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# Policy and Legal Obstacles in Recovering Dictator's Plunder

## **Abstract**

This paper examines the effectiveness of the Swiss system of mutual assistance in criminal matters in recovering dictator's plunder. It deals with policy obstacles, such as the question of the legitimacy of the new government which has taken power from the deposed dictator, and legal obstacles such as Head of State immunity, and the freezing, confiscation, and repatriation of illicit assets. It argues that the Swiss system of mutual assistance has been too demanding and too slow in providing effective and efficient asset tracing and recovery.

## **Keywords**

mutual assistance, Switzerland, illicit assets, dictators, grand corruption, freezing, confiscation and repatriation of illicit assets, Head of State immunity, recognition of governments, Swiss mutual assistance in criminal matters

# POLICY AND LEGAL OBSTACLES IN RECOVERING DICTATOR'S PLUNDER

*By David Chaikin\**

## **Synopsis**

This paper examines the effectiveness of the Swiss system of mutual assistance in criminal matters in recovering dictator's plunder. It deals with policy obstacles, such as the question of the legitimacy of the new government which has taken power from the deposed dictator, and legal obstacles such as Head of State immunity, and the freezing, confiscation, and repatriation of illicit assets. It argues that the Swiss system of mutual assistance has been too demanding and too slow in providing effective and efficient asset tracing and recovery.

## **Key Words**

Grand corruption, freezing, confiscation and repatriation of illicit assets, Head of State immunity, recognition of governments, Swiss mutual assistance in criminal matters.

### **(1) Introduction**

One of the great scourges of mankind is the scale of poverty in the developing world. A significant contributor to that poverty is the bad and corrupt leadership of many nation states. The World Bank has identified corruption as the 'single greatest obstacle to economic and social development'.<sup>1</sup> Top down corruption has a devastating effect on national treasuries, undermines the rule of law, and weakens the public institutions which are the foundation for good governance. It has an incalculable effect on the moral confidence and future prospects of a nation state.

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1 See anti-corruption and corporate governance website of the World Bank at <<http://www.worldbank.org/wbi/governance>>(10 May 2005).

The problem of 'grand corruption'<sup>2</sup> and 'indigenous spoliation'<sup>3</sup> is not new. What is different today is that the illicit activities of political and military elites are facilitated by an infrastructure of money laundering located in the world's offshore and international financial centres.<sup>4</sup>

Switzerland has 0.1% of the world's population and yet is a superpower in offshore private banking and asset management. It is one of the most important international financial centres, managing an estimated one-third of global private wealth. Since 1986 when Switzerland froze the illegal monies of the former Philippine President Ferdinand Marcos, the Swiss courts have been at the centre of a legal battle to recover the plundered wealth of developing countries. The Swiss legal system has dealt with claims made against former Heads of State or Heads of Government from Argentina, Ethiopia, Gabon, Haiti, Iraq, Ivory Coast, Kazakhstan, Liberia, Mali, Nigeria, Pakistan, Philippines, Peru, Ukraine and Zaire. The list of countries is even larger if one includes Swiss freezing measures against former Ministers, senior politicians and public servants of foreign countries who have used Swiss banks to conceal illicit monies.

Switzerland has provided a measure of assistance to foreign governments in the tracing, freezing and confiscation of illicit assets. This has been achieved through Swiss procedures for international mutual assistance in criminal matters. The cases that have arisen in Switzerland have highlighted some of the problems of mutual assistance. Although Switzerland has returned some illicit monies to developing countries, there is a strong perception that much of the world's plundered assets remain untouchable in Swiss private banks.<sup>5</sup>

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2 Grand corruption is the fraudulent enrichment and corruption of Heads of State, Heads of Government, senior politicians and high level public servants. See D Chaikin, 'Controlling Corruption by Heads of Government and Political Elites' in P Larmour and N Wolanin (Eds), *Corruption and Anti-corruption, Asia Pacific*, Canberra, 2001, 97-108.

3 Indigenous spoliation is the 'illegal act of depredation which is committed for private ends by constitutionally responsible rulers, public officials or private individuals'. N Kofele-Kale, *International Law of Responsibility for Economic Crimes*, Kluwer, Hague, 1995, 10.

4 See R Blum, *Offshore Haven Banks, Trusts and Companies*, Praeger, New York, 1984; D Chaikin, 'Money Laundering as a Supra-national Crime' in A Eiser and O Lagodny (Eds), *Principles and Procedures for a Transnational Criminal Law*, Max Planck Institute, Freiburg, 1992, 415-55.

5 See M A Montebourg (Rapporteur), *Sur les Obstacles au Controle et a la Repression de la Delinquance Financiere et du Blanchiment des Capitaux en Europe (1)*, Volume 3 - La Suisse, No 2311, l'Assemblée Nationale, Paris, 21 February 2001; J Ziegler, *Swiss Whitewash: Drugs, Dirty Money, and Laundering by the Swiss Banks*, Arcade, New York, 1992.

**(2) Legitimacy of the Foreign Government**

The circumstances in which a former Head of State is removed from political power will affect the asset recovery process. It is axiomatic that where a dictatorship is overthrown and replaced by a radical or revolutionary government, legal co-operation in asset recovery may not be forthcoming. If the new government does not formulate and implement a plan of democratic renewal, it is unlikely that other countries will assist it in the investigation and recovery of illicit assets.

The underlying assumption of international co-operation in criminal matters is that the requested state has confidence and trust in the legal system of the requesting country.<sup>6</sup> A request for mutual assistance is based on the notion that the requesting state is taking adequate legal measures to indict and to convict persons accused of criminal conduct and/or forfeit illicit assets. If the developing country's prosecutorial system is biased, if there is a lack of judicial independence, if the forfeiture of assets is an arbitrary process, then the requested state may reject a foreign government's claim for illicit assets.

