



Sherpa

Narrative report

2009

Sherpa, a not-for-profit association governed by the law of 1901, was set up in 2001 to protect and to defend victims of economic crimes.

Sherpa uses the Law as a development tool and through its action; it aims at contributing to the concrete implementation of the Millennium Development Goals (MDGs).

What has been achieved in 2009?

The *Illicit financial Flows and Development Program*

Whether linked to corruption or to multinational corporations' tax evasion, illicit financial flows are a big part of the development issue. They reduce the amount of available resources for essential public services and worsen the burden of southern countries' debt.

As a consequence, most governments in developing countries fail to fulfil basic human needs.

SHERPA conducts campaigns that aim at denouncing these illicit financial flows.

The *"Ill gotten gains" Campaign*

Many officials, particularly in developing countries, place personal gain above the good of the country. Supported by the banks and other financial intermediaries, these corrupt ruling elites pillage their countries' resources and hide the stolen assets in the economies of the North. This phenomenon is known as *kleptocracy* (from the Greek *klepto*, theft, and *kratos*, power,) and it constitutes a serious obstacle to development.

Article 51 of the United Nations Convention against Corruption (Merida Convention) establishes the restitution of illegal assets as a fundamental principle. While it is a laudable provision, the convention is State-centric: conceived by *States for States*. In other words, and although the Merida Convention strengthens considerably the means of recovery for stolen assets, these means are only at the disposal of the legal entity of the victim State. What if the ruling elites of such a State are the very ones who are plundering the resources of their country?

SHERPA intends to give victim populations, who are the first affected by this pillaging, the means to act. This is the rationale behind the launch of our "Ill-gotten gains" campaign.



Facts summary

The case started in 2007, when CCFD-Terre Solidaire published a report titled *"Biens mal acquis...profitent trop souvent - La fortune des dictateurs et les complaisances occidentales"* which estimated the amount of stolen assets located in Western countries.

Following this publication, SHERPA conducted a study in order to explore the various legal means by which such assets could be recovered should they be located on French soil.

■ Preliminary complaint n°1

In March 2007, NGOs Sherpa, Survie and the Fédération des Congolais de la Diaspora lodged a complaint before the Public Prosecutor in Paris, France against the ruling families of Angola, Burkina Faso, Congo-Brazzaville, Equatorial Guinea and Gabon; according to the NGOs, those families owned considerable real estate on French soil, assets which could not have been acquired merely through their legitimate salaries and revenues.

The complaint relies on the charges of receiving and concealing of embezzled funds as provided by articles 321-1 and 432-15 of the French Criminal Code. According to those texts, is punishable in France anyone who detains illegally-acquired assets on the French territory.

▪ Preliminary Investigation

In June 2007 a police investigation was ordered. It confirmed most of the allegations and further uncovered tens of millions of Euros worth of luxury properties and cars and hundreds of bank accounts belonging to the Heads of State, their family members and close associates. The investigation also shed light on the extremely unusual nature of some financing methods: Edith Bongo, then spouse of the President of Gabon, allegedly acquired a Daimler Chrysler which was paid for by direct transfers from the Gabonese public treasury.



Despite those findings, the investigation was closed down in November 2007 after the Public Prosecutor ruled that the crimes were “insufficiently substantiated”.

▪ Preliminary complaint n°2

On July 9 2008, Transparency International France (TI), as well as Congolese and Gabonese citizens, lodged another preliminary complaint before the Public Prosecutor.

This second complaint covers the exact same facts as those denounced 16 months earlier by Sherpa; the complaint's only purpose was to comply with the new legal requirements provided for the admissibility of civil party petitions before criminal courts.

Unsurprisingly, this complaint was also dismissed on September 3, 2008.

▪ Complaint with civil party petition

On December 2, 2008, TI France and Gabonese citizen Gregory Ngbwa Mintsa, both defended by attorney William Bourdon from the Paris Bar and President of SHERPA, lodged a complaint with civil party petition before the Dean of the Investigating Judges of the Paris Trial Court in the hope of triggering a formal preliminary investigation.

