How can civil society act to obtain the recovery of misappropriated assets?

Transparence International France, 30/06/2011

More than seven years following the adoption of the United Nations Convention Against Corruption (UNCAC) in Mexico in 2003, the effective implementation of the principle of the recovery of stolen assets to populations (article 51) is still far from having attained the hoped for results. According to the figures of the World Bank and UNODC (Star initiative), of the hundreds of billions of dollars stolen over the past fifteen years, no more than five billion have been recovered.¹

It has now become obvious that the effective implementation of this central principle of UNCAC cannot remain the sole initiative of the States. This is particularly true when they fail to engage in recovery processes because the presumed authors of misappropriation or those close to them still are in positions of power or because their institutions are not solid enough to become involved in this type of international cooperation. In those countries in which the misappropriated funds are invested, diplomatic considerations make it impossible to carry out the least initiative in most cases.²

In the South as well as the North, civil society must get involved and this is the sense of the declaration adopted by the fourteen African sections of Transparency International at the movement’s General Assembly on October 18, 2009 in Berlin.³

How can civil society act?

As soon as there are grounds to presume receipt of stolen property or money laundering of misappropriated public funds on their territory, the signatory states of the UNCAC should open investigations to verify the origin of funds having been used to obtain litigious assets. To guarantee that the facts are pursued, civil society organisations have at least the power to call upon the signatory states of the UNCAC Convention to act.

If such calls do not suffice, civil society organisations (non-profit organisations opposed to corruption, which defend human rights, non-profit organisations for lawyers), can go further and call upon the justice system to ensure that investigations are opened.⁴

The object of this note is to provide practical advice for carrying out this type of activity (I.) as well as appeals campaigns likely to support them (II.). It is based upon the experience of various French NGOs, among which Transparency International in France (III.).

² However, Switzerland’s recent efforts should be pointed out. Switzerland has just adopted a law making it easier to recover misappropriated assets by setting up a presumption of illicitness.
³ http://www.transparence-france.org/e_upload/pdf/appel_sections_africaines_de_ti_291009.pdf
⁴ It should however be noted that not all legal systems allow for the disinterested action of actors in civil society regarding collective prejudice (particularly in cases of corruption). Our partner, SHERPA, is currently carrying out a comparative survey in ten countries to evaluate the possibilities for civil society to trigger penal or civil procedures to confiscate/ recover illicit assets. The results of this survey will be added to the present note.
I. How can lawsuits be filed to ensure that presumably misappropriated assets are returned?

1. Starting point: the presumption that a foreign public official may have accepted or laundered illicit assets.

Such presumptions are generally based upon
- allegations of illicit earnings;
- identifying wealth that is difficult to explain given the official income of the concerned person, which may consist of various items such as real estate, bank accounts, corporate holdings, luxury products (such as yachts, sports cars, private planes, etc.)

2. Possible sources for identifying or verifying this type of information

Numerous data are publically available:

- NGO reports: the investigation of the CCFD\(^5\) or the British organisation Global Witness\(^6\) have, for instance, proved highly useful in this sort of affair.

- Reports, decisions and declarations from public institutions, such as
    - IMF audit on the management of oil revenues in the Republic of Congo
    - Court rulings in third countries.

- Press articles, particularly from investigative journalists.

- Specialised internet sites such as Wikileaks

- Public records: sometimes it is possible to identify real estate holdings by simply consulting the telephone book, the land registry and company registers which are generally available to the public.

3. The decision to act

\(^5\) « Biens mal acquis...profitent trop souvent », published in March, 2007 and « Biens mal acquis, à qui profite le crime », published in June, 2009. Cf. internet site of CCFD : [http://ccfd-terresolidaire.org/BMA/](http://ccfd-terresolidaire.org/BMA/)


The decision to act is taken when the presumption of receipt of stolen property or of embezzled public money in a signatory country of the UNCAC are sufficiently strong to suppose that an enquiry should be opened. This is particularly the case when there is a flagrant disproportion between the official income and the assets of the concerned person.

4. Identifying partners

Partners may be taxpayers or citizens of the countries in which the public money has been embezzled, irrespective of whether they are still domiciled in the countries.

Partnerships can also be concluded with other NGOs, whether they are located in the victim countries or in countries in which suspect assets are to be found. These NGOs may be specialised in the fight against corruption or the defence of human rights. They may also be associations of pro bono lawyers specialised in defending victims (such as Sherpa, Avocats sans Frontières).

5. Establishing applicable law for lawsuits pursued by non-profit organisations in cases of corruption

The legal basis for which civil society, non-profit organisations may sue in corruption cases has to be determined.

Here, we are looking at the particular action taken by TI France. The case was one of criminal law. It is also possible to carry out civil action. It should be noted that legal action varies depending upon the countries and legal systems.

Up until a recent ruling by France’s highest jurisdiction, based upon the UNCAC, anti-corruption NGOs were not recognised as being capable of initiating legal action against perpetrators of misappropriation because they were unable to demonstrate that they had suffered a direct and personal prejudice, distinct from the general interest represented by the public prosecutor.

