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Asset Recovery under the United Nations Convention against Corruption: challenges and opportunities

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ABSTRACT

The main challenges to recovering stolen assets abroad are related to the difficulties of national legal orders to overcome traditional differences and adopt harmonized solutions to fighting corruption. The United Nations Convention against Corruption (UNCAC) signed in 2003 is the first universal legal instrument to have an entire chapter dedicated to asset recovery and was celebrated for providing the means for more effective repatriation. This thesis intends to verify whether the UNCAC is in fact able to harmonize national legal orders by setting enforceable international parameters for asset recovery. It first identifies the main obstacles to recovering assets abroad by means of case studies. It then analyses whether and how the identified obstacles were addressed by UNCAC and, finally, it verifies whether the mechanisms to secure compliance with UNCAC provisions were put in place and makes suggestions to improve implementation of the Convention.

INTRODUCTION

In the recent decades, there is an identifiable predisposition of international community to cooperate with foreign governments in the effort to recover the assets[1] looted by corrupt politicians. That tendency was corroborated by the events following the Arab uprising of 2010-2011. Less than a week after the resignation of former President of Tunisia, Zine al-Abidine Ben Ali, the Swiss Federal Council announced the freezing of all assets that the Ben Ali family and their associates might hold in the country[2]. The Swiss announcement was followed by similar action by Austria[3], on 29 January 2011, and the European Union[4], on 31 January 2011.

In the case of former Egyptian President Hosni Mubarak, the Swiss Federal Council prepared the freezing order in advance and made it public on the same night he resigned from office[5]. The family of Muammar Kadhafi had their assets frozen by the Security Council Resolution 1970 (2011) on 26 February 2011 despite the resistance of the Libyan president to succumb to public pressure and

[1] For the purposes of this thesis, asset recovery shall be understood as any act aiming at the repatriation of property directly or indirectly linked to a criminal offence located in a foreign jurisdiction. Asset recovery cases may include, inter alia, any of the following acts: tracing, seizing or freezing, confiscating or forfeiting assets of any kind abroad. The Stolen Assets Recovery Initiative (StAR) provides a similar definition to the one used in this thesis: "pursuing assets through criminal or non-conviction based (NCB) confiscation or through proceedings in a foreign jurisdiction or through a private civil action" (J.P. Brun, L. Gray, C. Scott and K. M. Stephenson, Asset Recovery Handbook: A Guide for Practitioners, StAR Initiative, World Bank, (2011) 5). The Secretary General of the United Nations in the foreword of the United Nations Convention against Corruption, when referring to the obligation of Member States in regard to asset recovery, also refers to a similar concept, namely, "to return assets obtained through corruption to the country from which they were stolen."

[2] Conseil Federal Suisse, Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Tunisie, 19 jan 2011, at http://www.admin.ch/dokumentation/gesetz/00068/index.html?lang=fr&unterseite=yes. See also Guardian, *Switzerland freezes assets of Zine al-Abidine Ben Ali and Laurent Gbagbo: Swiss president says measures against ousted Tunisian president and Ivory Coast incumbent will be imposed with immediate effect*, 19 January 2011, at http://www.guardian.co.uk/world/2011/jan/19/switzerland-freezes-assets-ben-ali-gbagbo

[3] News24, *Austria freezes Ben Ali's assets,* 29 January 2011, at http://www.nytimes.com/2011/02/01/world/africa/01briefs-Tunisia.html?_r=1

[4] New York Times, *Tunisia: Ex-President's Assets Frozen*, 1 February 2011, at http://www.nytimes.com/2011/02/01/world/africa/01briefs-Tunisia.html?_r=1

[5] Conseil Federal Suisse, Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la République arabe d'Égypte, 2 feb 2011, at http://www.admin.ch/dokumentation/gesetz/00068/index.html?lang=fr&unterseite=yes. See also Reuters, *Swiss freeze possible Mubarak assets*, 11 February 2011, at http://www.reuters.com/article/2011/02/11/us-swiss-mubarak-idUSTRE71A58R20110211.

resign as head of state[6]. The Security Council explicitly affirmed its intention to return the frozen assets at a later stage to the people of Libya[7].

Global concern about corruption, however, is a relatively recent phenomenon. Bribes and other corrupt activities were largely supported or overlooked in colonies and former colonies by western powers to secure beneficial treatment and influence[8]. Especially during the Cold War, in exchange of political support[9], both Western and Soviet blocs have continuingly provided financial aid to foreign governments knowing that those resources would be deviated by despotic leaders. Furthermore, financial centers, many times located in the developed world, have been keen to attract rather suspicious funds by providing investment services with strict secrecy rules to political leaders[10].

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[6] As decided in relation to Ben Ali and Mubarak families, the Swiss Federal Council also ordered the freezing of Kadhafi family. See Conseil Federal Suisse, Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Libye, 21 fevrier 2011, at http://www.admin.ch/dokumentation/gesetz/00068/index.html?lang=fr&unterseite=yes.

[7] S.C. Resolution 1970 (2011), 6491st meeting, 26 February 2011, UN doc. S/RES/1970 (2011), operative paragraph 18.

[8] M. Pieth, *Recovering Stolen Assets – a new issue, in* M. Pieth. (ed.) Recovering Stolen Assets, Peter Lang (2008) 3. Alongside France and the US, Belgium was one of the main donors of foreign aid that was fundamental to maintaining Mobutu Seko in power. See D. Acemonglu, T. Verdier and J. A. Robinson, Alfred Marshal Lecture Kleptocracy and divide-and-rule: a model of personal rule, paper presented as the Marshall Lecture at the European Economic Association's Annual meetings in Stockholm, 24 August 2003. 171-172 and W. Reno, *Sovereignty and Personal Rule in Zaire,* 1 African Studies Quarterly 3 39 (1997) 41-42. According to Schraeder, "the establishment of a large and powerful foreign aid programme in francophone Africa, during cold war became a 'keystone of French foreign policy," that saw the region as "a natural French preserve (*domaine reserve,* or *pré-carré),* off limits to other foreign powers". This competition for influence in Africa led to the granting of foreign aid to authoritarian regimes. P. J. Schraeder, *From Berlin 1884 to 1989: Foreign Assistance and French, American and Japanese Competition in Francophone Africa,* 33 The Journal of Modern African Studies 4 539(1995) 540-541 and 545.

[9] Scher quotes as a classic case Mobutu Sese Seko, from the Democratic Republic of Congo (former Zaire), who received an estimated amount of USD 2 billion in aid from the US in exchange of support during the Cold War. Through the embezzlement of public funds, Mr. Seko was able to secure an extraordinary private wealth, which included the buying of airplanes and European chateaux. D. Scher, *Asset Recovery: Repatriating Africa's looted billions,* 14 African Security Review 4 (2005) 18. The US is also accused of having overlooked the deviation of aid granted to Haiti during the Duvalier regime, because the country "was strategically located adjacent to Cuba and was perceived as a bulwark against communism". L. A. Benton and G. T. Ware, *Haiti a case study of international response and the efficacy of non-governmental organizations in the crisis,* 12 Emory Int'l L Review 851 (1998) 858. See also J. Bajolle, The Origins and Motivations of the Current Emphasis on Corruption: The Case of Transparency International, paper presented at Workshop 2: The International Anti-corruption Movement, European Consortium for Political Research Joint Sessions of Workshops, Nicosia, Cyprus, 25-30 April (2006), 5-6.

[10] Pieth (2008) *supra* note 8, at 4-5. Pieth uses as an example some few reputable financial institutions that accepted to hold tons of gold from Pinochet, to have held accounts with a regular flow of hundred millions of dollars of well-known intermediaries to President Dos Santos from Angola, and to receive

However, since the late 70s, a reduction of patronage of corrupt regimes could be perceived, mainly due to a gradual recognition that the adverse consequences of corruption could cross national borders[11]. Domestic adverse effects of corruption could always be easily named – it prevents national income to be properly invested in public services as education, health and infrastructure, it lowers investment and, by redistributing national wealth in an incoherent and unfair manner, it can create or exasperate domestic tensions –, but the transnational effects of corruption became evident only in the last decades[12].

Globalization was fundamental to turn corruption from a domestic problem into an international issue. The first response to foreign corrupt acts derived from the Watergate case. The Securities and Exchange Commission's investigations revealed that US multinational corporations had made illegal payments in foreign countries[13]. Those investigations lead to the introduction and consequent approval of a bill that criminalized foreign bribery: the US Foreign Corrupt Practices Act (FCPA) of 1977. As the East European markets began to open in the 1990s, corruption started to have a direct effect on international competition. Some corporations deliberately adopted strategies to cut out competition by offering bribes to foreign officials[14]. In order to level the playing field in international trade, the US multinationals started pressing for the internationalization of the FCPA standards[15]. As a result, the US government succeeded in negotiating the OECD Convention on Combating Bribery of Public Officials which entered into force on February 15, 1999.

Also, since the late 1980s, international standards of customer due diligence and other preventative measures were gradually imposed on the private sector, mainly on financial institutions, as instruments to track and forfeit the proceeds of crime. The strategy focusing on the criminalization of money laundering began

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deposits of hundreds millions of dollars from Sani Abacha without questioning the manifestly illegal origin of those assets.

[11] G. Jorge, Recuperación de actives de la corrupción, Editores Del Puerto (2008) XIII

[12] T. R. Snider & W. Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis,* 40 Cornell Int'l L.J. 691 (2007) 695

[13] *Ibid.* 696-697.

[14] Pieth. (2008) *supra* note 8, at 3.

[15] P. Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Oportunity?*, 8 Journal of International Economic Law 1 191 (2005) 195-196 and T. R. Snider & W. Kidane. (2007) *supra* note 12, at 698. See also Jorge. (2008) *supra* note 11, at XIII.

with the US policy against drug trafficking, but was quickly extended to other offences such as financial crimes, organized crime and finally corruption, and was enforced by international organizations and bodies such as the World Bank, the International Monetary Fund (IMF) and the Financial Action Task Force[16]. Therefore, helping laundering the funds derived from corruption has increasingly become a costly alternative to the reputation of financial institutions. In that regard, when at least six of the major Swiss banks were found to be involved in the laundering of Sani Abacha criminal proceeds, the Chairman of the Swiss Banking Commission, Kurt Hauri, stated that "The mere fact that significant assets of dubious origin, from people close to former Nigerian President Sani Abacha, were deposited at Swiss banks is highly unsatisfactory and damages the image of Switzerland as a financial centre"[17].

Finally, corruption also facilitates the emergence of other global security threats[18] such as transnational organized crime, human trafficking, arms smuggling, drug trafficking and terrorism. Corruption and organized crime are interdependent activities[19]. Organized criminal groups depend on bribes and other forms of corruption to exercise their activities[20]. Customs officials are regular targets of bribes because they can facilitate the flow of illicit goods[21]. Criminal organizations also corrupt the Judiciary and other institutions in order to obtain protection for their members[22].

[16] Pieth (2008) *supra* note 8, at 6. See also Jorge (2008) *supra* note 11, at XVIII.

[17] BBC News, *Swiss banks rapped over Abacha loot,* 4 September (2000) at http://news.bbc.co.uk/2/hi/africa/909972.stm

[18] Secretary-General Kofi Annan, "Message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity", delivered by Dileep Nair, Under-Secretary-General for Internal Oversight Services, at http://www.un.org/apps/sg/sgstats.asp?nid=365

[19] M. Chêne and R. Hodess, U4 expert answer: Organized crime and corruption, U4 Anti-corruption resource centre, 28 May 2008, 1

[20] E. Buscaglia and J. van Dijk, *Controlling organized crime and corruption in the public sector*, 3 Forum on Crime and Society, 1 and 2, December 2003, 11.

[21] *Ibid.* 11. Chêne and Hodess affirm that "Mozambique, for example, has become an international transit-point for narcotics through widespread collusion between criminal groups and state officials. Maputo airport is known to be a low risk exit and entry point for drug smugglers and the state is increasingly perceived to become a *criminalised state*". (2008) *supra* note 19, at 2.

[22] E. Buscaglia and J. van Dijk. (2003) *supra* note 20, at 12.

On the other hand, corrupt politicians may seek support of mafia-like groups to maintain themselves in power[23]. Those close links can go as far as the financing of political campaigns of high-level politicians by known criminals[24]. Lately, a significant global concern has been the funding and the provision of sensitive material and, even safe haven, by corrupt governments to criminal and terrorist groups[25]. As Elliot describes, widespread corruption and weak institutions in Russia might have opened the door for terrorist groups to take advantage of the loss of control of the government over nuclear weapons and nuclear materials[26]. Therefore, the links between corrupt regimes and organized crime has been perceived as having increasing spill-over effects on the national security of other states.

The successful integration of global economy allied to technological developments, therefore, helped transform corruption into a global issue, in the sense that events occurring nationally impacted the whole world[27]. It also meant, however, that corruption could not anymore be effectively dealt as a domestic issue, but it required a coordinated action by the international community. In other words, as a global problem, corruption required new strategies of regulation and control leading to an adjustment of national legal orders with the purpose of making it feasible to investigate, prosecute and recover the proceeds of that offence in different jurisdictions.

The problem is that national legal orders developed as self-centered systems structured to deal principally with domestic issues. Even where common general principles are present, the legal measures and tools for crime prevention and prosecution vary enormously among States. Those profound differences that emerged in national legal systems still impose severe constraints on the capacity of

[23] *Ibid.* 16. Again, Chêne and Hodess offer some examples of these kind of links: "In West Africa, for example, there are many examples of high ranking personalities close to political power who are directly involved in illicit activities, suggesting strong links with organised crime. In 2005, for example, a member of the Ghanaian parliament was arrested in New York, trying to smuggle 67 Kilograms of heroin. The son of former President Ould Haidally in Mauritania was also arrested on cocaine trafficking charges in 2007." (2008) *supra* note 19, at 3.
[24] E. Buscaglia and J. van Dijk (2003) *supra* note 20, at 24.
[25] Bajolle (2006) *supra* note 9, at 7.
[26] K. A. Elliot, *Corruption as an International Policy Problems: Overview and Recommendations, in* K. A. Elliot, Corruption and the Global Economy, Institute for International Economics (1997) 176
[27] U. Beck, World at risk, Polity (2007) 8.

states to coordinate themselves to fight corruption. Therefore, while the freezing of assets, as a initial response of international community to the claims of countries that saw their financial resources looted by corrupt leaders, have been rather quick[28], the effective return of these assets to the requesting country have taken years or even decades.

Usually quoted as a successful case of asset recovery, it took nearly 7 years for Nigeria to see the return of the money held in Switzerland by the Abacha family, amounting to over USD 500 million[29]. From the estimated USD 5 billion stolen by General Abacha, Nigeria was able to track only USD 2.3 billion in bank accounts located in Switzerland, Luxembourg, Liechtenstein, Jersey, United States and United Kingdom and many of those assets are still under judicial scrutiny in those countries[30]. Following Ferdinand Marcos' fall from power in 1986, the Philippines government estimated that the former President and his associates accumulated USD 5 to 10 billion through corrupt practices[31]. Only in 2003, more than 17 years after the beginning of the investigations, was the country able to recover about USD 684 million from foreign jurisdictions[32].

On the other hand, the USD 5,7 million found to belong to Duvalier family in Swiss banks and frozen since 1986 has not yet been returned to Haiti, due to the lack of a criminal conviction against the Duvaliers in the requesting country[33]. The roots of those unsuccessful or ineffective asset recovery cases are the incapacity of States to make national legal orders communicate across and overcome differences

[28] In 1986, shortly after former President Ferdinand Marcos fled from Philippines the Federal Council of Switzerland filed a then unprecedented order to freeze the former dictator's assets being held in Swiss banks. In 1999, in response to a mutual legal assistance request by Nigeria, a Swiss investigating judge ordered the freezing of USD 670 million dollars linked to the Abacha family. General Abacha died in June 1998. In furtherance of the Swiss action, more than USD 700 million were also frozen in Liechtenstein and Luxemburg. See D. Chaikin, Tracking the proceeds of organized crime – the Marcos case, paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service and held in Canberra, 9-10 March 2000, at 10 and T. Daniel and J. Maton, *Recovering the proceeds of corruption: General Sani Abacha - a nation's thief*, *in* M. Pieth (ed.), Recovering Stolen Assets, Peter Lang (2008) 67.

[29] Daniel and Maton (2008) *supra* note 28, at 69.

[30] *Ibid.* 69 and 77

[31] StAR Initiative, Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, UNODC and World Bank (2007) 20

[32] StAR Initiative, Ferdinand Marcos – case study, World Bank and UNODC, at http://www1.worldbank.org/publicsector/star_site/documents/Case_Studies_02.pdf

[33] Basel Governance, *Duvalier assets cannot (yet) be returned to Haiti*, 3 February 2010, at http://www.assetrecovery.org.

between jurisdictions. The challenge imposed by the global fight against corruption is making legal systems incorporate similar parameters or adopt solutions that have proved effective in other jurisdictions.

The attempt to bring national legal orders together in order to allow or enhance the criminal intervention over certain issues that are common to different countries, referred here as internationalization of criminal law[34], can take different forms. It may result from horizontal cross-fertilization (*reference-croisées*) of national legal systems and between national and international courts, either through legislation or jurisprudence[35]. The internationalization of criminal law may also derive from international pressure from other states or international organizations leading, e.g. to the ratification and internalization of international treaties and conventions.

According to Delmas-Marty, cross-fertilization itself cannot secure an effective integration of national rules, it may at most promote the openness to a foreign legal order that may or not facilitate the cooperation process[36]. On the other hand, a vertical imposition of integration – by means of an international legal instrument – if too quick or too rigid can easily lead to rejection and therefore disintegration.

The process of internationalization of criminal law through the ratification of an international convention can aim at the unification, the standardization or the harmonization of diverse legal orders[37]. Unification means the substitution of distinct orders or rules by a single order or code[38]. Standardization aims at incorporating into national legal systems identical rules[39]. Harmonization is

[34] M. R. Machado, Internacionalização do direito penal. A gestão de problemas internacionais por meio do crime e da pena, Direito FGV, Editora 34 (2004) 25. On the internationalization of law see also M. Delmas-Marty. Trois défis pour un droit mondial. Editions du Seuil (1998).
[35] M. Delmas-Marty, Un ordre juridique en formation?, Extrait de la conclusion des cours prononcés au Collège de France en 2005, à paraître aux Editions du Seuil en 2006, "Un pluralisme ordonné", tome II des Forces imaginantes du droit (2005) 4-5.
[36] *Ibid.* 5.
[37] Machado (2004) *supra* note 34, at 25-27.
[38] *Ibid.* 26.
[39] *Ibid.* 26.

achieved by the equivalence of national legislations at the same time that the plurality of legal orders is preserved[40].

The main attempt to internationalize the legal treatment of the offence of corruption and overcome the obstacles to recovering assets in foreign jurisdictions is the United Nation Convention against Corruption (UNCAC)[41] signed in December 2003. As the most wide-ranging instrument to date relating to the fighting of corruption, the UNCAC has provisions covering four major areas: preventative measures, criminalization of different forms of corruption, international cooperation and asset recovery[42]. The UNCAC does not impose one single formula for achieving its objectives or the modification of the essential principles of national legal orders, and therefore can be classified as an attempt to internationalization of criminal law through the harmonization of legal orders in regard to fight against corruption.

In order to make the internationalization process more stable and durable and consequently making the correlations between legal systems stronger, the international instrument must have mechanisms to reinforce the factors of cohesion[43]. One mechanism is drafting provisions in mandatory terms. Another is to create a mechanism to verify and assess the implementation of the convention. Through this mechanism, it is possible to submit national legislation to a functional verification to secure that in practical terms domestic legal orders have an effective equivalence[44].

When the United Nations Convention against Corruption was first signed in 2003, many celebrated that it addressed the main difficulties to effective asset recovery[45], while others have expressed doubt in regard to its enforceability[46]. The

[40] *Ibid.* 26-27.
[41] It is most widely adhered multilateral convention in regard of corruption with 152 State Parties, as for July 2011.
[42] Webb (2005) *supra* note 15, at 205-206 and Jorge (2008) *supra* note 11, at XX.
[43] Delmas Marty (2005) *supra* note 35, at 6-8
[44] *Ibid.* 11.
[45] T. Daniel, *Repatriation of looted state assets: selected case studies and the UN Convention against Corruption,* Section on Legal Hurdles in Transparency International - Global Corruption Report (2004) and D. Vlassis and D. Gottwald, *Implementing the asset recovery provisions of the UNCAC, in* M. Pieth (ed.), Recovering Stolen Assets, Peter Lang (2008) 354.
[46] P. Webb (2005) *supra* note 15, at 209 and 228 and D. Claman, *The promise and limitations of asset recovery under the UNCAC*, *in* M. Pieth (ed.), Recovering Stolen Assets, Peter Lang (2008) 345-351.

main objective of this thesis, therefore, is to verify whether the UNCAC provides for the necessary means to achieve its proposed goals, by setting international parameters able to harmonize national legal orders in regard to corruption and, therefore, serving as an effective instrument to recover assets held by supposedly corrupt leaders abroad.

