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Controlling corruption by heads of government and political élites

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Grand corruption

The fraudulent enrichment and corruption of heads of states and senior government officials is a problem which has only recently begun to interest international lawyers. The organised and systematic plundering of national treasuries or spoliation of assets by political and military élites has ravaged many developing countries, exacerbating poverty and undermining economic and social development.

When a greedy authoritarian leader or despot is in power, there are few (if any) opportunities for taking legal action to prevent or interdict stolen monies or the proceeds of corruption. If, however, the authoritarian leader is deposed, the new government may seek the assistance of foreign governments and courts to investigate and recover stolen assets which are located abroad.

Although grand corruption is not a new problem, it has more serious consequences when practised by modern dictators. First, even if the dictator is overthrown, this does mean that the stolen money will be recovered, for the mobility of wealth has had the consequence that money may be deposited outside the country. Another consideration is the sheer size of the theft. The following examples are worth considering.

- The former Shah of Iran misappropriated an estimated US\$35 billion over 25 years of his reign, largely using various foundations and charities to conceal his illegal acts. No monies were recovered by the new Islamic regime of Ayatollah Khomeini.
- Ferdinand Marcos abused his position as President of the Philippines from 1965 to 1986 to acquire vast amounts of

property and wealth—including gold—belonging to the people. The Guinness Book of Records states that Marcos is one of the biggest thieves in history. But Switzerland only 'discovered' a mere US\$340 million of Marcos money, and after ten years of litigation those millions plus interest were repatriated from Switzerland to the Philippines.

- Papa Doc Duvalier and his son, as Presidents of Haiti from 1957–86, used the entire machinery of the state to extract between US\$500 million and US\$2 billion. It is estimated that during 1960–67, 877 per cent of government expenditure was paid directly or indirectly to Duvalier and his supporters. Only a relatively small amount of money was ever recovered by the Government of Haiti. The case was handicapped by a lack of a criminal conviction against Duvalier.
- Manuel Antonio Noriega, convicted cocaine trafficker and former commander of the Panamanian Defence Forces, transferred nearly US\$20 million of his fortune to banks in Europe in 1988. A significant part of this fortune was obtained through bribes from Colombian drug traffickers, but the fact that the US intelligence service also provided large amounts of finance to Noriega complicated the question as to whether his monies were licit or illicit.
- Mobutu Sese Seko of Zaire stole billions of dollars from one of the poorest countries in the world, and yet the Swiss authorities and banks have only found US\$3.4 million in Switzerland. Mobutu's untimely death while in exile, and the international legitimacy of the new government have complicated the recovery process.
- The former communist leader of Romania, Nicholas Ceausescu, acted as a feudal lord over his estate—he treated it as a resource to be plundered at will. During his more than twenty years in power, Ceausescu stole millions of dollars for the benefit of his family, while Romanians suffered abject poverty. An investigation by a Canadian team of investigators in 1990 traced significant assets corruptly diverted by Ceausescu, but a lack of political will in Romania meant that there was no effective follow-up action.
- The self-proclaimed Emperor Bokassa of the Central African Republic looted his country to the point of starvation. President Siaka Stevens of Sierra Leone, President Ahidjo of

Cameroon, and former President Amin of Uganda are all accused of looting the treasuries of their respective countries.

It has been often stated that corruption by the political élite is perhaps the most important obstacle to economic development. There is plenty of evidence that corruption may render a country bankrupt.

Criminality of political élites

The case of Ferdinand Marcos provides a useful illustration of grand corruption. Marcos was President of the Philippines from November 1965 until his flight from the Republic in February 1986. In an act of infamy, on 21 September 1972, Marcos declared martial law in the Philippines and then imposed an unjust dictatorship.

For various geopolitical reasons, the Marcos regime was strongly supported by the United States and its allies. For example, between 1962 and 1983 the United States provided US\$3 billion in economic and military aid. During this same period the World Bank lent US\$4 billion to the Philippines government. The large-scale borrowing from official lenders and foreign banks was seen as a major source of economic development.

Unfortunately, a substantial part of the Philippines' external borrowing was redirected out of the country via capital flight, which for the most part was in violation of Philippines law. Former-President Marcos must take the lion's share of responsibility for this capital flight. By 1985, the Philippines had the heaviest external debt burden (measured by the external debt to national income ratio) of any country in East and Southeast Asia. An important new feature was that, while the external debt was largely public, the external assets were strictly private.

The Marcos rule was undoubtedly economically disastrous for the Philippines. The causes were varied but greatly facilitated by the criminality of the former President, his family, friends and cronies. Evidence of their predatory criminality is found in various published materials. A Racketeering Influenced Corrupt Organization (RICO) claim brought in 1989 in California sets out in some 100 pages the details of how Ferdinand Marcos, Imelda Marcos, and others conspired to loot, divert and launder public assets for their personal use and benefit. The RICO claim estimated that US\$5 billion in ill-gotten wealth was taken by the Marcos family, their associates and accomplices.

The illicit wealth was gleaned by looting of money and property owned by the Philippines government and the central bank; diversion of entitlements to foreign economic assistance, including assistance from the United States and Japan; and extortion of and/or soliciting of bribes and

commissions in exchange for the granting of government employment, government contracts, licenses, concessions, permits, franchises and monopolies.

It is difficult to believe that the United States was unaware of the looting of the property of the Republic of Philippines for the benefit of the Marcos/Romualdez family and their associates. The display of public indifference by the US government to the Marcos family's predatory criminal activities may be justified as *realpolitik*. It had the side-effect, however, of giving comfort to Swiss banks and other financial institutions who were assisting the Marcos family in investing and disguising their illicit wealth.