There are three bases for refusing to provide assistance in a criminal matter to a newly formed government of a developing country. First, the requested state may not recognise the government of the requesting state because of its political makeup or its radical political agenda. The traditional policy of the Swiss Government has been to refuse international mutual assistance to any government which has seized power in questionable circumstances. This policy was a reflection of Switzerland's strict neutrality in foreign affairs.<sup>7</sup> By characterising a case as a 'political case', Switzerland avoided being entangled in sensitive and controversial political matters. This policy was applied in 1973 when Switzerland refused to act on the request of the new military junta of Ethiopia to freeze the alleged billion dollar Swiss bank accounts of deposed Emperor Haile Selassie.<sup>8</sup> It was also applied in 1979 when the Islamic

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6 See D Chaikin, 'Mutual Assistance in Criminal Matters: A Commonwealth Perspective' in *Memoranda of the Meeting of Commonwealth Law Ministers*, Commonwealth Secretariat, London, 1983.

7 The Swiss policy of neutrality has been modified in cases where necessitated by Swiss security policies and since Switzerland joined the UN in 2002. See website of Swiss Department of Foreign Affairs at [http://www.eda.admin.ch/sub\\_dipl/e/home/thema/intlaw/neutr.html](http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/neutr.html) (10 May 2005).

8 See 'The End of the Lion of Judah', *Time Europe*, 23 September 1974. J Tagliabue, 'The Swiss Stop Keeping Secrets', *New York Times*, 1 June 1986, at F4.

government of Ayatollah Khomeini requested the freezing of the alleged Swiss assets of Mohammed Reza Pahlavi, the deposed Shah of Iran.<sup>9</sup>

A second ground for rejecting a request for assistance in a criminal matter is where there is no treaty relationship between the requesting and requested state. The absence of an international legal obligation to provide assistance is sufficient justification for not acting on a request. This ground has become less important because there are now numerous multilateral treaties relating to drugs, organised crime, corruption, money laundering and terrorism which provide for measures of international co-operation in criminal matters.

Thirdly, in nearly all modern mutual assistance in criminal matters treaties, there are discretionary grounds for rejecting mutual assistance requests, such as where the matter relates to political or military offences.<sup>10</sup> These grounds of rejecting legal assistance are also found in domestic laws.<sup>11</sup> Terrorist-type offences and genocide are usually expressly excluded from the definition of a political offence. Military offences include offences such as desertion, draft evasion and violations of dress code. Offences challenging the authority of the state, such as insulting military officers or government officials, are also outside the scope of legal assistance.

Under Article 1 of the Swiss IMAC Act<sup>12</sup> execution of a request from a foreign country may be refused if it is likely to prejudice the sovereignty, security or similar essential interests of Switzerland. This is a key provision for the protection of national security and important foreign policy interests of Switzerland. It encompasses essential economic interests, such as the reputation of Switzerland as an international financial centre.

Swiss concerns about the political makeup of a new government apply to fledging democratic governments. One challenge is that the nature of the requesting government may change over time. This may affect the political will of the requesting country to pursue the request in a forthright manner. In some instances the government of the requesting country has become more sympathetic to the deposed

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9 See R T Naylor, *Hot Money and the Politics of Debt*, Black Rose, New York, 371-4.

10 See for example, Article 2 of the Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters 1991, ATS 1994, No 7.

11 See for example, s 8 of the *Australian Mutual Assistance in Criminal Matters Act 1987* (Cth) and Article 3 of the Swiss International Mutual Assistance in Criminal Matters (IMAC) Act 1982.

12 For a comprehensive practical analysis of the IMAC Act, see Federal Office of Police, *International Mutual Assistance in Criminal Matters Guidelines*, Bern, 2001.

leader. This may affect the judgment of the Swiss authorities as to how they should respond to ongoing mutual assistance.

The Swiss Banker's Association has claimed that the Swiss authorities have become too lenient in their handling of mutual assistance requests from certain less developed countries with which Switzerland is seeking closer economic ties. The Swiss Bankers Association has argued that in some case Swiss prosecutors have 'closed their eyes' to foreign countries abusing the Swiss system of judicial assistance for political purposes.<sup>13</sup> There have been also allegations that Swiss prosecutors have deliberately leaked confidential information to the press in order to exert pressure on powerful but unpopular foreign individuals or companies.<sup>14</sup>

### **(3) Head of State Immunity**

In cases of high level plunder, politicians and public servants who are accused of corruption will frequently object to civil and criminal jurisdictional claims on the basis that they are protected by various privileges or immunities. A number of international legal instruments provide guidance on the question of immunity. For example, Article 40(2) of the United Nations Convention against Corruption provides:<sup>15</sup>

Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

Article 40(2) gives a nation state a wide measure of discretion as to how it regulates the immunities of its public officials. The provision does not require states to change their domestic laws. This is unfortunate because many countries provide excessive immunities to their Heads of State, senior government officials and members of

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13 See 'Bankers warn against foreign political abuse', Swissinfo News, 14 September 2005; H Simonian, 'Swiss banks voice fears on political interference', Financial Times, London, 15 September 2005.

14 See for example, 'Federal prosecutor investigated over Yukos probe', Swissinfo News, 7 November 2004.

15 The Corruption Convention and detailed commentary is found at the official UN website, <[http://www.unodc.org/unodc/en/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/en/crime_convention_corruption.html)>.

Parliament. Some countries have passed constitutional laws giving former Heads of State immunity from legal prosecution even after they have left office.<sup>16</sup>

In addition to domestic laws, international law also provides immunities for Heads of State. Under customary international law Heads of State and their families enjoy absolute immunity from the criminal law process. This means that a Head of State is immune from criminal investigation or criminal prosecution by another State.

The breadth of this immunity was recognised by the Swiss Supreme Court in 1989 in *Marcos v Federal Department of Police*,<sup>17</sup> where the United States sought bank documents for the purpose of a criminal prosecution under the *Racketeer Influenced Corrupt Organization (RICO) Act 1979* against Ferdinand and Imelda Marcos.<sup>18</sup> The American prosecutor alleged that the Marcos couple had used their official positions to steal public monies, including US government aid funds, and had laundered those illicit funds through the purchase of works of art and real estate investments in New York.