In Chapter 1, the thesis will examine previous cases to identify the strategies used by domestic law enforcement authorities to pursue assets overseas and point out the main obstacles faced regarding the final return of the assets. Alongside with the analysis of three major corruption cases involving former heads of State – Duvalier, Marcos and Abacha -,the thesis will also look into two Brazilian cases, in which different asset recovery strategies were used. The main difference between the three first cases and the Brazilian cases is that former relates to the looting by heads of state and his associates of a large portion of the country's wealth, which was naturally accompanied by international commotion and consequent political pressure to see the assets return to the victim state. Brazilian cases, in contrast, usually involve moderate values, meaning at most tens of millions of US dollars[47], and naturally attract less attention from international media. . On the other hand, in the past decades Brazil has been the subject of "relentless and intense national political scandals"[48] that very often involve the transferring of corrupt proceeds abroad. According to the General-Coordinator of Asset Recovery of the Ministry of Justice of Brazil, by April 2011 there were five to six hundred ongoing cases of asset recovery in Brazil and at least 10% of those cases involved persons charged with corruption[49]. If added together, the amounts involved in those cases could reach figures comparable to those involved in Duvalier, Marcos and Abacha cases. However, until July 2011, Brazil was only able to repatriate around USD 3 million through asset recovery procedures[50]. One of the purposes of the thesis is therefore to compare the legal strategies used to recover

[47] Classic cases of asset recovery may involve hundreds of millions or even billions of US dollars.
[48] D. Zirker, The Corruption Conundrum in Contemporary Brazil, paper prepared for presentation at the International Congress of the Latin American Studies Association, Rio de Janeiro, Brazil, June 11-14, 2009, at 1.
[49] Numbers provided by Mr. Leonardo Ribeiro, General-Coordinator of Asset Recovery of the Department of Asset Recovery and International Legal Cooperation of the Ministry of Justice of Brazil (DRCI/MJ) during interview held on 7 April 2011.
[50] *Ibid.*

assets in “big” and “small” cases and to verify whether they face the same or different obstacles.

Then, thesis will analyse, in Chapter 2, the international legal framework offered by UNCAC to assist countries in the stages necessary to the final repatriation of illicit monies, namely tracing – including measures to lift banking and other secrecies – , freezing and seizing, managing and confiscating assets abroad. In the same Chapter, based on the analysis of self-assessment reports and the structure of the newly approved peer-review mechanism of UNCAC, the thesis will state whether UNCAC provisions have been effectively implemented and whether weaknesses to the asset recovery procedure still exist. Finally, the thesis aims to make recommendations as to how UNCAC implementation can be improved.

CHAPTER 1 – CORRUPTION ASSET RECOVERY BEFORE THE UNCAC: CASE STUDIES

The following subsections focus on the analysis of five concrete cases of asset recovery: the Duvalier, the Marcos, the Abacha, the TRT-SP and the Propinoduto cases. The first three cases are among the most notorious cases of attempts to repatriate assets deriving from corruption and concern the looting of a state's wealth by its own rulers and, for that reason, are to be considered the traditional type of asset recovery cases. The purpose is to verify whether the so-called "grand corruption" cases that originated in countries from three different continents, America, Asia and Africa respectively, face the same difficulties and adopt the same legal strategies to repatriation even if the victim countries are from different legal traditions. Another reason for choosing the latter two cases is the current shortage of successful examples of asset recovery.

The Brazilian examples, on the other hand, represent a different type of case. Not only do they involve smaller sums of deviated funds, but also refer to corrupt activities carried out by lower ranking public officials. By comparing the traditional asset recovery cases to cases of "small" corruption[51], the chapter aims to identify whether the obstacles they face are the same and to analyse eventual discrepancies in the responses of courts to apparently similar legal issues. The cases are addressed in chronological order to allow the reader to evaluate whether more recent cases have benefited from the experiences of previous ones.

The advantage of adopting a case-based approach is that concrete examples can better illustrate the impact of substantive and procedural differences among jurisdictions and, therefore, facilitate the identification of the obstacles to recovering assets abroad. One similarity between the chosen cases is that the corrupt agents involved tended to use typical money laundering schemes to conceal the origin of the assets[52], such as transferring the money through various

[51] Vlassis and Gottwald (2008) *supra* note 45, at 354.

[52] Jorge (2008) *supra* note 11, at XVI and Pieth (2008) *supra* note 8, at 5. See also P. Atkinson, *Introduction, in* Tracing Stolen Assets: A Practitioner's Handbook. Basel Institute on Governance. International Centre for Asset Recovery. (2009) 19.

jurisdictions, especially those with high secrecy standards[53]; using shell companies and intermediaries[54]; converting criminal proceeds into other type of assets[55], mainly luxury goods; or mingling them with assets of legitimate origin[56].

Pieth mentions some of the reasons behind the option to send corrupt money abroad rather than keeping it in the domestic financial system. One justification is that the volatility of the country's currency may make it unsafe to keep assets domestically[57]. Also assets which are kept home are easier to detect in the event of an upcoming investigation[58]. Finally, holding assets abroad may be useful in the event of a future exile[59].

One of the first steps in order to recover stolen assets which have been sent abroad is to choose the legal strategies to be pursued[60]. The different strategies involve initiating proceedings in domestic or in foreign jurisdictions. Domestically, the law enforcement authorities may start a criminal prosecution aiming at the conviction of the defendant and the confiscation of assets[61] or, where national legislation permits, start a non-conviction based (NCB) confiscation proceeding[62]. Since the assets are located abroad, as well as other types of evidence, in both cases, it will be necessary to rely on some of form of international legal cooperation[63] to gather information, to enforce orders and to obtain the return of the assets from a foreign jurisdiction[64].

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[53] Pieth (2008) *supra* note 8, at 5.
[54] *Ibid.* 5. See also B. Bertossa, *Mechanisms for Gathering Evidence Abroad, in* Controlling Corruption In Asia And The Pacific ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2003) 180.
[55] Atkinson (2009) *supra* note 52, at 19.
[56] *Ibid.* 19.
[57] Pieth(2008) *supra* note 8, at 4.
[58] *Ibid.* 4.
[59] *Ibid.* 4.
[60] Brun et al. (2011). *supra* note 1, at 5.
[61] *Ibid.* 9. The conviction-based confiscation can be either a direct effect of the conviction and be declared by a criminal court in the same sentence as the conviction, a solution usually adopted by civil law systems, or can be declared in a independent civil action after the conviction was confirmed in a criminal case. See W. Hofmeyr, *Navigating between mutual legal assistance and confiscation systems, in* M. Pieth (ed), Recovering Stolen Assets. Peter Lang. (2008) 136.
[62] Brun et al. (2011) *supra* note 1, at 9.
[63] The coverage of the term "international legal cooperation" adopted in the thesis is broad as suggested by Brun, Gray, Scott and Stephenson includes "informal assistance," mutual legal assistance (MLA) requests, and extradition. (2011) *supra* note 1, at 6.
[64] *Ibid.* 9.

One of the recognized advantages of starting a criminal prosecution domestically is the social impact that a corruption conviction may have in building up democratic institutions and to having a deterrent effect[65]. Furthermore, the knowledge of domestic legislation and tools of investigation make it easier to gather evidence to lead to a final conviction and confiscation of assets[66]. In terms of international legal cooperation, many jurisdictions only grant mutual legal assistance (MLA) requests for the forfeiture of assets in conviction-based confiscation proceedings[67], making a criminal prosecution preferable to civil action for obtaining the collaboration of foreign countries[68].

One possible difficulty faced by states when adopting this strategy is that in order to obtain MLA, the requesting country must also comply with dual criminality requirements, i.e. the conduct which gave rise to the request should also be a crime in the foreign jurisdiction[69]. Furthermore, sometimes the option of starting a criminal proceeding domestically may not be available because the defendant has died, fled or is immune to jurisdiction[70]. In other circumstances, the evidence against the defendant is not strong enough, even if the legal origin of the assets cannot be proven[71].In those cases, an alternative can be a non-conviction based confiscation procedure.

The main advantage of initiating non-conviction based confiscation proceedings, in jurisdictions where this kind of legal action is available[72], is that it usually requires a lower standard of proof[73], since the confiscation does not the depend on the conviction of the offender, but only on the evidence of the illegal

[65] *Ibid.* 11.
[66] *Ibid.* 11.
[67] Examples of countries that cannot grant MLA in non-conviction based confiscation proceedings are: Argentina (See FATF and GAFISUD, Argentina. Mutual Evaluation Report, 22 October 2010 at 192), Luxembourg (See FATF, Luxembourg. Rapport d'évaluation mutuelle, 19 février 2010 at 245) and Germany (FATF, Germany. Mutual Evaluation Report, 19 February 2010 at 283).
[68] Brun et. al (2008) *supra* note 1 , at 11 and Hofmeyr (2008) *supra* note 61, at 145.
[69] Brun et al. (2008) *supra* note 1, at 11 and Hofmeyr. (2008) *supra* note 61, at 138.
[70]Brun et al. (2011) *supra* note 1, at 11 and T. Greenberg, L. M. Samuel, W. Grant and L. Gray, Stolen Asset Recovery: A good-practices guide to non-conviction based asset forfeiture, StAR Initiative, World Bank (2009) 15.
[71] W. Hofmeyr (2008) *supra* note 61, at 135.
[72] Examples of jurisdictions that have some sort of NCB confiscation procedure are: Fiji, Guernsey, Ireland, Island of Man, Israel, Jersey, Liechtenstein, The Philippines, Slovenia, Switzerland, Thailand, South Africa, United States and United Kingdom. See T. Greenberg et al. (2009) *supra* note 70, at 23.
[73] Brun et al. (2011) *supra* note 1, at 11 and Greenberg et al. (2009) *supra* note 70, at 13.

origin of the assets. Therefore, whereas in a criminal case the conviction demands that the offence and the guilt of the defendant should be proven "beyond reasonable doubt"[74], some non-conviction based confiscation systems only demand a "balance of probabilities" standard of proof to grant the forfeiture of the assets[75].In some circumstances, NCB proceedings can be used retroactively, which means to "recover proceeds acquired before the law came into force"[76].

As explained above, however, it is not uncommon for foreign jurisdictions to impose restrictions on providing MLA to non-criminal proceedings. Both domestic strategies are however dependent on the capacity and the political will of the state authorities to prosecute the responsible persons or to go after the criminal assets[77].

Externally, countries that seek to recover looted assets may decide to bring a private action before a foreign court[78] and/or "to support a criminal or NCB confiscation proceedings that has been initiated in another jurisdiction against the corrupt official, associates or identified assets"[79].

Bringing a private claim before a foreign court will usually require the hiring of lawyers in that jurisdiction[80]. It shall be founded in some kind of liability, such as torts, breach of contract or illicit enrichment[81]. As mentioned by Brun et al, in those type of actions, the litigants have the advantage of a broader control of the proceedings and greater access to assets which may be registered in the name of third parties[82], but, on the other hand, litigating in a foreign jurisdiction can be highly expensive, not only because of the legal fees, but also in relation to the costs of executing different investigating and procedural measures abroad[83]. Another

[74] In civil law countries, this standard of proof is also referred as "intimate conviction" of the judge. Greenberg et al. (2009) *supra* note 70, at 13.
[75] Brun et al. (2011) *supra* note 1, at 11 and Greenberg et al. (2009) *supra* note 70, at 13.
[76] Hofmeyr (2008) *supra* note 61, at 138 and Greenberg et al. (2009) *supra* note 70, at 44.
[77] Brun et al. (2011) *supra* note 1, at 11.
[78] *Ibid.* 12 and Hofmeyr (2008) *supra* note 61, at 145.
[79] Brun et al. (2008) *supra* note 1, at 13.
[80] *Ibid.* 12 and Hofmeyr (2008) *supra* note 61, at 145.
[81] Brun et al. (2008) *supra* note 1, at 12.
[82] *Ibid.* 12-13.
[83] *Ibid.* 12 and E. Monfrini, *The Abacha case, in* M. Pieth (ed.), Recovering Stolen Assets, Basel Institute on Governance, Peter Lang (2008) 41. According to Hofmeyr, "skilled investigator can cost as much as USD 18,000 per day, in addition to the high costs of the top lawyers that are required". (2008) *supra* note 61, at 145.

disadvantage is that banking secrecy laws may impose obstacles to access information on the location of assets through a civil proceeding[84].

The second legal strategy to be pursued abroad is either to ask the competent authorities abroad to start a criminal investigation of their own[85], by e.g. filing a criminal complaint, or to support an on-going criminal case already opened in the foreign jurisdiction[86]. The cooperation in this case may be provided by "sharing incriminating evidence and a case file"[87] with the other State, by answering eventual MLA requests sent by the foreign authorities or, when it is authorized by the foreign legal system, to participate in the proceedings as civil third party (*parte civile*)[88]. Asset recovery through a criminal prosecution in a foreign jurisdiction may be obtained as direct court order[89], when the State is recognized as victim of the corruption offences for example, or by an agreement between the two jurisdictions[90].

Generally, none of the abovementioned domestic or external strategies are mutually exclusive[91]. As case analysis will attempt to demonstrate, countries have chosen to follow more than one of the strategies, which, in many ways, have proven to be complementary, as they assisted in the positive outcome of one another.

Regardless of the legal strategy pursued, the process of recovering assets abroad involves at least four phases: the investigation and asset tracing, the freezing and/or seizing of assets, the judicial phase, and the return of assets[92].

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[84] Monfrini (2008) *supra* note 83, at 42.
[85] *Ibid.* 13
[86] *Ibid.* 13
[87] *Ibid.* 13
[88] *Ibid.* 13. See also Bertossa (2003) *supra* note 54, at 182.
[89] Brun et al. (2011) *supra* note 1, at 8 and 13
[90] *Ibid.* 13.
[91] In some jurisdictions it is not possible to initiate simultaneously a criminal prosecution and a NCB confiscation proceeding. In addition, other legal systems do not allow a criminal investigation to start if the same facts are object to a criminal proceeding in another jurisdiction.
[92] This division is similar to the one adopted by Atkinson (2009) *supra* note 52, at 20 and by Brun et al. (2011) *supra* note 1, at 5-8. Atkinson, however, classifies the collection of intelligence and the initial checks on the authenticity of the information that triggered the investigation into a separate pre-investigative phase. For the purposes of this thesis, these initial procedures are included in the investigation phase, because in some situations, the intelligence gathering, in special financial intelligence reports, is only triggered after a case have been started and law enforcement authorities specifically request information to the Financial Intelligence Unit (FIU) or when the financial institution

Those phases will be presented sequentially to facilitate comprehension, but they are not necessarily consecutive; in fact, in practice they rarely are. As it will be seen when dealing with the concrete cases, sometimes an asset, such as a bank account, is traced and consequently seized, but information on transfers to and from that account will only be received at a later date, and that may lead to further tracing activities.

The first phase involves the gathering of evidence in order to reestablish the paper trail of the operations of money laundering and locating the proceeds of crime[93]. The investigative measures can be performed by law enforcement authorities of the country where the proceeds originated, by the authorities of the country where the assets are located, or even by hired private investigators[94]. The investigation can rely on publicly available sources, as public registries, but usually they will also involve measures that in general depend on official authorization, such as obtaining banking records[95].

Once the assets are located, as soon as feasible, measures to remove them from the control of the person under investigation and avoid their dissipation or transference should be put in place[96]. The requirements for enforcing freezing or seizing orders may vary among different jurisdictions. In some countries, the freezing of assets can only be ordered by a judge, whereas in other jurisdictions there is a possibility for emergency administrative freezing, by the Financial Intelligence Unit for example, but in that case the measure can

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starts an enhanced due diligence procedure regarding a client after hearing about an on-going investigation. Furthermore, Atkinson includes the freezing and seizure phase into the investigation phase since they are the natural result of the tracing of assets. For didactical reasons, in this thesis the freezing and seizure of assets will be considered a different phase because, as will be demonstrated by the cases study, they present rather different obstacles to the asset recovery than the tracing of assets. Finally, Brun et al. included a fifth phase which refers to the enforcement of orders. In the division adopted in this thesis the enforcement of orders will be considered within the phase related to the measure sought by the order to be enforced, therefore, if the order refers to the gathering of evidence, its enforcement will be considered to be included in the investigation phase, if it aims at securing assets, it will be analysed as part of the freezing and seizing phase and if its purpose is to determine the repatriation of assets, it will make part of the final asset recovery phase.

[93] Brun et al. (2011) *supra* note 1, at 5. See also Atkinson (2009) *supra* note 52, at 20.

[94] Brun et al. (2011) *supra* note 1, at 5.

[95] *Ibid.* 5. See also Atkinson (2009) *supra* note 1, at 20.

[96] Brun et al. (2011) *supra* note 1, at 6. See also B. Bertossa, *What makes asset recovery so difficult in practice? A practicioner's perspective, in* M. Pieth (ed.), Recovering Stolen Assets (2008) 21.

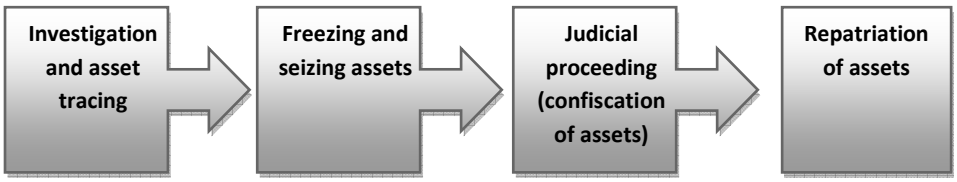
usually only last for a few days.[97]Nevertheless, as a rule the requesting authority must bring some evidence that links the targeted asset to the offence allegedly committed. A successful freezing or seizing order also depends on the ability of the requesting authority to give a precise description of the asset and its location, in addition to the execution of internal checks by the state where the assets are to be found[98]. Therefore, the effectiveness of the measures taken in the second phase rely largely on the comprehensiveness of the tracing executed in the previous phase.

During the third phase, the state should provide the necessary evidence to meet the burden of proof in order to achieve a final criminal conviction and/or the confiscation of assets or to obtain the recovery through a compensation or damages order[99].In the great majority of jurisdictions, the repatriation of assets is only possible if a final decision is presented to the authorities of the state where the assets are located.

The last phase involves the dealings made between the state to which the assets are to be repatriated and the state where the assets are located to secure the final recovery. The procedure for the repatriation can be described in a multilateral or bilateral treaty to which both states are parties, can be provided in domestic legislation or, in the absence of a legal instrument, can be settled by a special agreement between the parties[100]. In general, the "total recovery maybe reduced to compensate the requested jurisdiction for its expenses in restraining, maintaining, and disposing of the confiscated assets and the legal and living expenses of the claimant"[101].

[97] Brun et al. (2011) *supra* note 1, at 6. Luxembourg's FIU, for example, has such power.
[98] Bertossa (2008) *supra* note 96, at 21.
[99] Brun et al. (2011) *supra* note 1, at 7.
[100] *Ibid.* 8.
[101] *Ibid.* 8.

Figure 1: Phases of Asset Recovery[102]



Each of the four phases described above imposes different obstacles to the recovery of assets, resulting in a very lengthy and often unsuccessful process. These obstacles will be discussed in detail throughout the analysis of the cases below. The following Chapter discusses if those obstacles were addressed by the UNCAC.

1.1. The Duvalier Case[103]

The Duvalier case is an example of how the instability of governmental institutions and the lack of a defined strategy towards repatriation can impair a successful asset recovery. On the other hand, this case also shows how the willingness of the requested state to return the assets can contribute to the development of creative solutions to facilitate the return of proceeds of corruption to the victim state.

The Duvalier family ruled a violent and massive corrupt regime in Haiti from 1957 until 1986[104]. François Duvalier, later known as "Papa Doc", was elected President of Haiti in 1957, but soon after taking office he began to transform his

[102] This figure is based on the figure provided in Brun et al. (2011) *supra* note 1, at 6, with a few modifications.

[103] The analysis of the recovery of assets looted by the Duvalier family from Haiti will be restricted to those assets located in Switzerland. After Jean Claude Duvalier's fall, attorneys hired by the Haitian government found evidence that part of the money was also sent to France and the US. In the US, it is recorded that the proceeds were used to buy "real and personal property, to set up trust funds for their children and the like". According to Edelman, several requests were sent to the US under US Federal Statute, 28 U.S.C. § 1782 to obtain evidence for the criminal procedure in Haiti, as well as about six civil actions to recover the money were started in US Courts. D. P. Edelman, *Pursuing the assets of former dictators*, 81 Am. Soc'y Int'l L. Proc. (1987) 398.