Even before assessing the merits of the case, the Dean first had to rule on the admissibility of the plaintiffs: do TI France and Gregory Ngbwa Mintsa have a standing to sue in this corruption case?

On [May 5 2009](#), the Dean of Investigating Judges ruled on the non-admissibility of the civil party petition as lodged by the Gabonese citizen, considering M. Ngbwa Mintsa had no standing to sue. TI's France civil party petition, on the other hand, was deemed admissible, a decision which could and should have triggered a formal preliminary investigation had not the Public Prosecutor immediately appealed it...

On [October 29 2009](#), the Paris Court of Appeal overruled the Dean's order. Following the recommendations of the Public Prosecutor, the judges considered that TI France had no standing to sue in that case.

An appeal was then lodged before the Supreme Court of Appeal (the *Cour de Cassation*) and a final decision is expected in 2011.

Case Assessment

Without prejudging the evolution and conclusion of the procedure, SHERPA is proud to have brought to the public's attention various fundamental issues, such as the capacity of legal action for associations that fight corruption, or the independence of the Public Prosecution from the political power.



Furthermore, and following the various court decisions made in that case, several commentaries and doctrine papers were published in legal journals:

- F. Rome, Cousu de fil blanc : D. 2009 p. 1265 ;
- G. Roujou de Boubée, Compétence française pour des détournements de fonds publics commis au préjudice d'Etats africains : D. 2009 n°22 Edition ;
- Ch. Cutajar, L'affaire des « biens mal acquis » ou le droit pour la société civile de contribuer judiciairement à la lutte contre la corruption : JCP Générale n° 22, 27 Mai 2009, act. 277 ;
- Ch. Cutajar, Affaire « des biens mal acquis », un arrêt qui ne clôt pas le débat: JCP Edition Générale n° 51, 14 Décembre 2009, p.563.

Also, it is worth noting that the rabid insistence displayed by the Public Prosecution in its attempts to prevent the case from being opened caused the question to be brought before the National Assembly by socialist representative André Vallini. On **May 12th 2009**, during a routine session of questions to the government, the representative formally asked Secretary of Justice Rachida Dati: "In this case, did you exert your influence over the Office of Public Prosecution in Paris? If the answer is yes, along which lines did you do so? If no, did any other State authority intervene in the case?" (Complete records of the May 12th session can be accessed at http://www.assemblee-nationale.fr/13/cr/2008-2009/20090238.asp#P221_36264)

Lastly, SHERPA was invited to present the BMA case at a workshop hosted by INTERPOL in Lyon, France, under the title: "Investigating and prosecuting kleptocracy" (**October 21-23 2009**).



Our working groups

SHERPA, in partnership with various associations from the civil society, performed the dual task of reflection and pleading in order to prevent and fight illegal capital flight.

In 2009, SHERPA focussed its efforts on the following *issues*:

Merida Convention

On December 9 2003, 114 countries signed the United Nations Convention against Corruption (UNCAC) in Merida. This is the first international anti-corruption instrument.


The convention considers all forms of corruption (laundering, abuse of power, influence trafficking etc.) by public or private figures, and also compels signatory countries to make the different forms it takes into penal crimes. The convention has provisions that are as much preventative as punitive in the fight against corruption. It organizes procedures in order to facilitate international cooperation and technical assistance. In particular, it is the first convention to establish restitution of illegal assets as a fundamental principal.

Alongside the UNCAC Coalition (<http://www.uncaccoalition.org/>), SHERPA is campaigning for the Merida Convention to be ratified and for its provisions to be implemented effectively.