It was argued by the Marcos couple that they enjoyed immunity from criminal jurisdiction and that consequently the US request for mutual assistance was invalid. The Swiss Supreme Court agreed with the following proposition:

Heads of State are absolutely exempt *rationae personae* from all measures of constraint and exercise of jurisdiction on the part of a foreign state for acts committed by them, anywhere in the world, in the exercise of their official functions. By contrast with immunity from civil jurisdiction ... immunity from criminal jurisdiction of Heads of State is absolute ... This immunity would appear to cover, without reservation, to private acts.<sup>19</sup>

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16 For example, in 2000 the Parliament of Gambia passed a constitutional amendment which provided that 'the President of the Republic, who has ceased to exercise his functions may not be challenged, pursued, sought, arrested, detained or judged for any facts arising from basic law provided for in Article 81 of the Constitution'.

17 BGE Vol 115 Ib 496, 1989. Also reported in (1989) 102 ILR 53. The Supreme Court drew on various instruments including the 1986 International Law Commission Draft Convention on State Immunity and the Vienna Convention on Diplomatic Relations and the Convention on Special Missions to find that a Head of State should have as much protection as officials enjoy under those instruments.

18 On 21 October 1988 a grand jury in New York indicted Ferdinand and Imelda Marcos for violations of the RICO Act, mail and wire fraud, fraudulent misappropriation of property and obstruction of justice. Ferdinand Marcos did not face trial because of his death, while Imelda Marcos was acquitted because the prosecution was not able to tie Imelda directly to the financial crimes of her husband.

19 (1989) 102 ILR 53 at 57.

The ruling of the Swiss Supreme Court that the Marcos couple enjoyed Head of State immunity from criminal jurisdiction for private acts did not ultimately assist the Marcos couple in their litigation in Switzerland. The Supreme Court held that Ferdinand and Imelda Marcos could not assert Head of State immunity because of an express waiver by the Philippines Government of that immunity.<sup>20</sup> The Supreme Court reasoned that public international law grants the Head of State immunity 'not as a personal advantage but for the benefit of the state over which they ruled'. Consequently, Head of State immunity could not be used as a basis for rejecting the American request for Swiss bank documents.

The absolute immunity of a Head of State in criminal matters has been qualified in the case of crimes under customary international law. The House of Lords in the *Pinochet* case<sup>21</sup> held that General Pinochet was not entitled to immunity from prosecution for conduct amounting to torture. The statutes establishing International Criminal Courts<sup>22</sup> also deny immunity for all persons, including Heads of State, from criminal prosecution, in case of specified international crimes.

An important policy question is whether crimes of grand corruption committed by Heads of State should continue to enjoy absolute immunity from the criminal process. Since 1997 the Institute of International Law has called for limits on the immunity of Heads of State in cases of 'misappropriation of assets of the states which they represent'.<sup>23</sup> It may be expected that the increasing international concern with public corruption, money laundering and terrorist financing may lead to the development of state practice which curtails the abuse of immunities by Heads of State in criminal cases of grand corruption. Until this is the case, Heads of State who deposit illicit

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20 Similarly in 1989 the Swiss Supreme Court ruled that Jean-Claude Duvalier, the former 'President for Life' of Haiti, was not entitled to immunity from jurisdiction because of the waiver by the Government of Haiti. In contrast the French Cour de Cassation has held that the claim for restitution of funds from Mr Duvalier was not maintainable because this would involve the enforcement of claims of foreign states based on their public laws. See discussion of the French case in L Collins, *Essays in International Litigation and the Conflict of Laws*, Clarendon, Oxford 1994, 120-2.

21 *R v Bow Street Magistrate, ex p Pinochet (No 3)* [2000] 1 AC 147.

22 See for example, the statutes of the International Criminal Courts for the former Yugoslavia (Art 7 par 2 TPIY) and Rwanda (Art 6 par 2 TPIR). See B Broomhall, *International Justice and the International Criminal Court*, Oxford University Press, New York, 2003, 128-49; A Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, 264-77.

23 Resolution of the Institute de Droit Internationale, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Thirteen Commission, J Verhoeven (Rapporteur), Vancouver 2001.

monies in Swiss bank accounts will be protected by the traditional immunity in criminal matters.

There is the possibility of using civil proceedings to recover the illicit assets of a Head of State. There are different views as to the extent of the immunity of Heads of State from legal process in civil law cases.<sup>24</sup> One body of opinion states that Heads of State are immune from the legal process in civil law matters for acts committed both in an official capacity and in a private capacity. Another body of opinion is that the immunity of a Head of State in civil proceedings should be limited to official acts, and not be available in respect of acts of a private nature.

The preferable view is that a Head of State does not enjoy immunity from civil jurisdiction for professional or commercial activities undertaken in a purely private capacity. This view is based on the argument that in civil proceedings Head of State immunity should be treated in the same manner as the immunity of diplomatic agents of the State. This is likely to be the position in Switzerland where diplomatic immunity is not available in civil matters for conduct that is in the pursuit of private economic interests.<sup>25</sup> Although Head of State immunity is a less important obstacle in civil proceedings<sup>26</sup> than in criminal proceedings in Switzerland, this will be of no avail in grand corruption cases where the Head of State is still in power and the only victim is the requesting state.

#### **(4) Delays in Executing Requests**

The processing of requests for mutual assistance often entails considerable delays. In Switzerland the main cause of delays is the availability of well developed procedural and substantive rights of persons the subject of foreign mutual assistance requests. The target of a foreign investigation may contest a mutual assistance request in Switzerland on the ground of lack of double criminality,<sup>27</sup> failure to adhere to the

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24 See A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', *Académie de droit International, Recueil des cours*, 1994, Volume 24, III, 54 et seq.