[104] See J. Fergunson, Papa Doc, Baby Doc. Haiti and the Duvaliers, Basil Blackwell(1987) 30-118.

government into an autocratic regime, by severely repressing the opposition[105]. In an attempt to prevent a military *coup* against his regime, François Duvalier put in place a plan to weaken the armed forces and created a personal and extremely violent militia[106], known as the Tontons Macoutes[107]. With a clear mandate to "act as political cadres, secret police and instruments of terror"[108], the Tontons Macoutes were fundamental to consolidating Duvalier's power in Haiti. In 1964, Papa Doc promoted a referendum followed by a new constitution that awarded him with presidency for life and the capacity to nominate his successor[109]. Upon the death of François Duvalier in 1971, the presidency was passed over to his 19-year-old son, Jean-Claude Duvalier, nicknamed Baby Doc[110].

Corruption was widespread during both Duvalier governments. Many of the criminal profits originated from the embezzlement of the profits of commodities state-owned companies, such as the Régie du Tabac[111]. Part of the family wealth also allegedly originated from deviated amounts of foreign aid[112]. After a popular revolt beginning in 1985, Jean-Claude Duvalier fled the country on 7 February 1986[113].

1.1.1. The asset recovery procedure

On 4 April 1986, nearly 2 months after Duvalier's fall from power in Haiti, the Ministry of Foreign Affairs of Haiti sent a MLA request to Switzerland asking for the freezing of all assets located in the country belonging to former President Duvalier and his family on the basis that criminal proceedings had been

[105] *Ibid.* 39.
[106] According to Benton and Ware, it is estimated that the Tonton Macoutes have killed more than 40,000 thousand people and led thousands to exile. Benton and Ware. (1998) *supra* note 9, at 858. Fergunson quote as an example of the extreme violence of this militia the reprisal against the *Jeune Haïti* uprising of 1964, when hundreds belonging to mulatto families of the Jérémie community were massacred. (1987) *supra* note 104, at 48.
[107] Fergunson (1987) *supra* note 104, at 39-41.
[108] *Ibid.* 41.
[109] *Ibid.* 49.
[110] Edelman (1987) *supra* note 103, at 398.
[111] Fergunson (1987) *supra* note 104, at 53 and 70.
[112] According to Fergunson, in 1980, for example, the IMF granted to Haiti USD 22 million, from which USD 16 million "disappeared into Duvalier's various personal accounts". (1987) *supra* note 104, at 70.
[113] Fergunson (1986) *supra* note 104, at 119.

initiated in Haiti against the mentioned persons[114]. The Haitian government argued that during his presidency Baby Doc plundered over USD 900 million from public coffers[115]. Since Haiti and Switzerland had not signed a mutual legal assistance bilateral treaty, the processing of the freezing request was regulated by the Swiss federal act on mutual legal assistance in criminal matters (*loi fèdèrale sur l'entraide internationale en matière pénale* – EIMP).

In response to the MLA request, several accounts were seized in financial institutions located in Zurich, Vaud and Geneva, including an account held in UBS by Foundation Brouilly, registered in the name of Simone Ovide Duvalier, the mother of Jean-Claude Duvalier, with deposits amounting to USD 2.4 million.

On 12 June 1986, the Haiti authorities completed the MLA request in order to obtain the designation of the seized amounts deposited in the Swiss accounts. The transmission of the banking records of those accounts was approved by the investigating judge, about two years later[116], under the condition of receiving "formal guarantees from Haiti that the procedures against the Duvalier clan would observe due process, the regularity of the procedures, and that special tribunals would not be put in place"[117].

The Haitian government issued the required guarantees in August 1990, but the decision of the investigating magistrate was annulled by Chamber of Accusation because the government of President Aristide, which issued the initial formal guarantees, was overthrown from power in September 1991[118]. Renewed guarantees were then requested to the new government. Those guarantees were only offered five years later, on 27 November 1996.

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[114] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009. at http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=12.01.2010_1C_374/2009. § A

[115] *Ibid.* § A.

[116] In 2 August 1988.

[117] Basel Institute on Governance, Jean-Claude "Baby Doc" Duvalier, Asset Recovery Knowledge Centre. at http://www.assetrecovery.org/kc/node/558ce875-a33e-11dc-bf1b-335d0754ba85.15.

[118] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. *supra* note 114.

According to article 80*p*[119] of the EIMP, the Federal Office of Justice (FOJ) of Switzerland should pronounce on the acceptance of the MLA requests. This pronouncement was delivered on 15 May 2002, when the FOJ considered that the commitment of Haitian government could not be

> considered sufficient, given the instability of the institutions of Haiti, especially the succession of Governments since 1996, the denunciations made by organizations of protection of human rights and the lack of progress in the field of human rights since the beginning of the procedure of MLA, sixteen years ago. The contacts established with the requesting State did not reveal a real willingness to carry on the proceedings against Jean-Claude Duvalier. One could even doubt the existence of such a procedure[120].

The FOJ also stated that statute of limitation of the charges against Jean-Claude Duvalier under Swiss law had already run[121], since the facts occurred more than 15 years before.

Facing the threat of having to allow the Duvaliers access to the amounts deposited in the accounts, possibly leading to a political confrontation with the Haitian government, the Swiss Federal Council issued an order under article 184 (3)[122]of the Swiss Constitution on 14 June 2002 to secure the freezing of the assets for three years until an agreed solution to the destination of the amounts could be reached[123]. The administrative freezing was first extended for two years on 3 June

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[119] Art. 80p Conditions Subject to Acceptance
1 The executing and the appellate authority as well as the Federal Office may totally or partially subordinate the granting of mutual assistance to certain conditions.
2 The Federal Office shall communicate the conditions to the requesting State when the decree on the granting and the extent of the mutual assistance is final and shall give him an appropriate deadline to accept or refuse. If the deadline given is not respected, the mutual assistance may be granted on the points that are not subject to conditions.
3 The Federal Office shall examine if the response of the requesting State constitutes a sufficient commitment to the conditions set.
4 The decision of the Federal Office can be appealed against in the Appeals Chamber of the Federal Criminal Court within ten days of its notice in writing. The decision of the Appeals Chamber is final.

[120] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at §A. [Freely translated from French by the author].

[121] Basel Institute on Governance. Jean-Claude "Baby Doc" Duvalier. Asset Recovery Knowledge Centre. *Supra* note 117, not paginated.

[122] Article 184 Foreign Relations
(3) When the safeguard of the interests of the country so require, the Federal Government may issue ordinances and orders. Ordinances have to be limited in time.

[123] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at §B.

2005, and for another year on 22 August 2007[124]. In the same month the President of Haiti confirmed that "proceedings against the Duvalier clan had recommenced on the grounds of misappropriation of public funds"[125].

On 28 January 2008, the decision of the FOJ to reject the MLA request was confirmed by the investigating judge, on the basis that it had passed more than 20 years from occurrence of the facts resulting in the expiration of the statute of limitation of the charges against the defendants. Therefore, by that time, the freezing of the accounts was only maintained through the force of the political decision of the Swiss Federal Council.

On 23 May 2008, close to the expiration date of the last extension of the administrative freezing, the Haitian government, assisted by a Swiss lawyer[126], presented a request for reexamination of the decisions that considered the MLA request inadmissible[127]. Haiti argued that criminal proceedings on charges of crimes against humanity, financial crimes and misappropriation of public funds were opened in Haiti against Jean-Claude Duvalier and annexed supporting documentation[128]. The main argument of Haiti was that the Duvaliers constituted a criminal organization which was maintained mainly by the perpetration of crimes against humanity[129].

This claim had two consequences for the admissibility of the MLA request. First, under Swiss law the statute of limitations for crimes against humanity was 30 years and the same crimes were not subject to any statute of limitation under Haitian law[130]. Therefore, the MLA request to freeze the accounts

[124] *Ibid.* §B
[125] Basel Institute on Governance. Jean-Claude "Baby Doc" Duvalier. Asset Recovery Knowledge Centre. *supra* note 117, not paginated.
[126] The lawyers' fees were covered by the Department of Foreign Affairs of Switzerland as a further demonstration of the engagement of the Swiss government to find a solution to return the Duvalier funds. See Federal Office of Justice. Duvalier assets remain frozen: Account holders must prove lawful origin. 2 July 2008, at http://www.bfm.admin.ch/content/ejpd/en/home/dokumentation/mi/2008/ref_2008-07-02.html
[127] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at § C.
[128] *Ibid.* §C
[129] *Ibid.* §C
[130] *Ibid.* §C

could not be considered inadmissible on the grounds that the statute of limitations had expired.

Second, under Swiss law, the proceeds of crimes perpetrated by a criminal organization are presumed to originate from an illegal source; in other words, the burden of proof in regard of the origin of the assets is shifted to the defendants[131]. If the defendants are not able to produce evidence of the licit origin of the assets, an anticipated recovery of the deposits could be facilitated. The characterization of the corrupt leader and their associates as members of a criminal organization was successfully used in the Abacha case, as will be discussed later, and was the principal legal argument underlying the decision of the Swiss Federal Supreme Court to anticipate the repatriation of funds to Nigeria in 2005.

The political situation in Haiti had also improved since 2002 and the government was finally able to give credible assurances of respect for human rights and fair trial demanded by the Swiss authorities[132].

On 27 June 2008, the FOJ accepted the arguments of the Haitian government and determined the freezing of accounts once again[133]. It also accepted that the Duvaliers and their associates could be seen as a criminal organization and therefore invited them to submit evidence of the licit origin of the assets.

Fondation Brouilly, the main owner of the frozen accounts, filed a submission in the FOJ stating that the conditions for a reexamination were not present, and therefore, the application should be considered a new MLA request, because it was founded on new charges[134]. In its view, the new request was itself also inadmissible because not enough evidence of a criminal organization was presented and the statute of limitations had already elapsed[135]. Finally, since no

[131] *Ibid.* § C
[132] *Ibid.* §C
[133] *Ibid.* §C
[134] *Ibid.* §C
[135] *Ibid.* §C

forfeiture proceedings were started in Haiti, an anticipated repatriation was not allowed[136].

The arguments of the Fondation were not accepted by the FOJ which subsequently ordered the anticipated repatriation of USD 4.6 million on 11 February 2009. However, some conditions to the recovery were imposed. The funds should be deposited in a designated account and would be destined to be "used in a transparent manner to the benefit of the Haitian population through the humanitarian or social projects."[137] The Federal Department of Justice and Police of Switzerland would be responsible for monitoring the use of the funds[138]. In regard to the statute of limitations, the FOJ affirmed that the expiration term should be verified only taking into account the domestic legislation of the requesting state and not the Swiss law[139].

An appeal by the Fondation was rejected by the II Complaints Chamber of the Federal Swiss Court on 12 August 2009. By interpreting article 33*a*[140]of the Swiss Federal Council's Ordinance on International Mutual Assistance in Criminal Matters (*ordonnances d'entraide internationale en matière pénale – OEIMP*)[141], the Court considered that the freezing order was only limited by the statute of limitations provided by the legislation of the requesting country and not by the Swiss law[142]. On 24 August 2009, Fondation Brouilly presented an appeal in public law matters seeking the annulment of the Complaints Chamber decision.

On 12 January 2010, the Swiss Federal Court granted the appeal of Fondation Brouilly and ordered the unfreezing of the amounts deposited in the Fondation's account in UBS bank[143]. The main question in issue in the appeal

[136] *Ibid.* §C
[137] *Ibid.* §C [Freely translated from French by the author].
[138] *Ibid.* §C
[139] *Ibid.* §C
[140] Art. 33a Duration of Seizure of Assets
If the handing over of assets intervenes only based on a final and executable order of the requesting State (art. 74a, para. 3 EIMP), the assets will remain seized until such order is issued or the requesting State notifies the competent executing authority that such an order may no longer be issued, in particular because of lapse of time.
[141] The OEIMP details the procedure for granting MLA provided in the EIMP.
[142] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at § C.
[143] *Ibid.* dispositif §1.

decision was whether the 23 May 2008 request of the Haitian government should be considered a request for reexamination of the first MLA request sent in 1986 or a completely new request.

According to article 5(1)(c) of the EIMP[144], one of the conditions for the admissibility of MLA request regarding compulsory measures, such as the freezing of assets, is that the statute of limitations under Swiss law has not expired. This formal admissibility requirement must be verified upon receipt of the MLA request by the FOJ[145] and then by the executing authority[146], which in the case was the investigating magistrate.

When the first MLA request was received in 1986, this requirement was met. Therefore, if the 23 May 2008 application was to be considered a request for reexamination of the 1986 request, the 5(1)(c) EIMP requirement would not have barred its admission. According to the Swiss Federal Court, this requirement must only be verified in the moment in which the request is received and not when a final decision is delivered, in order to avoid that a request which was first declared admissible to become later inadmissible due to the duration of the MLA proceedings[147].

However, the Swiss Federal Court found that the 2008 request should be considered a new request. In its reasoning, the Court stated that the 1986 request was definitively rejected by the investigating judge's decision of 28 January 2008[148]. In the Swiss Federal Courts' view, the Federal Council's freezing order was not intended to extend the one granted in the MLA procedure, it held a different nature and served as a political alternative to an eventual failure of the latter[149].The Court, therefore, concluded that the 2008 request constituted a new

[144] Art. 5 Extinction of the Penal Claim
1 A request shall not be granted if:
[…]
c. its execution requires compulsory measures and the prosecution or execution of the sentence were absolutely barred under Swiss law by the statute of limitations.
[145] See article 78(2) of EIMP.
[146] See article 80 of EIMP.
[147] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at §6.2.
[148] *Ibid.* §6.4
[149] *Ibid.* §6.4

MLA request that should be submitted to the article 5(1)(c) admissibility test by the FOJ and by the investigating judge[150].

As mentioned before, the 2008 request described the offences committed by the defendants as misappropriation of public funds, crimes against humanity and financial crimes. The Swiss case law accepted the offence of misappropriation of public funds as falling into the category of offences committed by a criminal organization for the purposes of double incrimination requirement[151]. The statute of limitations of the latter offence under Swiss law runs out in 15 years. Considering that the crime was committed until February 1986, meaning until the fall of Jean-Claude Duvalier's regime, the statute of limitations expired in 2001[152].

The Swiss Federal Court considered that the Complaints Chamber misapplied article 33*a* of the OEIMP to the case. The mentioned article refers to handing over of assets depending on a final decision of forfeiture by the requesting state and the constraint measures related to it. The test of the article 33a of the OEIMP is only verified when the requesting state presents such final decision. It only applies, therefore, to requests that were already considered admitted under article 5(1)(c) of the EIMP[153].

Furthermore, the Swiss Federal Court did not accept the argument of the requesting state that the statute of limitations of 30 years regarding crimes against humanity applied to the case, because the proceeds did not directly originate from those crimes, but from the offence of misappropriation of public funds[154].As a result, the Court concluded that the new request was inadmissible under article 5(1)(c) of the EIMP, because the statute of limitations of 15 years had run out[155].

Although not central to the final decision, the Swiss Federal Court did not question the findings of the FOJ and the Complaints Chamber that the assets

[150] *Ibid.* §6.4
[151] *Ibid.* §6.5
[152] *Ibid.* §6.5
[153] *Ibid.* §6.5
[154] *Ibid.* §6.6 and 6.7
[155] *Ibid.* 6.8.

derived from the activities of a criminal organization[156], confirming its decision of 2005, in the Abacha case, that recognized the possibility of reversing the burden of proof in corruption cases. The same argument was also used in the TRT-SP case.

The appellant argued in its submissions that the Haitian government did not prove that the defendants were part of a criminal organization. The Swiss Federal Court affirmed that in MLA proceedings it is not up to the executing authority "to pronounce on the veracity of the evoked facts in the request"[157]. The role of the requested authority is to verify whether the facts described in the MLA request constitutes a criminal offence under Swiss law, in other words, whether it complied with the double criminality principle, and whether the requesting authority presented a clear description of the facts justifying the request that are credible and "without errors or gaps" to be considered minimally admissible[158].

According to the Swiss Federal Court, the requesting authority does not need to submit evidence supporting its accusations in the MLA proceedings[159]. In the case, the Swiss Federal Court considered that the description provided by the Haitian government was sufficient to verify that Simone Duvalier, the only person with powers to dispose of the assets belonging to Fondation Brouilly, made part of the criminal organization active during the Duvaliers' regime.

Curiously, after declaring that the MLA request was not acceptable due to the expiration of the statute of limitations, the Swiss Federal Court recognized that the national law on mutual legal assistance might no longer be appropriate to regulate the procedure of high corruption cases. According to the Court:

> The recovery of assets of deposed dictators faces various obstacles. States which have been victims of this kind of conduct face special problems: in particular they may have ambiguous relations with the deposed regime and often do not have a judicial system which is capable of ensuring, in an effective way and respecting human rights the prosecution of former

[156] Basel Institute on Governance. Jean-Claude "Baby Doc" Duvalier. Asset Recovery Knowledge Centre, *supra* note 117, not paginated.
[157] Fondation Brouilly v. Office Federal de La Justice. Tribunal Fédéral Suisse. Arrêt du 12 Janvier 2010. Ire Cour de Droit Public.1C _374/2009, *supra* note 114, at§ 4.1.
[158] *Ibid.* §4.1.
[159] *Ibid.* §4.1. When pronouncing on the principle of presumption of innocence, the Court also stated that it is not up to the requested state authority to examine the culpability of the defendants. It should only verify if the criminal proceedings conducted by the requesting state comply with fair trial and due process requirements. See §4.2.

> officials and the confiscation of their assets […] In this context, the conditions of the EIMP appear too strict for such cases. The lengthy procedures, the difficulties regarding evidence may be - as here - insurmountable obstacles.[160]

However, the Court affirmed that it is the role of the Legislative branch to "make the necessary adjustments and concessions to accommodate the peculiarities of these procedures"[161].The rather unusual nature of the statement made by the Swiss Federal Court appears to be more a self-justification for what could be perceived as an unjust and morally wrong decision by the general public. The Swiss Federal Court no doubt realized that denying the return of assets embezzled by a former dictator would be considered a backward step in the Swiss struggle to rid itself of the image of being a haven for illicit proceeds[162] and would be a disappointment for Haiti's impoverished population which saw its difficult situation aggravated by an earthquake which hit the country the same day that the judicial decision was delivered. However, the Court's powers to interfere in favor of Haiti were blocked by the limits imposed by an outdated regulation which required the demonstration of concrete judicial efforts by the requesting state in order to allow Swiss authorities to take any steps towards the return of corruption proceeds.

The judicial outcome of the MLA request was not completely unexpected by the Swiss government. Anticipating the need to find an alternative solution for repatriation in Duvalier case, since 2008, the Federal Council was preparing a proposal to amend the EIMP. The solution given by the Swiss Government came in two steps[163]. First, the Swiss Federal Court decided to intervene again on 3 February 2010 and maintained the administrative freezing of the assets using its power under the Swiss Constitution[164]. Second, on 1 October 2010[165], the Federal Assembly of the Swiss Federation approved the Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful

[160] *Ibid.* §7. [Freely translated from French by the author].
[161] *Ibid.* §7. [Freely translated from French by the author].
[162] K. D. Magliveras, *The new Swiss law on foreign assets recovery: a new paradigm for international mutual legal assistance in criminal matters?*, American Society of International Law, Accountability, Winter (2010). not paginated. at http://www.asil.org/accountability/winter_2010_5.cfm.
[163] *Ibid.* not paginated
[164] *Ibid.* not paginated and Basel Institute on Governance, Jean-Claude "Baby Doc" Duvalier, Asset Recovery Knowledge Centre, *supra* note 117, not paginated.
[165] It entered into force on 1 February 2011.

Means (*Loi fédérale sur la restitution des valeurs patrimoniales d'origine illicite de personnes politiquement exposées* – LRAI)[166].

LRAI is applicable "in cases where a request for mutual assistance in criminal matters cannot produce an outcome owing to the failure of state structures in the requesting state in which the politically exposed person exercises or exercised office"[167]. The power to freeze the assets is given to the Federal Council under the conditions set in LRAI's article 2, namely that the assets have been previously provisionally frozen in response to a MLA request, that they belong to PEPs[168] or their associates and that "the country of origin is unable to satisfy the requirements of legal assistance proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system"[169].

After the Federal Council ordered the freezing, the Federal Department of Finance may be instigated to start a forfeiture proceeding before the Federal Administrative Court[170]. This proceeding must start within 10 years from the time the freezing order takes effect[171]. No statute of limitations can be invoked in the proceedings[172]. As noted by Magliveras, LRAI has "clear extraterritorial effects considering that it concerns criminal acts that were (actually or allegedly) perpetrated in the country of origin and, moreover, there is no legal requirement that Switzerland has any link with either the acts or that state"[173].