The meaning of illicit wealth

The distinction between illicit assets and property lawfully belonging to a dictator or authoritarian leader is by no means clear in countries that suffer appalling regimes—for example, that imposed by Saddam Hussein in Iraq. Where the authoritarian leader takes control of all the institutions of government, where there is no distinction between the head of state and the state itself, and the law is changed to 'legitimise' if not justify the economic plunder, then the law of the dictator authorises economic crimes. Moreover, where there is no legal distinction between the funds of the state and those of the ruling class, it is problematic to define 'illicit assets'. Abuse of political power for economic ends is thereby sanctioned by the state.

Furthermore, if the authoritarian leader is deposed and the state brings into play a new constitution and laws which retrospectively criminalise acts of spoliation by the former leader, then the question arises as to whether courts in other countries will recognise retrospective criminal acts. Under the laws of most countries, the answer to this question is no.

Intelligence and investigatory techniques

The significance of practical investigatory and legal problems in tracing and recovering of assets in an offshore setting cannot be underestimated. Even well-resourced international banks write off billions of dollars each year in bad debts which are sourced through fraud. The usual procedures for tracing of assets, liquidators and official receivers often do not result in adequate recovery.

The problems are extensive. First, the illicit assets must be located and shown to be owned or controlled by the target—for example, a deposed dictator. The tracing of assets is an extremely complex task, which has been made more difficult in a world where wealth is mobile and money laundering more sophisticated. The facilities of tax havens and the instruments of bank

secrecy must be overcome. Second, the recovery of illicit monies may take a considerable period of time because of procedural and substantive laws in the requested country. Where third parties make claims on the same assets, the recovery process is complicated.

Few international investigations are supported by adequate intelligence and surveillance systems. The traditional passive methods of obtaining information are often unsuitable in the context of detecting serious economic crime. The difficult and often time-consuming task of penetrating the target—especially one that is protected by organised crime or powerful elements in the government—suggests a need for alternative mechanisms. Such mechanisms will not be elaborated on here. A key part of any recovery strategy is secrecy.

Net worth analysis

A simple method of determining whether a political leader has accumulated illicit wealth is to carry out a net worth analysis test. A person's net worth is the amount by which one's assets exceed one's liabilities. A political leader's net worth should increase during his period of public office only to the extent that he has legitimate savings from his income and/or capital appreciation. Any increase in net worth that cannot be explained should be treated with suspicion. Indeed, in some countries such as Hong Kong and India, any unexplained increase in wealth by a public official constitutes a *prima facie* criminal offence.

Net worth analysis is a valuable investigatory tool in circumstances where there is no direct link between the political leader and the alleged illegal activity, for example, where money has been effectively laundered. It is also useful when the target has acquired many assets, or where the records or documents showing the financial activities of the political leader are missing, destroyed or are unreliable.

The Marcos family are a prime example of people with political power who failed the 'net worth test'. A financial analysis based on the Marcos family's income tax returns for the financial years 1966–85 are revealed in Table 6.1. It is interesting to note that Ferdinand Marcos was barred from practising as a professional lawyer during his entire twenty-year presidency, but Marcos claimed that his legal fees represented 'receivables from prior years'—that is, prior to the period 1967–84.

When Ferdinand and Imelda Marcos became the First Couple in 1965, their net worth was only P120,000 (US\$7,000). When they were thrown out of the Philippines in 1986, their estimated assets amounted to more than US\$5 billion. Indeed, the Swiss accounts of the Marcos family which were frozen in 1986 amounted to approximately US\$357 million. This sum far exceeded the Marcos family's legitimate increase in net worth.

Money laundering and offshore financial secrecy

A major obstacle in the recovery of the hidden wealth of the Marcos family is that the former President was a master manipulator of financial transactions and used an extensive and complex system of laundering monies through Swiss and offshore banks. Marcos did not generally use his own name in illegal transactions; instead he used nominees such as friends, cronies and layers of foundations and companies to conceal his activities. The Marcos family thrived on the idea of secret names. For example, in a letter dated 18 October 1968, Marcos informed his Swiss bank that the 'word John Lewis will have the same value as our own personal signatures'. Later President Marcos chose the pseudonym 'William Saunders' while Imelda Marcos chose the name 'Jane Ryan' in transacting business with their Swiss banks. The Marcoses used every laundering scheme available to conceal their investments. At the same time his Swiss banks offered him various instruments of bank secrecy to protect his interests, such as numbered accounts, Liechtenstein Foundations, and attorneys with professional secrecy obligations.

Much has been written about Swiss bank secrecy. It is well known that it is not only based on a contractual relationship between banker and client, but is also backed by criminal sanctions. Swiss Bank Corporation explains Swiss bank secrecy in the following way

...that no one working in a bank, be he an officer, employee, authorised agent or auditor, may divulge any information whatsoever about any matters dealt with in the course of his job. This even includes knowledge of whether someone is a client, no matter whether temporarily or permanently, whether the client is Swiss or a foreigner, whether he resides in Switzerland or abroad and whether the bank transacts business for him only in Switzerland or abroad as well (Schutze 1983).

Swiss bank secrecy has gained a formidable reputation because the Swiss authorities take breaches of bank secrecy (which amount to a criminal offence) very seriously, and because Swiss bankers fiercely protect the privacy of their customers through various practices and technological systems. For

Table 6.1 **Income tax returns for Marcos family, 1966–85**

Reportable income	P 16, 408,442 (US\$2,414,484.91)
Official salaries	P 2,627,581
Legal practice	P 11,109,836
Property income	P 149,700
Others	P 2,521,325

Source: Republic of the Philippines v Ferdinand E. Marcos and Imelda R. Marcos, Case No 0141, Sandiganbayan, 17 December, 1991.

example, accounts of VIPs are usually listed by numbers or codes which are known only to a limited number of bank employees, and not to all employees dealing with the account. The secrecy principle used by government intelligence agencies, that is the 'need to know' principle is diligently applied by Swiss banks for the benefit of their clients.

