
VISITING EXPERTS' PAPERS

ASSET RECOVERY

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I. INTRODUCTION

The confiscation of the proceeds of crime remains a global issue as criminals continue to move monies through financial systems with ease and to acquire legitimate assets across the world. In the context of corruption and fraud, which this paper is based upon, and to put the problem into perspective, the World Bank announced that in one year alone over \$1 trillion were paid in bribes. This statistic does not even represent the cost of large scale fraud or embezzlement from public funds. At a country level the Nigerian Economic and Financial Crimes Commission puts Nigeria's own corruption and theft at approximately USD 420 billion since independence in 1960 – more than the total amount of development aid provided to all of Africa by Western governments between 1960 and 1997. The knock on effect of this crime is that now an estimated 25% of the world's costs on government procurement is the result of corruption on a large and systematic scale. In 2007, Transparency International suggested that of the \$4 trillion spent on government procurement annually, approximately \$400 billion will be siphoned off in corruption, usually in the form of bribes. This is monies lost to public projects such as roads, schooling and the construction of hospitals. Even where the projects are commenced they often lead to the building of unnecessary infrastructure or infrastructure that is of dangerously poor quality.

For this reason, efforts to prevent corruption, the wholesale plundering of state assets, systematic fraud and the manner in which the proceeds of such criminal activity move through financial centres has recently assumed a high international profile attracting great political interest. The answers to such problems are complex, transcending legal and political boundaries, and require an enormous effort in both the developing countries where the assets were stolen and the financial centres of the world where they reside, or once resided.

Close international co-operation, whether at an informal or a formal level, on confiscation issues remains the key and should be developed. This paper sets out to consider the current international architecture in place to see what progress is being made and indeed what efforts are being made. The paper will adopt a perspective based on the recovery of assets stolen through, principally, corruption and fraud.

II. THE INTERNATIONAL LEGAL FRAMEWORK

For the purposes of this paper it is worth examining the legal context in which international efforts are anchored and the extent of the international obligations. A number of the international Conventions include provisions on the confiscation of criminal proceeds in the identification, tracing, freezing and confiscation of criminal assets and also seek to promote international co-operation in this context. The most relevant are the UN Convention against Transnational Organized Crime (UNTOC), the UN Convention against Corruption (UNCAC) and the Council of Europe Conventions on Money Laundering and Confiscation (the Strasbourg Conventions), which have served to build upon a growing body of other relevant international legal instruments.¹

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¹ For example, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990), the Council of Europe Criminal Law Convention on Corruption (1999), the International Convention for the Suppression of the Financing of Terrorism (1999), and the (revised) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).

Article 13 (1) of UNTOC² imposes an obligation upon a State Party to act in response to requests for confiscation from other states “to the greatest extent possible within its domestic legal system.” This, UNTOC suggests, can be done either through direct submission of the request to competent authorities with a view to obtaining a confiscation order and then executing it; or through the submission to its competent authorities, with a view to giving effect to a confiscation order issued on the territory of the requesting state. However it is important to note that although corruption is a sufficient legal basis for Article 13, as it is covered by Article 8 UNTOC, the criminal act must have been carried out by an ‘organized criminal group’ within the definition of Article 2 (a).³ In some jurisdictions the theft of public funds through corrupt means on a grand scale is sufficient in law to meet these criteria. UNTOC also envisages the return of the assets, rather than a reliance upon asset sharing agreements which seems to have been the way so far, in Article 14 (2) in order to “give compensation to the victims of crime or return such proceeds of crime to their legitimate owners.”

But it is the United Nations Convention against Corruption (UNCAC) that has set the legal pulses racing with its broad and purposive approach and it is upon UNCAC that this paper will primarily focus. As the first global legally binding instrument in the fight against corruption, UNCAC came into force on 14 December 2005. The Convention deals with an impressive range of offences and preventative measures and also builds upon the growing array of provisions designed to strengthen international co-operation in criminal matters. However, where UNCAC differs from many of the other anti-corruption conventions already in existence is the innovative and far-reaching provisions on asset recovery.

With the advent of UNCAC, however, has come a great deal of hype and, inevitably, false promises from a number of countries keen to shroud themselves in the veneer of international respectability that UNCAC provides. But does UNCAC also represent a possible new dawn of hope, a realization that some change is slowly but inexorably taking place? Can it become the tool for change and the mechanism by which a start is made even if only to even make a small dent in the staggering annual figures of stolen assets that are declared by international organizations or, for example, put forward in the Nyanga Declaration of 2001 by the representatives of Transparency International in 11 African countries? It noted that \$20 billion to \$40 billion “...has over the decades been illegally and corruptly acquired from some of the world’s poorest countries, most of them in Africa, by politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets.”⁴

The detail is in the text of UNCAC and, in particular, Chapter V which deals with fundamentally new asset recovery provisions. It is notable that at the heart of many of the new obligations is the principle of international co-operation in this field. For example, Article 51, and the general spirit of Chapter V, links in with the demands already articulated in Articles 43 and 46, when requiring State Parties to afford one another the widest measure of co-operation and assistance in this regard. UNCAC calls for both a proactive and co-operative approach and, considering past experiences, an important step to this end might be implementing a special system for spontaneous cooperation as envisaged by Article 56.

Furthermore, UNCAC also attempts to promote legal tools and remedies that will assist in the direct recovery of proceeds and property from other jurisdictions. Article 53, for example, is designed to ensure that State Parties have in place a wide range of legal remedies to recognize other State Parties as having legal standing to initiate civil actions and other direct means to recover illegally obtained and exported property. The suggested list includes:

- as a plaintiff in a civil action (Paragraph a);
- as a party recovering damages caused by criminal offences (Paragraph b); or
- as a third party claiming ownerships rights in a confiscation procedure, being it civil or criminal (Paragraph c),

² The link between organized crime and corruption is fairly well established. As far back as 1994, the UN’s Naples Declaration recognized that the growing threat of organized crime had a “corrupting influence on fundamental social, economic and political institutions”, leading eventually to the development of UNTOC.