SHERPA notably participated to the 3rd Conference of the States Parties to the United Nations Convention against Corruption (UNCAC) held in Doha, Qatar (**November 9-13 2009**)

Transparency in extractive industries

The resources curse refers to a paradox: countries and regions endowed with the most abundant natural resources tend to have weaker economic growth and worse development indicators than countries with few natural resources.


 SHERPA wishes to reverse this paradigm and is campaigning in favour of transparency in the mining industry as part of the *Publish What You Pay* coalition - an international campaign to make mining companies (oil, gas and ore) publish the amount of taxes and royalties they pay to the governments of the states where they operate.

Financial opacity

According to a report on tax havens published by the Norwegian government, almost 20% of deposits in tax havens originate from developing countries i.e. "a sum between 2 200 and 2400 billion dollars, or 30 times the amount the developing countries receive in aid." ("Tax Haven and Development", Commission on capital flight from developing countries, 2009).

Of course, tax havens are so attractive because of their banking secrecy, their impenetrable legal structures and their lack of judicial cooperation. They are the preferred locations to hide and/or launder criminal assets.

The fight against illegal capital flows will remain in vain as long as the scandal of offshore financial areas continues. Therein lies the importance of the struggle led by the *PFJ-Paradis Fiscaux et Judiciaires* platform (www.argentsale.org).

The debt issue

Is it right for peoples in the South to bear the burden of debts that have enriched only the individuals in the corrupt elites?

While being against the principle of a total and unconditional debt cancellation, SHERPA sees this as a true development issue that demands an appropriate legal response.

The association has furthermore devoted two studies to this question and published these in a work on the same theme: "How to Challenge Illegitimate Debt: Theory and Legal Case Studies", Aktion Finanzplatz Schweiz, November 2009.

The Globalization and Human Rights Program

The European Commission defines Corporate Social Responsibility (CSR) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" (Green Book on Corporate Social Responsibility, 2001).

Such a position is insufficient to Sherpa which strongly advocates for the settlement of a comprehensive corporate accountability framework.

The Resources and Conflicts Campaign

The link between natural resources and conflicts is two-fold. First, as a much-needed asset, natural resources are the source of many conflicts that aim at controlling mining regions - and are therefore a key factor in assessing the risk of civil war in a given country ("On economic causes of Civil War", Collier, P. and Hoeffler, 1998). Second, as a source of wealth, the financial gain from exploiting natural resources can fuel continued conflict (i.e. buying arms and munitions, paying soldiers).

The situation then often arises where corporations profiteer from these conflict situations.

DLH - Logs of war in Liberia: Facts summary



On [November 18, 2009](#), SHERPA, Global Witness, Greenpeace France, les Amis de la Terre and a Liberian citizen filed a complaint before the Public Prosecutor in Nantes, France, against DLH France and DLH Nordisk A/S, both subsidiary companies of Dalhoff Larsen and Horneman Group (DLH), thereby denouncing the group's purchase policy in Liberia during the civil war.

Between 2001 and 2003, timber from Liberian companies directly linked to Charles Taylor was purchased, imported in France and distributed throughout Europe by DLH. During those years, DLH was purchasing timber from companies specifically targeted by several UN reports for their responsibility in human rights violations, breaching of UN arms sanctions, environmental destruction and corruption.

By importing timber from those sources, it is the plaintiffs' opinion that DLH France and DLH Nordisk A/S are guilty of 'recel', i.e selling and/or handling of illegally acquired goods, an offense punishable under French Criminal Law. In the present case, 'recel' is characterized by DLH-purchased, imported and distributed timber's illegal origin: forest concessions which were acquired and operated in violation of Liberian Law.

Case Assessment

Can companies whose purchasing policy finances violence and armed conflicts be held accountable?

Should SHERPA's arguments be admitted in court, the consequences would be huge: the case would become a notable milestone.

Also, it is worth noting that this case is developing as talks are proceeding at the European level regarding a regulation aimed at fighting illegal timber imports in Europe. SHERPA is advocating for an appropriate sanction mechanism against companies who knowingly trade in Conflict Timber.