The Swiss banks also offered Ferdinand Marcos the use of corporate vehicles to protect his interests. For example, the Swiss bank accounts which were originally in his own name were replaced by Swiss bank accounts in the name of various Liechtenstein Foundations. Thus Marcos did not appear as the account-holder. The advantages of a foundation is that the identity of the beneficial owner is concealed in a private fiduciary agreement and the existence of a Liechtenstein Foundation does not appear in a publicly available record.

Extreme secrecy was facilitated in Switzerland by the use of lawyers or notaries in setting up Swiss bank accounts. Ordinarily, a Swiss bank was required to identify its customers so as to prevent the anonymous and illicit investment of assets. Indeed, since 1977 the Due Diligence Agreement of the Swiss Banking Association set out specific rules on proper identification of accounts, the breach of which could lead to a fine of up to SFr. 10 million. The Agreement had a serious flaw, however, in that clients could conceal their identity by using lawyers who would front for their clients. The banks required the lawyers to sign the notorious Form B in which they declared that they were familiar with the beneficial owner of the account and that they were unaware of any improper business of the owner. Form B allowed lawyers to vouch for their client's good standing and in effect also allowed the banks to claim that they did not know the true owner of the account.

There is evidence that the Swiss financial intermediaries used Form B as a vehicle to assist President Marcos in hiding his assets. For example, one of the documents found at the Malacanang Palace in Manila following Marcos' flight was a letter dated 19 May 1983 from a Senior Vice President of a major Swiss bank to President Marcos, informing him that due to changes in Swiss banking law, the attorneys of his Liechtenstein Foundation, who were also bank employees, had resigned and had been replaced by new attorneys from a prominent Geneva law firm. The advantage of this change was that 'the independent lawyer (can offer)...the additional secrecy of his professional privilege'.

The significance of the above transactions is that none of the Swiss banks acknowledged that Marcos used Swiss lawyers as a front to conceal Marcos assets. Indeed, in 1986, when the Philippine government requested the Swiss authorities to freeze Marcos family accounts, there was complete silence about the nature of the Marcos family interests. Furthermore, even

after the Swiss Supreme Court ruled that the banks must disclose all the bank documents concerning the Marcos accounts to the Philippine government, the Swiss authorities failed to provide comprehensive information about the accounts. Not one Form B document in the name of Swiss lawyer was disclosed. The documents disclosed by the Swiss merely confirmed what the Philippine government already knew about the Swiss bank accounts.

In theory, the extent of the problems in the Marcos case would not be seen again because Switzerland has abolished Form B accounts and introduced a new stringent money laundering law. Indeed, it has been claimed that the effects of these changes to Swiss law is that Switzerland is no longer as attractive a place for secreting illicit assets. However, the facts suggest that the Swiss banks continue to be attractive to foreign dictators and politicians.

Operation Big Bird and Philippine mutual assistance requests

Operation Big Bird was a plan devised by a Filipino banker, Michael de Guzman, to 'recover' a part of the Marcos fortune in Switzerland. It was hatched shortly after the revolution in 1986 when Ferdinand Marcos and his family were forced to flee the Philippines. De Guzman, who knew the son of Marcos' security chief, flew to Hawaii and obtained powers of attorney from both Ferdinand and Imelda Marcos. He then flew to Zurich and, on 24 March, requested Credit Suisse to transfer the money and assets of eleven of Marcos' Liechtenstein Foundations to an Austrian bank in Vienna. The bank officers stonewalled de Guzman and told him to return the next day. Credit Suisse then informed the Swiss authorities that a Marcos agent was seeking to withdraw US\$213 million. Later that evening the Swiss Federal Council imposed an emergency freeze order on the Marcos assets.

Evidence suggests that, at that stage, de Guzman was acting on behalf of the Marcos family and not on behalf of the new Philippines government. Only de Guzman knows whether he had a secret agenda to double-cross Marcos and steal the money for the Philippines people. What is interesting is that Credit Suisse did not act immediately on the instructions of Marcos agent, even after its bank officers telephoned Marcos, who confirmed that he had issued a power of attorney to de Guzman. One of the reasons for Credit Suisse's caution was that the Swiss Banking Commission had ordered all banking institutions to report their holdings in Switzerland or their management from Switzerland of any assets of the Marcos family, or of persons or legal entities connected with them.

The Federal Council's unilateral freeze order was unprecedented in Swiss banking history. Some Swiss bankers claimed that 'it would compromise Switzerland's reputation as a haven of banking secrecy'. Its legal justification was said to be the external affairs power of the Swiss Constitution. The

freeze order was made in anticipation of a claim by the Philippines government for Marcos' money.

The Philippines government welcomed the freeze order. At this time, it was confident that the Swiss legal system would provide an expeditious mechanism to recover the ill-gotten fortune of the Marcos family. The Philippines government hired three politically well-connected and highly competent lawyers from Zurich, Geneva and Lugano to handle their case.

An official request by the Solicitor General of the Philippines to continue the freeze was made on 7 April 1986. This was followed by the filing of a formal mutual assistance request with a detailed brief, setting out the criminal charges which were being investigated in relation to Marcos and the evidence of the Marcos family's Swiss bank accounts. The Swiss Federal Department of Justice then issued a freeze order in substitution for the exceptional freeze order by the Federal Council. This freeze order was later confirmed by the Swiss Supreme Court and is still in force today.