If the law of the country in which a complaint would be lodged does not expressly provide for this possibility, the organisation that is suing must take account of this and argue its capacity to take legal action in the courts. This is a goal worth fighting for, as the experience of French NGOs in advancing applicable law has shown (cf. III).

This note does not detail the possibility for tax payers who are direct victims of misappropriation of public funds to lodge this sort of suit in foreign countries in which the misappropriated assets are supposed to have been received. Suffice it to say that to our knowledge, no case law exists concerning this possibility. Our partner, Sherpa is currently carrying out a comparative study covering 10 countries on the issue of which civil society actors are capable of initiating penal or civil prosecution aiming at the recovering of misappropriated public goods.
6. **Drafting the charges:**

   a. The principle of filing charges

Charges are based upon a simple idea. As soon as there are substantial presumptions of receiving misappropriated public funds on their territory, signatory states of the UNCAC convention are obliged to open enquiries on the origin of the funds. This is particularly justified when there is a flagrant misfit between the official income and the identified assets of the person who is being accused.

   b. Objectives behind filing charges

Initially, the objective is to obtain the opening of an enquiry aimed at registering the litigious goods held on the territory and the origin of the funds used for acquiring those goods. If it is shown that the origin was fraudulent, the ultimate objective is to obtain the recovery of the misappropriated money for the defrauded populations.

   c. Persons aimed at

The charge can aim not just at those persons who committed the presumed misappropriation of funds, but also persons close to them who received a part of the misappropriated assets.

The suggestion has also been made that the enquiry be expanded to all intermediaries who may have facilitated the receipt of the stolen assets (banks, lawyers, notaries, etc., who can be shown not to have respected their obligations with regard to fighting money laundering).

   d. The United Nations Convention against Corruption as basis for charges.

Chapter 5 of the Convention states the general objective of recovering misappropriated assets. On this basis, simple presumptions that an official possesses assets that obviously cannot have been paid for with his official income should suffice to request that an enquiry be opened.

Unfortunately, the mechanism for recovering assets provided for in the UNCAC Convention is limited to the extent that States are the only ones capable of acting (for by virtue of article 55 of the Convention on international cooperation for confiscation, means for acting to recover stolen assets are only available to the State which is victim to the misappropriations).

However, when the very public agents of the State which is the victim are those carrying out the looting, no action will be undertaken. In such cases, litigation by the victims and organisations are the only recourse against impunity.

Organisations and victims can act on the base of another principle of the UNCAC which provides for the active participation of civil society in the fight against corruption. By virtue of article 13 of the Convention, every participating state must take appropriate measures to
promote the active participation of civil society in preventing the fight against corruption. The possibility for non-profit organisations to litigate should be one of those measures.

This is the interpretation of France’s highest court of justice in a recent ruling\(^8\).

*While the fight and prevention against corruption, (...) are a specific aim which 5 (...) implies the support and participation of non-governmental organisations, which has to be translated into domestic law by the possibility for legally constituted non-profit organisations with such an objective to file suit as civil parties with regard to breaches of law enumerated in this Convention.*

Moreover, article 35 of the United Nations Convention stipulates that each State Party must take the necessary measures to allow persons and entities which have undergone prejudice because of corruption to litigate against those who are responsible with a view to obtaining remedy.

e. Related charges

Receipt of stolen property and complicity related thereto, misappropriation of public funds, complicity related to embezzlement, money laundering, complicity related thereto, misuse of company assets for personal use, complicity related thereto, fraud, receipt of assets attained through any of the above offences.

II. **What complementary forms of appeal exist?**

- Acting against instruments and territories that facilitate the circulation and laundering of illicit financial flows (trusts, tax and legal havens)

Experience shows that in many cases, it is difficult to identify misappropriated assets due to the refusal of tax or legal havens to cooperate, with excessive bank secrecy on a specialisation in the trust industry or other companies that serve as screens. Often registered in countries such as Luxemburg or the Bahamas, such screens may make it possible for public officials who have perpetuated embezzlement to acquire and use luxurious properties in the world’s most beautiful capitals without it being possible for those conducting an enquiry to trace back the properties to their effective beneficiaries.

An increasing number of NGOs have launched appeals on these issues, particularly in relation to commitments taken by the G20. One of the chief recommendations of TI France is to create national trust registries so as to allow investigators who so desire to know the effective beneficiaries.

- Plead for laws that make it easier to freeze and recover suspect assets, by reversing the burden of proof.

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\(^8\) Ruling by the Cour de cassation of November 9, 2010 following the appeal by the NGO Transparence-International France. (procedure in detail in III.)
Cf. in this respect the introductory paragraph devoted to Switzerland.

- Appeal where needed so that victims and non-profit organisations may litigate so as to trigger off processes of freezing and recovering assets.
- Appeal for the effective implementation of anti-laundering measures by banks and other intermediaries.