³ Article 2 (a) UNTOC ‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

⁴ http://www1.transparency.org/pressreleases_archive/2001/nyanga_declaration.html

Other key asset recovery provisions of UNCAC are as follows;

- (i) The mechanisms for the recovery of property through international co-operation in confiscation, as covered by Articles 54;
- (ii) International co-operation for the purposes of confiscation, as covered by Article 55; and
- (iii) The Return and disposal of assets, as covered by Article 57.

Article 54 imposes three obligations and builds upon the growing international consensus that domestic orders for confiscation can be executed in foreign jurisdictions despite the old political issues that thwarted previous attempts. The three powers contained in Article 54 (1) represent a circle of formidable legal provisions that will capture most factual circumstances. Article 54 obliges states; (a) to take measures necessary to permit its authorities to give effect to a foreign confiscation order; (b) take such measures to permit domestic authorities having jurisdiction, to order confiscation “by adjudication of an offence of money laundering or such other offence” and finally (c) to consider taking measures to permit confiscation of property without a criminal conviction in certain cases.

Article 54 (1) (a), which is also reflected in the provisions of UNTOC, may take one of two different forms. The competent authorities of the requested state may either recognize or enforce the foreign confiscation order, per se, or they may institute new proceedings under their own domestic law and enforce the confiscation order through domestic proceedings. In both cases, the authorities of the requested State are obliged to recognize the judicial effect of the foreign judgment. In either scenario, the requested state will need to be satisfied that the requesting state is legally competent to make the order. Many countries have already put in place procedures for enforcing foreign confiscation orders.

There may be a huge advantage here in the sense that the requested state may be in a better position to undertake a thorough investigation than the authorities in the requesting state, for example, the requested state may be in a position to better establish the full extent of the funds transferred and may even, depending upon the jurisdiction in question, be able to use a value based approach to the confiscation proceedings rather than a property based approach, offering much better opportunities for the requesting state to recover significant amounts of the stolen proceeds.

Under Article 54 (1) (b) there is a clear requirement for a legal finding or an adjudication in the requested state for an associated offence, which will generally speaking be for money laundering prosecution although UNCAC also envisages other offence.⁵ Recent history has demonstrated the true value of such an approach with the proceeds of several grand corruption cases having been recovered by prosecuting money laundering charges in the jurisdiction where the proceeds of corruption had been secreted. The fact that the authorities of the country where the assets have been secreted are often more independent or are not hampered by some of the legal constraints which affect the authorities in the requesting state, for examples questions of immunity from prosecution or statute of limitations considerations, means that this can be a very effective weapon in the pursuit of corrupt individuals.

UNCAC already relies on anti-money laundering mechanisms to prevent, trace, seize and confiscate the proceeds of corrupt practices.⁶ Article 31 (8) even contemplates the prosecuting state reversing the burden of proof for proving the origin of the property of foreign origin.

For a number of clear examples of the value of requested states pursuing corrupt individuals for money laundering in their jurisdictions see the efforts of the Swiss authorities in respect of the Abacha monies in Switzerland⁷ and the efforts of the UK authorities in pursuing Nigerian State Governors through the UK

⁵ *Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law.*

⁶ Paragraph (1) (b) should be read in conjunction with articles 14, 23 and 52. Under Articles 14 and 52, State Parties shall ensure that its financial intermediaries report suspicious transactions in addition, Article 23(2)(c) requires State Parties to be able to prosecute money laundering offences irrespective of the place in which the predicate offence had taken place.

⁷ Federal Office of Justice, Press Release, 21 January 2000 - http://www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/2000/ref_2000-01-21.html

criminal and civil courts.⁸

Finally, under Article 54 (1) (c) when referring to “other procedures authorized under its domestic law” there is a clear message sent that there may be circumstances in which the States Parties may wish to use other non traditional means to secure a successful return of stolen assets even in circumstances where there is no criminal conviction of the suspect.

One obvious example is the use of legal provisions in countries such as in the United States, Ireland, the United Kingdom and Colombia, among others, which permit civil or administrative confiscation procedures that operate *in rem* - procedures established against the property (not the individual) and governed by a civil standard of evidence against property suspected to be the proceeds of crime. It may even have been derived from a foreign criminal offence and is undertaken without the need for a criminal procedure in the jurisdiction where the proceeds were originated.

The implementation of this recommendation relies on the punitive or restorative character each State Party assigns to the concept of confiscation, essentially therefore a non criminal remedy.⁹ UNCAC recommends applying this remedial type of confiscation to situations in which the offender can not be prosecuted by reasons of death, absence of flight or “in other appropriate cases.”¹⁰

Furthermore, in an appreciation of both the novel provision in Article 54 (1) (b), the provisions in Article 31 (8) and the spirit of UNTOC the Swiss Federal Office of Justice has in recent months declared that the assets of former Haitian President Jean-Claude Duvalier which have been frozen in Switzerland are to be handed over to Haiti. The lawful origin of the assets, worth some 7 million Swiss francs, could not be proven by the account holders, in circumstances where the burden of proof was reversed and placed upon those claiming a proprietary right in the proceeds, and so the Swiss Federal Office of Justice held that the Duvalier clan acted in the same way as a criminal organization, as defined in Article 260 of the Swiss Penal Code. This decision came on the back of an MLA request made in 2008 by the Haitian government.¹¹

As we have already seen, UNCAC provides mechanisms for recovery of property through international co-operation in confiscation, but in terms of asset recovery it is Article 55 that is the enabling provision for the use of international co-operation. In the review of Article 54 we have established in what circumstances the requested state should act; under Article 55 the obligation is to establish a regime for international co-operation with the purpose of confiscation with very specific criteria laid down for the process of engaging the requested state – it is almost a walk through guide. Article 55 seeks to place an obligation upon the State Party to create specific procedures to be used upon receiving a request for recognizing and enforcing foreign confiscation orders and foreign provisional measures. These measures should be extended not just to the proceeds of crime but also property, equipment and even other instrumentalities that have been used in the commission of the offences.