Meanwhile, de Guzman had joined forces with Colonel Jose Almonte, a distinguished army officer, in order to recover the Marcos monies. De Guzman tried again to withdraw the Marcos money at Credit Suisse but without success. He then sought the assistance of the Presidential Commission for Good Government (PCGG) and the Solicitor-General. On 4 July Solicitor General Ordonez filed a request with the Swiss Federal Office for Justice and Police asking Credit Suisse to transfer monies in eleven Foundations to an Austrian bank account controlled by de Guzman. The request was signed by the Solicitor General and Colonel Almonte on behalf of the Philippines Government, and de Guzman as the duly authorised representative of the Marcos family. It was supported by Swiss government officials who promised to arrange for the defreezing of the Swiss accounts.

However, the money was never sent to the Vienna bank. Solicitor General Ordonez had become disillusioned with Operation Big Bird and was concerned about a possible diversion of the funds. His concerns were supported by PCGG's Swiss lawyers who received information that the Vienna bank was in financial trouble. On the instructions of Ordonez, and without informing Almonte or de Guzman, the Swiss lawyers requested Credit Suisse to transfer the Marcos monies to a new destination, namely an account of the Philippines government to be opened at Credit Suisse. Before complying with this request, the Swiss bankers contacted Marcos, who now said that the powers of attorney were fake and that his only representative in Switzerland was his lawyer, de Preux. Subsequently, the Swiss authorities rescinded the defreeze order. The monies thus stayed in Credit Suisse under the name of the Marcos Foundations, and were subject to a freeze order.

The Philippines government did not recover any money from Operation Big Bird. The failure of this operation has been the subject of a report by a Special Committee on Public Accountability by Representative Victorico Chaves, as well as a report by Senator Salonga, the first chairman of the PCGG. The Chaves report blamed Salonga, Ordonez and the Swiss lawyers for aborting what it described as the best chance for recovering some of the Marcos money. On the other hand, Salonga says that Ordonez saved the Philippines government from a massive theft.

This is not the place to comment on whether Operation Big Bird was an ingenious operation to double-cross Marcos for the benefit of the Philippines people or whether it was an operation controlled by a Marcos agent to secure money for the former President. I do not wish to add to the rumours, speculation and political backstabbing concerning this affair. However, I make three observations. First, Swiss lawyers representing the PCGG—the body tasked by the Philippine President to trace and recover the Marcos assets—have asserted that Marcos must have been sure that if and when the money was transferred to Vienna, it would be available to him. That is, Marcos would have only agreed to the transfer to Vienna if he was sure that he would be the beneficiary. This assertion fails to take into account how vulnerable Marcos was in Hawaii and that he was just as dependent on de Guzman as was the Philippines government. Second, it has been suggested that de Guzman intended to steal the money for himself. But for de Guzman to steal money so openly would be stupid. Moreover, de Guzman was entitled to over 540 million pesos (that is, a 20 per cent commission on the US\$213 million) if it was recovered. It is likely that de Guzman did not trust Philippines officials to pay him a commission, and that is why he wished to keep control over the account. Third, one of the beneficial effects of Operation Big Bird was that the information gathered by de Guzman, together with the documentation found at Malacanang Palace, formed the basis of the Philippines government's claim on the Marcos fortune.

International legal cooperation and asset recovery

In the Marcos case, Swiss cooperation with the Philippines was based on the 1981 Swiss federal law on international criminal assistance, the 1982 implementing ordinance, and various procedural and enforcement provisions in the laws of the cantons of Switzerland. Not surprisingly, a team of attorneys for the Marcos family waged a vigorous battle against the Philippines government's recovery efforts. It is interesting to note that the Marcos family have never given an adequate explanation as to how they

could fund this expensive litigation, given that their assets in the Philippines, United States and Switzerland were frozen in early 1986. It is estimated that tens of millions of dollars in legal fees have been expended by the Marcos family in protecting their overseas assets.

The Swiss litigation has essentially involved three stages. First, the Marcos family opposed the provisional freeze order, as well as the order that their banks hand over to the Swiss authorities information concerning the accounts. This stage of litigation proceeded through various cantonal supreme courts and was ultimately heard by the federal (Supreme) court in Lausanne, which ruled in favour of the Philippines government on 1 July 1987.

The second stage concerned whether and when the information and details concerning the bank accounts would be transmitted to the Philippines government. It took another three years before the Swiss courts reached a decision. On 21 December 1990, the Swiss Federal Supreme Court ruled that the Swiss authorities were entitled to hand over to the Philippines government the information concerning the Marcos family's Swiss bank accounts. In particular, the court noted that although no charges had been brought against the Marcoses or their accomplices, the Philippines government had expressed a clear desire to institute criminal proceedings before the Sandiganbayan (anti-corruption) court. The court also observed that the Philippines government had delayed opening a criminal proceeding against the Marcos family until it received the banking information from Switzerland.