On [December 17, 2009](#), SHERPA was invited to present the case during a conference on corporate social responsibility hosted by Lawyers Without Borders in Brussels.

Our Working groups



In partnership with several NGOs (Forum Citoyen pour la RSE, Alliance pour la Planète...), SHERPA has contributed in 2009 to the works of the Grenelle of the Environment, a negotiation platform initiated by the French Government in 2007.

At the European level, SHERPA conducted a legal study supporting the advocacy efforts of the ECCJ (European Coalition for Corporate Justice) toward the European Union: "Proposals for a European regulation of transnational corporations' activities", [March 2009](#)).

Our Interventions

In 2009, SHERPA provided legal assistance two groups of victims.

AREVA - Miners' exposure to radiations



Alerted in 2003 by Aghirin'Man, a Nigerien NGO dedicated to environmental issues, SHERPA and the CRIIRAD (Independent Research and Information Commission on Radiations) decided to go to Niger and to investigate the conditions under which AREVA operates locally, and to assess in particular the impact of uranium mining.

Major problems were identified, including the lack of workers' awareness of radiological issues and insufficient or non-existent radioprotective gear.

Following the publication of an investigation report on the situation in Niger, former AREVA Gabonese mine workers came forward and approached SHERPA's teams on issues similar to the ones identified in Niger: many feared that their health had been affected by their work in the uranium mines. Medecins du Monde then joined SHERPA and the CRIIRAD, bringing its medical expertise. In April 2007, the three organizations published a second report regarding the situation in Gabon and announced they would be filing a complaint against AREVA.

At this point AREVA attempted to negotiate a settlement. In full agreement with the partner-organizations (Médecins du Monde, CATRAM, AGHIR'INMAN and the MOUNANA Association), SHERPA decided to go forward with the settlement process.

On June 19, 2009, after a two-year negotiation period, SHERPA and Médecins du Monde reached an agreement with AREVA, thus settling the issue of the mine workers with a two-fold objective in mind: reparation and prevention.

The agreement created a Local Health Monitoring Body on each mining site operated by AREVA (Gabon, Niger, Kazakhstan and Canada). Each body will consist of an Executive Board and a Medical Committee, both tripartite (with representatives from NGOs, local populations and AREVA). These monitoring bodies will focus on the workers' health, both during and after their working for AREVA.

In this manner, any employee of AREVA or any of its subsidiaries or sub-contractors suffering from a work-related illness (as defined by the Medical Committee in the Table IV of said work-related illnesses) will be taken care of and compensated, either by the his own Social Security or, should that prove impossible, directly by AREVA.

Also, the agreement states that in any future mining operation, AREVA shall put in place a Preliminary Health Assessment procedure prior to exploitation, in order to accordingly calibrate any further impact of its mining operations on local health and environment. This novel mechanism will be first implemented in Niger on the Imouraren Project.

Lastly, the agreement creates a Monitoring Committee consisting of 6 scientists specialized in radioprotection: 3 of them appointed by AREVA, the 3 others by SHERPA and Médecins du Monde.

The Committee's objectives are to define the required protocols for the functioning of Health Monitoring Bodies and for the homogenization of their methods and procedures; to define the specific protocols for the implementation of the Preliminary Health Assessments in AREVA's new zones of operation; and to collect and analyze the data from the local health monitoring bodies as well as to suggest, if necessary, supplementary means to improve the mines' safety. Those proposals will be made public in an annual report.

Without being overly optimistic, it is hard to deny that this agreement has substantially improved the employees' work conditions. It is, however, only a step in the right direction, and the agreement's effectiveness will depend on its actual implementation. The story is only starting...

COMILOG - Breach of employment contract

The company COMILOG (Ogooué Mining Company) was incorporated in 1953 with the task of exploiting a large manganese deposit located in Gabon near the city of Moanda. Because of the vast distances between the mine and the Gabonese coast, a cable car was built between Moanda and Mbinda, Congo, and railway tracks were laid from there to the port of Pointe Noire.

