

Repatriation of looted state assets

some case studies and the UN Convention against Corruption

States and businesses are becoming increasingly aware of the damage and suffering corruption causes populations around the globe. In that context, it is not surprising that worldwide concern over corruption by heads of state is reaching new heights. The dangerous combination of immunity from prosecution and the exercise of unlimited personal power allows corrupt leaders to devastate their countries by persistent, organised looting of the nation's coffers. The drafting of the United Nations Convention against Corruption is therefore timely¹. Of particular interest in this context is Chapter V of the Convention, which is entitled 'Asset Recovery'.

Before turning to the salient Articles of Chapter V and their potential impact, it is instructive to examine three of the more notorious cases of looting by heads of state in the last decade - and the efforts made by states to repatriate the funds. The three cases have the common feature of focusing on assets deposited in Swiss banks. Strict banking secrecy gave rise to Switzerland's former notoriety as a safe haven for illicit funds, leading to an estimated one-third of the world's illegal wealth being deposited in Swiss banks. The now celebrated legal action taken on behalf of Holocaust victims was a major factor in opening up the Swiss banking sector. With the appointment of uncompromising and effective examining judges such as Carla del Ponte and Bernard Bertossa, who were armed with the legal powers to force disclosure and freeze assets, Switzerland quickly developed a legal climate that in many ways now leads the global fight against corruption. While transformation did not take place without complications or criticism, Switzerland's experience does point the way forward for states that subscribe to the new UN Convention. In this regard, as in many others, Switzerland's admission to the UN in September 2002 is yet another step in the right direction.

Mobutu Sese Seko

Estimates vary on the sums looted from Congo by Mobutu Sese Seko. He was in power for nearly 22 years, during which time Congo received more than US \$12 billion in aid, mainly from the World Bank. The Mobutu kleptocracy probably stole most of the funds, although Mobutu himself claimed to be worth less than US \$50 million.

The day before Mobutu was toppled in May 1997, the Swiss authorities commanded all 406 Swiss banks to check for Mobutu accounts. They found just US \$4 million. The Swiss then wrote to Kinshasa asking for clarification of the ownership of the funds. By 1999 no reply had been received from President Laurent Kabila. Why not? As one European politician put it: "*Kabila has simply replaced Mobutu with Mobutism.*"² Such a relatively paltry sum as \$4 million may not have seemed worth the trouble and expense of proof of ownership, even if it could have been provided. Yet even if it could have been provided, the Swiss probably would not have repatriated the money, as the next two cases show.

Ferdinand Marcos

The repatriation issue is a major aspect in the case of the former president of the Philippines. Only after protracted litigation in Switzerland did Swiss authorities agree to assist the Presidential Commission on Good Governance (PCGG), a non-judicial authority that was investigating the Marcoses in the Philippines. This decision was taken although no charges had been brought against the Marcoses in the Philippines, where local authorities were awaiting the Swiss evidence. After considering whether and when assets held in Swiss bank accounts would be returned to the Philippines, the Swiss Supreme Court held that the assets should indeed be returned, but subject to the following three requirements:

- The government of the Philippines would file a criminal charge and/or bring forfeiture proceedings against the



Marcoses in the Philippines within one year, failing which the assets would be unfrozen.

- A Philippine court with appropriate criminal jurisdiction should give a final judgement confirming that the assets were stolen or illicit property to be confiscated and returned to their rightful owner, the government of the Philippines.
- The criminal prosecution and/or forfeiture proceedings 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.

These stipulations prompted the chairman of the PCGG to criticise the Swiss law on international legal assistance in criminal matters (the EIMP). He accused the Swiss of attempting to thwart rather than facilitate states' repatriation efforts. In the end, the PCGG signed an agreement with the Swiss authorities under which the 'anticipatory restitution' provision in Article 74 of the EIMP was used to allow repatriation before final judgement was obtained in the Philippines. Article 61 of the draft UN Convention would permit such a step in the future if the requested State waives the requirement of a final judgment in the requesting State.³

There was, however, a sting in the tail of the Supreme Court decision: the transfer of assets, which amounted to some US \$657 million, had to be made to an escrow account in the Philippine National Bank over which the Zurich district attorney retained control, including the choice of investments to be made from the account. In this way, the Swiss authorities in effect ensured that the monies remained under their control until they were satisfied with the conduct of the government in the Philippines. In August this year (2003) it was finally announced that the frozen assets are to be released by the Swiss authorities to the Philippines government, five years after they were deposited and fourteen years after the death of Marcos in Hawaii in 1989. The announcement follows a ruling given on 15 July 2003 by the Philippine Supreme Court to the effect that the Marcos family had "failed to justify the lawful nature of their acquisition" of the Swiss monies⁴. This is a helpful ruling, the principle behind which is now incorporated in Article 67 bis of the Draft Convention⁵ (see further below).