The third and final stage of the litigation concerns whether and when the assets in the Swiss bank accounts will be returned to the Philippines. The Swiss Supreme Court, in its decision of 21 December 1990, accepted that in principle the assets should be returned to the Philippines. But the Court set out certain preconditions for the transfer of the frozen assets to the Philippines. First, the Philippines government had to file a criminal charge and/or bring a forfeiture proceeding against Mrs Marcos in the Philippines by 21 December 1991. If a criminal prosecution or forfeiture proceeding was not instituted within this period, not only would the assets not be returned to the Philippines but the freezing order would be lifted. Second, the assets would only be repatriated to the Philippines when the Sandiganbayan or another Philippines court competent in criminal matters made a final decision concerning the criminal prosecution and/or forfeiture. That is, the Filipino courts had to render a final judgment that the assets were stolen property and were to be forfeited and returned to their original owner, the Philippines government. Thirdly, the criminal prosecution and/or the forfeiture proceeding were required to comply with the procedural requirements of due process and rights of the accused under the Swiss Constitution and the European Convention on Human Rights.

No Philippines government official would have predicted that the Swiss courts would impose such strict conditions before repatriating the illicit Marcos assets. This led Mr Gunigundo, former chairman of the PCGG, to voice considerable reservations about the utility of IMAC (International Mutual Assistance in Criminal Matters), the Swiss law on judicial assistance. In 1996, Mr Gunigundo made the following comment

I believe that IMAC has really been conceptualised to make it more difficult for the requesting state to secure the release of any frozen account given so many conditionalities which are involved, and given our experience with the Marcos accounts since 1986 which have been frozen for 10 years.¹

Despite these comments, the Swiss authorities made a deal with the Philippines government for the repatriation of the monies to the Philippines prior to the satisfaction of the conditions imposed by the Swiss Supreme Court. Under this deal, the Office of the District Attorney of Zurich ordered the restitution of the now US\$570 million frozen in Switzerland to the Philippines National Bank, to be held in escrow pending the satisfaction of the various conditions. The decision of the District Attorney of Zurich was challenged by the Swiss banks and various Marcos foundations. But, in a series of decisions in December 1998 and January 1999, the Swiss Supreme Court upheld the order of the District Attorney of Zurich. In reaching its decision, the Swiss court said

Today's state of knowledge does not allow serious doubt about the illegal provenance of the seized monies. The incompleteness of the records makes it impossible to attribute the individual assets to specific offences, and it is possible therefore that also legal assets of the Marcos family were deposited with the foundations. However, such legal assets could, as established correctly by the claimant, only be minor sums compared to the total amount of the assets seized. With respect to the overwhelming majority of the assets seized, the facts are sufficiently clear to allow the assumption of an obvious illegal provenance. Under these circumstances an early restitution of the assets is possible in principle if there are sufficient guarantees that the decisions regarding seizure or restitution, respectively, will be rendered in proceedings according to law and order. The decision whether to seize or reconstitute monies seized must be taken in the Philippines where the criminal actions were committed.²

The court also recognised that 'Switzerland has a considerable interest in an early restitution of (the frozen) monies'.³ In essence, the court said that the money should be returned to the Philippines where the local court(s) would make the final decision as to the lawful ownership of the alleged Marcos monies.

Limits to international assistance

The political dimensions in cases of recovery of grand corruption should never be underestimated. The Marcos case is a leading example of how different interest groups have sought to prevent recovery. The Swiss banks have been singled out because they have been the prime beneficiary of grand corruption and state theft. There is now considerable evidence that the Swiss banks have not fully cooperated with Philippine government pleas for assistance in retrieving the illicit assets of former dictator Ferdinand Marcos. The evidence of non-cooperation can be found in the following material.⁴

- Operation Domino—an undercover operation of the Philippine government to trace the gold and cash assets of the Marcos family which was sabotaged by the Swiss authorities resulting in the laying of criminal charges for economic espionage against Reiner Jacobi, an agent of the Philippine Presidential Commission on Good Government. In 1991, the German courts rejected a Swiss request to extradite Jacobi on the grounds that the Swiss charges were of a political nature.
- The 1994 documentary film on Operation Domino including a filmed confession by the Director of Communications of a leading Swiss bank admitting to a Marcos account.
- Failure of the Swiss authorities to respond adequately to Philippine government requests in 1998 to freeze the assets of Irene Araneta Marcos which were allegedly held at the abovementioned Swiss bank.
- A criminal complaint made by Attorney Francisco Chavez, the former Solicitor General of the Philippines, concerning the conduct of various Swiss banks, Swiss and Liechtenstein fiduciaries, and Swiss public servants. The criminal complaint was made in 1999 to the then Swiss Attorney General Carle de Ponte.
- The evidence submitted to the Philippine Senate Blue Ribbon Committee, which conducted hearings in 1999 and 2000 into an alleged conspiracy between the Swiss banks and the PCGG to divert and hide the assets of the Marcos family.
- German Government Intelligence Reports on the 'Money Laundering Community in Liechtenstein' which specifically identified five Liechtenstein financial advisors to the Marcos family and pointed to the intimate links between Liechtenstein and Switzerland (1999, 2000). Subsequently, Liechtenstein

was named as an un-cooperative country by the Financial Action Task Force into Money Laundering (FATF).

In February 2001, Irene Marcos Araneta, the youngest daughter of former Philippine President Marcos, visited Germany and unsuccessfully attempted to transfer the Marcos family monies out of secret accounts in a Swiss bank. The failure of the Marcos family to get access to their illicit funds suggest that after the death of Ferdinand Marcos, the Marcos family may have lost control of the funds vis-à-vis the Swiss banks and Swiss fiduciaries.

Criminal sanctions against political élites: extradition and prosecution

In many cases, the bringing of criminal charges against a former dictator will be a vital part of the process of recovering the proceeds of corruption. However, the bringing of criminal charges against a deposed dictator raises difficult issues, including the following.