LRAI also provides in article 6 a presumption of unlawful origin of the assets when "the wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase which is connected to the exercise of a public office by the politically exposed person" and "the level of corruption in the country of origin or surrounding the politically exposed person in question during their term of office is or was acknowledged as high"[174].

[166] Magliveras (2010) *supra* note 162, not paginated.
[167] Article 1 of LRAI.
[168] The concept of PEPs will be discussed in further detail in the next Chapter.
[169] Article 2c of the LRAI.
[170] Article 5 of the LRAI.
[171] Article 3.
[172] Article 5(3) of the LRAI
[173] Magliveras (2010) *supra* note 162, not paginated
[174] Article 6 of the LRAI.

Finally, LRAI establishes the conditions under which assets are to be returned. According to articles 8 and 9, the repatriation of assets must aim at improving the living conditions, strengthening the rule of law and fighting impunity of crimes in the country of origin and must be employed in programmes of public interest.[175].

In May 2011, the Swiss government announced that "the Federal Department of Finance (FDF) initiated forfeiture proceedings before the Federal Administrative Court (FAC) concerning the Duvalier assets frozen in Switzerland"[176] based on LRAI.

1.1.2. Obstacles to asset recovery

The main obstacle to asset recovery in the Duvalier case was certainly the political and institutional incapacity of the Haitian government to conduct proper criminal proceedings against the defendants. According to Swiss law, the return of assets depended on a final decision of confiscation by Haitian courts. Even if the country did not suffer from constant political turnovers that prevented the development of a consistent strategy for the recovery of assets, until January 2011 Duvalier was in exile in France, and Haiti did not have any the legal provisions allowing for a non-conviction based confiscation.

This was aggravated by the continued lack of confidence in Haitian institutions by the Swiss authorities, which repeatedly asked for reassurances of respect for human rights in the criminal proceedings by the requesting authority prolonging the MLA proceedings. In a strictly legal evaluation, those requests of reassurances cannot be characterized as unreasonable, since issues of public order, such as lack of fair trial and respect of due process, have been for a long time used as justifications for the rejection of cooperation in international instruments

[175] See also Magliveras (2010) *supra* note 162, not paginated.
[176] Haiti libre, *Haiti - Switzerland: FDF initiates forfeiture of frozen Duvalier assets,* 2 May 2011, at http://www.haitilibre.com/en/news-2858-haiti-switzerland-fdf-initiates-forfeiture-of-frozen-duvalier-assets.html

regarding mutual legal assistance[177]. In fact, from the fall of Duvalier until 1994, Haiti suffered from profound political instability, including the establishment of a military dictatorship. In 1994, the increasing human rights violations inflicted by the military government led to calls for international intervention authorized by the United Nations Security Council Resolution 940. Therefore, until that date, the Swiss concerns regarding the respect for human rights in Haiti were justified. Even after the restoration of a democratic regime, however, there were continued reports of fraud in the electoral process and violent outbreaks against President Aristide's government that could prevent the development of regular criminal proceedings in that country[178].

It must be noted, however, that the countries mostly affected by the deprivation of public funds deviated by corrupt leaders are also the ones unable to build solid institutions. Therefore, instead of waiting for the installation of a reliable government in the requesting country, a possible solution could have been to condition the return of funds on a specific destination. This solution, however, was only considered by the FOJ in 2009 when the request was no longer admissible.

Another alternative would be making the grounds for refusal of MLA more flexible in cases of grand corruption due to its particular international relevance. Actually, it can be argued that the return of criminal proceeds to a victim country is not to be considered a threat to the public order, but rather is in the service of public interest of the requested state, as stated in 1997 by the Swiss Federal Supreme Court in the Marcos case[179].

Both obstacles had a direct impact on the freezing and seizure, as well as the recovery of assets phase. First, the provisional freezing could not be maintained indefinitely without the initiation of a criminal prosecution in Haiti. As held in FOJ decision dated 15 May 2002, the freezing is only justified if there is any

[177] See e.g. Article 8(2)(a) of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme), article 9(e) Inter-American Convention on Mutual Assistance in Criminal Matters and article 2(b) of the 1959 European Convention on Mutual Assistance in Criminal Matters.

[178] See US Department of State, Background note: Haiti, 7 December 2010, at: http://www.state.gov/r/pa/ei/bgn/1982.htm

[179] See subsection 1.2.1 below.

prospect of an upcoming conviction and a final decision on the confiscation of assets. The inactivity of the law enforcement authorities and the dilatory investigation and criminal proceedings in the requesting country as an obstacle to the freezing phase are not particularities of the Duvalier case, as will be discussed later in relation to the Marcos and the Brazilian cases.

Haiti's reluctance to start criminal proceedings against the Duvaliers and their associates made a final decision very unlikely. As a consequence, the final recovery of assets itself was jeopardized, because the rule is that a final decision of confiscation by the requesting authority is necessary to the final return of assets[180].

The possibility of intervention of third parties, mainly defendants, in the MLA proceedings provided for in Swiss law was also one of the reasons for the extended length of the case. The abuse of due process rights by the defendants is a common feature in all cases discussed in this section. Furthermore, the complexity involved in cases regarding the looting of public funds by heads of state demand an extended statute of limitations, which was provided neither in either Swiss nor in the Haitian law.

The lack of knowledge on the requested state's national law might also have impeded a successful outcome of the MLA request, and impacted on both the freezing and the return of assets. The introduction of the offence of criminal organization in the Swiss national legal system occurred in 1994[181] and has proven to be a successful tool for asset recovery already in 2005 in the Abacha case. Nevertheless, a MLA request aiming at the application of some of the benefits of this legal provision, such as the reversed burden of proof of the origin of the assets, which could have resulted in the anticipated return of the assets was only attempted in 2008. The hiring of a lawyer with knowledge on Swiss law sooner could have helped in this sense, but it was very unlikely that a consistent strategy for the recovery of assets could have been adopted considering the constant turnover of governments in Haiti. The cost of hiring lawyers in foreign jurisdictions

[180] Article 74*a*(3) of the EIMP

[181] Article 260ter of the Criminal Code introduced by the Federal Act dated 18th March 1994 and entered into force on 1 August 1994.

might, however, be considered a prohibitive expense for poor countries. In the Duvalier case, the Swiss government decided to bear the legal fees of the hired lawyers, but another solution is to grant the power to public attorneys to represent foreign governments in national courts[182].

Particularities of the Swiss national legal system and the political engagement of the Swiss government to find a solution to the case, on the other hand, avoided the complete failure of the recovery of assets in the Duvalier case. The possibility of an administrative freezing order by the Federal Council in cases of national interest were pivotal for preventing dissipation of the assets when the MLA requests were considered inadmissible under the EIMP. This type of legal tool depends exclusively on political considerations and is not available in several other jurisdictions where the freezing of assets must rely exclusively on the execution of a MLA request mainly by judicial authorities[183].

Even more innovative is the forfeiture procedure provided by LRAI to failing states as substitute for the failure of MLA requests. It is an unprecedented mechanism for asset recovery, which enables Switzerland to make the return of assets derived from corruption solely a matter of domestic law, even in cases where there is a jurisdictional link that would allow Swiss authorities to initiate their own criminal proceedings[184]. As noted by Magliveras, if similar legislation was to be adopted on a large scale by other states, it would no longer "be necessary to depend on the asset recovery provisions of the relevant multilateral instruments and on the complex requirements of international mutual legal assistance proceedings", the latter already proved ineffective to recover assets of grand corruption cases.[185]

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[182] In Brazil, the Office of the Attorney General of the Union is responsible for representing foreign governments in civil action before national courts when the need for representation derives from an international obligation.

[183] The Brazilian Code of Criminal Procedure restricts the power to freeze assets to a judicial court order (see article 127). In the United States, the freezing of assets through an MLA also depends on a court order. (See Section 2467(d)(3)(A) of title 28, United States Code, known as the Preserving Foreign Criminal Assets for Forfeiture Act of 2010). On the other hand, freezing powers by non-judicial authorities is possible, for example, in Lithuania where prosecutors can enact pre-trial freezing orders and Luxembourg, where the FIU can determine the freezing of assets for three months conditioned to the existence of a the communication of suspicious financial transaction.

[184] Magliveras (2010) *supra* note 162, not paginated.

[185] *Ibid.* not paginated.

1.2. The Marcos case[186]

Although the Marcos case is considered to be the first successful example of asset recovery, one purpose of choosing it for analysis is to offer an illustration of how the reliance on a single legal strategy for recovering assets can defer the final outcome. The case is also useful for demonstrating that in the presence of a necessary political interest, the requested state can interpret its own legal system in a way that favors repatriation.

Ferdinand Edralin Marcos was elected President of the Philippines in 1965 and reelected in 1969[187]. Wishing to perpetuate himself in power, which was not democratically possible because the Philippines' Constitution did not allow for a third term, President Marcos declared a martial law in September 1972 and established a dictatorial regime which lasted until 25 February 1986 when he had to flee the country after a military uprising[188] which gave the power to Corazon Aquino[189].

After the new government was installed, President Aquino created the Presidential Commission on Good Government (PCGG) to investigate the corrupt practices of the Marcos regime and recover the ill-gotten wealth accumulated by the former President and his associates[190]. The PCGG investigations identified three main sources of criminal proceeds[191]. The first source was the diversion of foreign aid and war reparations paid by Japan[192]. The second one was the embezzlement of the amounts received as military aid and other discretionary

[186] The victims of human rights violations during the Marcos regime filed innumerous suits in the US in order to receive reparations. This thesis however will concentrate in the recovery of assets performed by the Philippines government, mainly referring to the deposits held in Swiss accounts.
[187] S. V. Marcelo, *The long Road from Zurich to Manila: The recovery of Marcos Swiss dollar deposits, in* M. Pieth, (ed.) Recovering Stolen Assets, Basel Institute on Governance, Peter Lang (2008) 89. See also Chakin. (2000) *supra* note 28, at 4.
[188] The uprising started after the announcement that Marcos had won the presidential election of 8 February 1986. The electoral process was considered to have been conducted with violence and massive fraud. Marcelo (2008) *supra* note 187, at 90.
[189] *Ibid.* 90.
[190] *Ibid.* 91.
[191] Chaikin (2000) *supra* note 28, at 5.
[192] *Ibid.* 5.

funds[193] from the US as reward for the sending of Filipino troops to Vietnam, the so-called Philcag funds[194]. Finally, the third source was "the extortion of, and or the soliciting of bribes and commissions in exchange for the granting of government employment, government contracts, licenses, concessions, permits, franchises and monopolies."[195]According to Chaikin, there was also record of "plain outright theft of public assets" which "included direct withdrawals of monies from the public treasury and the gold stocks of the State"[196].

The estimated illicit profits accumulated by the Marcos' family and associates amounted to USD 5 billion[197], which were laundered through various schemes which included the use of intermediaries and the opening of accounts using pseudonyms[198] or foundations created under Liechtenstein law[199]as front companies[200].

Ferdinand Marcos died in 1989, but the legal pursuit of his illicit wealth continued against his wife and heirs.

1.2.1. The asset recovery procedure

Although President Marcos had bought six heavy duty shredders to destroy official documents[201] foreseeing that his regime was coming to an end, the investigators of the new government could still find "voluminous documents and papers" in the presidential palace which indicated bank accounts and financial

[193] According to Chaikin, "between 1962 and 1983 the United States provided $3 billion in economic and military aid, while during this same period the World Bank lent $4 billion to the Philippine government".(2000) *supra* note 28, at 6.
[194] *Ibid.* 5-6.
[195] *Ibid.* 6.
[196] *Ibid.* 6.
[197] *Ibid.* 10
[198] Ferdinand Marcos and Imelda Marcos used in some Swiss accounts for example the pseudonyms of William Saunders and Jane Ryan, respectively. Chaikin (2000) *supra* note 28, at 9 and Marcelo (2008) *supra* note 187, at 93.
[199] The main advantage of creating Liechtenstein Foundation is the possibility to conceal the real beneficial owner though fiduciary agreements. Chaikin (2000) *supra* note 28, at 8.
[200] Chaikin (2000) *supra* note 28, at 7-8. See also S. Salvioni, *Recovering the proceeds of corruption: Ferdinand Marcos of the Phillipines, in* M. Pieth (ed.), Recovering Stolen Assets, Basel Institute on Governance, Peter Lang (2008) 80.
[201] Chaikin (2000) *supra* note 28, at 9.

transactions operated by the Marcos family and associates[202]. Those documents became known as the Malacanang documents, as a reference to the name of the palace.

Furthermore, on 18 March 1986, the United States Government delivered documents also referring to former President Marcos to the PCGG, which were called the Honolulu papers[203]. Both the Malacanang documents and the Honolulu papers established investigatory leads to Marcos' wealth and would later become the basis for the MLA request sent to Switzerland requesting the freezing of the funds deposited on the identified accounts[204].

Before the transmission of the MLA request, however, the Swiss authorities imposed a unilateral freeze on the Marcos assets on 24 March 1986[205]. At that time, the administrative freezing by the Federal Council based on a Constitutional provision was unprecedented[206], but later became a useful tool in similar cases, such as the Duvalier case.

Unlike the Haitians in the Duvalier case, from the beginning the Philippines government adopted the strategy of hiring Swiss lawyers to represent its interests in that country[207]. On 7 April 1986, a MLA request by the Solicitor General of the Philippines was filed in the Swiss Federal Department of Justice and Police containing witnesses to be heard, documents to be seized and accounts to be frozen[208]. The Filipino MLA request was also received under the EIMP, because the countries had not yet signed a treaty on mutual legal assistance in criminal matters.

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[202] *Ibid.* 9 and Marcelo (2008) *supra* note 187, at 93.
[203] Marcelo (2008) *supra* note 187, at 93.
[204] Chaikin (2000) *supra* note 28, at 9.
[205] Marcelo (2008) *supra* note 187, at 93. The unilateral freeze was the result of Operation Big Bird, in which a Filipino Banker Guzman, holding a power of attorney from the Marcos family tried to withdraw USD 213 million from Swiss accounts which were supposedly to be returned to Philippines. The Swiss authorities were informed by Credit Swiss about the intention to withdraw the deposits and imposed the administrative freezing. See Chaikin (2000) *supra* note 28, at 10.
[206] Chaikin (2000) *supra* note 28, at 10.
[207] Salvioni (2008) *supra* note 200, at 79. See also Chaikin (2000) *supra* note 28, at 11.
[208] Marcelo (2008) *supra* note 187, at 95 and Salvioni (2008) *supra* note 200, at 79-80.

A supplementary request was sent informally on 18 April and formally on 25 April 1986[209]. On 29 May 1986, the District Prosecutor's Office of Zurich, considering the request admissible, asked all banks in the canton of Zurich to block all accounts in the name of the Marcos family and their associates and to hand over all bank records regarding the frozen accounts[210].

As soon as the MLA request arrived in Switzerland, the Marcos family started a legal battle to obstruct its execution[211]. They first appealed the decision of District Prosecution's Office of Zurich determining the freeze of the accounts. The main arguments of the defendants were based on immunities issues, the lack of criminal proceedings in the Philippines, the violation of the European Convention of Human Rights and other procedural issues.[212]

The appeal was finally decided by the Swiss Federal Court on 1 July 1987 which dismissed the claims. Among other things, the Court stated that the EIMP does not require a criminal proceeding to be already pending before a judge of the requesting state in order for a request to be considered admissible. It is enough that a case may potentially be brought before a judge[213] and in the Marcos case a preliminary investigation had already been started by the PCGG. The Swiss Federal Court was satisfied by the fact that the Philippines authorities intended to bring a criminal proceeding against the defendants in order to grant the MLA[214].

The Swiss Federal Court also found that the coercive measures sought by the MLA request could be executed in Switzerland, because the acts described

[209] Marcelo (2008) *supra* note 187, at 94.
[210] Ferdinand Edralin Marcos and Imelda Marcos Romualdez v. District Prosecutor's Office Zurich and Public Prosecutor's Office of the Canton of Zurich. Swiss Federal Court. Hearing of 1 July 1987 concerning the request of judicial aid of the Republic of Philippines. at http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=3201021f-a345-11dc-bf1b-335d0754ba85. 6 §C
[211] Salvioni (2008) *supra* note 200, at 82 and Chaikin (2000) *supra* note 28, at 12.
[212] Ferdinand Edralin Marcos and Imelda Marcos Romualdez v. District Prosecutor's Office Zurich and Public Prosecutor's Office of the Canton of Zurich. Swiss Federal Court. Hearing of 1 July 1987 concerning the request of judicial aid of the Republic of Philippines, *supra* note 210, at 6 §C.
[213] *Ibid.* 17 §6.
[214] *Ibid.* 19 §6. The case would be heard by the Sandiganbayan Court, a special court having jurisdiction over the criminal and civil matters relating to corruption.

in the request could be charged as criminal acts under Swiss Law[215], therefore, it upheld the decision of the District Prosecution's Office.

In a second stage, the Marcos' lawyers challenged the possibility of the Swiss authorities to transmit the banking documents to the Philippines government. Since the Malacagang documents were incomplete[216], those banking records were necessary to trace other accounts held by the defendants as well as to establish the link between the assets and the criminal conduct in order to file a petition in the Philippines Court asking for the final forfeiture of the assets[217].

In June 1988, the investigating magistrate of Fribourg authorized the transmission of banking records regarding the account in the name of Aquamina corporation, owed by the Marcos family, and the remittance of the funds to the Philippines[218]. The defendant's main arguments against this decision were that it had violated their right to be heard and that a criminal proceeding had not yet been initiated in the requesting state.

A final decision by the Swiss Federal Supreme Court on this issue was granted two years later, on the 21 of December 1990[219]. In regard to the latter argument, the Court reaffirmed the findings of the Federal Court in its 1987 decision, stating that the executing authority can grant assistance to an administrative body carrying out a preliminary investigation, if it is sufficiently established "that this investigation be susceptible of terminating by the sending of the prosecuted persons before a competent tribunal to repress the wrongful"[220]. The Swiss Federal Supreme Court also found that the fact that criminal proceedings have not yet been initiated in the requesting state after three years was justified because it depended on the information of foreign banking operations

[215] *Ibid.* 25 §9.
[216] Salvioni (2008) *supra* note 200, at 80.
[217] Marcelo (2008) *supra* note 187, at 94.
[218] Arrêt de la Ire Cour de droit public du 21 décembre 1990 dans la cause Hoirs de Ferdinand Marcos, Imelda Marcos-Romualdez et société A. contre République des Philippines et Fribourg, Chambre d'accusation du Tribunal cantonal (recours de droit administratif). 116 Ib 452. English translation at: http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=3426c8d3-a345-11dc-bf1b-335d0754ba85
[219] *Ibid.*
[220] *Ibid.* §3a.

as evidence of the money laundering[221].The information aimed at by the MLA request was destined to be used as supporting evidence for the indictment. However, the Supreme Federal Court established a deadline of one year for the criminal proceedings to start in the requesting state, as the Philippines authorities would be in possession of the necessary documents[222]. As in the Duvalier case, assurances of respect of human rights in the criminal proceedings were also required[223].

The Swiss Federal Supreme Court also rejected the argument of the defendants that the statute of limitations of 15 years under Swiss law had run, which would make the request inadmissible. According to the Court, the crimes committed by the defendants were to be considered a continuing offence, and therefore the statute of limitations had not expired yet[224].

The Court, however, decided that it was not possible under the EIMP provisions to return the assets to the Philippines before a final decision by the competent court in the requesting state in that regard[225].

On 17 December 1991, a few days before the deadline established by the Swiss Courts[226], the Philippines finally filed a petition in the Sandiganbayan Court requesting a final order of forfeiture[227], taking into account that the defendants could not satisfactorily show that the assets were lawfully acquired[228]. The Philippines government opted to file a civil action because under its legal system, the criminal proceedings can only be conducted in the presence of the defendant[229]. After leaving power, Marcos fled to the US[230], but died in 1989. The

[221] *Ibid.* §3b.
[222] *Ibid.* §5c and dispositif §2b.
[223] *Ibid.* dispositif §2ª.
[224] *Ibid.* §4b.
[225] *Ibid.* §5c.
[226] The delay however was partially caused by the editing by Swiss authorities of the banking documents to protect non-participatory third civil parties. See Basel Institute on Governance, Chronology: Efforts to Recover Assets Looted by Ferdinand Marcos of the Philippines, Intermediate Training Programme on Asset Tracing, Recovery and Repatriation, Jakarta, September 2007, at: http://www.assetrecovery.org/kc/node/609c7c27-a33e-11dc-bf1b-335d0754ba85.html.9. at 7.
[227] Civil case no. 141
[228] Marcelo (2008) *supra* note 187, at 94-95.
[229] Salvioni (2008) *supra* note 200, at 82.
[230] A criminal proceeding against members of the Marcos family was attempted in the US. On 21 October 1988, they were indicted in New York for offences under Racketeer Influenced and Corrupt

new Philippines government feared that an eventual extradition and return of Ferdinand Marcos could threaten national security[231].