25 See J Egli, 'L'Immunité de juridiction et d'exécution des Etats étrangers et de leurs agents dans la jurisprudence du Tribunal fédéral' in L Dalleves et al (Eds), *Centenaire de la Loi fédérale sur la poursuite pour dettes et faillite*, Zurich, 1989, 202.

26 There are additional difficulties in Swiss civil proceedings because there is no pre-trial disclosure or depositions. See P Gully-Hart, 'Civil Pursuit of the Criminal Defendant: An Overview of Swiss Law', IBA Conference, Miami, April 2005.

27 The dual criminality principle in Article 64(1) of the IMAC Act states that compulsory measures of assistance are only available if the facts of the case show that the foreign crime

principle of proportionality,<sup>28</sup> or the potential abuse of the principle of speciality.<sup>29</sup> Procedural rights include the right to be informed of the measure of mutual assistance and the right to appeal against orders made by Swiss officials or Swiss courts. These rights are more extensive than those available in other countries, such as the United States and Australia.

The Swiss system of mutual assistance is complicated, involves multiple appeal opportunities, and produces interminable delays before documents are sent to the requesting country. This has caused problems for developing countries which have sought bank documents relating to plunder by their former leaders. Invariably well-resourced deposed dictators use every substantive and procedural hurdle to prevent discovery of their secret bank accounts and the recovery of their illicit assets.

In the Marcos case it took nearly five years before the Swiss authorities handed the first batch of bank documents to the Government of the Philippines. This included a ten month delay while the Swiss examining magistrate, applying the principle of proportionality, edited and decided which documents would be sent to the Philippine Government.

The experience in the Marcos case led to a revision of the *Swiss IMAC Act* in 1996 with the aim of reducing time delays. The new law, which the Swiss media described as 'Lex Marcos', reduced the range of legal remedies and limited the number of parties which had appeal rights. Swiss banks which hitherto had automatically objected to any request for bank documents by a foreign government were deprived of any standing. The procedural laws of the twenty six Swiss cantons were simplified by the introduction of a standard law regarding mutual assistance procedures.<sup>30</sup>

The problem of delay has not been eliminated by the revised *IMAC Act* because the target of a foreign investigation still enjoys considerable rights under the Swiss mutual assistance process. This is illustrated by the Abacha case where the Nigerian

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'contains the elements, other than intent or negligence, of an offence punishable under Swiss law'.

28 The proportionality principle in Article 4 of the IMAC Act states that a request for assistance may be rejected if 'the gravity of the offence charged does not justify proceedings'.

29 The principle of speciality in Article 67(1) of the IMAC Act provides that a requesting state may not use documents and information obtained through Swiss assistance for the purpose of prosecution for any offence for which mutual assistance is not permissible (ie political, military or fiscal offences).

30 See J Natterer, 'Switzerland's International Mutual Legal Assistance in Criminal Matters', Working Paper of Transparency International, Basel, January 1998.

Government had to wait for nearly four years before the transmission of the Swiss bank documents.<sup>31</sup>

On 14 October 1999 the Swiss authorities issued a provisional freeze order over the alleged illicit assets of the former military ruler of Nigeria, General Sani Abacha. Two and half years later on 22 January 2002 the Swiss Federal Office for Police issued orders authorising the transmission of bank documents to Nigeria. Following the collapse of settlement negotiations between the Abacha family and the Nigerian Government, the Swiss Supreme Court agreed to hear the Abacha appeal in September 2002. In April 2003 the Swiss Supreme Court ordered the return of the bank documents and in August 2003 the bank documents were transmitted to Nigeria.

It thus took nearly four years from the date of the freezing of the assets to the transmission of the Swiss bank documents to Nigeria. Although bank documents are sometimes dispatched to requesting countries at a greater speed,<sup>32</sup> delays of over a year appear to be the norm in Swiss mutual assistance procedures. The major cause of delay is the system of Swiss mutual assistance which allows defendants to challenge any attempt to pierce Swiss bank secrecy.

The legal consequences of delay include the impeding of the prosecution of the corrupt and frustrating the confiscation of illicit assets. Swiss bank documents are often the only significant evidence of corruption, so that any major delay in their transmission may result in the criminal proceedings in the requesting state being terminated or the prosecution being unsuccessful. Since grand corruption cases will often have a high profile in the new democracies, delays in transmitting Swiss bank documents may have adverse political consequences. Governments which claim that deposed dictators have stolen large sums of money quickly lose their credibility when they are unable to produce the evidence in the form of Swiss bank documentation.

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31 The following discussion is based on press reports issued by the Swiss Federal Office of Police Matters and Swiss news reports, especially the web site <<http://www.letemps.ch>>.

32 For example, in November 2000 Switzerland froze Sfr 120 Million francs in bank accounts tied to Peru's fugitive ex-spy chief Vladimiro Montesinos, and in April 2001 handed over bank documents relating to those accounts to Peru. The fact that Montesinos was a fugitive in hiding during this period affected his ability to assert his right to object to the execution of the mutual assistance requests in Switzerland. See 'Affaire Montesinos: des documents sont remis au Perou', Press Release, Federal Office of Police Matters, Bern, 21 April 2001.

**(5) Freezing of Illicit Assets of Former Heads of State**

The Marcos case represented a watershed in the freezing of illicit assets of deposed Heads of State. On 25<sup>th</sup> March 1986 the Swiss authorities used extraordinary powers to freeze the assets of Ferdinand Marcos, the former President of the Philippines, his family and business associates.<sup>33</sup> The Swiss Federal Council's freeze order was a controversial political decision, albeit that its legal justification was based on Article 102 section 8 of the 1874 Swiss Constitution.<sup>34</sup> Under this provision the Federal Council assumes responsibility for the protection of the interests of the Swiss Confederation in its foreign relations. The Swiss Federal Council announced that the freeze order was made in anticipation of a claim by the Philippine Government, which was filed one month later on 25 April 2005.<sup>35</sup>

The Federal Council order was criticised by the Swiss Bankers Association which asserted that the decision was arbitrary, inappropriate and an undesirable compromise on Switzerland's reputation as a haven of banking secrecy.<sup>36</sup> In contrast, the Philippine Government welcomed the Swiss freezing order which was made in circumstances where Ferdinand Marcos was attempting to transfer his illicit fortune out of Switzerland.