COMILOG started operating in Congo in 1959 and immediately enjoyed a derogatory conventional status. COMILOG was employing more than 1000 workers, mostly Congolese, in order to transport the manganese ore to Pointe Noire prior to its export.

In 1988, the company laid off a first batch of workers. In 1991, an accident involved a COMILOG-operated train in Mvougouti, near Pointe Noire, with casualties in the hundreds. Following this terrible accident, and although it was unrelated to COMILOG's core activities, COMILOG's executives decided to obey an injunction from the Gabonese authorities and to suspend the transport of manganese ore on Gabonese railways; the consequence would be

the brutal lay off of the remaining workforce employed in Congo.

The company refused to compensate the laid-off workers in any way, and even denied them an end-of-employment certificate, a document without which the workers would be unable to claim their retirement pensions.

In 2006, following a chance encounter in Congo of M. William Bourdon, President of SHERPA, and M. Alain Leopold Moukoyou, President of the Workers' Association, SHERPA was mandated by the Congolese association to help enforce the workers' rights and obtain from COMILOG the payment of just compensation.

Thanks to countless testimonies and abundant evidence accumulated during a 2007 mission, 868 individual cases were eventually constituted.

On November 9 2007, SHERPA filed the 868 cases before the Paris Industrial Tribunal (the Conseil Prudhommal).

The total demands for compensation, including the prejudice of every former employee, closely amounts to €60 million.

Since then, two hearings were held before the Conciliation Bureau of the Paris Conseil Prudhommal, on October 8, 2008 and June 22, 2009.

N.B: This first conciliatory phase is designed to help the opposing parties find a common ground and, possibly, an amiable agreement. It is only in the event such an attempt would fail that the case would be brought before the judging bureau.



SHERPA in the news

Pour protéger et défendre les populations victimes de crimes économiques, qu'ils soient le fait d'acteurs publics ou privés, des avocats d'affaires et des juristes se sont regroupés au sein de Sherpa. Portrait d'une association qui a fait du code pénal une arme citoyenne.

Nul n'est censé ignorer... Sherpa

PAR ELODIE PRENANT | JOURNALISTE

Leur nom, ils l'empruntent à ces fameux guides, réputés pour leur audace et leur expertise, qui aident les grimpeurs à atteindre les plus hauts sommets de l'Himalaya. Leur cible : les multinationales dont le droit international peine encore à reconnaître la responsabilité sociale. Leur arme : le code pénal. Leur objectif : responsabiliser les sociétés mères pour les mauvaises pratiques de leurs filiales dans les pays du Sud. Enx, ce sont les avocats et les juristes réunis au sein de l'association Sherpa.

Pas vu, pas pris

2002. Huit travailleurs brésiliens mettent en accusation Total pour « séquestration arbitraire et travail forcé », affirmant « avoir été contraints par l'armée du Myanmar d'excaver, sur le chantier de construction du gazoduc de Yadana, des tâches assimilables à du travail obligatoire ». 2008. Le Conseil des Prud'hommes de Paris examine la plainte déposée par des cheminots du Congo Brazzaville, employés de la Comilog (Compagnie minière de l'Ogoué, filiale du groupe français Eramet), sur un contentieux vieux de dix-sept ans. Pour la première fois, la responsabilité d'une société mère est engagée pour les violations au droit du travail de l'une de ses filiales à l'étranger, en l'occurrence le licenciement abusif – et sans indemnités – de 895 salariés. Deux cas parmi tant d'autres, de ex enquêtes, deux plaintes, deux négociations, derrière lesquelles on retrouve Sherpa. C'est en partant du constat « qu'il n'est plus possible de s'en tenir à la dénonciation et qu'il est urgent de créer un nouvel outil pour s'attaquer à la logique du "pas vu, pas pris" », que William Bourdon, avocat à la Cour, fonde l'association. Impossible d'agir seul. Il s'entoure alors de professionnels du droit qualifiés et impliqués, qui traquent les vices juridiques. « On a engrangé de petites victoires, constate Yann Quéinnec, à la tête de l'association. Il ne faut pas lâcher car on est en train de moissonner les petites graines qu'on a semées il y a plus de trois ans ». Avec son collègue, Joseph Brehm, ils ont enquêté, dès 2003, sur la situation sanitaire et environnementale autour des mines d'uranium exploitées par Areva au Niger. Au bout de quatre années d'enquête,