Meanwhile, PCGG Chairman attempted to make a settlement with the Marcos family for the sharing and return of the assets[232]. The settlement, nevertheless, was considered contrary to the Constitution by the Philippines Supreme Court in 1998[233].

An amendment of the EIMP in 1995, on the other hand, renewed the hopes of the Philippines government for an anticipated return of the funds frozen in Switzerland[234]. Article 74a of the EIMP established that the handing over of assets should be based "as a rule" on a final decision by the requesting state, opening up the door to, in exceptional occasions, the return to be executed at any other stage of the proceedings in the country of origin[235].

Therefore, a new request for the anticipated return of the assets was formulated by the Philippines on the 10 of August 1995[236]. The District Prosecutor's Office of the Canton of Zurich granted the return sought by the requesting state and on the 21 of August 1995, it ordered the Swiss bank to liquidate the assets in the name of the defendants and transfer the funds to an escrow account of the Philippines National Bank[237]. This decision implied reversing the 21 December 1991 decision of the Swiss Federal Supreme Court[238]. This decision was also subject to appeal by the defendants.

On 10 December 1997, the Swiss Federal Supreme Court confirmed the order to grant the anticipated return of the funds, reversing its decision of 21

Organizations Act (RICO), but after the death of Ferdinand Marcos, the grand jury acquitted Imelda Marcos on 2 July 1990, finding that she could not be responsible for the crimes committed by her husband. See Chaikin (2000) *supra* note 28, at 25.

[231] Chaikin (2000) *supra* note 28, at 25.

[232] Marcelo (2008) *supra* note 187, at 96.

[233] *Ibid.* 96.

[234] Salvioni (2008) *supra* note 200, at 85.

[235] *Ibid.* 85. See also Chaikin (2000) *supra* note 28, at 14.

[236] Chaikin (2000) *supra* note 28, at 13.

[237] Arrêt de la 1re Cour de droit public de Tribunal fédéral Suisse dans la cause office fédéral de la police (OFP) contre Aguamina Corporation (recours de droit administratif), du 10 décembre 1997. English translation at: http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=3be163cf-a345-11dc-bf1b-335d0754ba85 §B

[238] Chaikin (2000) *supra* note 28, at 14.

December 1991[239]. According to the Court, the anticipated handing over of criminal assets is subject to two tests[240]. First, it must be verified if the requirements to renounce the condition of a final decision are present[241]. Second, it must be confirmed whether rights of third parties oppose the immediate restitution[242].

As stated by the Swiss Federal Supreme Court, the destiny of the assets must be decided in proceedings which comply with human rights standards protected by international instruments[243]. This first requirement is common to both anticipated and final return of assets. According to the Court, the Philippines proceedings were in compliance with human rights principles[244].

Furthermore, the Swiss Federal Supreme Court stated that the anticipated return can be granted when "circumstances are so clear that the criminal origin of the assets is indisputable, in which situation it would not make sense to demand a decision regarding seizure or restitution"[245]. The Court also reaffirmed that it is within the interest of Switzerland not to be seen as a safe haven for illicit monies and that this national interest can be seen "as grounds for a waiver of an enforceable decision of the requesting state"[246]. In respect of the Marcos case, the Court concluded that:

> [t]oday's state of knowledge does not allow serious doubts about the illegal provenance of the seized monies. The incompleteness of the records make it impossible to attribute the individual assets to specific offenses, and it is possible therefore that also legal assets of the Marcos family were deposited the foundations. However, such legal assets could, as established correctly by the claimant, only be minor sums compared to the total amount of assets seized. With respect to the overwhelming majority of the assets seized, the facts are sufficiently clear to allow the assumption of an illegal provenance. Under these circumstances an early restitution of the assets is possible in principle if there are sufficient guarantees that the decision regarding seizure or restitution, respectively, will be rendered in proceedings according to law and order. The decision whether to seize or

[239] Arrêt de la 1re Cour de droit public de Tribunal fédéral Suisse dans la cause office fédéral de la police (OFP) contre Aguamina Corporation (recours de droit administratif), du 10 décembre 1997, *supra* note 237, at dispositif §2.
[240] *Ibid.* §3
[241] *Ibid.* §3
[242] *Ibid.* §3
[243] *Ibid.* §4e.
[244] *Ibid.* §5c) bb)
[245] *Ibid.* §4f.
[246] *Ibid.* §5a.

> restitute the monies seized must be taken in the Philippines where the criminal actions were committed.[247]

The Court also stated that after the amendment of the EIMP it is no longer necessary that the seizure and forfeiture of the assets are made by a criminal court. What is required is that the criminal origins of the assets are stated by a court, irrespective of the nature of the proceedings[248]. This is a very progressive finding. As will be seen in regard to the drafting of the UNCAC, most states are still not prepared to grant MLA founded on a non-conviction confiscation.

In regard to the second test, the Swiss Federal Supreme Court found that the provision under article 74a of the EIMP aims to protecting bona fide third parties and not the parties involved in criminal activities[249].Therefore, the party should be a real third party and not a fictitious entity created by the defendant to control the assets[250].

The Swiss Federal Supreme Court also faced the question whether it should protect the interests of the victims of violations of human right during the Marcos regime. Those victims have been granted the right to receive compensation from the District Court of Hawaii and this decision was confirmed by the Ninth Circuit Court of Appeals[251]. As consequence, these victims wanted to "take hold of the assets of Marcos estate deposited in Switzerland"[252].

The Swiss Federal Supreme Court concluded that those victims could seek the payment of compensation in Philippines' courts, since that country was equally bound by the human rights obligations and, therefore, the anticipated return was not barred by the interests of the victims[253]. However, the Court imposed as a condition to handing over the assets that the Philippines' government

[247] *Ibid.* §5b.
[248] *Ibid.* §5e.
[249] *Ibid.* §6.
[250] *Ibid.* §6a.
[251] *Ibid.* §7a.
[252] *Ibid.* §7a.
[253] *Ibid.* §7 c)cc.

report on the developments regarding measures and proceedings to indemnify victims of the Marcos regime[254].

As a result of the Federal Supreme Court decision, in 1998, around USD 681 million dollars were transferred to the Philippine National Bank[255]. As Chaikin reminded, the control of the monies transferred, nevertheless, remained on the hands of the District Prosecutor's Office of Zurich, who settled the guidelines for managing of the funds[256].

A final decision on the assets by the Philippines only came, however, on 15 July 2003, when the Supreme Court ruled "that the funds transferred from Switzerland are ill-gotten and must therefore be handed over to the Philippine Government"[257]. The money was destined to be used in agrarian reform[258]. On 5 August 2003, the Swiss authorities confirmed that the deposits on the escrow account could be definitively disposed of by the Philippines government[259].

1.2.2. Obstacles to asset recovery

While the initial tracing of assets of the Marcos family was facilitated by the discovery of the Malacagang documents and the delivery of the Honolulu documents, some criticize the lack of further investigation and pursuit of new assets by the PCGG and the Philippines' lawyers[260]. In fact, from the estimated USD 5 billion looted by Ferdinand Marcos and his associates, only USD 680 million were traced and recovered by the Philippines. One of the indicated reasons is the prohibition on lawyers gathering evidence on behalf of their clients under Swiss

[254] *Ibid*. dispositif §2b.
[255] Salvioni (2008) *supra* note 200, at 82. The original value frozen was around USD 356 million which increased in interest to the above mentioned value.
[256] Chaikin (2000) *supra* note 28, at 15.
[257] Basel Institute on Governance (2007) *supra* note 226, at 13.
[258] *Ibid.* 13.
[259] Marcelo (2008) *supra* note 187, at 107. The Philippines government is still litigating in the Singapore High Court over USD 23 million which were deposited in West LB, a Singapore Bank. These amounts, which were first deposited in a Swiss account, were transferred to Singapore, and deposited with the Singapore High Court due to competing claims. The Philippines government claims that it awarded the deposits after the 2003 Supreme Court decision that resulted in the liberation of the funds deposited in the PNB escrow account. See Basel Institute on Governance (2007) *supra* note 226, at 13-15.
[260] See e.g. Chaikin (2000) *supra* note 28, at 18.

law[261]. Besides, as verified by Chaikin, the Philippines' government deliberately decided to focus on the assets located in Switzerland and the US and did not follow the lead to assets potentially hidden in Hong Kong, Singapore, Japan, German, England, Cayman Islands, Morocco and Libya[262]. As authorities usually have limited resources, it seems to be a rather common policy to concentrate efforts on jurisdictions where the chances of success are higher, either because those jurisdictions facilitate MLA or because they are where most of the traced assets are located. A similar behavior can be observed in the TRT-SP case.

Others criticize the lack of domestic criminal investigations in Switzerland, even after the approval of a money laundering statute in 1990[263]. Even considering the clear evidence that Swiss banks failed to comply with their duty to disclose suspicious accounts held by the Marcos family, no criminal proceedings were brought forth in Switzerland against the employees of those banks[264]. As correctly described by Chaikin, "it appears that the Swiss banks have played a game of 'blind man's bluff' with the Philippine Government. They merely confirmed what was already generally known about the Marcos accounts"[265]. The opening of criminal investigations in Switzerland could have helped to identify other assets belonging to the Philippines. As the next section will show, in the Abacha case the active role performed by the investigating judge of the criminal proceedings started in Switzerland was fundamental to expediting the asset recovery procedure as well as to tracking and freezing assets in third states.

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[261] *Ibid.* 18. Switzerland adopts an inquisitorial system of criminal law, where the prosecutor has to investigate the relevant facts on his own initiative (Ermittlungsmaxime = Untersuchungsmaxime= Inquisitionsmaxime), meaning he is responsible for obtaining both exculpatory and incriminatory evidence. (See R. Hauser, E. Schweri and K. Hartmann, Schweizerisches Strafprozessrecht, 6th ed., Helbing & Lichtenhahn (2005) 243). The other parties' lawyers can ask the prosecutor to seek specific evidence to support their case, but it is at the discretion of the prosecutor to consider whether any piece of evidence is relevant to the case. Furthermore, in regard to the representation of foreign governments, the Swiss Criminal Code considers an offence to carry out "activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official" (Article 271 of Swiss Criminal Code).

[262] Chaikin (2000) *supra* note 28, at 18.

[263] Salvioni (2008) *supra* note 200, at 80 and Chaikin (2000) *supra* note 28, at 15-18.

[264] The frozen accounts in Switzerland did not include any account from the biggest bank in the country the UBS, however, the Director of Communications of UBS confessed to the German documentary film maker, Peter Mueller in 1991, that Marcos had a small account of "a few million" in the bank. Chaikin (2008) *supra* note 28, at 17.

[265] *Ibid.* 18.

During the freezing and seizing phase and the judicial phase, the main obstacle to the recovery of assets was the successive intervention and appeals filed by the defendants with the clear purpose of delaying the execution of the MLA request. It took nearly five years from the initial MLA request for the PCGG finally take hold of the banking records of the Swiss accounts and be able to initiate the civil forfeiture action in the Philippines.

As appropriately verified by the Swiss Federal Supreme Court in the 1990 decision, the pace of domestic proceedings in the requesting country is heavily dependent on the time which the requested country takes to deliver judicial assistance. Any thoughts on the contrary would invariably lead to a vicious cycle: the assets cannot be seized and evidence cannot be delivered by the requested country due to the lack of criminal proceedings in the requesting country, but the criminal proceedings cannot be opened without the support of the evidence located in foreign country. If countries do not find a way to speed up the legal cooperation, they risk assets being moved and disappearing forever while authorities fight the bureaucratic requirements of outdated regulations on MLA.

As regards the recovery phase, one important obstacle is the potential existence of competing claims over the assets in the requested state, which can impose some delay on the process. When dealing with cases involving former dictators, usually corrupt practices are also linked to the persecution of political opposition and human right abuses. The victims can also be considered by the country were the assets are located as entitled to receive a share of the forfeited assets as reparation for the violations. In the Marcos case, the Swiss Federal Supreme Court, while attributing considerable weight to the international human rights obligations, solved the issue by transferring the responsibility to deal with the distribution of reparations to the domestic courts of the Philippines.

The Supreme Court found a wise way out to the problem. It certainly did not have the capacity or information necessary to evaluate each individual claim in order to verify whether they could be considered victims entitled to receive reparations. Had it decided to rule on the issue, it might have prolonged the legal battle in Switzerland, risking the expiration of the statute of limitation. That outcome was not in the interest of the Philippines nor the victims of human

rights abuses. Furthermore, the Swiss Federal Court adopted the necessary safeguards to prevent its ruling from conflicting with Swiss duties under human rights conventions, since it demanded that the Philippines' government report on actions taken to compensate victims of the Marcos regime.

The case, in many aspects, represented an evolution in the interpretation of international legal cooperation for the purposes of asset recovery. The first major contribution of the Marcos case was the finding of the Swiss Supreme Court that MLA assistance could also be granted to civil proceedings if they aimed at declaring the criminal origin of the assets.

Secondly, the Court also accepted that the criminal origin of the assets could be established without the need to point out the nexus to a specific criminal conduct. This decision represents the recognition of the complexity involved in corruption cases, particularly those committed by dictators.

The extended time in which the corrupt practices are committed by the state agents and the sophisticated laundering schemes employed by them make it impossible for the prosecution to establish a clear connection between the offences and each of the identified assets. Therefore, the evidence of the criminal activity in conjunction to the disproportion between the wealth of the criminal and his licit income should be sufficient to create an overall presumption of illegality of the origin of the assets to allow its repatriation.

Finally, the case helped set some conditions to overcome the principal obstruction to more successful cases of asset recovery: the need for a final decision from the requesting country. As settled by the Swiss Supreme Court, there is no reason for preventing the anticipated return of assets when it is clearly established the illegal origin of the assets. Although a similar position was adopted in the Abacha case, it seems that, in cases where the political pressure to reach a final solution is significantly smaller, the Swiss courts have been more cautious in applying this precedent of the Supreme Court extensively, even when the illicit origin of the assets is recognized beyond reasonable doubt, as occurred in the TRT-SP case.

1.3. The Abacha case

As compared to other cases, the Abacha case should be regarded as an example of how the synchronization of multiple legal strategies in conjunction with the active coordination of different jurisdiction can result in effective asset recovery.

General Sani Abacha seized power in Nigeria in 1993 through a military coup[266] that prevented the newly elected President, Chief Moshood Abiola, to take office[267]. The Abacha regime was marked by violent political persecution, human rights violations and corruption forcing the exclusion of Nigeria of the Commonwealth in 1995[268].

The first source of General Abacha's illicit wealth was the direct withdrawals of public funds from the Central Bank of Nigeria, which became known as the "security votes monies scandal"[269]. The method consisted mainly in asking the National Security Advisor, IsmaïlaGwarzo, to make a request of urgent funding for national security purposes[270]. The requests, which usually did not contain any detailed explanation, could only be authorized by the President[271]. The funds were withdrawn in cash or in travellers' cheques by Gwarzo and taken to the General's house[272]. The money was then laundered by the General's eldest son, Mohammed Abacha and would end up in accounts belonging to the Abacha family and Abubakar Bagudu, a business associate of the Abachas[273]. Some of the funds were directly wire-transferred from the Central Bank to one of Abacha's or his associates' accounts[274].It is estimated that around USD 2 billion had been deviated by this method[275].

Another corrupt practice was receiving bribes for approving inflated public contracts which were paid by the contractors directly into offshore accounts

[266] Monfrini (2008) *supra* note 83, at 42.
[267] Daniel and Maton (2008) *supra* note 28, at 63.
[268] Monfrini (2008) *supra* note 83, at 42.
[269] Daniel and Maton (2008) *supra* note 28, at 66.
[270] *Ibid.* 66.
[271] *Ibid.* 66.
[272] Monfrini (2008) *supra* note 83, at 44.
[273] *Ibid.* 44.
[274] *Ibid.* 44.
[275] Daniel and Maton (2008) *supra* note 28, at 67.

belonging to the Abachas.[276] The Abachas were also involved in the "Ajaokuta Steel Plant buy-back fraud"[277]. In the 1970's the Russians financed the construction of the Ajaokuta Steel Plant in Nigeria[278]. However, the highly expensive plant, by the end of the 1990's, did not give the expected return[279] and "[i]n an effort to cut their losses, the Russians started selling off the debt due on the plant to anyone who was prepared to take it on"[280]. The Abachas used Mecosta, a front company established in the British Virgin Island, to buy the debt by 53% of its face-value and then sold it back to the Nigerian government by twice the sum they have paid[281]. The GBP 166 million of profit was deposited in a Bank in London[282].

When General Abacha died of a heart attack in June 1998, his successor, General Abdulsalami Abubakar, called for democratic elections and installed a Special Investigation Panel to trace and recover the assets looted by Abacha[283]. The new government also issued Decree 53 of 26 May 1999 that among other things offered amnesty to public officialswho disclosed information on the stolen assets[284]. As a result of this decree, Mohammed Abacha and Bagudugave the location of around USD 670 million and GBP 50 million[285].

1.3.1. The asset recovery procedure

According to Monfrini, the attorney hired by the government of Nigeria to recover the assets abroad, the legal strategies adopted in the case were to send MLA requests to support domestic criminal prosecutions and to lodge "criminal complaints for money laundering in jurisdictions where the assets of the Abacha criminal organization had been identified or were suspected to be"[286]. A civil

[276] Monfrini (2008) *supra* note 83, at 44.
[277] *Ibid.* 46.
[278] Daniel and Maton (2008) *supra* note 28, at 70.
[279] *Ibid.* 70.
[280] *Ibid.* 70.
[281] *Ibid.* 70.
[282] *Ibid.* 70.
[283] Monfrini (2008) *supra* note 83, at 43.
[284] Daniel and Maton (2008) *supra* note 28, at 66.
[285] *Ibid.* 66.
[286] Monfrini (2008) *supra* note 83, at 41.

complaint was also brought in the United Kingdom in order to recover the assets linked to the Ajaokuta Steel Plant buy-back fraud[287].

The evidence gathered by the SIP allowed the Nigerian government to send a letter rogatory to Switzerland on 30 September 1999[288], "requesting the handover of 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"[289]. The freezing order that concerned deposits amounting to USD 80 million was granted on 13 October 1999, but the Swiss authorities asked for a formal MLA request, which was sent by Nigeria on 20 December 1999[290].

The Nigerian authorities, as occurred in both Duvalier and Marcos cases, had difficulties obtaining in a timely manner banking information that could help trace other assets held by the Abachas[291]. Therefore, the government of Nigeria decided to support a domestic criminal investigation[292] already opened in Switzerland by the Attorney General of Geneva on money laundering, and participation in a criminal organization, and also filed new complaints on "breach of trust, fraud, extortion, unfaithful management, concealment, participation in a criminal organization, money laundering and lack of due diligence in financial matters"[293].

The advantages of qualifying the Abachas and their associates as a criminal organization under Swiss law were the same as in the Duvalier case. Switzerland has jurisdiction over this offence if part of the criminal activity, mainly

[287] *Ibid.* 46.
[288] *Ibid.* 47.
[289] Daniel and Maton (2008) *supra* note 28, at 67.
[290] Monfrini (2008) *supra* note 83, at 47.
[291] *Ibid.* 48.
[292] *Ibid.* 48.
[293] Basel Institute on Governance, Chronology: Efforts in Switzerland to Recover Assets Looted by Sani Abacha of Nigeria, Intermediate Training Programme on Asset Tracing, Recovery and Repatriation, Jakarta, September 2007. 3, at http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=78488349-a33e-11dc-bf1b-335d0754ba85

money laundering, has occurred in its territory, and it also implies reversing the burden of proof regarding the origin of the assets[294].

In addition, on 3 December 1999, the investigating magistrate in Geneva granted Nigeria the status of civil third party (*partie civile*) in the criminal proceedings and, therefore, it would be entitled as victim to be rewarded the confiscated assets in case of a conviction[295].

Also in December 1999, the investigating magistrate sent a blanket order to 385 banks registered in Switzerland to verify whether there were any accounts belonging to the Abachas and their associates[296]. In result of this order and the fulfillment of the reporting of suspicious transactions obligation by the Swiss banks new accounts were identified and a total USD 645 million belonging to the criminal organization were frozen by the end of 1999[297].

A criminal prosecution in Switzerland had two other advantages for the asset recovery process, as listed by Monfrini[298]. First, after the indictment it was possible for the government of Nigeria, as civil party, to access the files of the case, including the banking records[299], despite some restrictions imposed by the Swiss Courts on the use of the information[300]. Second, the investigation in Switzerland allowed the tracing and freezing of assets in a third jurisdiction, Luxembourg, as a result of the transmission of MLA requests by the Swiss investigating magistrate[301].