- Criminal trials are usually heard in the presence of the defendant. For example, under the Bill of Rights chapter of the 1987 Constitution of the Republic of the Philippines, the accused is entitled to meet the witnesses face to face and no trial may take place in the absence of the accused except after arraignment, provided the accused has been duly notified and his failure to appear is unjustifiable.
- A criminal trial would require that the deposed dictator be extradited from a third country. It is rare for a dictator to be returned to his home country, usually because he has been given sanctuary or asylum.
- Even if there was an extradition treaty or arrangement with a third country, it is unlikely that that country would consent to extradition. Further, the defendant may seek to rely on various exceptions to extradition, such as the 'political offence' exception, or to rely on doctrines such as 'act of sovereign immunity'.
- Extradition is not usually granted where there is a substantial risk that the accused will not obtain a fair trial in the requesting state. It is difficult for a deposed dictator to get a fair trial, especially because of the problem of selecting an impartial jury.

In most cases, the new government will not wish to extradite a deposed dictator because of concerns about national security. For example, the government of Corazon Aquino considered that the return of former President Marcos to the Philippines would provide a rallying point to Marcos loyalists and set the stage for a *coup d'état*. There is evidence to show that Marcos was conspiring in 1987 to invade the Philippines with a military force and

seize power. Indeed, US State Department officials, after learning of Marcos's covert schemes, confined him to Oahu Island in Hawaii.

Another possibility is to arrange for the trial to be heard in a third country or the so-called country of asylum. For example, President Aquino of the Philippines signed an executive order authorising Sandiganbayan (anti-corruption) court to try cases outside Philippines territory and Solicitor General Chavez asked US officials whether the tribunal could be convened in Hawaii. But the United States would not permit a foreign court to conduct a criminal trial within US jurisdiction.

The remaining option in the case of former President Marcos, was a criminal trial in the United States for US offences. Grand juries in New York and Virginia were already investigating the Marcos family. Any future trial might be heavily politicised, given that Marcos had been a 'staunch ally of the United States' and that President Reagan still considered Marcos a friend. The US Attorney-General offered a plea bargain to the Marcos family whereby if they pled guilty and surrendered certain assets they would not be imprisoned. Marcos refused. Consequently, on 21 October 1988, the Marcos family was indicted by a federal grand jury in New York for RICO offences, including mail and wire fraud, fraudulent misappropriation of property, and obstruction of justice.

Marcos was too sick to attend the arraignment and on 28 September 1989 he died. On 20 March 1990, Imelda Marcos was arraigned and put on trial. On 2 July 1990, Imelda Marcos was acquitted on all counts. A number of reasons have been given for the acquittal, but the major weakness was the difficulty of linking Imelda to the criminal conduct of her husband. Jurors interviewed after the trial told some reporters that they could not hold the widow responsible for the crimes of her husband. The Philippines government explained the loss in the following terms

Imelda Marcos (Imelda, for short) was acquitted in New York. There was a failure of evidence, an illusion of innocence. The American prosecutor waited for the transmittal from Switzerland of documents that would have established Imelda's direct participation in the illegal deposits in Swiss banks of money belonging to the Filipino people. The Swiss documents never came. Her defence that she had neither knowledge nor participation in the illegal dollar deposits in Swiss banks by her late husband, was consequentially sustained. Somehow, she had hypnotised herself into believing her own lies. After all, she got the American judge and jurors to believe her.⁵

In the Philippines, more than 100 criminal and civil cases have been brought against Mrs Marcos. For example, more than 26 criminal cases were filed in the Sandiganbayan, 37 criminal cases were brought in the Manila Regional Court and 16 criminal cases were brought in the Quezon

City Regional Trial Court. The criminal cases concerned, among other things, Mrs Imelda Marcos' involvement with various Liechtenstein Foundations, the looting of the Central Bank of the Philippines by the sale of US\$125 million treasury notes to various foundations. Mrs Marcos was accused of violating the anti-graft law, and of tax fraud and misappropriation of public funds. Most of these cases were filed within the time limits imposed by the Swiss court. The filing of the criminal cases was made on the basis of the approval of the Ombudsman, who certified that the accused was probably guilty of the offences.

A significant problem in resolving the cases against Mrs Marcos is that under the judicial system of the Philippines, long and interminable delays are commonplace and the judiciary is inclined to postpone hearings at the request of the defense or prosecution. Mrs Marcos' lawyers have successfully exploited the Philippines judicial system and made a mockery of the notion of timely justice by, for example, filing no less than seven motions for the dismissal/quashing of the charges against her, all of which were refused by the courts. Mrs Marcos' lawyers also sought to delay the hearing of the cases by filing numerous postponements.

Nevertheless, following a trial of twenty months, Mrs Marcos was convicted in 1993 by the First Division of the Sandiganbayan. Mrs Marcos was sentenced to prison for 18–24 years, with a minimum of 9–12 years, and was perpetually disqualified from public office. Mrs Marcos' motion for the consideration of her conviction and sentence was subsequently dismissed. Her appeal to the Supreme Court was initially unsuccessful, but a differently reconstituted Supreme Court reheard her case *en banc* and she was acquitted. Mrs Marcos faces numerous other criminal charges, however, which may take years before a hearing and final conclusion is reached. Finally, the Sandiganbayan (the anti-corruption court) in Manila has held that the Marcos family must forfeit the secret deposits in Swiss banks. The civil forfeiture decision is now subject to appeal.

Defences in civil recovery proceedings

There are a number of defences which may be available in civil recovery proceedings involving former dictators. The relevant doctrines include the act of state doctrine, the doctrine of *forum non conveniens*, and the doctrine of head of state immunity.