The use of such powers in the early stages of an investigation, as envisaged in Article 55 (2) is important, as in some jurisdictions, particularly common law jurisdictions, a claimant in a civil action can require an *ex parte* discovery order to compel banks, and a large number of other intermediaries or third parties, to provide information without disclosing the fact that such information is being sought to the person in respect of whom the information is pertinent. This, usually known as Norwich Pharmacal/Bankers Trust¹² type order, will allow the competent authorities of a State Party, provided the necessary pre-requisites are

⁸ <http://news.bbc.co.uk/2/hi/africa/4253362.stm>, <http://news.bbc.co.uk/2/hi/business/3626408.stm>, <http://news.bbc.co.uk/2/hi/africa/7035427.stm>

⁹ Consider the judgment in the European Court of Human Rights, in the case of *Welsh v. UK* (1995) for a fuller consideration of some of the complex legal arguments that this type of provision elicits.

¹⁰ The Stolen Asset Recovery Initiative –StAR- (World Bank and UNODC) have recently published a Non Conviction Based Guide which provides practical advice to jurisdictions contemplating NCB asset forfeiture legislation inline with Article 54 1 (c) UNCAC The Guide identifies the key concepts - legal, operational and practical - that an asset forfeiture system should encompass. See <http://www.worldbank.org/star>

¹¹ See the Federal Office of Justice press release in this matter - <http://www.bj.admin.ch/bj/en/home/dokumentation/medieninformationen/2009/2009-02-12.html>

¹² *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 1975

satisfied, to obtain access to information which will enable them to search for assets hidden by suspected criminals. Such orders are also usually sought in conjunction with freezing injunctions, thus constituting a powerful range of legal weapons.¹³

Under the provisions of Article 55 (3) (6) if a State Party elects to make the taking of the measures conditional on the existence of a relevant treaty, that State Party shall consider this Convention as the necessary and sufficient treaty basis. This of course is easier said than done in practice as many countries remain wedded to fairly rigorous criteria when it comes to engaging in international co-operation. Yet recently, again in a real signal that the order of such things may genuinely be changing, the Bangladeshi authorities were able to plead the UNCAC provisions as a legal basis for MLA and asset recovery with Singapore, a country with which it has no bilateral MLA relations.

In efforts to recover over \$200 million alleged to have been stolen and placed into overseas jurisdictions by former premier Khaleda Zia's son, Arafat Rahman Koko, the Bangladeshi authorities are said to have cited successfully the provisions of UNCAC as the legal basis for the exchange of critically important information and evidence in relation to this ongoing investigation in the absence of any formal bilateral treaty with Singapore.¹⁴

However, having said this, Article 55 does still contain a number of important provisions that allow a requested state to refuse international co-operation, such as a refusal to co-operate or the lifting of a provisional freeze if the requested state does not receive sufficient and timely evidence or if the property is of a de minimis value. Although Article 55 does go on to say that in the case of lifting of any provisional measures the requesting State Party shall be given an opportunity to present its reasons in favour of continuing the measure.

The consolidating and innovative legal tools available under Chapter V UNCAC are really a precursor to Article 57 which contains fundamentally important provisions on the return of assets that have been confiscated under the various mechanisms of UNCAC. The principle of returning confiscated proceeds of corruption is a significant departure from the well established principle that reflects the fact that confiscated assets, generally speaking, belong to the country whose courts have issued the confiscation order. As a result, when confiscating the proceeds of corruption, the requested states may need to consider enacting specific provisions that allow their courts to return the proceeds to the victim country, in the cases and circumstances required by Article 57, in order to avoid conflicts with existing practices adopted in case of proceeds of other crimes.

But as the UNODC itself testifies, reaching agreement on how to repatriate the proceeds of corrupt activity in the early stages of negotiating the Convention was not always easy. This is a particularly important issue for developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.¹⁵

So what are the main provisions in Article 57? Article 57 paragraph 3 establishes the basis for returning and disposing of those proceeds confiscated under Articles 46 and 55 of the Convention. In doing so, Article 57 distinguishes three different situations:

The most straight forward case is represented in paragraph 2(a) - when the property in question is the proceeds of embezzlement of public funds or the laundering of such proceeds the requested State shall return the confiscated property to the requesting State. This will be generally done on the basis of a final judgment in the requesting State. However, there remains a possibility for the requested state to waive

¹³ To see the power of such applications see *Recovering Stolen Assets* – Mark Pieth (Peter Lang publishers) Chapter entitled 'Civil proceedings to recover corruptly acquired assets of public officials' by Tim Daniel and James Maton.

¹⁴ <http://www.thedailystar.net/newDesign/news-details.php?nid=71090>

¹⁵ See website: http://www.unodc.org/unodc/en/crime_convention_corruption.html.

such a final determination. Yet this is exactly what took place in the Swiss efforts to repatriate the millions of dollars of Abacha monies when in August 2004 the federal Office of Justice agreed to transmit to Nigeria all assets in Switzerland, waiving the normal condition of a prior judicial forfeiture order. The decision was subsequently upheld by the Swiss Supreme Court in February 2005 on the basis that the assets were clearly the product of specific crimes (the theft of large amounts of monies from the Central Bank), that the accounts in Switzerland were largely in false names and, critically, that the accounts structures set up by Abacha, his cronies and family constituted a criminal enterprise under Swiss law.¹⁶ Switzerland was again setting new standards in the realm of asset recovery.