[294] Monfrini (2008) *supra* note 83, at 49.
[295] Daniel and Maton (2008) *supra* note 28, 67.
[296] Monfrini (2008) *supra* note 83, at 50.
[297] *Ibid.* 50.
[298] *Ibid.* 50-52.
[299] *Ibid.* 50. See also Daniel and Maton (2008) *supra* note 28, at 67.
[300] As decided by the Swiss Federal Supreme Court on 7th December 2001 that the access to the case files could not result in the circumvention of the regular MLA procedure nor in the undue restriction of the party to access the file. The Court remanded the case to the investigating judge that, giving a solution to the "paradox" allowed the Government of Nigeria to access the files, provided that it would not use the document in domestic proceedings making the MLA lose its object. See Extrait de l'arrêt de la Ie Cour de droit public du 5 juin 2001 dans la cause Abacha et Bagudu contre Chambre d'accusation du canton de Genève (recours de droit administratif). §4
[301] Monfrini (2008) *supra* note 83, at 52.

The government of Nigeria also sent a MLA request to Luxembourg on 29 February 2000[302]. Upon receipt of Nigerian request, Luxembourg authorities were able to freeze USD 630 million deposited in eight bank accounts[303].

Domestic criminal proceedings in Luxembourg could not be initiated, however, because, by that time, the only predicate offence to money laundering in their legal system was drug trafficking[304]. On the other hand, Luxembourg authorities authorized Nigeria to share the evidence gathered in that jurisdiction with the Swiss authorities whowere also prosecuting the Abacha's criminal organization[305].

The evidence gathered in Switzerland and Luxembourg also helped to identify bank accounts used by the Abachas in Liechtenstein[306]. On 28 July, another MLA request was sent to Liechtenstein which resulted in the freezing of USD 200 million deposited in several bank accounts[307]. A criminal investigation was opened in Liechtenstein in which the Nigerian government was also accepted as a civil party[308]. In the course of their criminal investigation, Liechtenstein authorities obtained MLA from Nigeria, Switzerland, Germany, Austria and Luxemburg[309]. On 19 January 2005, six people were indicted by Liechtenstein Attorney-General[310]. Since the accused were absent from the proceedings it was converted into a forfeiture proceeding that is still pending in the country's courts[311]. Assets in Luxembourg and Liechtenstein remain frozen[312].

Part of the Abachas money was also sent to Jersey. As a result of a MLA request sent on 1 January 2001, Jersey authorities ordered the freezing of USD 160 million and launched their own investigation on money laundering[313]. When Abubakar Bagudu was arrested in Texas, Jersey authorities asked for his

[302] *Ibid.* 53
[303] *Ibid.* 53.
[304] *Ibid.* 53.
[305] *Ibid.* 53.
[306] *Ibid.* 54.
[307] *Ibid.* 54.
[308] *Ibid.* 54.
[309] *Ibid.* 54.
[310] *Ibid.* 54.
[311] *Ibid.* 54.
[312] Daniel and Maton (2008) *supra* note 28, at 69.
[313] Monfrini (2008) *supra* note 83, at 54.

extradition[314]. In order to avoid the criminal prosecution in Jersey, Bagudu agreed to return the USD 160 million to Nigeria[315].

On the letter rogatory sent on 20 December 1999, the government of Nigeria had already sought the anticipated return of the funds deposited in Switzerland based on article 74a of the EIMP[316]. This request was renewed on 2nd October 2003, after the conclusion of the remittance of the banking documents by Switzerland. On 18 August 2004, the Federal Office of Justice granted the anticipated handing over[317]. This decision was supported by the fact that the clear existence of a criminal organization has been demonstrated in the Swiss domestic criminal proceedings[318].

The FOJ's decision, which was appealed by the defendants, was partially confirmed on 7 February 2005 by the Swiss Federal Supreme Court[319]. The Court authorized the repatriation of the amounts which have been proven to be linked to the fraudulent withdrawals from the Central Bank of Nigeria[320]. The other accounts which held deposits whose origin was not yet clearly established would remain frozen in Switzerland[321]. The Court also ruled that the reversal of the burden of proof on the origin of assets of a criminal organization was also applicable to MLA proceedings. According to the Court:

> In its message of 30 June 1993 relating to the amendment of the Penal Code which led to the introduction of ch. 3 of Article 59 CP, in accordance with the Law of 18 March 1994 […] the Federal Council emphasized that the purpose of this new law was to repeal the prevailing rule in both internal law and mutual legal assistance, according to which an asset can only be confiscated where it is possible to prove the criminal offence from which it is derived. With regard to the criminal organization, confiscation extends to all assets in its possession. *This is explained by the fact that if the assets in*

[314] *Ibid.* 54.
[315] *Ibid.* 54.
[316] *Ibid.* 56.
[317] *Ibid.* 56.
[318] *Ibid.* 56. This requirement was already made clear by the Swiss Federal Supreme Court in Marcos case.
[319] Extrait de l'arrêt de la Ire Cour de droit public dans la cause Abacha et consorts contre Office fédéral de la justice (recours de droit administratif) 1A.215/2004 du 7 février 2005. 131 II 169. at : http://relevancy.bger.ch/php/clir/http/index.php?lang=de&type=highlight_simple_query&page=1&from_date=&to_date=&from_year=1954&to_year=2007&sort=relevance&insertion_date=&query_words=132+II+81&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F131-II-169%3Ade&number_of_ranks=0&azaclir=clir#page169
[320] *Ibid.* §7.3.1.
[321] *Ibid.* §9.

> *question are held by a criminal organization, it is entirely probable that they are derived from an equally criminal activity* […] The Federal Council has justified the adoption of a specific rule in that respect inter alia by *the need to facilitate mutual legal assistance and the execution of foreign confiscation orders relating to property and assets transferred to Switzerland by criminal organizations* […] *It follows – even if the message does not say so – that article 59, ch. 3 second sentence, CP also applies in the field of mutual legal assistance* […] Thereafter, funds held by a criminal organization are presumed to be of criminal origin unless the holders prove contrary. Unless they have reversed the presumption in Article 59 ch. 3 second sentence, CP, delivery must be ordered in accordance with Article 74a (3) EIMP, without any further examination of the provenance of the funds reclaimed. The structure set up by Sani Abacha and his accomplices constitute a criminal organization as defined by article 59 ch. 3 CP, since its object was to embezzle funds from the Central Bank of Nigeria for private purposes, and to profit from corrupt transactions[322]. [emphasis added]

The Court, therefore, determined that the FOJ should afford the defendants the opportunity to prove the licit origin of the funds reversing the presumption established by article 59 of the Penal Code, before remitting the remaining assets to Nigeria[323]. Since the Abachas were not able to provide the necessary evidence, between 2005 and 2007 all the assets deposited in Switzerland amounting to USD 508 million were transmitted to Nigeria[324]. The remittance, however, was agreed under the condition that the assets would be "used for development projects in health and education, as well as for infrastructure", under the supervision of World Bank and the Swiss government[325].

As mentioned above, civil proceedings were also initiated in the United Kingdom in order to recover the assets related to the Ajaokuta Steel Plant buy-back fraud in July 1999. Between July and August 1999, the government of Nigeria, Mohammed Abacha and Abubakar Bangutu negotiated a settlement and agreed to end the claims for DEM 300 million. However, the parties disagreed to the extent of the agreement[326]. The government of Nigeria claimed that the settlement referred only to the buy-back fraud and the defendants argued that it encompassed all claims against them and their associates[327]. The issue was finally decided in

[322] *Ibid.* §9.1.
[323] *Ibid.* §9.2.
[324] Monfrini (2008) *supra* note 83, at 59.
[325] Daniel and Maton (2008) *supra* note 28, at 69.
[326] Monfrini (2008) *supra* note 83, at 46.
[327] *Ibid.* 46.

February 2001, when the London High Court decided in favor of the government of Nigeria and ordered the payment of DEM 300 million[328].

In June and August 2000, Nigeria and Switzerland also transmitted MLA requests to the United Kingdom in order to support their respective criminal investigations, mainly referring to bank transfers in London[329]. The Abachas started a legal battle to avoid the execution of the requests and eventually managed to delay the transmission of the evidence until December 2004[330]. No account was frozen or any investigation on money laundering was started in the UK[331].

1.3.2. Obstacles to asset recovery

In comparison to the other cases previously analysed, the Abacha case is by far the most successful one. In eight years of litigation, the Nigerian government was able to recover USD 1.2 billion from the USD 2 billion traced so far[332]. This, however, probably represents half or, on the most optimistic evaluations, two-thirds of what was looted by General Abacha and his associates[333].

Despite that, it is still possible to identify some difficulties faced by the Nigerians during the recovery process. Every phase of the MLA proceedings, such as the transmission of documents, the freezing of assets and the repatriation, was challenged judicially by members of the Abacha criminal organization. The last appeal of the Abachas against the transmission of banking documents to Nigeria in the MLA proceedings in Switzerland was only decided in April 2003, almost four years after the request was sent[334]. The same delay occurred with the MLA request sent to the UK.

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[328] *Ibid.* 46.
[329] Daniel and Maton. (2008) *supra* note 28, at 74.
[330] *Ibid.* 75 and Monfrini (2008) *supra* note 83, at 65.
[331] Monfrini (2008) *supra* note 83, at 65.
[332] *Ibid.* 41.
[333] Daniel and Maton. (2008) *supra* note 28, at 77.
[334] Monfrini (2008) *supra* note 83, at 52.

Except for Switzerland, which waived this requirement, the lack of a final decision is still preventing the repatriation of assets frozen in Luxembourg and Liechtenstein, for example.

The lessons taken from the Abacha case are nonetheless mainly positive. First, the adoption by Nigeria and Jersey of mechanisms to give immunity or accept plea bargaining agreements in exchange for effective collaboration with some of the involved persons, has proved to be a useful tool for tracing assets. As discussed, not in every case is prompt information on the location of stolen assets available, as it occurred in the Marcos case upon discovery of the Malacagang documents. Hiring private investigators, as discussed, can also be highly expensive and, without the proper details on the identification of assets, an MLA request can be refused as a fishing expedition.

The opening of criminal investigations on money laundering and criminal organization in foreign jurisdictions were pivotal to supplement and give expediency to the tracing and recovery of assets. Domestic law enforcement authorities have at their disposal legal tools, such as blanket orders, which are not readily accessible through MLA. Requesting authorities, for example, are generally required in MLA proceedings to provide precise information on the nature and location of the assets which are object to a request. Broad and vague requests, known as "fishing expeditions", are usually considered as grounds for the refusal of assistance[335].

In the Abacha case, the exchange of information through MLA requests between states which started criminal prosecution in their territories, mainly Nigeria, Switzerland, Liechtenstein and Jersey, created a network of legal cooperation capable to uncover more easily the path of financial transactions regarding the illegal monies. As a result, authorities could establish the existence and the *modus operandi* of the criminal organization more clearly, facilitating the return of assets. This was only possible because each of these countries started investigations of their own and took active steps to gather evidence in other jurisdictions on behalf of their own criminal cases. Had the Nigerian authorities

[335] T. Lasich, *The investigative process – a practical approach*, *in* Tracing Stolen Assets: A Practitioner's Handbook, Basel Institute on Governance, International Centre for Asset Recovery (2009) 66

relied only on the lengthy procedure of MLA request, when the first evidence broke through the battle with the defendants and reached their hands, probably the evidence sitting in third jurisdictions would have already vanished and the assets transferred to another safe haven.

Finally, it must be emphasized the progressive position of the Swiss Supreme Court, as occurred in the Marcos case, in regard to the efforts of returning assets derived from corruption in at least two aspects. First, the waiving of the requirement of a final decision of confiscation for the handing over of the stolen assets when there is clear evidence of their illicit origin. Second, when the Court sustained the presumption of illegality of the overall assets belonging to a criminal organization and dismissed the necessity to prove the specific criminal offence from which they originated.

1.4. The São Paulo Regional Labor Court (TRT-SP) Case

The main purpose of analyzing the TRT-SP case is to verify whether the adoption of different legal strategies of asset recovery is an available and effective approach in cases involving moderate values. The secondary purpose is to compare whether there are similarities between the obstacles faced in grand corruption cases and small corruption cases. Furthermore, the case illustrates how the lengthy processing of the criminal cases in the courts of the requesting state is one of the main barriers to asset recovery.

This case refers to the embezzlement of public funds destined to pay the construction of a building of Regional Labor Court of Sao Paulo (TRT-SP). Nicolau dos Santos Neto, at the time the President of the TRT-SP[336], launched in January 1992 a tendering process for the acquisition/construction of the building for the Councils of Settlement and Judgment of the city of Sao Paulo[337]. Although 29 companies registered for the tendering process[338], only three presented proposals

[336] Later, he became the President of the Constructing Commission of the TRT-SP.
[337] Parliamentary Commission of Inquiry. Report on Regional Labour Court. 2nd Region. Brazil. English Translation. 12.
[338] *Ibid.* 16.

and one was disqualified[339]. Later investigations by the Parliamentary Commission of Inquiry (CPI) showed that several companies which withdrew from the process received checks from Grupo Monteiro de Barros, involved in the case[340].

The company which won the tendering process was INCAL Indústria e Comércio de Alumínio Ltda, but surprisingly the auction was adjudicated in the name of INCAL Incorporações SA which did not participate in the process[341]. The latter company, which was supposed to construct a building of over USD 100 million, was incorporated one day after the tendering process and had a declared capital of only USD 70[342]. INCAL Incorporações was in fact a consortium made of "Monteiro de Barros Investimentos S/A (whosepartners are Fabio Monteiro de Barros Filho and José Eduardo Corrêa Teixeira Ferraz) and Grupo OK Construções e Incorporações S/A (owedby Luiz Estevão de Oliveria)"[343]. Grupo OK was the company which lost the tendering process to INCAL.

Although the contract was only signed in September 1992, the President of TRT authorized between April and July 1992 advance payments for the construction of the building amounting to BRL 36 million[344], alongside with many other irregularities regarding the Brazilian law on public procurement.

On 16 March 1993, Judge Nicolau dos Santos Neto, the President of the Construction Commission of the TRT-SP at the time, proposed the hiring of an engineer to accompany the stages of construction[345]. After a tendering process, Antonio Carlos da Gama e Silva, who presented the lower price between three participants, was hired[346].

The engineer's main task was to prepare reports "which confirmed the physical progress on the enterprise, in percentage terms relative to the service projections contained in the physical chronogram, comparative to the release of

[339] *Ibid.* 16.
[340] *Ibid.* 15-16.
[341] *Ibid.* 17.
[342] *Ibid.* 17
[343] Basel Institute on Governance, Nicolau dos Santos Neto. Chronology, Asset Recovery Knowledge Centre, at: http://www.assetrecovery.org/kc/node/e8feaf07-54cc-11de-bacd-a7d8a60b2a36.5
[344] Parliamentary Commission on Inquiry (1999) *supra* note 337, at 17-18.
[345] *Ibid.* 32
[346] *Ibid.* 33.

resources by the TRT"[347]. In the reports prepared by da Gama e Silva, it was never identified any disproportion between the stage of the construction and the payments made by the Tribunal[348]. The Federal Prosecution Office reached a different conclusion later on, when it affirmed that in 1998 only 64% of the building was constructed, but 98% of the funds had already been given to INCAL[349]. As concluded by the CPI, the reports by the engineer were used by the Tribunal to release more funds to the construction company[350]. The investigation did not find any deposits by the Grupo Monteiro de Barros to da Gama e Silva during the period he was hired, but he received checks before he signed the contract in 1993 and after he cancelled the contract with TRT in 1998[351].

Upon suspicion of embezzlement of funds regarding the TRT-SP building, in May 1997, the Federal Prosecution Office (MPF) started an investigation. In July 1998, the MPF filed a civil public action for administrative impropriety[352] against Nicolau dos Santos Neto, the businessmen who owed the companies behind INCAL Incorporações, including a Senator (Luiz Estevão de Oliveira) and the companies involved. On 28 September 1998, the judge suspended the payment to INCAL and ordered that the remaining funds related to the construction of building should be deposited in a judicial account and also ordered the freezing of the assets belonging to the defendants, among other things[353].

Furthermore, a Parliamentary Commission of Inquiry (CPI) was created in 25 March 1999, to investigate irregularities practiced by members of the Judicial branch, beginning with the TRT-SP case.[354] It is estimated that the works on the TRT building cost the company around BRL 62 million[355] but it had received

[347] *Ibid.* 34.
[348] *Ibid.* 35-36.
[349] Folha online, *Entenda o caso da obra do TRT de São Paulo,* 3 May 2006, at. http://www1.folha.uol.com.br/folha/brasil/ult96u78196.shtml
[350] Parliamentary Commission on Inquiry (1999) *supra* note 337, at 37.
[351] *Ibid.* 41.
[352] The action for administrative impropriety is regulated in Brazil by Law 8.429 of 1992. Although it has a civil nature it can result in different sanctions for the public agent such as the confiscation of assets and the loss of the public position.
[353] Parliamentary Commission on Inquiry (1999) *supra* note 337, at 51.
[354] *Ibid.* 8.
[355] Approximately USD 44 million. See Basel Institute for Governance, Nicolau dos Santos Neto. Chronology, *supra* note 343, not paginated

approximately BRL 231 million[356] from the Tribunal, resulting in more than BRL 169 million of illegal profit for the contractors[357]. After lifting the banking secrecy of those involved in the case, the CPI found out that INCAL Incorporações made massive transfers to Grupo Monteiro de Barros and Grupo OK, each time the public treasury released funds for the construction. It is estimated that Grupo OK received USD 34,286,217.5 of embezzled funds[358]. The criminal proceeds were used to buy luxury goods both in Brazil and abroad or laundered through bank accounts in foreign jurisdictions[359].

Due to his involvement in the case, Senator Luiz Estevão was impeached in June 2000[360]. Criminal proceedings in Brazil against those involved in the case began in 2000 and are still pending a final decision by the Superior Court of Justice[361].

[356] Approximately USD 165 million. See Basel Institute for Governance, Nicolau dos Santos Neto. Chronology, *supra* note 343, not paginated.
[357] Apelação Criminal 2000. 61.81.001248-1. Tribunal Regional Federal da 2ª Região. Julgamento em 4 de abril 2005. 26.
[358] Folha online. (2006) *supra* note 349, not paginated.
[359] Apelação Criminal 2000.61.81.001248-1. Tribunal Regional Federal. (2005) *supra* note 357, at 26.
[360] Basel Institute on Governance, Nicolau dos Santos Neto. Chronology, *supra* note 343, not paginated.
[361] The Brazilian courts are severely overburdened, which impacts the processing of cases in general. In 2009, for example, from each group of 100 proceedings, 71 ended the year without a final solution. (see Conselho Nacional de Justiça, *Congestionamento de processos reforça compromisso com metas,* at: http://www.cnj.jus.br/index.php?option=com_content&view=article&id=9842:2o-vara-criminal-do-acre-julga-todos-os-processos-de-meta-2&catid=1:notas&Itemid=169). Regarding the Brazilian Superior Court of Justice (STJ), in 2010 alone, over 260 thousand new proceedings were distributed for judgment and 24,28% of the court's decisions were appealed internally to one of the Chambers or Sections of the STJ. (See Superior Tribunal de Justiça, Relatório Estatístico 2010, 10, at http://www.stj.jus.br/webstj/Processo/Boletim/verpagina.asp?vPag=1&vSeq=168). A research study ordered to identify the main gaps of the judicial system pointed out that "the slow pace of justice has been used for procrastinating a final decision by parties who take advantage of the current congestion of the proceedings". (Conselho Nacional de Justiça, *Ministro Peluso defende uso de pesquisas para identificar gargalos do Judiciário,* at: http://www.cnj.jus.br/index.php?option=com_content&view=article&id=10581:em-quatro-dias-mutirao-em-curitiba-concedeu-beneficio-em-49-dos-processos&catid=1:notas&Itemid=169 – [freely translated by the author]

1.4.1. The asset recovery procedure[362]

According to the Head of the International Department of the Office of the Attorney-General of the Union of Brazil (DPI/AGU)[363], Brazil focused its recovery efforts mainly on the United States of America and Switzerland, although some informal requests for international legal cooperation were sent to other jurisdictions such as Spain, France, Lebanon and the Bahamas. Two main legal strategies were adopted. First, MLA requests have been transmitted to both countries in order to provide evidence for the domestic criminal proceedings in Brazil, as well as to obtain the freezing and later confiscation of assets of the persons under investigation. Second, law firms were hired abroad to file a civil complaint in the US in order to confiscate an apartment belonging to Nicolau dos Santos Neto and to represent Brazil as a civil third party in criminal proceedings brought forth in Switzerland.