The Marcos case proved to be a powerful precedent in 'dictator's jurisprudence'. The idea that assets may be frozen before a foreign country makes a mutual request marked a new Swiss standard of dealing with deposed dictators. This was justified by the Swiss authorities in the unique case where a dictator had been removed from power and the new fledgling government was not ready to make a valid and satisfactory mutual assistance request.

Any delay in imposing a freezing order entails a significant risk that assets will be transferred or laundered in the interim period. This has been one of the most important practical difficulties in the recovery of illicit assets. There have been too

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33 A more detailed account of the initial freezing of Ferdinand Marcos accounts is found at D Chaikin, *Tracking the Proceeds of Organised Crime: The Marcos Case*, Transnational Crime Conference, Australian Institute of Criminology, Canberra, March 2000, 11-2. The article is published on the AIC website

<<http://www.aic.gov.au/conferences/transnational/chaikin.pdf>> (10 August 2005).

34 The new Swiss Constitution of 1999 recasts the external affairs power in Articles 184-187.

35 Relying on the Philippines Government's requests, the Swiss Federal Office for Police Matters issued a freeze order in substitution for the exceptional freezing order of the Federal Council.

36 See E Tavernier, 'Legislative Developments in Swiss Banking', (1987) *IFLR* 29.

many cases where it has been alleged that illicit assets were moved merely hours or days before the order freezing bank accounts.<sup>37</sup>

The timing of recognition of a government may affect the recovery process in that delays in recognition may give a deposed dictator an opportunity to transfer and launder illicit monies. An illustration of this problem is the case of Mobutu Sese Seko, who ruled resource rich but impoverished Zaire (now called the Democratic Republic of Congo) for 32 years, and accumulated a billion dollar illicit fortune.<sup>38</sup>

The facts of the Swiss freezing of the Mobuto assets are as follows.<sup>39</sup> On 16 April 1997 the Swiss Federal Council refused to act on the request of the Zairian opposition to freeze the assets of Mobuto because he was still the Head of State of Zaire and the civil war in Zaire had not concluded. On 13 May 1997 the new and interim Attorney General of Lumbumbashi in Zaire made a legal assistance request to the Swiss Federal Office for Police to freeze Mobuto's assets in Switzerland. The Swiss political authorities declared that the request was admissible because it had come from the 'legal authorities of Zaire' in circumstances where Mobuto had fled the capital and was seeking refuge in a third country. The Swiss Federal Council ordered the freezing of the assets of Mobuto and his family. On 15 May the Swiss Federal Banking Commission, at the request of the Federal Council, carried out a 'systematic investigation' of possible assets of Mobuto and members of his family, by requesting 406 Swiss banks to inform the Commission of any Mobuto accounts. On 3 June the Banking Commission announced that 406 banks had responded to its request and that six banks had disclosed assets of the Mobuto family of Sfr 4,786,570 (US\$ 3.4 million).

The discovery of a mere \$3.4 million in Switzerland was greeted with scepticism by the new Government of Zaire. It suspected that Mobuto had hundreds of millions of dollars hidden in Swiss banks and that a large part of his fortune had been transferred

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37 See, for example, allegations by Gabrielle Koller that US\$ 400 million was transferred days before the 1986 freezing order in the Marcos case, in D Cueto, '\$400-M Marcos money just the tip of the iceberg', *Philippine Daily Inquirer*, 17 May 2002. See also Y Ridley and S Elam, 'Milosevic shifts millions to Liechtenstein Bank', *Guardian*, 27 June 1999.

38 See 'The man who used a country as his personal bank', *Business Times*, Zambia, 25 May 1997; P Adams, *Odious Debts: Loose Lending, Corruption And the Third World's Environmental Legacy*, Probe International, London, 1991, 129-31.

39 The facts are based on an official response of the Swiss Federal Council to a question dated 29 April 1997 deposed by Margrith von Felten, spokesman of the Socialist Group of the Swiss Federal Parliament - Blocking of the Fortune of President Mobuto. Response of the Federal Council dated 10 October 1997, Swiss Federal Assembly, Bern, Reference Number 97.3702.

or laundered during the dying days of his regime.<sup>40</sup> The Government of Zaire was frustrated that the Swiss authorities had not carried out any substantial investigation and that the disclosures of the Swiss banks had been accepted at face value. The position was even more disappointing in that Switzerland was the only country of 18 countries which responded to the requests of the new Government of Zaire to freeze the assets of the Mobutu clan.

In Switzerland it is relatively easy for a foreign government to secure a freezing or precautionary order under Article 18 of the *IMAC Act* against suspected illicit assets. There are dozens of cases where the Swiss authorities have frozen accounts and assets of foreign politicians and former political leaders. In some cases the Swiss authorities have issued provisional measures to freeze illicit assets of a deposed political leader prior to the new regime in the developing country establishing its human rights and democratic credibility. The justification for freezing orders in such circumstances is that they preserve the status quo and prevent the disappearance of suspected illicit funds.

One criticism of the present Swiss procedure is that it does not require the requesting country to undertake to pay the costs or damages if the precautionary order is unjustified. There is no downside risk for a requesting country which applies for a freezing order through the mechanism of a mutual assistance request. It is arguable that the Swiss procedure is inadequate in that there is no security for costs in a criminal freezing procedure. Nor is there any consideration of the possibility of awarding damages against a foreign government which has wrongfully obtained a freeze order.