Sani Abacha

General Sani Abacha was military dictator of Nigeria from 1993 to 10 June 1998, when he died suddenly of a heart attack. Estimates of the amounts he looted in his five years in office vary from US \$2 billion to US \$5 billion. The upper limit would represent about 10 per cent of Nigeria's annual income from oil over five years.⁶ Abacha was immediately replaced by another military ruler, General Abdulsalami Abubakar, who wasted no time in telling Nigerians that it was the aim of his government to return Nigeria to democratic rule. Elections were held in early 1999 and Olusegun Obasanjo was sworn in as president on 29 May 1999.

Before Obasanjo took office, the interim military government of Abubakar had delivered a clear message to members of the Abacha clan and their associates: the government was aware that huge sums had been looted during Abacha's rule, and those monies had to be returned. As a result of this initiative, the government recovered some US \$825 million and paid it into special accounts opened at the Bank of International Settlements in Basle, Switzerland. The majority of these monies have since been utilised by the government for housing projects, education and allocation to the governments of Nigeria's 36 states.

While considerable sums were 'voluntarily' returned, others remain frozen in other jurisdictions, most notably some \$1.3 billion in Switzerland, Luxembourg and Liechtenstein. The monies were frozen as the result of action taken by the Obasanjo government in late 1999. Five years after Abacha's death, none of this money has been returned to Nigeria and the government is still attempting to reach a settlement with the Abachas. Such an agreement would help the government avoid the sort of difficulties that arose in the Mobutu and Marcos cases.

In April 2003 the Swiss Supreme Court handed down a judgement that rejected numerous appeals by the group of expensive lawyers hired by the Abachas. These efforts had sought to prevent the transmission of incriminating documents and, ultimately, the repatriation of stolen funds to Nigeria. The judgement stops short of ordering repatriation of the illicit funds. Instead, as was the case in the Marcos case, it is heavily preoccupied with ensuring that the defendants get a fair trial and that human rights conventions be observed. Once the Swiss authorities are satisfied on these counts, it may be possible for the Nigerian government's lawyers to apply for repatriation of the funds under Article 74 of the EIMP in anticipation of convictions being secured in Nigeria. A final resolution would still be some way off, however, if obtaining those convictions in a country where 85 per cent of the judiciary is said to be corrupt were to be made a pre-condition of the release of funds.

Chapter V of the draft UN Convention

Chapter V commences with a significant statement:

*"The return of assets pursuant to this chapter is a fundamental principle of this Convention and States Parties shall afford one another the widest measure of co-operation and assistance in this regard."*⁷

The Chapter goes on to set out a collection of measures that States Parties are enjoined to take to facilitate asset recovery. These include:

Article 65: provisions aimed at getting States to require domestic financial institutions to adopt stringent "know your customer" (kyc) procedures, particularly in regard to those "entrusted with prominent public functions and their family members and close associates" to whom "enhanced scrutiny" provisions should apply. The whole package of measures in Article 65 addresses many of the core issues associated with abuse of office, lax banking controls and the use of offshore banks. If every country were to pass legislation giving effect to the measures contained in this article, and ensure proper enforcement, there is no doubt that opportunities for looting to take place would be radically reduced.

