAPPs in order to restore the balance between the parties involved.

With regard to actions brought on the grounds of media law, in addition to decriminalising defamation, consideration should be given to introducing a form of prosecution and defence when the facts clearly fall within the scope of a public debate, or when lawsuits are brought by a legal person against broadly defined whistleblowers, or to reversing the burden of proof.

In addition, in order to better protect the rights of targeted persons from the phenomenon of forum shopping, it might be useful to modify the rules of jurisdiction and applicable law in relation to defamation within the European Union.

Furthermore, it is imperative to strengthen the current sanctions in relation to abusive proceedings, so that they have a real deterrent effect, without prejudice to the damages that may be awarded in relation to the financial and moral prejudice of the persons concerned.

Finally, in order to strengthen the societal sanctions of these practices, it would be interesting to broaden the possibilities offered under offence of obstruction, provided for in Article 431h of the Criminal Code, on the model of the offence with regard to whistleblowing to ensure that the statute effectively covers obstruction of the broadly defined whistleblowers’ freedom of expression, when the procedures or threats of procedures have the effect of preventing organisations or individuals from exercising their freedom of expression and activities necessary to their missions.
Judicial actions enable non-profit associations to defend the statutory objectives they have set for themselves. These “watchdogs of democracy” play a key role in the fight against impunity for certain crimes by aiding victims through the justice system and, more generally, involving citizens in defending the public interest by getting them to join the associations’ actions.

However, there are increasing restrictions on these associations’ judicial action in criminal matters. In France, public prosecution is initiated and exercised by the public prosecutor, who decides whether or not to prosecute a perpetrator in accordance with the principle of prosecutorial discretion. Under the conditions determined in Article 2 of the Code of Criminal Procedure (CCP), public prosecution may also be initiated by injured parties when they bring civil action. The victim of a crime or misdemeanor can indeed bring civil action to obtain redress for the damage caused by the offence. They can also initiate public prosecution by lodging a “civil party” complaint (“plainte avec constitution de partie civile”) directly with an investigating judge, a magistrate whose independence from the executive is fully guaranteed.

Exercised by associations to defend their statutory objective, civil action is at the forefront of the fight against corruption, and human rights and environmental violations resulting from economic activity. Civil action mitigates the arbitrary nature of prosecutorial discretion and provides necessary support to victims.

Indeed, in cases involving political, diplomatic, or economic interests, the prosecutors’ lack of independence from the executive presents a risk of conflict of interest, which may limit their willingness to prosecute. Furthermore, the direct victims of offences are not always identifiable, or may lack the material, psychological, and financial means to initiate criminal proceedings, especially when the offences have been committed abroad.

The prosecution of offences, particularly those related to globalization, therefore becomes a double-unknown equation, in which both the public prosecutor and the victims are not always willing and/or able to act. Enabling associations to initiate public prosecution through the exercise of civil action is therefore an imperative to fight impunity and realize the right of access to justice.

The first edition of Sherpa’s handbook suggested strengthening opportunities for associations to initiate public prosecution and exercise their rights as civil parties. In particular, the handbook recommended amending Article 2 of the Code of Criminal Procedure in order to facilitate the action of associations fighting against environmental damage and corruption.

Although in the first few years following this proposal, some developments may have given associations hope, this trend has since been reversed. Initially, the legislature gradually established the role of associations in criminal proceedings by increasing the number of legal authorizations provided for in Articles 2-1 et seq. of the CCP. Initiated with authorizations granted to anti-alcohol and anti-racist leagues, these legal authorizations now cover a variety of realms, which the legislature considered worthy of enhanced protection, including environmental and consumer protection, the fight against gender-based violence, and corruption.

However, the civil action regime available to associations resulting from these various authorizations is fragmented and incomplete. Created in response to scandals and changes in criminal policy, the authorizations provided for in these articles are inconsistent. Some do not in fact enable public prosecution to be initiated.

Some articles make the associations’ admissibility conditional on prior executive “approval” (“agrément”). In particular, anti-corruption associations are approved by the Minister of Justice according to often subjective criteria, set by a decree of the Conseil d’Etat. In reality, the admissibility of anti-corruption associations thus depends not on a court decision but on a governmental decision, even though the associations’ legal action as civil parties should attenuate the arbitrariness, with regard to the specificity of the aim and statutory objective pursued. This solution would enshrine a general admissibility while codifying the case law known as “Biens Mal Acquis”, which had retained this solution with regard to associations fighting corruption.

In order to limit disputes regarding their admissibility, the special authorization regime could be maintained, while being harmonized with regard to the authorization criteria. Associations falling within the scope of these authorizations could thus continue to benefit from a form of presumption of admissibility in certain realms of expertise.