In circumstances where the requesting state fails to reach a final judgment in certain situations, possibly because the defendant has died or fled the jurisdiction, maybe because the statute of limitations has expired or the person enjoys immunity for prosecution, the corrupt official remains in power, or because the prosecution and judiciary can be corruptly manipulated, this development is significant.

Overall, Article 57 provides the default provision in paragraph 3 (c), that “In all other give priority consideration to returning confiscated property to the requesting, State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.”

The die has now been cast and it is now up to the international community to respond.

III. CONCLUSION

The notion of recovering stolen assets is no new phenomenon, even though discrepancies in the monies that continue to be made by criminals through corruption, fraud and other offences and the monies recovered by law enforcement agencies remain dramatic. The legal and procedural processes that enable investigators and prosecutors the world over to pursue such proceeds have been honed over the last 20 years or more through efforts in the US (to defeat drugs traffickers) and Italy (to combat organized crime), to quote just two obvious examples, which are now mainstreamed in many of our own jurisdictions. But the development of asset recovery systems has now advanced far beyond the original criminal conviction based confiscation processes and now incorporate structures that are often outside of what is normally considered to be the criminal process, such as non-conviction based and even taxation based systems which are proving to be useful weapons in the armoury of law enforcement. These procedural advancements are supported by a wealth of international policy initiatives (For example, G8 and the 2004 Justice and Home Affairs Ministers Declaration on Recovering the Proceeds of Corruption and recent OECD and G20 declarations on tax havens) through to the international Conventions already identified in this paper.

And yet, the corrupt officials and organized crime groups that we have touched upon in this paper continue to build large and complex international networks and amass substantial profits with seemingly little prospect of being caught. There is no doubt that the ability of the victim state to strip these individuals of those assets is critical if those networks are to be disrupted and the financial markets of the world are to be protected from the scourge of money laundering.

On the international stage there is little doubt that UNCAC now represents the standard by which many countries will wish to be judged, even if it does not represent a conceptual revolution, rather a consolidated framework of ideas and practices that go some considerable way to providing an effective machinery in which to recover the proceeds of corruption. But ultimately what is emerging is the notion that success rests upon the will of these countries that do develop a genuine yearning to recover their stolen monies and have the good luck to manage to trace, freeze, confiscate and try to repatriate them from a country that is willing to employ clever legal practices to assist.

¹⁶ ATF 1A.215/2004 of 7 February 2005 – published on <http://www.bger.ch>

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APPENDIX A:
SANI ABACHA OF NIGERIA

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General Sani Abacha was the Nigerian head of state between 1993 and 1998, coming to power through a coup. He had been close to the central power base of successive military governments in Nigeria, having been Minister of Defence and the Chief of Army staff.

Upon his sudden death in 1998, General Abdulsalami Abubakar took over, becoming head of state. He put in place a transition government, scheduled presidential elections and transitioned Nigeria into democracy and civilian rule.

A. Asset Recovery Efforts

The transition government set up a Special Investigation Panel (SIP) that had the task of investigating the looting and the corruption during the Abacha government. A preliminary report produced by the SIP pointed out two main modus operandi used by the Abachas to plunder Nigeria's coffers: (i) through false funding requests for security operations and equipment, and (ii) through monies directly transferred from the Central Bank of Nigeria by wire transfers to accounts abroad held by offshore companies linked to the Abachas and their cronies (Monfrini, 2008). The preliminary report unveiled that the Abachas had siphoned approximately USD 1,5 million and GBP 416 million from the Nigerian state (Monfrini, 2008).

The Nigerian government followed up the report and issued Decree No. 53, which ordered the return to Nigeria of real property and movable assets, as well as cash that had been illegally acquired by the Abachas and their entourage, in exchange of immunity from prosecution. Nigeria was able to recover more than USD 800 million through this method (Monfrini, 2008). Most of these returned assets were held in Swiss bank accounts, and the return was made through the account held by the Central Bank of Nigeria at the Bank for International Settlements (Daniel and Maton, 2008) in Switzerland.

1. Tracing the Assets in Switzerland

Shortly after the issuance of Decree No. 53, and based on information gathered by the SIP, the Nigerian government stepped up its asset recovery efforts and issued a request for mutual legal assistance to Switzerland, in December 1999.¹ The request sought to "obtain documents that would assist criminal investigations in Nigeria and the seizure of funds held in Swiss bank accounts controlled by members of the Abacha family and their associates" (Daniel and Maton, 2008). The Nigerian authorities additionally requested the anticipated return of the assets. Through this request, the Swiss government was able to seize an additional USD 80 million dollars in Switzerland.

However, the Nigerian government was in need of further identifying other assets being held by the Abachas and their associates. Information and documents provided by Switzerland through the request for mutual legal assistance gave the Nigerian government further information on the trail of the monies and the money laundering schemes.

Notwithstanding, Swiss legislation requires its authorities (i) not to transmit investigatory files or requested documents while there is a challenge to the request for mutual legal assistance, and (ii) to inform the investigated persons of the request for mutual legal assistance prior to the submission of the documents to the requested country, so as to allow for due process. Monfrini (2008) explains "due to the existence of appeals and the obligation of secrecy of the Swiss authorities handling the request for mutual legal assistance, no proper interaction between the Nigerian and Swiss investigators could take place."

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¹ The Nigerian authorities announced in September 1999 that a request for mutual legal assistance would be submitted to Switzerland. As a result, the Swiss authorities issued a freeze order and stated that Nigeria had three months to present a formal request for mutual legal assistance (Monfrini, 2008).