Act of State doctrine

Under the 'act of state' doctrine, a court will not conduct a hearing in a case which involves it making decisions concerning the conduct of a foreign

government under the law of a foreign sovereign. But does this doctrine apply to spoliation cases against former dictators of a country?

In the United States, the act of state doctrine was a significant part of the defence of former President Marcos in claims brought by the Republic of the Philippines for the recovery of substantial property and assets in New York and California. In New York, the Republic of the Philippines sought to recover five substantial properties, including a 71-storey office building on Wall Street which was held by, and through, corporations in Panama, the Netherlands Antilles and the British Virgin Islands, which were allegedly puppets of the Marcos family.

In New York, the Court of Appeals upheld a preliminary injunction restraining the transfer of the properties pending trial, and rejected the Marcos defence of act of state. The Court said that a distinction had to be drawn between private acts and official acts of a foreign head of state; that official acts were not reviewable to US courts, even if they were in violation of international law; but acts committed in a private capacity did not fall within this exclusion. The court noted and considered significant the fact that the Plaintiff in the case was the foreign state which the former head of state had controlled. Although the court initially refused an injunction, it later reheard the case and decided that the act of state doctrine would not be a barrier to the suit and granted worldwide injunctions.

In contrast to the Marcos case is the decision of the French courts in the Duvalier litigation. In 1986, the Republic of Haiti sued the Duvalier family in France, claiming that the family had embezzled over US\$120 million from the Republic during the Presidency of Baby Doc Duvalier from 1971 to 1986. The French Court de Cassation ruled that it would not exercise jurisdiction in order to enforce claims of the Republic which were not founded upon public law—that is, their purpose was related to the exercise of governmental power.

Court of convenience/ *Forum non conveniens*

Under US practice, a court may decline to hear a case, even if it falls within the jurisdiction of the court, in circumstances where the court has decided that the case could be more conveniently and appropriately heard in another jurisdiction.

After the fall of the Shah Pahlavi of Iran, the new Islamic Republic sued the former Shah in New York and the principal money laundering deposit vehicle, the Pahlavi Foundation. It was alleged that the defendants had accepted bribes, misappropriated or embezzled many billion dollars in Iranian funds. The Court of Appeals of New York upheld the dismissal of the suit based on the doctrine of *forum non conveniens*. The case ostensibly

failed because the Islamic Republic had not established a substantial nexus or connection between the acts complained of, and the forum where the action was brought. The court reached this decision even though the record did not establish that there was an alternative forum where the action could be maintained.

Head of State immunity

The head of state doctrine was considered in the Noriega case (see *United States v Noriega* 117 F.3d 1206 (1997)). Manuel Antonio Noriega was convicted in the US Federal Court of multiple counts of involvement in cocaine trafficking. He appealed against his conviction on a number of grounds, including his claimed status as a head of state. The relevant facts pertaining to Noriega's political status were as follows. At the time of his indictment in March 1988, Noriega was the commander of the Panamanian Defence Forces in the Republic of Panama. The Panamanian President, Eric Arturo Delvalle, dismissed Noriega from his military position, but Noriega refused to accept the dismissal. Panama's legislature then sacked Delvalle, but the US government continued to recognise Delvalle as the constitutional head of Panama. A presidential election was held but the results were hotly contested, with allegations of vote rigging and corruption. The US government recognised Guillermo Endara as Panama's President and thus head of state. On 15 December 1989, Noriega publicly declared that a state of war existed between Panama and the United States. The United States, on the orders of President Bush, invaded Panama and seized Noriega (see *United States v Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990)).

The District Court, and on appeal the Court of Appeals in the United States, rejected Noriega's claim for head of state immunity. On the assumption that the head of state immunity is operative, the court looked at the Executive Branch for direction on the propriety of a claim for head of state immunity (*Kadic v Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995)—holding that Executive Branch had not recognised defendant as head of state). It had been suggested that in the absence of a formal determination by the Executive that the defendant was to be treated as a head of state, no immunity should be granted by the courts (*In re Doe*, 860 F.2d 40, 45 (2d Cir.)). And prior to the enactment of the Foreign Sovereign Immunity Act the former Fifth Circuit had held that where the Executive Branch does not convey clearly its position on an immunity question, the judiciary should make an independent ruling on that issue (*Spacil v Crowie*, 489 F.2d 614, 618–619 (5th Cir. 1978)). In the Noriega case, the Court of Appeal considered that Noriega's community claim failed under either the *Doe* or the Special standard. It went on to conclude that

[t]he Executive Branch has not merely refrained from taking a position on the matter: to the contrary, by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state-immunity. Moreover given that the record indicated that Noriega never served as the constitutional leader of Panama, and that Panama has not sought immunity for Noriega and that the charged acts relate to Noriega's private pursuit of personal enrichment, Noriega likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case (p. 121).

Indeed, in *re Doe* the court noted at 45 that 'there is respectable authority for denying head-of-state (immunity) for private or criminal acts'.

Turning to the question of act of state doctrine, the District Court said

In order for the act of state doctrine to apply the defendant must establish that his activities are 'acts of state', that is, that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself... That the acts must be public acts of the sovereign has been repeatedly affirmed... Though the distinction between public and private acts of government officials may prove elusive, this difficulty has not prevented the courts from scrutinising the character of the conduct in question (pp. 1521-2).

The court concluded that acts of drug trafficking could not conceivably constitute public acts on behalf of the Panamanian state. See also *Hilao v Estate of Marcos* (1994) 25 F.3d 1467, where the claim for immunity by the Estate of former President Marcos of the Philippines Government failed in circumstances where the Philippines government filed a brief in which they asserted that foreign relations with the United States would not be adversely affected if claims against former President Marcos and his estate were litigated in US courts.