The legislature would have to coordinate this system with the general system of Article 2-4 in order to allow associations that are not legislatively authorized, to carry out legal actions that are relevant to their statutory purpose. Such a solution would be similar to the solutions adopted in administrative matters and to the solutions provided by Spanish or Portuguese law, which enshrine the actio popularis.

In some writings on anti-corruption, the admissibility of associations is still discussed. The approval process prevents a large number of associations from accessing criminal justice to defend their statutory objective and in many cases limits their scope of action to a limited number of offences.

With regard to the fight against international economic crime, this creates an inequitable situation in which, for example, an Indian anti-corruption association lacking executive approval would not be able to bring suit against a French company involved in corruption in India. Far from enshrining the key role of associations in advancing the rule of law, the current solution endorses a form of control over their legal action through special authorizations and reflects the growing suspicion towards “private prosecutors.”

Sharma, "Regulating Transnational Companies, 46 Proposals", op. cit., see the proposals No. 110-3.

ibid, see in particular proposals 81-11, 23, 24, and 36.

ibid, p. 10.


Sharma, "Regulating Transnational Companies, 46 Proposals", op. cit., proposal No.1 suggested integrating an additional subparagraph into the Articles of Partnership Contract, by inserting obligations into the definition of a partnership contract, as follows: "(Our translation).

The legislator has in fact directly or indirectly established various obligations of vigilance incumbent on parent companies, contracting businesses or their managers, in particular regarding concealed work, corruption, money laundering, human rights or environmental violations.

See on this subject, Marie-Caroline Bourdon, "Regulating Transnational Companies, 46 Proposals", op. cit., see proposals No.21 and 22.

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See on this subject, Marie-Caroline Bourdon, "Regulating Transnational Companies, 46 Proposals", op. cit., see proposals No.21 and 22.
26. Tribunal collectif, «La responsabilité environnementale se négocie pas » (Lundi, 8 November 2013).
27. La «régime d’assurance en 2016 » du 9 décembre 2016 (relative à la transparence, à la lutte contre la corruption et à la rigueur de la vie économique), Article 17.
28. Juliette Tricot et Tatiana Sachs, «La règle de la déontologie de l’emploi et les responsabilités des entreprises », Droit et Société, n° 100/2020. The French law illustrates the extent to which, under the scrutiny of compliance, the conditions of criminal liability are transformed without any need to modify the text of the existing statute. This is the strength of the legal or financial conditions of the tax. Even without a conviction for tax evasion, the tax authorities have the right to order the rectification of the documents to be submitted to them by individuals or entities who have not fulfilled their obligations towards the tax authorities.
29. The mechanism now also covers the tax authorities which, if fraud and criminal evidence of the nature of tax evasion is found, can lead to tax authorities ever legal or financial conditions of an organisation to not submit the information about the identity of his shareholders or tax avoidance.
30. «Select this option must be submitted to the competent tax office and must appear in the register of taxpayers or personal income tax».
Handbook of Proposals

endnotes
Accountability, Human Rights and MSI: La protection des lanceurs d'alerte


208. See, in particular, the fight against corruption: "Corruption offences have the particularity of not having direct victims or of not allowing victims to know that they are victims. This is the case when a company bribes a public decision-maker in order to obtain a contract, and the competitors who have been ousted can hardly know the real reason for their ouster. In this case, the possible inaction of the public prosecutor’s office when informed of such facts cannot therefore be counterbalanced by the civil action brought by the victim. This situation is the cause of suspicions sometimes expressed about the real will of the justice system and the Government to see corruption acts effectively prosecuted and punished, in particular when they concern elected officials,” Report made on behalf of the Law Commission by Mr Yann Galut, MP, registered on 12 June 2013, page 30. (Our translation).


210. Assemblée nationale, Office parlementaire d’évaluation de la législation, Rapport n°1583 sur l’exercice de l’action civile par les associations, Pierre Albertini, 11 May 1999; see also Tribunal de grande instance de Paris, 10th correctional chamber, Request for opinion No. 1200015: "From a technical point of view, the above-mentioned legislative provisions do not regulate in a perfectly uniform manner the conditions for the empowerment of associations and its effects." (Our translation).

211. Law No. 2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime. Included in Article 2-23 of the CCP following the Cahuzac affair, the legislative authorisation in the realm of corruption has the particularity of requiring associations to obtain prior executive approval, issued by the Minister of Justice. Decree No. 2014-327 of 12 March 2014 on the conditions for approval of anti-corruption associations with a view to exercising the rights recognised to the civil party. Article 1: “sufficient number of members”, “the disinterested and independent nature of its activities”, “during the years of its existence, effective and public activity with a view to combating corruption” (Our translation).