The first leads in regard to the assets purchased by Nicolau dos Santos Neto with the proceeds of corruption came from investigations by the MPF and the CPI, especially from the testimony of Marco Aurélio Gil de Oliveira[364], former son-in-law of the Brazilian judge. The evidence pointed to the existence of an apartment in the Bristol Towers in Miami and bank accounts in the US and Switzerland. A working group consisting of members from the Ministry of Justice, the Office of the Attorney-General of the Union, the Ministry of Foreign Affairs, the Federal Prosecution Office, the Central Bank and the Council of Control of Financial Activities (the Brazilian Unit of Financial Intelligence) was created with the purpose of tracing and recovering the assets related to the TRT-SP case[365].

On 28 April 1999, the CPI sent a request to the US to obtain information on the apartment owned by Nicolau dos Santos Neto in Miami. The US authorities replied that they could not answer the request without authorization from the owner of the real estate, but information on the sale contract could be found in a

[362] The information regarding the asset recovery procedure in the TRT-SP was mainly obtained through the interview with authorities from the Office the Attorney-General of the Union of Brazil (AGU) on 6 April 2011.
[363] Interview of Ms. Danielle Aleixo Reis do Valle Souza conducted on 6 April 2011
[364] D. Pinheiro e M. Lima, *Dom Nicolau, lau, lau, lau, lau*, Veja. 28 April 1999, at: http://veja.abril.com.br/280499/p_044.html
[365] Advocacia-Geral da União, Caso TRT 2a Região, Relatório de 15 Janeiro 2001, at 1.

public registry. The CPI found that the apartment was registered in the name of Hillside trading, a company incorporated in the Bahamas.

On 25 April 2000, a letter rogatory was sent to the US asking for the freezing of the apartment. The US authorities answered that as the goal of the measure was the final confiscation of the apartment, then it should have been processed as a MLA request or should be requested to an American judge by means of a civil action. By that time, the Mutual Legal Assistance Treaty between Brazil and the United States of America was not in force[366], which made the granting of MLA more complicated. Consequently, Brazil decided to hire a law firm to pursue the domestic civil forfeiture of the apartment in American courts and to act as a facilitator for the dialogue between Brazil and the US authorities in charge of executing the MLA requests. Both measures depended, nevertheless, on evidence collected in the Brazilian criminal proceedings to demonstrate the link between the assets and accounts located abroad and the embezzlement of the funds destined for the construction of the building.

On 12 July 2000, a request was sent to the US aiming at the identification of bank accounts and bank transactions, real estate transactions, the existence of any companies owned by the defendant and the freezing of the apartment in the Bristol Tower in Miami and other assets in the name of the defendants. As mentioned, the execution of the request was facilitated by the law firm hired by Brazil in the US. Throughout 2001, the US authorities sent the banking records of accounts owned by the defendant which showed that a few days after the release of funds for the construction of the TRT-SP in Brazil, huge deposits were made into the accounts held by Luiz Estevão de Oliveira in US banks, followed by transfers to the account in in Geneva held by Nicolau dos Santos Neto.

On 27th August 2001, the Eleventh Circuit Court forfeited the apartment in the Bristol Towers in Miami, declaring that "the funds used to purchase the Property were funds belonging to plaintiff Federal Republic of Brazil, and wrongfully converted by the defendants though the abuse of a position of trust

[366] The MLAT entered into force only in 2001.

with respect to those funds"[367]. After determining the selling of the apartment, the US court returned around USD 870 000 to Brazil in 2002.

Upon receiving information on the ongoing investigations against Nicolau dos Santos Neto in Brazil, the Swiss authorities decided to open their own investigation against the Brazilian judge and his wife on money laundering in 1999. On 4 May 1999, the investigating judge of Switzerland sent a MLA request to Brazil asking for the copies of the Brazilian investigation files and for the testimony of Judge Nicolau dos Santos Neto. At the same time, the investigating judge ordered the freezing of funds[368] deposited in an account of abank in Geneva.

In February 2000, the Brazilian authorities sent a MLA request to Switzerland asking for the freezing of the abovementioned account[369]. On 10 August 2000, the Swiss authorities confirmed that the funds were under a double freezing (as a consequence of the order in the criminal proceeding opened in Switzerland and in response to the Brazilian MLA request). The defendant appealed against the decision which granted the MLA freezing request[370].

The Swiss authorities asked Brazil to correct its request by indicating the location and links of the eventual assets with the criminal conducts of the defendants. A new request was sent by the Brazilian authorities, but it was still considered on 29 January 2001 as an undetermined research by the Swiss authorities. Only on 28 January 2003, the judge of the Geneva canton partially granted the Brazilian request and authorized the transmission of banking records[371]. The tracing measures requested by Brazil had already been executed as part of the investigation in the Swiss criminal proceedings against judge dos Santos

[367] Federative Republic of Brazil vs Neto, Nicolau Dos Santos, Biarritz Properties Corp and Stedman Properties Inc. Eleventh Judicial Circuit Court. Final Judgment. 27 August 2001. Case Number: 2000-21649-CA-01. 2

[368] Approximately CHF 7 million.

369 Arrêt du 27 novembre 2007 IIe Cour des plaintes. Nicolau DOS SANTOS NETO contre JUGE D'INSTRUCTION DU CANTON DE GENÈVE, partie adverse Entraide internationale en matière pénale au Brésil. Durée de la saisie conservatoire (art. 33 a OEIMP). Tribunal Penal Federal. Numéro de dossier: RR.2007.131. at Faits, §B.

[370] Ibid. at Faits, §C.

[371] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §20.

Neto, therefore, the judge simply ordered the transmission of copies of the Swiss file[372].

On 26 May 2004, Brazil sent a formal MLA request seeking the repatriation of the funds. On 20 September 2004, the investigating judge authorized the anticipated return of the funds deposited in the Swiss accounts accounts that at time amounted to USD 4,389,084. However, this decision was later reversed by the Accusation Chamber on 13 January 2005 which affirmed that the 26 May 2004 request did not comply with procedural formalities and also ruled that the repatriation of the assets could only be granted after a final decision on the confiscation in the Brazilian criminal proceedings[373]. The return of the assets by force of the MLA request was then mainly dependent on the conclusion of the criminal case in Brazil.

Meanwhile, on 26 October 2000, the Geneva Court denied the appeal of Nicolau dos Santos Neto against the freezing of his accounts in the domestic criminal proceeding in Switzerland[374]. On 12 June 2001, the Swiss lawyer hired by Brazil filed a criminal complaint and asked Brazil for authorization to participate as civil third party in the ongoing criminal proceedings in Switzerland[375].

On 20 August 2007, Nicolau dos Santos Neto filed an appeal in the Accusation Chamber of Geneva, under the MLA proceedings, asking for the unfreezing of his accounts due to the lack of a final confiscation order in Brazil. The Swiss informed Brazilian authorities that the freezing of assets must be cancelled if it appears that the foreign authority is not in a position to obtain the confiscation of the assets, therefore, they asked the requesting authorities to inform what the status of the criminal proceedings in Brazil against the defendant was and to provide justification as to why a final decision of confiscation had not been reached yet.

[372] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §20
[373] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §23.
[374] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §16
[375] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §5

The Brazilian authorities stated that Nicolau dos Santos Neto was convicted in first instance on 26 June 2002 for corruption and money laundering and sentenced to 8 years imprisonment. The judge also ordered the confiscation of the assets. This decision was appealed by both the defendant and the prosecution. On 4 April 2005, the Brazilian Federal Court of the 3rd Region upheld the conviction, and increased the sentence to 14 years imprisonment. The defendant then appealed to the Superior Court of Justice, which has not rendered a decision yet. The Brazilian authorities explained that there was no specific delay regarding the case, but it is only following the normal course of Brazilian criminal procedure. In 27 November 2007, the Federal Court of Switzerland accepted the information sent by Brazil and maintained the accounts frozen.

The investigation phase of the criminal proceedings against Nicolau dos Santos Neto and his wife, Maria da Gloria Bairão dos Santos in Switzerland ended in October 2007, over 8 years after the case was opened. As generally occurs in cases of money laundering proceeds resulting from offences committed abroad, the national authorities must rely on information received from the country were the predicate offences were committed to provide evidence of the illicit origin of the targeted funds. As seen, the confirmation of conviction of the defendants in the second instance of the Brazilian case for the perpetration of predicate offences only took place in 2005. Therefore, the length of the criminal proceedings in Brazil may be the main justification for the delay in the conclusion of the investigation in Switzerland.

On 28 April 2009, in response to a Brazilian request on those criminal proceedings, the General Prosecutor of Geneva ordered the confiscation of the amounts deposited in the Swiss accounts and also the payment of USD 3,873,628 as compensation(*créance compensatrice*)[376] both in favor of Brazil.

[376] The compensation was ordered because it has been proven in the criminal proceedings in Switzerland that transfers amounting to USD 3,873,628 were made from the Swiss account to accounts belonging to front companies in Miami, New York and Cayman Islands between 1994 and 1999. See Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §41. According to Article 71 of Swiss Penal Code : "If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the State in respect of a sum of equivalent value, which claim may be enforced against a third party only

On 13 January 2010, the Police Court of Geneva upheld the General Prosecutor's order. The Police Court established that the evidence in the Swiss criminal proceedings was sufficient to determine the criminal origin of the assets deposited in the accounts and that Nicolau dos Santos Neto made part of a criminal organization which rendered possible the confiscation of the assets under Swiss Law, as explained in the previous cases[377]. Furthermore, according to the decision, the fact that the defendant was not convicted for taking part in a criminal organization did not prevent the confiscation in Switzerland[378]. This decision, however, is still subject to appeal and, therefore, the assets have not been repatriated to Brazil yet.

Despite some evidence pointing to the existence of assets belonging to the criminal organization in the Bahamas, France, Spain, Singapore and Lebanon, there is no record that the informal consultations sent by the Brazilian authorities to those countries in this regard have been complemented by formal MLA requests so far. In the case of the Bahamas, the local authorities informed that the gathering of information protect by secrecy under local law depended on the transmission of a MLA request based on a MLA treaty. At that time, Brazil did not have such bilateral treaty signed with the Bahamas[379].

1.4.2. Obstacles to asset recovery

The efforts to recover assets in the TRT-SP case built upon the experience of the Abacha case[380]. Relying on the knowledge of local lawyers about the domestic legislation and procedure of foreign jurisdictions allowed not only the repatriation, in less than 2 years, of the value of the apartment in Miami[381], but

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if he is not excluded by Article 70 paragraph 2."(the English translation of the Swiss criminal code is available at http://www.admin.ch/ch/e/rs/311_0/index.html).

[377] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §6.1 and §8.

[378] *Ibid.* §8.4

[379] However, according to the Head of the International Department of the Office of Attorney General of the Union, the information about companies established in the Bahamas was later obtained by the efforts of evidence gathering by a law firm sub-hired by the American Law firm working on that case.

[380] Even the Law firm hired in Switzerland was the same as the one hired by the Nigerian government in Abacha case.

[381] Although Brazil has now more than 500 ongoing cases of asset recovery, according to the information provided by the interviewed authorities in the DRCI/MJ of Brazil, the amount recovered in the TRT-SP and approximately USD 3 million recovered in the Banestado case, which does not involve offences related to corruption, are the only cases of repatriation of criminal assets in Brazil.

also the gathering of evidence necessary to trace assets transferred from US accounts to other jurisdictions. In Switzerland, the active participation of Brazil in the domestic criminal procedure led to a first instance decision of confiscation, even in the absence of a final decision in the Brazilian proceedings. If Brazil had relied only on the MLA request, there would not be any chance to recover the assets in a near future, because, as will be explained below, the Brazilian proceedings are far from reaching their conclusion.

The TRT-SP case has nonetheless faced many obstacles so far. In relation to the tracing phase, one identified obstacle was the lack of a legal basis for the MLA procedure. In the very beginning of the case, Brazil had a MLA treaty in criminal matters neither with the US nor with the Bahamas, which made the gathering of evidence protected by secrecy, such as banking records, very difficult. Unlike Switzerland, those countries did not have at the time very clear domestic legislation regulating the granting of MLA. But even the Swiss EIMP, as seen in the Duvalier case, was considered outdated for dealing with the complexity of corruption asset recovery cases. This obstacle could only be overcome, first, by the hiring of a law firm in the US which made use of domestic procedures to gather the evidence which could not be easily obtained by other means and, second, by the entering into force of the MLA with the US in 2001[382].

Another obstacle for the tracing phase was the lack of continuity in the official efforts to recover assets in other identified jurisdictions. One justification may be the limited resources available to law enforcement authorities who already face an overload of criminal cases. Therefore, there might have been a conscious choice to concentrate efforts on the jurisdictions that offered a better chance to recover assets[383]. Another reason may have been the lack of expertise of these authorities in regard to the next steps of an adequate asset recovery procedure.

[382] A MLA treaty between Brazil and Bahamas has been negotiated but is not in force yet. Bahamas however is party to United Nations Convention against Corruption, to the United Nations Convention against Transnational Organized Crime and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 that can serve now as basis to MLA.

[383] According to the interviewed authorities of the DPI/AGU of Brazil, following the leads pointing out to the existence of assets in Lebanon and France, informal consultations were conducted through the respective Brazilian embassies. Those preliminary consultations nevertheless received negative responses. This could have led to the presumption by the law enforcement authorities that the leads were either wrong or the assets were moved before Brazil could take any action to freeze them and further efforts to send formal requests were unjustified.

After receiving vague or negative responses to their consultations through informal channels, the authorities may not foreseen alternative paths to pursue the search in those foreign jurisdictions.

It is not clear, however, why in that case the Geneva investigating judge, after verifying the transfer of deposits from Swiss account to other jurisdictions failed to initiate MLA proceedings leading to freezing order in those other countries as it occurred in the Abacha case. Nevertheless, the provisions under article 71 of the Swiss Criminal Code permitting the ordering of compensation of the corresponding value of assets that are no longer available in Swiss jurisdiction came out as a solution to deficiencies in the efforts to uncover the money flow.

The Brazilian authorities involved in asset recovery procedure share the view that the main barrier to freezing and repatriation phases regarding Brazilian cases in general has been the lack of a final decision on the conviction of the defendants and the confiscation of assets in the Brazilian criminal proceedings[384]. The second instance decision confirming the conviction was delivered in 2005, since then the case is pending on the Superior Court of Justice (STJ) docket. After a decision of the STJ it will still be possible for the defendants to appeal to the Brazilian constitutional court, the Federal Supreme Court (STF). In other words, the Brazilian criminal procedure allows for a fourth instance, which extends excessively the length of the proceedings in Brazil.

According to the Head of the DPI/AGU, in order to maintain the freezing orders in MLA proceedings in foreign jurisdictions, the Brazilian authorities were periodically asked to justify the absence of a final decision[385]. As a provisional measure, the freezing of assets is only sustainable if the final confiscation is still a possible outcome. If the criminal proceedings take too long to come to an end, there is a reasonable chance that the statute of limitations will expire preventing the forfeiture.

[384] This was the opinion of the Head of DPI/AGU, Danielle Aleixo Reis do Valle Souza, of the Deputy Director of DRCI/MJ, Camila Colares, and of the General Coordinator of Asset Recovery of the DRCI/MJ, Leonardo Ribeiro, given during interviews conducted between 6 and 8 April 2011.
[385] Views expressed during interview conducted in 6 April 2011.

Unfortunately, the Accusation Chamber of Geneva did not adopt, in the 2005 decision in the MLA proceedings, the precedents of the Swiss Federal Supreme Court in the Marcos and Abacha cases, waiving the necessity of a final decision to return the assets to Brazil, although the investigating judge has concluded that the criminal origin of the assets was "clear and without ambiguity"[386].

In many instances it is possible to identify a strategy of the defence to start a legal battle to cause the delay of the proceedings in the requesting country, and then to argue in the MLA proceedings in the requested country that the absence of a final decision violates its right of due process and expeditious trial and ask for the lift of the freezing orders. As in the Marcos and Abacha cases, it is therefore essential that the requested country possess some legal mechanism to return assets regardless of a final conviction in the requesting country, if the criminal origin of the assets is evident. Although the decision of the Police Court of Geneva recognizing Nicolau dos Santos Neto as part of a criminal organization and rendering the confiscated assets in favor of Brazil is not yet final, it is certainly the best alternative of the latter country to see those assets ever returning to the public coffers.

1.5. The Propinoduto case[387]

The main elements to be scrutinized in the Propinoduto case are the impact of an inadequate legal framework for MLA on the outcome of the asset recovery case and the interdependency between the criminal cases conducted in the victim state and in the state where the assets are located. In addition, as with the TRT-SP case study, the analysis will try to identify the similarities and distinctions between the processing of small and grand corruption cases.

The Propinoduto case started as a Swiss investigation on money laundering committed by employees of a Swiss Bank. In June 2002, two Swiss

[386] Procureur Generale vs. Nicolau dos Santos Neto and Maria da Gloria Bairão dos Santos. Judgement du Tribunal de Police. Chambre 4. 13 janvier 2010. §21.
[387] Also known as Operation Ambre in Switzerland.

banks entered into a fusion[388]. After receiving a report of an external audit institution which pointed out that they suspected that accounts in the bank that was being achieved belonging to 8 Brazilian civil servants were being used for money laundering, the other bank filed a criminal complaint in the Swiss Prosecution Office in July 2002. The assets deposited in those accounts amounted to over CHF 40 million[389].

The Swiss Prosecutor decided to order the immediate freezing of the accounts and on his own initiative transmitted the collected information to the Brazilian Federal Prosecution Office in August 2002, hoping that a simultaneous investigation in that country would help secure a conviction in Switzerland.

An investigation was then launched in Brazil against 5 tax officials from the State of Rio de Janeiro, Carlos Eduardo Pereira Ramos, Rodrigo Correia Silveirinha, Lúcio Manuel Picanço dos Santos, Rômulo Gonçalves, Júlio Cesar Nogueira and 5 federal tax officials, Amauri Frank Nogueira Silva, Marcos Antonio Bomfim da Silva, Hélio Ramos da Silva Lucena, Sérgio Jacome de Lucena, Axel Ripoll Hamer, identified as the owners of the Swiss accounts.

The investigations conducted by the Brazilian Federal Police and the Brazilian Federal Revenue Service concluded that the deposits in the Swiss accounts originated from bribes paid by Brazilian companies to reduce tax liabilities. The criminal proceeds were mainly laundered by Brazilian exchange brokers. The case also led to an investigation by the State Assembly of Rio de Janeiro, mainly because Silveirinha, one of those involved in the case, was deputy Secretary of Tax Administration of the state of Rio de Janeiro at the time.

1.5.1. The asset recovery procedure[390]

[388] Tribunal Penal Federal. Arrêt du 18 septembre 2008 et complément du 18 mai 2009 Cour des affaires pénales. Numeros du dossier : SK.2007.28 et 2008. At Faits § A and B.
[389] Ibid. §N.
[390] The information regarding the asset recovery procedure in the Propinoduto case was mainly obtained through the interview with authorities the Office of the Attorney-General of the Union of Brazil (AGU) on 6 April 2011.

As in the TRT-SP, the main legal strategies used by the Brazilian authorities to recover the assets deposited in the Swiss accounts were to transmit MLA requests in support of the domestic criminal proceedings in Brazil and to hire a lawyer in Switzerland to represent Brazil, as a civil third party, in the criminal proceedings opened in the foreign jurisdiction. The difference between the two cases, however, is that the decision to adopt the second strategy was not taken at the beginning of the asset recovery procedure in 2003, but only in 2008. The consequences of this decision will be discussed in section 1.5.2.

As mentioned above, the case begun when the Swiss Prosecutor transmitted information on the ongoing criminal investigation in Switzerland by the Swiss Prosecutor to Brazilian authorities. The information was also sent as a letter rogatory and had an enclosed request for the lifting of the banking secrecy of the defendants in Brazil. Nevertheless, it was only in February 2007 that the Superior Court of Justice decided to convert the letter rogatory into a MLA request, which has a more expeditious proceeding in Brazil, and send it to the executing authorities. This decision was challenged by the defendants by means of the filing of a habeas corpus[391] in the Federal Supreme Court of Brazil (STF). In February 2008, the STF granted the habeas corpus suspending the execution, because the judges considered that the Swiss prosecutor was not the competent authority to order the lifting of banking secrecy[392]. In their view, the request should have been issued by a magistrate. This decision was only reversed on 24 March 2009[393], so it took almost 6 years for the request of the Swiss Prosecutor to be finally executed.