Due to this legal impediment, the Nigerian government supplemented its mutual legal assistance efforts by retaining legal counsel in Switzerland so as to assist them in their asset recovery efforts. In such a way, the Nigerian government could: (i) file a criminal complaint in Switzerland against the Abachas and their cronies, and (ii) make an application to the Swiss courts to become a *partie civile* to the Swiss criminal investigation based on the criminal complaint filed, if accepted.

Monfrini (2008) explains that the legal strategy used by the lawyers in Switzerland on the criminal complaint was twofold, and relied heavily upon qualifying the Abachas and their cronies as a criminal organization. By doing so, it would: (i) give Swiss authorities the jurisdiction to investigate and prosecute all members of the Abacha criminal organization, regardless of the fact that they had never been in Switzerland, as the activities of the criminal organization had taken place, at least in part, in Switzerland; and, more importantly, (ii) once the Abachas and their cronies were qualified as a criminal organization, there would be a reversal of the burden of proof, and the members of the organization would bear the burden of proving otherwise.

Once the criminal complaint was filed and accepted by the investigating magistrate, the Nigerian government would apply to become a *partie civile* to that investigation. It should be noted that Switzerland, like most civil law jurisdictions, allows the victim to make an application as *partie civile* to the court, whereby it becomes party to the criminal proceeding and assists the prosecution in the case. The civil party also has full access to the investigatory files and related information pertaining to the investigation, among others.

Thus, by applying to become a *partie civile* in the Swiss courts, the Nigerian government legally circumvented the legal obstacles of obtaining information through the request for mutual legal assistance and gained access to information that led to the discovery of other assets held by the Abachas in Switzerland and other jurisdictions.

As a direct result, seizure orders were issued and resulted in the seizure of an additional USD 670 million in various Swiss accounts. The information obtained through the Swiss investigation also allowed the Swiss courts to request mutual legal assistance to Luxembourg and Lichtenstein, where an additional USD 830 million were seized (Daniel and Maton, 2008).

2. Tracing the Assets in the United Kingdom

In July 1999, the Nigerian Government had initiated civil proceedings before the High Court regarding the Ajaokuta steel plant debt buy-back fraud.² It concerned the rightful ownership of the proceeds of the sale of debt owed by Nigeria to Russia (Daniel and Maton, 2008).

The Ajaokuta steel plan had been a Soviet project in Nigeria from the 1970s. In an effort to cut their losses in the project, the Russians started selling off the debt due on the plant. Daniel and Maton (2008) explain that, on the surface, it was a good deal for Nigeria as it acquired the debt for just 53% of its face value.

However, the Abachas created a shell corporation that indirectly acquired the debt from the Russians and then sold it to the Nigerian government for twice the sum it had paid, and retained these profits in London. Ultimately, Nigeria won the Ajaokuta proceedings in London, and was awarded the payment of DEM 300 million plus costs (Monfrini, 2008).

In June 2000, the Nigerian authorities sent a request for mutual legal assistance to the United Kingdom seeking evidence of both the Ajaokuta proceedings and theft of monies from the Central Bank of Nigeria. The Abachas challenged the decision to render assistance and, later on, to transmit the documentation to Nigeria. These legal challenges slowed the execution of the request for mutual legal assistance and its efficiency. It was only in 2004, four years after the request had been initially sent to the United Kingdom, that the documentation was sent to Nigeria (Daniel and Maton, 2008).

² The fraud consisted essentially in the buy-back by the Abacha government of bills of exchange relating to the building of the Ajaokuta steel plant owed to a Russian company for DEM 986 million, resulting in the fraudulent profit of over DEM 490 million for the Abacha criminal organization (Monfrini, 2008).

The slow progress of the request for mutual legal assistance in the UK prompted the Nigerian government to supplement those efforts with civil proceedings seeking to obtain bank documents related to the Abachas and their cronies, as well as corporate vehicles in which they were the beneficial owners (Daniel and Maton, 2008). Daniel and Maton (2008) explain that the strategy proved successful since the Nigerian government gained access to bank documents *ex parte*, and only after six weeks were they served on the civil proceedings, along with a worldwide freezing order freezing their assets. The civil proceedings in the United Kingdom pressured the Abachas to disclose their assets worldwide.

However, the evidence produced through the civil proceedings was not as effective as it had been hoped, as only USD 50 million had remained in the United Kingdom when the civil proceedings were initiated, from a total of USD 1.3 billion that had been channelled through English banks (Daniel and Maton, 2008).

3. Repatriation and Monitoring

After the Swiss Supreme Court determined that the Nigerian request for mutual legal assistance could be granted in 2003, and the Nigerian government reiterated its request that the assets be repatriated prior to a final judgement and forfeiture (Monfrini, 2008) based on the Swiss Federal Law on International Mutual Assistance in Criminal Matters (IMAC).

As an exception to the rule, the IMAC allows for the anticipated return of assets to the victim country at any stage during the criminal proceedings. Monfrini (2008) reminds that the anticipated return of assets, foreseen in article 74a of the IMAC, and which can be done at any stage of the criminal proceedings in the victim country, is an exceptional “empowering provision (Kann-Vorschrift) which gives the authority wide powers of discretion for the purpose of deciding, on the basis of a thorough examination of all the circumstances, whether and under what conditions an anticipated remittance could take place.”