An illustration of the potential unfairness of the freezing procedure is the Yukos case. In June 2004 the Swiss Supreme Court ordered the release of US\$ 3.3 billion in assets of US\$ 5 billion frozen three months earlier in relation to the Russian oil giant, Yukos.<sup>41</sup> The Russian prosecutors had obtained the Swiss freeze order against 20 individuals connected to Yukos, including Mikhail Khodorkovsky, Russia's richest individual, who were accused of misappropriating state assets. The Swiss Supreme Court released the frozen funds on the ground that the Swiss authorities had violated the principle of proportionality in blocking such a huge sum whereas the Russian criminal proceedings were based on a smaller sum, namely US\$ 283 million. The

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40 See 'Swiss banks find only \$3.4 million in Mobutu assets', CNN, Zurich, 3 June 1997; 'Swiss to Freeze Mobutu's Assets', Voice of America, 19 May 1997.

41 See 'Court orders release of more Yukos assets', Swissinfo News, 15 June 2004; 'Court unfreezes another Yukos-linked account', Swissmoney News, June 18, 2004; V Korchagina, 'Yukos Wins Swiss Cases, Loses Judge Back Home', Moscow Times, 15 June 2004.

parties appealing against the freeze order also alleged that the Russian Government prosecution of Khordorkovsky was based on political motives.<sup>42</sup> The Swiss freeze order destroyed Yukos's attempt to takeover another Russian oil company and contributed to Yukos's terminal decline. The damage to Yukos by the freeze order was not subject to any compensation.

#### **(6) Confiscation and Repatriation of Illicit Assets**

There is a wide variety of state practice in the confiscation and repatriation of illicit assets. Many states will not confiscate assets in a criminal procedure unless there is a final order of conviction of the perpetrator of the crime and proof of a direct link between the crime and the illicit assets. Some states permit the registration and enforcement of foreign criminal judgments, which may include confiscation orders, while others consider that the enforcement of a foreign criminal judgment is against public policy.

Many countries will not repatriate assets unless there is an asset sharing arrangement whereby both the requesting and requested countries split the assets which are frozen.<sup>43</sup> It is legally questionable whether the requirement of an asset sharing arrangement is consistent with Article 57 of the UN Corruption Convention.<sup>44</sup> It is ethically questionable whether the country which is the depository of illicit assets has any entitlement to those assets.

The legal basis for confiscation and repatriation of assets was one of the most controversial issues between the Philippines Government and the Swiss Government in the Marcos case. It provides a cogent illustration of the practical difficulties of using the criminal process to recover illicit assets stolen by a deposed political leader.

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42 Mr Khodorkovsky had funded the opposition parties to President Putin. See 'The rule of law, Russian-style', *Economist*, London, 5 July 2004; C Mortished, 'Russia's investors caught in war between the Tsar and the boyars', *The Times*, London, 9 June 2004.

43 The United States is the leading advocate of asset sharing arrangements. See for example, the US Draft Model Bilateral Agreement on Disposal of Confiscated Proceeds of Crime (2005). Available at <[http://www.unodc.org/pdf/crime/ieg\\_crime\\_2005-01-26\\_draft\\_model\\_agr\\_01.pdf](http://www.unodc.org/pdf/crime/ieg_crime_2005-01-26_draft_model_agr_01.pdf)>15 May 2005).

44 Article 57(1) states that confiscated property shall be returned to its legitimate owners, and Article 57(3) states: 'In the case of embezzlement of public funds or of laundering of embezzled public funds ... (the requested State Party shall) return the confiscated property to the requesting State Party'.

*Marcos case study*<sup>45</sup>

In 1986 two Swiss banks froze \$356 million of assets held by four Liechtenstein foundations and a Panamanian company allegedly controlled by or beneficially owned by Ferdinand and Imelda Marcos. After protracted legal proceedings in Switzerland,<sup>46</sup> on 20 December 1990 the Swiss Supreme Court ruled<sup>47</sup> that the Swiss bank documents concerning the Marcos family may be transmitted to the Philippines. The Supreme Court also accepted in principle that the assets frozen in Switzerland should be returned to the Philippines, but laid down three conditions before the repatriation of any assets.

The first requirement was that the Philippines Government must file a criminal charge and/or bring a forfeiture proceeding against Mrs Marcos in the Philippines within one year of the Swiss judgment. This requirement was directed against Imelda Marcos because her husband Ferdinand Marcos<sup>48</sup> had died in Hawaii in 1989 and Imelda Marcos had been accused of being directly connected with the Swiss bank accounts.

Secondly, repatriation would only be permissible when a Philippine court with competent jurisdiction issued a final judgment that the Marcos assets in Switzerland were illegal and ordered those assets to be forfeited in favour of the Philippines Government.

Thirdly, repatriation should only take place when the Philippines Government established that the criminal prosecution of Imelda Marcos and the forfeiture proceedings against the illicit assets complied with the requirements of due process and the rights of the accused as provided under the Swiss Constitution and the European Convention on Human Rights.

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45 The Marcos case study is based on material that the author collected while he was working as a lawyer for a private client who had a contract with the Philippines Government to trace and recover the Marcos assets.

46 For a discussion of the three stages of Swiss criminal litigation involving the Marcos case, see D Chaikin, above No 33, 10-2.

47 *Estate/Heirs of Ferdinand Marcos v Federal Office of Police Matters*, Unpublished judgment of the Swiss Supreme Court of 19 September 1989, Ref 1A 58/1989. The Philippines Government provided an English translation of this judgment to the author.

48 For a discussion of the problems of extraditing and prosecuting a deposed dictator, see D Chaikin, above No 34, 12-4. See also D Chaikin, 'Extraterritoriality and the Criminalization of Foreign Bribes' in B Rider (Ed), *Corruption: The Enemy Within*, Kluwer, The Hague, 1997, 285-301.

The Presidential Commission on Good Government ('PCGG'),<sup>49</sup> the investigatory agency set up by the Philippines Government to investigate the Marcos assets, criticised the conditions imposed by the Supreme Court on the Philippines Government and voiced considerable reservations about the utility of the Swiss law on legal assistance.<sup>50</sup> The Philippines Government was of the view that the Swiss authorities should transfer the monies back to the Philippines without any prior conditions and that Filipino courts should decide questions of ownership and forfeiture of the alleged illicit assets of its former leader.