Articles 67 and 67 bis deal with measures for the recovery of property under individual States' domestic law and through international co-operation on confiscation. Again, the aim is to encourage States to take steps to ensure that their domestic law permits courts to order those who have committed offences established under the Convention to pay compensation or damages to States which have been harmed by those offences. Article 67 bis deals, *inter alia*, with measures to freeze or seize property in a requested State where orders have been issued by competent authorities in a requesting State. Paragraph 2(a) of the Article contains the important provision already referred to above that such orders made in a requesting State should enable the requested State to take action on the basis of *reasonable belief* that there are sufficient grounds for the requesting State to take



such actions and that the property will eventually be subject to an order of confiscation for the purposes of the Article. Paragraph 2(b) takes this process a step further by saying that the requested State can take action simply on the grounds of reasonable belief without even the necessity for a freezing or seizure order being issued by the competent authority in the requesting State. This provision envisages a situation which is far closer to the position in Switzerland, where prosecuting Magistrates already take action to freeze assets on the basis of reasonable belief without the necessity for court orders in the requesting States. This situation contrasts sharply with the position in, for example, the United Kingdom, where it has been the case that the authorities (in the case of the UK, the Home Office) will not take action unless they are satisfied that criminal charges have been brought in the requesting country and that those criminal charges are properly brought. This can lead to inordinate delay and, of course, all delays favour the malefactor who can use the time to shift his funds elsewhere.

Article 60 deals with international co-operation for the purposes of confiscation. Many of the provisions have to do with submission of the requests but they place a positive obligation on the requested State to take measures to identify, trace and freeze, or seize proceeds of crime. One innovative provision requires each State Party to furnish copies of its laws and regulations giving effect to this Article and any subsequent changes to the Secretary General of the United Nations.

Article 68 provides that each State Party shall endeavour to take measures to permit it to forward information on illicitly acquired assets to another State Party without prior request when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations which might lead to a request by that State Party under Chapter V of the Convention. This, again, is an innovative provision. It tracks the setting up of Financial Intelligence Units (FIU's) in States which

are members of the Egmont Group which is concerned mainly with exchanges of information on money laundering activity and, in fact, Article 66 enjoins states which have not already done so, to consider setting up FIU's.

The penultimate Article in the Chapter is Article 61 which deals with return and disposition of assets. This is an extremely important Article. It basically sets out the requirement for requested State Parties to return to requesting State Parties embezzled public funds. The concept of repatriation has led to considerable difficulties in the past, as highlighted in the examples given at the beginning of this article. Importantly, under Article 61, a requested State Party can waive the requirement of a final judgment being given in the requesting State Party and return property when the requesting State Party "*reasonably establishes its prior ownership of...confiscated property to the requested State Party or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property*". This provision is, again, similar to the existing procedures in Switzerland which enable the Swiss criminal courts to confer "*damaged*" status on a civil party (including States). This allows the Swiss criminal court to order confiscation of assets and repatriation to the "*damaged*" State.⁸

The Articles described above have changed significantly from the Articles which appeared in the previous draft of the Convention. It remains to be seen whether Chapter V will change again when the draft comes up for further consideration in late September.

What Chapter V sets out to do is to encourage States to set up comprehensive regimes of mutual legal assistance which are designed to be as helpful as possible to requesting States. It is to be hoped that requested States will take heed and observe the spirit as well as the letter of the aims of Chapter V making it less and less easy for rogue Heads of State to pillage their impoverished citizens.

Notes

- 1 During the latter half of 2003, the precise formulation of the draft United Nations Convention against Corruption was scrutinised and debated in Vienna. At this writing, the final document was to be open for signature in December 2003, in Monterrey, Mexico.
- 2 *In the Footsteps of Mr Kurtz* (New York: Harper Collins, 2001) p308 - a fascinating account of the Mobutu years.
- 3 Art 61.3 (a) and (b).
- 4 Sunday Mail (Australia) 6 August 2003 - according to the article Emelda Marcos has appealed this decision, claiming that she and her three children were deprived of due process: the existence of this approval does not appear to be delaying the hand-over of funds.
- 5 Article 67 bis: 2(a).
- 6 Evidence given to the International Development Committee, a UK Parliamentary Select Committee, whose Fourth Report, on Corruption, was published on 22 March 2001.
- 7 Art 64: in this section, Articles will be referred to in the order in which they appear in the draft Convention. The numbering is not sequential, however: it runs thus - 64, 65, 67, 67 bis, 60, 60 bis, 68, 61 and 66.
- 8 The use of this procedure was dramatically illustrated in August 2003 when the Geneva Examining Magistrate ordered assets confiscated from Benazir Bhutto and her husband Asif Zadari to be returned to Pakistan.



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