Sherpa menace la multinationale de déposer une plainte pour « mise en danger d'autrui, homicides involontaires et faute inexcusable ». S'engagent des négociations qui dureront deux ans. Résultat : sur chaque site d'extraction, Areva s'engage à mettre en place un observatoire sanitaire pour faire un suivi régulier des conditions de travail et assurer un suivi médical si besoin. Pour des associations comme la CRIBAD¹ ou le Réseau Sortir du nucléaire², cet accord est d'abord vécu comme « une surprise ». Une surprise au goût amer. « Cet accord, c'est du pain béni pour la communauté d'Areva », dénonce Stéphane Lhomme, porte-parole du Réseau Sortir du nucléaire. Les « succès » remportés par Sherpa – souvent faits de petits précédents qui ouvrent des brèches dans le droit international – ne font pas toujours l'unanimité.

Faire la lumière

Les multinationales ne sont plus les seules dans le collimateur de l'association. Des chefs d'Etat les y ont rejointes en 2007 : Omar Bongo (Gabon), Denis Sassou Nguesso (Congo Brazzaville) et Teodoro Obiang (Guinée équatoriale). Chef d'accusation : recel de détournement de fonds publics qui incrimine le fait de détériorer sur le sol français des biens – notamment immobiliers – qui ont été acquis de manière illégale. Le 2 décembre 2008, Sherpa soutient la plainte déposée en ce sens par l'ONG Transparence Internationale France et Gregory Nguwa Mintswa, un citoyen gabonais. « Quand on voit ces chefs d'Etat qui pillent les richesses de l'Afrique et le misère dans laquelle vit leur population, il est urgent que les citoyens puissent parler à l'inertie », estime Maud Perdrizet-Vaisière, en charge pour Sherpa de la désormais médiatique affaire des « biens mal acquis ». Malheureusement, le cours de la justice est souvent si souvent si chaotique. « Aujourd'hui, c'est campagne pour l'association de multinationales-franco-africaines qui organise les pères profits du pillage des deniers publics africains », s'emporte William Bourdon. Le 29 octobre, la cour d'appel de Paris a en effet annulé une décision d'enquête sur les biens détenus en France par les trois présidents. Qu'à cela ne tienne, fidèle à son patronyme, l'association ne baisse pas les bras et continue la bataille pour les victimes des crimes économiques. 1

Altermondes n° 20 - December 2009

Thanks to our success in several iconic cases (Bien Mal Acquis, AREVA...) SHERPA's action is growing more visible in the Media. SHERPA has been increasingly active on TV and Radio, not to mention numerous articles in the newspapers.

NGO Transparency Indicator

Sherpa has been awarded a 10 out of 10 grade by the Prometheus Foundation in its NGO Transparency Indicator. This indicator ranks French NGOs yearly on the basis of their compliance to transparency rules. More information at: <http://www.promethee.fr>

In Memoriam

Jacques Ossebi was a French-Congolese journalist who had made fighting corruption his personal crusade; he died suddenly in Brazzaville's Military Hospital during night on February, 1st 2009.

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patagonia

fph

 ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE

SIGRID RAUSING TRUST

SHERPA also wishes to thank its members, employees, members of the Board, collaborators, voluntary workers and interns, without whom our 2009 achievements would not have been possible.

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