The Swiss authorities ultimately agreed waiving the need for a final judgement in Switzerland, in part due to the findings on the criminal investigation that had occurred in that country, in part due to the agreement of the Nigerian authorities to have the assets monitored (Monfrini, 2008). As such, USD 458 million – namely assets derived from specific crimes in respect of which criminal proceedings were pending – were repatriated to Nigeria in 2004. An additional USD 50 million – attached to the Swiss prosecution that the Abachas were a criminal organization – was subsequently also repatriated (Monfrini, 2008) in 2005. In those decisions, the Swiss Supreme Court also conditioned the return of the assets to procedural guarantees to the Abachas in their criminal prosecution in Nigeria.

Although initially reluctant, the Swiss government heeded to the concerns of the Swiss Parliament of which assurances needed to be given by the Nigerian government.³ The Nigerian government issued assurances to the Swiss government in that regard, stating that the repatriated assets would fund development projects in the healthcare and education sector, as well as in infrastructure projects.

The discussion surrounding the monitoring of the returned assets of the Abacha case had been ongoing since December 2000. At the time, a coalition of Swiss non-governmental organizations – later called the Swiss Abacha Coalition – had called a press conference aiming at discussing the use of the Abachas stolen wealth, and had proposed that it be earmarked and have specific destination on: (i) ecological disasters, and (ii) compensation for oil field workers who had fallen victim to human rights violations.

The Swiss Abacha Coalition eventually met with Swiss officials in charge of the Abacha case and also visited Nigeria. During the visit, a two-day conference took place, where forty Nigerian non-governmental organizations discussed the recovery of the Abacha assets. The Nigerian Civil Society Network on Stolen Assets (forty NGOs from the six geopolitical zones of Nigeria) was founded and later co-ordinated by the African Network for Economic and Environmental Justice (ANE EJ). The network’s role was to assure the equitable utilization of the stolen assets.

The World Bank was ultimately identified as a neutral party to review the utilization of the repatriated assets, and was further expected to be part of an ongoing programme to improve public finance management

³ <http://www.aktionfinanzplatz.ch/pdf/kampagnen/potentatengelder/nigeria/Gysin.Abacha05.pdf> (in German)

in Nigeria. Jimu (2009) explains that “[t]hrough the World Bank, the Swiss government provided a grant of about USD 280,000 to co-finance the Public Expenditure Management and Financial Accountability Review (PEMFAR). PEMFAR was initiated as a means of executing reforms in budget spending, with regard to Nigeria’s national economic empowerment development strategy (NEEDS) priorities in education, health, and basic infrastructure (power, roads, and water). Out of a total sum of USD 505 million repatriated from Switzerland, and according to the agreement reached on priority pro-poor sectors, the allocations were to power (USD 168.5 million), works (USD 144.5 million), health (USD 84.1 million), education (USD 60.1 million), and water resources (USD 48.2 million).”

However, the monitoring of the assets was presented with several challenges. One of such challenges was the use of the recovered assets themselves. Two subsequent reports (from the World Bank,⁴ and a shadow report produced by the NGO coalition⁵) on the monitoring of the assets suggest that USD 200 million had been misappropriated and not used for development projects, as agreed. Jimu (2009) explains that one of the challenges in the monitoring process was following up on the allocation of the repatriated assets was tracking the funds in the national budget. The reports indicate that there were instances in which spending agencies used the repatriated assets to cover outstanding arrears or to make partial payments for ongoing multi-year projects (Jimu, 2009). Another challenge concerned the quality of the implementation of the projects – the review process reported that several projects fell behind schedule or were abandoned, while some of the completed projects showed poor workmanship (Jimu, 2009).

B. Conclusion

The Sani Abacha case demonstrates that traditional state-to-state co-operation through mutual legal assistance is at times insufficient to overcome the differences in legal requirements between jurisdictions, which may end up delaying the assistance sought and hampering the expected results. This case clearly illustrates that pro-active co-operation of prosecutors and investigators in the victim country and recipient countries, and these amongst themselves, is paramount to ascertain greater efficiency in the asset recovery processes.

Moreover, victim countries should consider pursuing all available avenues – including hiring legal counsel in the recipient countries – in order to recover the stolen assets in the most efficient manner possible. In the Sani Abacha case a complex strategy was put in place that resulted in the effective recovery of USD 2 billion (Monfrini, 2008) of the estimated USD 5 billion which had been looted.

The Sani Abacha case clearly illustrates that the official channels do not always provide the best course of action in the asset recovery process. It was through the joint co-operation and co-ordination of not only several jurisdictions, but also between private and public initiatives, that a swift seizure of the Abachas’ assets was possible.

However, the Abacha case still shows that it is uncertain that the return of the assets will be put to use appropriately by the new government. Whereas the monitoring of returned assets can spark lively debates, it should be brought to discussion by the international community to assess its feasibility, need and efficiency.

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⁴ http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/10/000011823_20070410131028/Rendered/PDF/393900v10UNI0A11Monitoring01PUBLIC1.pdf

⁵ Available at http://www.evb.ch/cm_data/Report_Abacha.pdf

APPENDIX B:
RECOVERING FERDINAND MARCOS' STOLEN ASSETS IN SWITZERLAND

*Daniel Thelesklaf**

The case of Ferdinand Marcos illustrates how difficult it is for the successor government of a corrupt regime to regain ownership of the assets stolen from the state.¹ In the case of the Philippines, it took seventeen years to recover approximately USD 658 million that had been deposited in Switzerland (Pieth, 2008). To put the challenge of asset recovery into perspective, it is estimated that Marcos plundered USD 5 to 10 billion, or even more, while head of state (The World Bank, 2007).

A. Background²

The corrupt activities of Ferdinand Marcos are reported to having commenced while he was a congressperson and head of the import control board, which allowed him to gather large bribes in return for approving import licences (Chaikin, 2000).

Marcos had been a congressperson from 1949 to 1959, where it was reported that he used political influence for personal enrichment. He had also been a senator from 1959 to 1965, where he became the opposition leader and the Senate President, in 1965. He was then elected in 1965 as the tenth president of the Philippines, and later re-elected in 1969 and 1981.