Subsequently the PCGG negotiated a compromise deal whereby the Swiss authorities agreed to transfer the frozen Marcos assets prior to the rendering of a legally valid and final decision of the Philippine courts in respect of the forfeiture petition filed by the Philippines Government on 17 December 1991.<sup>51</sup>

On 19 August 1995 the PCGG filed a new mutual assistance request and sought the transfer of the frozen assets deposited in the Swiss banks to the Philippine National Bank (PNB). On 21 August 1995 the Office of the District Attorney of Zurich ordered the 'anticipatory transfer' of the frozen assets to an escrow account with the PNB. These orders were challenged by the Marcos family and creditors of the Marcos estate.

In December 1997 and January 1998 the Swiss Supreme Court<sup>52</sup> issued a series of judgments confirming the decision of the District Attorney of Zurich. The Supreme Court reversed its previous 1990 decision that a final court ruling in the Philippines was a necessary condition for the repatriation of the illicit funds. The Supreme Court placed special reliance on the amended Article 74 of the *IMAC Act* which allowed the restitution of assets at any stage of a foreign criminal proceeding. Although restitution of assets under Article 74 generally requires a 'valid and enforceable decision of the requesting state', in exceptional circumstances 'anticipatory restitution' may be permitted.

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49 For an outline of the powers and jurisdiction of the PCGG, see the official Philippines Government website at <<http://www.pcgg.gov.ph>> (10 April 2005).

50 See letter dated 10 June 1996 from Mr Gunigundo, Chairman of the PCGG, to the author.

51 See *Republic of the Philippines v Ferdinand E Marcos (represented by his Estate and Heirs), Imelda R Marcos et al*, Forfeiture Petition under Republic Act 1379, filed on 17 December 1991 in the Sandiganbayan, First Division, Manila, Case No 0141.

52 The Swiss Supreme Court issued two corresponding judgments on 10 December 1997, six corresponding judgments on 7 January 1998 and two corresponding judgments on 15 January 1998. See for example, *Federal Office of Police Matters v Aquamina Corporation*, BGE 123 II 595, 10 December 1997.

The Supreme Court thus summarised the relevant criteria for restitution:<sup>53</sup>

With respect to the overwhelming majority of the assets seized the facts are sufficiently clear to allow the assumption of illegal provenance. Under these circumstances an anticipatory restitution of the assets is possible in principle if there are sufficient guarantees that the decision regarding seizure or restitution, respectively, will be rendered in proceedings according to law and order. The decision whether to seize or return the monies seized must be taken in the Philippines where the criminal acts were committed.

The Swiss Supreme Court found that the Philippines Constitution and legal system complied with the international norms of procedural justice and human rights, and noted that Imelda Marcos enjoyed wide-ranging rights which she had exercised in numerous criminal and civil proceedings in the Philippines.

Subsequently, in April, June and July 1998 Credit Suisse and Swiss Banking Corporation transferred to the PNB funds and securities to the aggregate value of US\$ 567,216,397<sup>54</sup> to be deposited in escrow in the name of the five entities, namely the Panamanian company, Aquamina Inc, and the Liechtenstein foundations, Avertina, Palmy, Vibur and Maler.

The major consequence of the transfer of funds was that the identity of the depository institutions was changed from two Swiss banks to a Philippines bank. This did not mean that the funds were available for use by the Philippines Government. The funds were still subject to the control of the Swiss authorities, albeit that they were now deposited in a Philippines bank.

In accordance with the agreement reached with the Philippines Government, the District Attorney of Zurich exercised control over the use and disposition of the illicit Marcos monies prior to the conclusion of a final and enforceable judgment of the Philippines courts. Under the Zurich District Attorney's guidelines the illicit assets of the Marcos family could only be invested by the PNB in the money market or in securities with a Standard and Poor's investment rating of at least 'AA'.<sup>55</sup> The

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53 *Federal Office of Police Matters v Aquamina Corporation*, above No 53. This quote is taken from an unofficial English translation of the court's judgment, supplied by the PCGG to the author.

54 This sum consisted of the original sum of approximately \$356 million plus interest and investment earnings. See Philippine National Bank, Manifestation and Compliance filed on 10 March 1999 in the Sandiganbayan First Division Manila in *Republic of the Philippines v Ferdinand E Marcos*, Case No 0141.

55 See Memorandum of the Trust Banking Group of the Philippine National Bank, Manila, 24 April 1998.

significance of this requirement was that the funds could not be deposited or invested in any Filipino bank, corporation or government agency, since all these institutions have a too low investment rating.

In effect, the Swiss authorities used the vehicle of human rights so as to continue to exert control over the alleged illicit assets of former President Marcos. At all times it was Swiss interests, and in particular the international reputation of the Swiss financial system, which has been the foremost consideration in Swiss decision making. It took five more years before the legal proceedings for confiscation of the Marcos assets were concluded in the Philippines. On 15 July 2003 the Supreme Court of the Philippines declared the now US\$ 650 million of the Marcos assets to be ill-gotten wealth under section 6 of the *Republic Act No 1379*<sup>56</sup> and ordered its confiscation. Subsequently in August 2003 the Zurich District Attorney authorised the release of the funds to the Philippines Government, but this decision did not result in the actual transfer of funds from the PNB to the Philippines Treasury until 2 February 2004.

The transfer of the funds to the Philippines Government took place nearly 18 years after the first mutual assistance request to freeze and repatriate the illicit Marcos monies and 12 years after the Swiss Supreme Court had considered that in principle the illicit monies belonged to the Philippines Government. The delays in this case were a reflection of the inadequacies of both the Swiss and Filipino legal systems. Although the Swiss system of mutual assistance has improved, it is still the case that repatriation of illicit assets is subject to significant delays in Switzerland.