### III. Litigation: precedents set by French NGOs

- **Suit filed against Presidents Bongo (Gabon), Sassou n’Guesso (Congo Brazzaville) and Obiang (Equatorial Guinea) and their respective circles**

**March, 2007:** CCFD-Terre Solidaire published the report, *Biens mal acquis ... profitent trop souvent – La fortune des dictateurs et les complaisances occidentales* which lists an inventory of assets held abroad, inter alia in France, by various heads of state of developing countries. The report also lists assets held in Switzerland, the United Kingdom or the United States.

**March, 2007:** On the basis of information in the CCFD report, three other French non-profit organisations (Sherpa, Survie and the Fédération des congolais de la Diaspora) filed criminal action with the public prosecutor of Paris against a number of African political leaders, pointing to the substantial real estate holdings they owned on French territory. The disparity between the official salaries of these heads of state and the fortunes they had been able to acquire made it possible to presume a misappropriation of funds.

**In the course of 2007:** Subsequent to this initial charge, a police investigation was carried out. It confirmed most of the allegations to be found in the charges, revealing the existence of a number of other assets, both in real estate and mobile assets (such as cars and bank accounts).\(^9\)

**November, 2007:** Despite the findings of the police enquiry and the list of goods held in France by the Presidents in question, the public prosecutor, upon les résultats de l’enquête de police et la liste des biens détenus en France par les Présidents instructions from the government decides to dismiss the case on the grounds of insufficient evidence for misappropriation of funds.

**December, 2008:** With the legal support of Sherpa, TI France and Gregory Ngbwa Mintsa, a citizen of Gabon again file suit, this time with an independent judge in French criminal law

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\(^9\) The enquiry carried out by the French police in 2007 made it possible to list 39 luxurious appartment belonging to the Bongo clan, most of which were in Paris’ most luxurious districts; 112 bank accounts opened in the names of members of the N’Guesso clan; a collection of automobiles worth at least five million euros (Ferrari, Rolls Royce, Maseratti, Bugatti, etc.) bought by Téodorin Obiang, the son of the President of Equatorial Guinea.
(juge d’instruction), with the hope of obtaining a judicial enquiry. The procedure is then concentrated upon the capacity of plaintiffs to have recourse to an examining magistrate (juge d’instruction) in this sort of case. Grégory Ngbwa Mintsa acts as a tax payer in Gabon. TI France acts as an NGO specialised in the fight against corruption. While certain organisations have the capacity to litigate according to French law, this is not yet the case for non-profit organisations specialised in the fight against corruption. In order to prove that TI France has an interest in acting in this case, it is necessary to prove that because of its specific mission and financial resources in fighting corruption, the organisation suffered direct and personal prejudice from the actions carried out by the heads of state in question.

May, 2009: The examining magistrate recognises TI France’s capacity to act. This should have automatically led to the opening of an in-depth legal enquiry. However, the public prosecutor immediately appealed following the ruling. In the same ruling, the judge rejected the suit filed by Grégory Ngbwa Mintsa as a tax payer in Gabon.

October, 2009: The appeals court decides to overrule the ruling by the examining magistrate and declares TI France’s suit inadmissible. Transparency International France files appeals to France’s highest jurisdiction to request again that its capacity to act in justice in the affair be recognised.

November, 2010: In a landmark ruling, the highest French appeals court, Cour de cassation acknowledges the admissibility of TI France’s lawsuit in this case. It is acknowledged that TI France suffered direct and personal prejudice because of its specific mission and the resources invested in its actions, because of the alleged offences which damage the collective interest TI France defends. Following this ruling, the in-depth judicial enquiry that TI France had been calling for adamently for the previous two years was opened. The enquiry was aimed at making it possible to seek out the origins of funds used for acquiring goods in France and possibly to lead to criminal action against those persons who were called into question.

- **Actions undertaken against former President Ben Ali (Tunisia) and against President Gaddafi (Libya)**

January, 2011: TI France, Sherpa and the Arab Commission of Human Rights file suit against the former President and members of his family in order to obtain the opening of an enquiry as to goods held in France. A police enquiry was opened a few days later, leading to the freezing of a good last February 1. The good was an airplane which belonged to the son-in-law of former President Ben Ali.

February, 2011: SHERPA and Transparency International France file charges with the public prosecutor in Paris against various members of Muammar Gaddafi’s family so as to obtain the opening of a judicial enquiry into assets they may possess in France. The aim was to obtain from the French government the immediate freezing of any assets to be found in France, so as to ensure they would not be relocated to non-cooperative jurisdictions, an outcome which would make the recovery of those assets for the Libyan people more difficult.
By enshrining the right of NGOS to seek remedy for prejudice personally suffered because of the illegal behaviour which directly injure the collective interests they defend, France’s supreme court, the Cour de Cassation, has merely translated the recommendations of the United Nations Convention Against Corruption into domestic law. It would be desirable if this approach, taken by the highest jurisdiction in one of the State Parties to the Convention, were favourably echoed in other States to which the same norms apply.