Head of state immunity was raised in a criminal context in the Pinochet case. In December 1998, the British House of Lords was faced with one of the most important international human rights legal questions since World War II. Was Augustus Pinochet Ugarte entitled to immunity as a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was head of state? According to the Chilean authorities, Pinochet had been President of the Government Junta of Chile and then Head of State for the Republic of Chile from 1973 to 1990. Pinochet had assumed power in 1973 after a military coup in Chile against the democratically elected government of Salvador Allende. His military regime was recognised by the government of the United Kingdom and the United States. Pinochet continued in power until after democratic elections, whereupon he handed over his power to the newly-elected President Aylwin in March 1990.

It was not Chile, the country where Pinochet resided, that sought Pinochet's arrest and extradition. It was Spanish prosecutors who sought the extradition of the former Chilean leader on the basis that he had procured and ordered the most serious of crimes—genocide, murder on a grand scale, torture and the taking of hostages—against Spanish citizens in Chile. The Government of Chile lodged a formal protest with the British government over Pinochet's arrest, pointing out that Pinochet was entitled to immunity as a former head of state and visiting diplomat to the United Kingdom.

The House of Lords held that the crimes of torture and hostage-taking fell outside what international law would regard as functions of a head of state and therefore General Pinochet was not entitled to immunity from criminal process, including extradition. This decision was set aside by the House of Lords because of claim of appearance of bias of one of the Law Lords.

Rights of third parties

One problem facing governments in the recovery of assets from a former head of state is competing claims made by third parties. In the case of the Marcos assets, claims were made by third party creditors, including unpaid lawyers, suspected bogus claimants, and by various torture victims of the Marcos regime.

The most significant non-government claimants are the victims of Marcos' human rights abuses. During Marcos' rule, the political opposition was suppressed and massive human rights abuses were inflicted on a large number of—mainly poor—Filipinos. In Hawaii, a class action suit was brought by nearly 10,000 victims and/or their relatives for summary execution, torture, disappearance and arbitrary detention. The class actions suit was brought under a unique US federal law, the Alien Tort Claims Act, 28 USC #1350. This statutory provision authorises US Federal Court jurisdiction over 'any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States'. Former President Marcos, who lived in Hawaii, sought unsuccessfully to dismiss the suit on the grounds of head of state immunity, lack of personal jurisdiction, and lack of subject matter jurisdiction under the Alien Tort Claims Act. After ten years of litigation, a judgment of nearly US\$2 billion was obtained by the Plaintiff class of nearly 10,000 Filipino victims of torture, summary execution and disappearance. This judgment has been upheld on appeal to the US Court of Appeals for the Ninth Circuit. But as at today the human rights victims have collected an insignificant portion of monies on their US judgment. All efforts to collect the judgment have been frustrated.

Conclusion

There is increasing international concern as to the devastating effect of grand corruption on developing countries. An important international measure to deal with grand corruption is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which was adopted by 28 of the 29 OECD countries on 17 December 1997. The OECD Bribery Convention requires each signatory to introduce into domestic law a criminal prohibition for bribery of foreign public officials, effective sanctions against such bribery, and accounting and auditing laws so as to 'prohibit the establishment of the off-the-book accounts, for the purpose of bribing foreign public officials or of hiding such bribery' (OECD 1997).

A related and equally important development is the introduction of new and more comprehensive money laundering rules. In many countries, officers and employees of financial institutions render themselves liable to prosecution for money laundering if they accept, deposit, invest or transfer assets stemming from crime and corruption. For example, since May 2000, Swiss banks which intentionally accept funds belonging to foreign holders of office and which stem from corruption may be prosecuted for money laundering.

A useful preventative measure is the increased due diligence standards adopted by international banks. For example, in 1987 as a direct consequence of the Marcos case, the Swiss Federal Banking Commission developed a practice requiring Swiss banks to enter into business relationships with high-ranking public officials, such as heads of state or members of government, only with the approval of senior management.

Unfortunately, there is considerable evidence that Swiss banks continue to accept foreign political leaders as customers. For example, in November 1999 the Swiss Federal Banking initiated an investigation into nine Swiss banks which had accepted and handled funds (of over US\$670 million) from the entourage of the President of Nigeria, Sanni Abacha. The Commission publicly condemned six banks for not handling the customer relationship with the necessary due diligence.

Finally, the case of former Philippine dictator Ferdinand Marcos provides a prime example of the obstacles faced by a successor government in tracking and recovering corrupt and stolen assets. This chapter has detailed the wide-ranging legal, political and institutional problems beset by developing countries in retrieving such assets. It is time to consider whether the proposed International Criminal Court should extend its jurisdiction to include cases of grand corruption and economic plunder since such criminal activity can have as great an economic and social impact as war crimes.

Notes

¹ Letter from PCGG Chairman M Gunigundo to Dr D Chaikin, 11 June 1996.

² Republic of the Philippines v Estate of Ferdinand Marcos, Swiss Federal Supreme Court, 1st Public Legal Department, 1A.103/1997/kls, 7 January 1998:10.

³ Republic of the Philippines v Estate of Ferdinand Marcos, Swiss Federal Supreme Court, 1st Public Legal Department, 1A.103/1997/kls, 7 January 1998:11.

⁴ See the website of Reiner Jacobi, www.marcosbillions.com.

⁵ See petition for forfeiture of assets under RA 1379 in the case of Republic of the Philippines v Ferdinand Marcos (represented by his Estate and Heirs) and Imelda Marcos, Case SB No. 0141, Sandiganbayan, Republic of The Philippines, 17 December 1991:1.