#### *Other Cases*

The Marcos case set a precedent concerning the conditions for the repatriation of illicit assets by Switzerland to a developing country. In all cases a requesting country is required to issue a guarantee that it will respect the human rights of defendants in criminal proceedings. The Swiss Federal Office of Police examines the foreign government's guarantee to determine whether it meets certain human rights standard and whether it is effective given the current political and legal situation in the requesting country.<sup>57</sup>

The Swiss authorities do not consider guarantees issued by developing countries as permanently effective. For example, in the case of the Haitian request to recover the alleged illicit assets of former President Jean-Claude Duvalier, the Swiss Federal

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56 Section 6 of the Republic Act 1379 states that 'whenever any public officer has acquired during his incumbency an amount or property manifestly out of proportion to his salary, the said property should be presumed to have been unlawfully acquired'.

57 See Federal Office of Police Matters, above No 13, 27-8.

Office of Police ruled in May 2002 that the guarantees supplied by the Government of Haiti in 1986 were no longer sufficient.<sup>58</sup> In issuing its ruling, the Swiss Federal Office of Police referred to the 'lack of any notable progress in political and institutional stability' and the continuing 'chronic instability' in Haiti. The effect of this decision was that the IMAC procedures were no longer available. In June 2002 the Swiss Federal Council stepped into the jurisdictional gap and re-froze the illicit assets of Mr Duvalier relying on its constitutional power over foreign affairs.<sup>59</sup> Consequently, the illicit funds of Duvalier, which had been frozen for more than 16 years, are in a state of 'legal limbo'.

More controversially the Swiss government had adopted a policy of delaying the return of illicit assets to a developing country when it perceives that there is a risk that the looted monies will be stolen or misused by the leaders of the new government, Ambassador Jacques de Watteville, Director of Financial and Economic Affairs of the Swiss Ministry of Foreign Affairs, summarised the Swiss position in his statement: 'Morally, we can't give money back to a country if we know it will just go into another pocket, from one corruption case to another'.<sup>60</sup>

The Swiss Federal Council has used conditionality as a means of controlling the circumstances and modalities for returning to Nigeria the illicit assets of former President Sani Abacha and his associates. In May 2005 the Federal Council established two conditions for the return of the illicit funds of Sfr 568.2 million (US\$ 460 million) to Nigeria.<sup>61</sup> The transfer of the funds would be staggered over a period of time ostensibly because some of the assets were not liquid. The second condition was that the World Bank would monitor the Nigerian Government's use of the funds for specific development projects in health, education and infrastructure.

The Federal Council's decision was based on political expediency, rather than any legal principle. The Federal Council's conditions for the repatriation of illicit assets were not required as a matter of law since the Swiss Supreme Court's judgment had not imposed this type of conditionality on the Abacha assets. The Nigerian

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58 See 'Freeze on Duvalier assets extended'. *Swissmoney News*, 7 June 2005; S Arsever, 'Fonds Duvalier: le coup de bluff du Conseil fédéral', 15 June 2002; F Mansour, 'Nouveau blockage des fonds Duvalier', *Le Temps*, Geneva, 21 June 2002; F Mansour, 'Les étapes d'une trop longue procédure', *Le Temps*, Geneva, 21 June 2002.

59 See Swiss squeeze 'Baby Doc' Duvalier and Milosevic', *Swissinfo News*, 15 June 2002.

60 This quote is taken from an article by R Thurow, 'Switzerland has discovered thawing assets is tougher than freezing', *Wall Street Journal*, 4 November 2001.

61 See 'Restitution des Fonds Abacha: Modalités', Press Release, Swiss Justice Ministry, Bern, 26 May 2005; 'Swiss put conditions on return of Abacha cash', *Swissinfo News*, 26 May 2005.

Government accused the Swiss Government of paternalistic behaviour for refusing immediately to repatriate the illicit monies to the rightful owner.<sup>62</sup> In September 2005 the Swiss Government agreed to return SFr 360 million (US\$ 290 million) to Nigeria after the Nigerian Government had entered into an agreement with the World Bank 'to monitor Nigeria's use of the funds'.<sup>63</sup>

## 7 Conclusions

Uncovering dictator's plunder will be a topic of major legal and political interest in the 21<sup>st</sup> Century because it symbolises the quest of developing countries for justice in dealing with past corrupt and authoritarian governments. As a rule dictators tend to be bad, corrupt and incompetent leaders. Given that many governments are undemocratic and subject to little, if any, electoral accountability, there is plenty of scope for dictator's plunder.

Switzerland has attracted through its bank secrecy system billions of dollars of illicit and corrupt monies from foreign dictators, politicians and public servants. In the past 30 years Switzerland has provided a measure of assistance to developing countries in freezing and repatriating some of the illicit assets. The problem is that in most cases, the Swiss system of mutual assistance has been too demanding and too slow in providing effective and efficient asset tracing and recovery.

Swiss jurisprudence will need to reconsider the justification for many of its rules and procedures which impose considerable costs to developing countries which seek the return of their national patrimony. The responsibility of Switzerland in tackling dictator's plunder is not hers alone. There are other international financial centres such as Luxembourg, London and New York which have been used to hide and launder funds from developing countries.<sup>64</sup> International law will need to develop new principles to trace and recover the corrupt monies of both existing and deposed Heads of State.<sup>65</sup>

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62 'Nigeria slams Swiss blackmail', *Swissmoney News*, 29 May 2005; 'Swiss Govt Told to Return Abacha Loot With Apologies', *The Vanguard*, Lagos, 14 June 2005.

63 See 'Swiss to return more Abacha', *Swissinfo News*, 9 September 2005.

64 See *Hearings on Recovering Dictator's Plunder*, Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit, US House of Representatives, Washington, 2002.

65 There have been several international initiatives to deal with 'politically exposed persons' under the framework of international anti-money laundering guidelines, but these are too general to make any significant change to Swiss law and practice. See for example, the Wolfsberg Anti Money Laundering Principles for Global Banks, 30 October 2000.