Marcos faced several challenges during his second term in office – the Philippines faced an economic crisis, and social unrest, among others. In response, Marcos suspended habeas corpus and declared martial law using as excuse the assassination attempt against his Minister of Defence. It is later revealed that said attempt had in fact been staged by the military.

Martial law was lifted in 1981 and general elections were called. Ferdinand Marcos was victorious, despite the fact that the major opposition parties had boycotted the elections. The support for the Marcos regime waned there onwards, more so after the assassination in 1983 of the opposition leader Benigno Aquino, Jr. on the tarmac of the Manila International Airport, upon his return to the Philippines from exile.

During his third term in office, in 1986 he called for snap presidential elections, with more than a year left in his term, in an attempt to ease escalating public discontent. The opposition united under Benigno Aquino's widow, Corazon Aquino, and Marcos was declared the official winner, despite the elections having been denounced by international observers as marred with fraud.

A peaceful civilian-military uprising called the "People Power Revolution" and the withdrawal of the support to the regime by General Fidel Ramos and Defence Minister Juan Ponce Enrile – the general administrators of the martial law and strong allies of Ferdinand Marcos – forced Marcos, his family and cronies into exile in the United States.

The US customs inventory upon the arrival of the Marcoses and their entourage in Honolulu indicated that they had brought with them USD 1.27 million worth of newly minted Philippine Pesos; certificates of deposit worth USD 1 million and 24 one-kilo gold bars and certificates of gold bullion (allegedly worth billions of dollars).

B. Tracing and Recovering the Stolen Assets

Ferdinand Marcos, members of his family and cronies accumulated wealth through six channels: (i) the takeover of large private enterprises, (ii) the creation of state-owned monopolies in important sectors of the economy, (iii) the awarding of government loans to private individuals acting as fronts or his cronies,

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¹ available at <http://www.assetrecovery.org/kc/node/5881e61f-a33e-11dc-bf1b-335d0754ba85.4>

² A detailed timeline of events can be found at <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=62506d95-a33e-11dc-bf1b-335d0754ba85>

(iv) the raiding of the public treasury and government financial institutions, (v) the receipt of kickbacks and commissions from firms working in the Philippines, and (vi) the diversion of foreign aid and other forms of international assistance (Chaikin, 2000).

Moreover, Marcos had three main sources to the loot (Chaikin, 2000): (i) beneficiary of large-scale diversion of entitlements to foreign economic assistance, including reparation funds from Japan and economic aid from the United States;³ (ii) the PhilCAG funds;⁴ and (iii) kickbacks from public works contracts, involving the extortion of, and the soliciting of bribes and commissions in exchange for the granting of government employment, government contracts, licenses, concessions, permits, franchises and monopolies. Chaikin (2000) informs that there were also other forms of plunder, whereby Marcos withdrew monies from the public treasury and the gold stocks of the Philippines.

After Corazon Aquino took office, and a few days after the exile of Ferdinand Marcos and his entourage, she instated the Presidential Commission on Good Governance (PCGG), whose basic functions were: (i) to recover ill-gotten wealth accumulated during the Marcos Regime; (ii) to adopt institutional safeguards to prevent corruption in Government; and (iii) to investigate such cases of graft and corruption as may be assigned by the President. Corazon Aquino further passed an Executive Order on March 1986 freezing all of Marcos' assets in the Philippines.

The newly established PCGG in turn ordered the Philippines National Bank to seize⁵ Marcos' and his cronies' assets in the country. Letters were sent by the PCGG to banks, with a memorandum requesting their co-operation.

As the Marcoses left the Philippines for exile, large amounts of documentation they were unable to destroy were left behind at the Malacañang Presidential Palace (Pieth, 2008), and later become known as the Malacañang Documents. They contained detailed (although incomplete) financial arrangements that Marcos had with Swiss banks, which totalled approximately USD 356 million.

1. The Marcos' Net Worth Analysis

Chaikin (2000) demonstrates that Ferdinand Marcos and his wife, Imelda Marcos, would not pass a net worth analysis.⁶ Marcos' income declaration to the Philippine authorities in 1965, prior to taking office, was PHP 120,000, or approximately USD 7,000. In the years between 1966 and 1985, Marcos declared a total income of PHP 16,408,442 (approximately USD 2,414,442.91). These, in turn, were divided into: (i) his official salary; (ii) his legal practice;⁷ (iii) farm income; and (iv) others.

2. Tracing Marcos' Assets in Switzerland

The Marcoses used a complex money laundering structure to launder proceeds derived from corruption. The Philippines was thus faced with a difficult task in recovering the assets on account of the highly intricate and secretive nature of the network of accounts in different jurisdictions – which included Switzerland, Lichtenstein and the United States – that were used to hide the true origin and ownership of the proceeds of the Marcoses' corrupt activities.

The PCGG Consolidated Report on Swiss Documents, prepared in 1990, revealed that monies amassed by the Marcoses and their cronies had been laundered into sixty accounts kept in six Swiss Banks, under the name of seventeen foundations (incorporated mostly in Liechtenstein, so as to layer and distance the Marcoses from the proceeds of their corrupt activities); establishments and shell corporations; as well as codenames, aliases, pseudonyms, e.g., William Saunders, Marcos' pseudonym during World War II; and numbered bank accounts (Chaikin, 2000).

³ Both the Japanese and the American governments have denied this (Chaikin, 2000).

⁴ PhilCAG were the Philippine Civic Action Group. They were Philippine soldiers that served between 1966-1970 in the Vietnam War and were mainly involved in civilian infrastructure projects.

⁵ The PCGG had, for a determined period of time, the power to freeze suspect assets.

⁶ Net worth analysis is a method whereby financial investigators indirectly link a person and the alleged illegal activity and the laundered monies, as no direct evidence is available or unreliable.

⁷ While in office, Marcos was barred by law to practice law, although in his income declaration he claimed the amount as "receivables from prior years" (Chaikin, 2000).

In an unprecedented move, the Swiss Federal Council decided to freeze in March 1986 all of Marcoses' assets. This political decision was legally based on Article 102. (8)⁸ of the Swiss Constitution of 1874 and informed that a forthcoming request for mutual legal assistance would follow from the Philippines.

The Swiss Federal Council further mandated the Swiss Banking Commission to be informed by the banks of the assets they were holding and in which the Marcoses had an interest (Chaikin, 2000). The direct result from this decision was that Swiss banks were prohibited from transferring monies in any account identifiable with the Marcoses. This allowed the Swiss – but not the Philippine government – to have a precise overview of all of Marcos' funds and accounts in Switzerland.

The Malacañang Documents proved invaluable to assist the Philippines in demonstrating the trail of the monies and establishing investigatory leads (Chaikin, 2000) in Switzerland. They formed the basis of the first mutual legal assistance request issued in April 1986 by the Philippines seeking to seize Marcos' illegal wealth and to obtain the respective bank documents. The request was based on the Swiss Federal Law on International Legal Assistance in Criminal Matters (IMAC).

Swiss authorities were able to cross-reference the information received from the Swiss Banking Commission with the information provided in the Philippine mutual legal assistance request, which allowed for a precise seizure of Marcos' assets. The receipt of the request for mutual legal assistance allowed for the Swiss Federal Council to lift the freeze imposed.

Notwithstanding, the Swiss authorities rejected the request for mutual legal assistance, as it was deemed 'indeterminate and generic'. This led to having the mutual legal assistance partially accepted: the Swiss authorized sharing the bank documents with the Philippine authorities, but denied the request to seize the assets. As the legal challenges to the decision began, the Swiss Federal Council re-imposed its freeze order in July 1986.

Ultimately, the Swiss Supreme Court ruled in December 1990 that the assets were to be returned, in principle, to the Philippines. However, the following conditions had to be met: (i) a final conviction rendered against Imelda Marcos within one year, otherwise the assets would not be returned to the Philippines and the freeze order would be lifted; (ii) that a Philippines court render a final judgment that the assets are stolen and that they be returned to the Philippines government; and (iii) that Imelda Marcos be accorded due process of law, and that the proceedings comply with the Swiss federal constitution and the European Convention on Human Rights and Fundamental Freedoms.⁹

A second mutual legal assistance request was issued by the Philippine government in 1995 requesting the anticipated repatriation of the assets¹⁰ (Chaikin, 1995). The IMAC generally only admits that the repatriation can take effect upon final judgment, although it exceptionally allows for the anticipated restitution of the assets at any stage of the criminal proceedings in the requesting state.

Legal challenges again arose to this second request for mutual legal assistance, and the Swiss Supreme Court finally determined in 1997 and 1998 the anticipated return of the assets. The Swiss Supreme Court, however, noted that the disposal of the assets would only be determined by judicial proceedings in the Philippines (Chaikin, 2000).

Thus, in 1998, the Swiss banks transferred an aggregate value in excess of USD 567 million to escrow accounts in the Philippines National Bank, pending final judgment of the case in the Philippines. The Swiss authorities further imposed strict guidelines for the use and management of the escrow account. These funds, in February 2004 and at the time worth USD 624 million, were remitted from the escrow account to the Philippines treasury, to the "Agrarian Reform Fund" off-budget fund, with the purpose of being spent on agrarian reform programmes.

⁸ Article 102. The powers and obligations of the Federal Council, within the limits of this constitution, are in particular the following: (...) (8) It shall watch over the external interests of the Confederation, particularly its international relations, and it shall be in charge of external affairs generally.

⁹ See Philippines asset recovery statement, Conference of UNCAC States Parties, Jordan.

¹⁰ The repatriation of assets from the recipient to the victim country is, as a rule, only possible after the courts of the latter country issue a conviction and transmits it to the recipient country via mutual legal assistance.

C. Conclusion

The Ferdinand Marcos case clearly illustrates the difficulties that governments face in recovering stolen assets. Although the Malacañang Documents provided a wealth of information to the Philippine authorities that enabled them to engage the Swiss authorities, several factors played against a more positive outcome.

The initial request for mutual legal assistance was met with partial success. On the one hand the PCGG had to overcome several challenges while dealing with an extremely complex case. The fact that it had been established to recover the Marcoses assets and was thus new to the task and had no previous experience to draw from is clear from the outset of the requests.

On the other hand, the approach taken by the Swiss authorities in cross checking the information provided in the Philippine request for mutual legal assistance with those provided by the Swiss Banking Commission, while commendable, proved in practice that the Swiss authorities did not go beyond the Philippine request. Only the assets mentioned in the request were frozen, and no Swiss investigations were carried out into the other accounts (Pieth, 2008).

The fact that the repatriation took 17 years to be completed, with several legal challenges in both countries, shows the added complexity that asset recovery brings to legal proceedings both in the recipient and victim countries.

Furthermore, no investigation was carried out regarding the responsibility of the financial institutions that assisting in laundering the assets into Switzerland.

Finally, attention should be drawn to the fact that the Philippine Commission of Audit noted that a significant portion of the recovered assets in the Agrarian Reform Fund were used to finance excessive, unnecessary expenses unlikely to benefit the agrarian reform beneficiaries. The Commission of Audit also informed that monies were also found to have been used to procure items at inflated prices, while many spending items were not among the approved priority projects.

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