The information received from Switzerland, however, resulted in the immediate launch of investigations in Brazil. On 14 January 2003, the Brazilian authorities sent a MLA request to Switzerland asking for the freezing of the defendants' accounts and the transmission of the corresponding banking records. In May 2003, the Swiss Prosecutor admitted the MLA request and authorized the sending of the banking records. As a consequence of that decision, the assets were

[391] Habeas Corpus 91002. Supremo Tribunal Federal. Ministro Relator Marco Aurélio Mello.
[392] Habeas Corpus 91002. Supremo Tribunal Federal. 1ª Turma. Ministro Relator: Marco Aurélio Mello. Acórdão de 26 de fevereiro de 2008.
[393] Habeas Corpus 91002. Supremo Tribunal Federal. 1ª Turma. Ministro Relator: Marco Aurélio Mello. Decisão nos Embargos de Declaração no HC 91002. Acórdão de 24 de março de 2009.

put under a double freezing – by an order in the Swiss criminal proceedings and as a response to the Brazilian MLA request.

The decision of the Prosecutor was, however, appealed by the defendants to the Swiss Federal Court. On 15 July 2003, the Federal Court granted the defendants appeal for considering that the Brazilian MLA request was incomplete as it failed to indicate the evidence gathered against the defendants to justify the measures requested or establish the links between the accounts and the criminal acts committed in Brazil. The accounts remained frozen because of the order on the Swiss criminal proceedings. A complementary MLA request was sent to Switzerland on 23 September 2003.

The defendants were convicted for money laundering, tax evasion, false declaration, corruption and misrepresentation in first instance in the Brazilian proceedings on 31 October 2003[394]. The judge also ordered the confiscation of the criminal assets. However, due to the poor coordination among law enforcement authorities and those responsible to serve as contact point with the Swiss authorities, the copy of the first instance decision was only sent to Switzerland on 22 April 2005, after repeated requests by the Swiss authorities of more evidence to support the freezing. An appeal against the conviction was filed in the Brazilian Federal Regional Court of the 2nd Region.

On 7 January 2005, the Swiss investigating magistrate sent a second MLA request to Brazil asking for a copy of all the evidence produced in the Brazilian criminal proceeding which could support the Swiss investigation and also asked for the hearing of Brazilian defendants and witnesses and the authorization for the participation of Swiss investigating authorities in that hearing.

The Brazilian defendants also filed a habeas corpus in the Federal Supreme Court to prevent the execution of this MLA request, especially in regard to the hearing of the witnesses by the Swiss authorities. The Federal Supreme Court, on 5 March 2005[395], granted a provisional suspension of the execution of the

[394] Processo n. 2003.51.01.500281-0. 3ª Vara Criminal. Sentença de 31 de outubro 2003.
[395] Habeas Corpus 85588-1. Supremo Tribunal Federal Ministro Relator: Marco Aurélio Mello. Decisão de 05 de março 2005.

Swiss MLA request stating that in the absence of a bilateral treaty between the countries, the request should have followed the letter rogatory procedure[396].

In response to the suspension of the execution of the Swiss MLA request of 7 January 2005[397], the Swiss investigating judge sent a supplementary request to Brazil on 20 April 2006 complying with the formalities of the letter rogatory procedure. However, the judge included a request for the suspension of the defendants' right to silence during the hearing, otherwise he would consider the attendance of the Swiss authorities useless.

The execution of the letter rogatory was authorized by the Brazilian Superior Court of Justice on 5 May 2006[398], except for the request for the suspension of the defendants' right to silence, which is a constitutional right in Brazil and cannot be waived. This authorization was also appealed by the defendants. On 14 July 2006, the appeal was granted by the Supreme Federal Court which provisionally suspended the execution of the letter rogatory on the basis that the Superior Court of Justice did not grant the defendant the right to be heard before admitting the request[399]. This provisional suspension was reversed on 24 March 2009, when the habeas corpus was judged definitively[400] and the request could be finally executed. By that time, however, the Swiss criminal proceedings were in a final stage and it is doubtful that the execution of a request sent in 2005, during the investigation phase, could impact on the outcome.

As for the Brazilian supplementary MLA request of September 2003 asking for the freezing of assets, it was only considered admissible by the Swiss Federal Court in February 2006. The Swiss Federal Court concluded that the transmission of the documents was necessary for the judgment of the appeal filed

[396] In Brazil, the execution of MLA requests, either based on a treaty or on reciprocity, follows a different and more expeditious procedure than the letter rogatory. According to the Brazilian Constitution, before being executed, the letter rogatory must be admitted first by the Superior Court of Justice. The MLA request, on the other hand, is sent directly to the competent authority for execution. See Resolution 9 of the Superior Court of Justice, dated 4 May 2005.

[397] The suspension of the execution of the MLA request was made definitive by the Federal Supreme Court on a decision dated 4 April 2006.

[398] Carta Rogatória 1818-CH, Superior Tribunal de Justiça. Decisão do Presidente de 5 de maio de 2006.

[399] Habeas Corpus 89171. Supremo Tribunal Federal. Ministro Relator Marco Aurélio Mello. Decisão de 14 de julho 2006.

[400] Habeas Corpus 89171. Supremo Tribunal Federal. 1ª Turma. Ministro Relator: Marco Aurélio Mello. Acórdão de 24 de março de 2009.

in the Brazilian Federal Regional Court. After that decision, the assets were again frozen under the MLA proceedings.

The Swiss authorities constantly sent requests for updates on the status of the Brazilian proceeding. As explained in the Duvalier case, the freezing of assets in Switzerland is only justifiable if a final confiscation order is still a viable outcome in the requesting state. The Swiss authorities were particularly concerned that the statute of limitations would run both in the Brazilian and in the Swiss proceedings. As an answer to one of those consultations, on 23 March 2006, another MLA request was sent by Brazil informing the Swiss about the status of the Brazilian criminal proceedings and the applicable statute of limitations and asking the authorities to maintain the freezing of the Swiss accounts held by the Brazilian defendants in DBTC.

On 19 of September 2007, the Brazilian Federal Regional court upheld the conviction of defendants and ordered the confiscation of criminal proceeds[401]. This decision was appealed by the defendants to the Superior Court of Justice, which has not rendered a decision in the case yet.

It was only after the transmission of a second instance judgment regarding the predicate offences in Brazil could the closing of the investigation phase of the Swiss criminal proceedings be completed, which demonstrates, as occurred in the TRT-SP, that in cases involving transnational crimes the length of the proceedings in the involved jurisdictions are closely related.

In February 2008, Brazil was formally invited to take part in the trial as civil third party. It was only then that the government decided to hire a Swiss lawyer to represent Brazil in the case.

On 18 February 2008 the Federal Swiss Court convicted the Swiss bank employees for money laundering and on 18 May 2009 ordered the confiscation of the assets belonging to three Brazilian defendants deposited in Swiss accounts, because, according to the court, they could not prove the licit origin of the amounts

[401] Apelação Criminal 2003.51.500281-0. Tribunal Regional da 2ª Região. Acórdão de 19 de Setembro de 2007.

deposited in those accounts[402]. With respect to the other seven Brazilian defendants, the Federal Supreme Court ruled that the Swiss file did not contain sufficient evidence to demonstrate that the funds deposited were the proceeds of crimes of corruption; therefore, the Swiss Federal Criminal Court could not order the confiscation of those assets. They remained frozen however due to the freezing orders in the MLA proceedings.

The Court left the decision on the request to repatriation of the assets to the civil third party, Brazil, to a later stage[403]. Two of the Brazilian defendants did not file a timely appeal challenging the confiscation sentence, which became final for them in December 2009. There are ongoing negotiations between Brazil and Switzerland to the final repatriation of those assets.

1.5.2. Obstacles to asset recovery

The peculiar feature of the Propinoduto case is that the criminal assets were traced by foreign authorities *before* any investigation started in the country where the criminal activities occurred. This makes it an interesting case study. Private actors, such as financial institutions, are considered to be generally in a better position than official authorities to identify assets of suspicious origins. Those actors are the ones which have greater knowledge of how regular transactions work and can better verify if an operation falls out of the regular pattern.

This assumption is made on the basis of the modern system of preventive measures against money laundering[404]. Private actors have the obligation to apply regular checks on the businesses which they operate and report suspicious transactions to the official body in charge of analyzing those communications and verifying whether there is any evidence of crimes being

[402] Tribunal Penal Federal. Arrêt du 18 septembre 2008 et complément du 18 mai 2009 Cour des affaires pénales. Numeros du dossier : SK.2007.28 et 2008.16. pp73-78
[403] *Ibid.* 138.
[404] See Machado (2004) *supra* note 34, at 148 and K. S. Helgesson, *Public-Private Partners Against Crime: Governance, Surveillance and the Limits of Corporate Accountability*, 8 Surveillance & Society 4 471 (2011) 472.

committed. In some countries, these reports are made to a body known as the financial intelligence unit (FIU)[405].

In the Propinoduto case, the UBP did not inform the FIU, but directly filed a complaint with the law enforcement authorities. The logic, however, remains the same: the bank was the one capable of identifying indication of money laundering, triggering the criminal procedure. As the Federal Swiss Court concluded in the 18 September 2008 decision, the employees of the DBTC were supposed to apply enhanced monitoring checks in relation to the accounts of the Brazilian defendants because the latter were civil servants and, therefore, politically exposed persons[406]. If an efficient system of preventive measures were put in place at global level, there should be more cases starting in a similar way as the Propinoduto case.

Another interesting feature of the case was the initiative of the Swiss authorities to spontaneously share information with the country where the crimes were supposedly committed. The Swiss investigation depended on evidence located in Brazil, and the Swiss law on MLA specifically provided for the possibility of this transmission[407]. Without a legal basis for the sharing, other jurisdictions might see themselves as unable to act similarly[408]. These two particularities regarding the initiation of the asset recovery case are the main, if not the only, positive lessons learned from the case.

As described above, the case was based on a two-way MLA procedure. Brazil depended on information about the bank accounts to carry out the investigation domestically, and the Swiss authorities had to rely on the Brazilian proceedings to obtain information linking the money deposited in the accounts to a criminal origin in order to secure a money laundering conviction. The abuse of

[405] The name financial intelligence unit is used by the Financial Action Task Force in its 40+9 Recommendations to refer to the body responsible to receive suspicious transactions reports (STRs). See e.g., Recommendations 13 and 26.

[406] The concept of politically exposed person will be further discussed in Chapter 2.

[407] Art. 67a of the EIMP: "Spontaneous Transmittal of Information and Evidence

1 An authority prosecuting offences may spontaneously transmit to a foreign authority prosecuting offences information or evidence that it has gathered in the course of its own investigation, when it determines that this transmittal is of a nature:

a. to permit the opening of a criminal proceeding; or

b. to facilitate a pending criminal investigation."

[408] Bertossa (2008) *supra* note 96, at 23.

judicial appeals by account owners, in both jurisdictions, and the absence of a clear procedure to provide MLA, at least in one of the sides, turned the asset recovery into a lengthy and ineffective process.

The first Brazilian MLA request was rejected by the Swiss Federal Court because it failed to adequately establish the link between the money in the accounts and a criminal offence. In practice, law enforcement authorities in Brazil faced a paradox. Switzerland had informed them of the existence of the accounts and the amount deposited, but had not provided data on the operations coming in and out of the accounts. The law enforcement authorities needed access to information on the money flow in order to trace the operations and find the source of the money. However, they could not obtain this information by means of a MLA request unless they presented evidence on the illegal origin of the assets.

The dependence of the investigation in the requesting country on the evidence located in the requested country had already been recognized by the Swiss Supreme Court in 1990 in the Marcos case, as explained before, but did not serve as a precedent to facilitate a more expeditious solution in the Propinoduto case. The authorization for the transmission of the banking records and the order to freeze the assets only came in 2006, three years after the initial request and when the Brazilian criminal proceeding was already in the appeals stage. Had the information come earlier, it could have helped strengthen the investigation leading to a clearer description of the operations by the criminal organization and possibly the tracing of new assets. Also, in that case, the opening of a criminal proceeding in Switzerland was pivotal to ensuring that the assets were not dissipated before the MLA request could be considered admissible by the requested country.

The advantages of participating actively in the criminal proceedings carried out in the jurisdiction where the assets are located were already known from the experience of the Abacha and TRT-SP cases. Lawyers acting locally not only have privileged information on local legislation, but also can act as brokers making the exchange of information between the parties more directly and efficiently. The participation of Brazil as a third civil party in the Swiss criminal proceedings probably helped adduce evidence to ascertain the illegal origin of the assets and secure the confiscation, but acting sooner could also have improved the

dialogue between the investigating authorities of that country and Switzerland, and could have contributed to reducing the delay in the MLA proceedings.

In addition, Brazil did not have an adequate framework to provide MLA. Unlike Switzerland, it still did not have a law on international legal cooperation, so the execution of MLA request would always depend on the provisions of a bilateral or multilateral treaty or a few provisions of the Civil Procedure Code[409] regarding the execution of letters rogatory. The lack of clear legislation and the confusion between two different instruments for granting assistance – the letter rogatory and the MLA request – opened the way for the defendants to abuse the judicial machinery in order to stall or undermine the criminal case. The ratification of the bilateral treaty between Brazil and Switzerland[410] or the application of provisions on MLA of a multilateral treaty in the case, as affirmed by the STF, could have prevented the delay of more than four years to execute simple measures, such as the hearing of witnesses.

As regards the repatriation phase, it is also still not clear what is preventing the return of the assets, as occurred in the Marcos and Abacha cases, especially in relation to the assets definitively confiscated in the Swiss criminal proceeding, since the illegal origin of the assets was already established beyond reasonable doubt by the Swiss Federal Court. The same can be said in relation to the assets in the TRT-SP case. The main difference, therefore, between "small corruption" cases and "grand corruption" cases seems to lie in the repatriation phase.

As can be seen from the case studies, both types of cases share similar legal, structural and systemic barriers, such as the abuse of due process rights by defendants, deficiencies in the legal framework and lack of expertise regarding the legal system of the foreign jurisdiction. However, when it comes to applying exceptions to the final confiscation decision rule, the political relevance of the case and the ability of the requesting state to exercise political pressure seem to play an important role.

[409] See articles 201,202, 210 and 211 of the Brazilian Civil Procedure Code.
[410] The MLA Treaty in criminal matters between Brazil and Switzerland entered into force on 7 October 2009.

It is true that the criteria set by the Swiss Federal Supreme Court in the Marcos case permitting the anticipated repatriation were clear: respect for due process and other human rights and certainty about the illicit origin of the assets. The exception authorizing the anticipated return, however, was drafted in vague terms on purpose to leave room for its discretionary application. Therefore, the criteria set in the case law *can* be applied, but not necessarily *must* be applied.[411]. That is when political considerations intervened to create pressure for the application of the exception. That can be an explanation for why Swiss courts are reluctant to apply the exception in small corruption cases even if proof of illicit origin is provided either in an MLA request or in the files of a domestic proceeding in the requested state.

This thesis suggests that in corruption cases, because of the unique and serious nature of that offence, the requested state should always adopt an attitude which favors repatriation, regardless of the amounts or the hierarchical position of the persons involved. Therefore, there should be no room for application of distinct standards in small and grand corruption cases. The criteria for anticipated return should be made objective and applied consistently.

Since MLA proceedings is not supposed to function as a retrial of a criminal case, when the anticipated return is requested through international legal cooperation a standard of proof similar to the one recommended for money laundering and participating in criminal organization offences could apply. The requesting state should bear the burden establishing that *probable cause* exists to believe that the assets derived from the commission of corruption[412]. Once that requirement is met, a presumption of illegality should apply to the traced assets. The owners of the assets should then be called to prove by *preponderance of evidence* the licit origin of the assets in order to avoid forfeiture[413]. If the legality is

[411] The Swiss Supreme Court itself recognized that the application of the exception of article 74a of the EIMP is a discretionary exercise. See Arrêt de la 1re Cour de droit public de Tribunal fédéral Suisse dans la cause office fédéral de la police (OFP) contre Aguamina Corporation (recours de droit administratif), du 10 décembre 1997, *supra* note 237, at dispositif §4f.

[412] This is the standard of proof required by the US Money Laundering Forfeiture Law 18 U.S.C. §§981-982. See S. D. Cassella, *Establishing probable cause for forfeiture in federal money laundering cases,* 39 N. Y. L. Sch. L. Rev. 164 (1994)165 and F. C. Razzano, *American Money Laundering Statutes: the case of a worldwide system of banking compliance programs,* 3 J. Int'l L. & Prac. 277 (1994) 290.

[413] Cassella (1994) *supra* note 416, at 165 and Razzano (1994) *supra* note 416, at 290.

not proven, the assets should be transferred to the requesting states and deposited in an escrow account under the condition that the assets should be returned to the previous owners if a final confiscation is not granted by the requesting state's courts.

1.6. The different nature of obstacles to recovering assets abroad

In order to effectively address the obstacles identified above, one must look into their causes. Therefore, it is proposed that each of the obstacles to asset recovery is classified according to its different nature: political, legal and structural or systemic.[414]. This division has the sole purpose of facilitating the analysis as to how those obstacles were dealt with (or not dealt with) by the drafters of the UNCAC, bearing in mind that, in practice, no classification is strict, since obstacles can fall under more than one classification.

1.6.1 Political obstacles

The first identified political obstacle to effectively recover assets abroad is the lack of political will. The process of recovering asset as explained above is lengthy and can be highly expensive[415]. Therefore, its success depends in great measure on the commitment of the government to allocate adequate resources for

[414] Different classifications of obstacles to asset recovery were proposed by the StAR Initiative and the FATF. The division adopted in this thesis, although using a different terminology, has a very similar content to the one proposed by the StAR Initiative. The latter divides the "barriers to asset recovery" into: general barriers and institutional issues, legal barriers and requirements that delay assistance, operational barriers and communication issues. (See K. M. Stephenson, L. Gray, R. Power, JP. Brun, G. Dunker and M. Panjer, Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action, StAR Initiative, World Bank and UNODC. (2011) 19-94). The FATF, on the other hand, divides the impediments to international legal cooperation into legal, structural, procedural or systemic. (See and FATF, Final Report of the Confiscation Project Team, Including Draft Best Practices Paper On Confiscation (R.3 And 38), February 2010 at 7-9). For the purposes of this thesis, legal obstacles will cover both problems of substantive and procedural law, therefore, encompassing some of the procedural impediments identified by the FATF. Problems related to the lack of training, considered as a procedural impediment by the FATF, will be dealt as a structural problem.

[415] Webb (2005) *supra* note 15, at 210 and Secretary-General. Preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets to the countries of origin. UN doc. A/61/177 (2006) 9.

the enterprise[416]. This commitment can be shown, for example, by creating a special team or task force to deal with the case, as occurred with the creation of PCGG in Marcos case, the SIP in the Abacha case and the governmental task force in the TRT-SP case.

There are many reasons behind the decision of a government not to dedicate sufficient efforts to recover assets derived from corruption. It may be an attempt to protect political allies supposedly involved in the criminal activities[417] or simply because the country suffers from continued political turnovers so it lacks the necessary stability to define a coherent recovery strategy, as occurred with Haiti as regards the Duvaliers. It also may be justified in terms of the economic interests of a State, as an effort to shield an influential company that enters into suspicious dealings[418].

A second political obstacle is the lack of confidence of the requested country in the institutions of the requesting country[419]. Requiring reassurances of the application of due process and other human right standards in the domestic proceedings in the requesting country is a classical example of this obstacle, as occurred in the Duvalier case. As explained by the FATF, "where corruption is an endemic feature of the political system in the requested jurisdiction, there may be a reticence on the part of the requesting jurisdiction to submit the request, due to the potential for links between politicians and criminals"[420]. In the cases analysed, a practical solution found to this barrier was to impose conditions on the destination of the repatriated assets[421]. This practice, however, raises concerns regarding a foreign interference on the sovereign disposition of national resources[422]. As recalled by Pieth, it is difficult to justify the lack of trust for

[416] FATF (2010) *supra* note 418, at 9 and Stephenson et al. (2011) *supra* note 418, at 24.
[417] Webb (2005) *supra* note 15, at 211 and FATF (2010) *supra* note 418, at 9.
[418] Stephenson et al. (2011) *supra* note 418, at 24.
[419] *Ibid.* 20-23 and Bertossa (2008) *supra* note 96, at 25
[420] FATF. (2010) *supra* note 418, at 9.
[421] Pieth (2008) *supra* note 8, at 17.
[422] According to Mr. Pedro Guerra Gomes Pereira, Asset Recovery Specialist of the Basel Institute of Governance, some jurisdictions have challenged the legitimacy of those restrictions on the basis on sovereign rights over national resources. Views expressed in personal interview on 25 April 2011.

returning assets if the government of that State was recognized as legitimate by the requested country under international law in the first place[423].

1.6.2 Legal obstacles

Advancing through the different steps concerning an asset recovery process can be hazardous if a legal framework for providing MLA is lacking or is inadequate. In the TRT-SP case, the absence of a bilateral treaty with the US or the Bahamas almost impeded Brazil from gathering the necessary information for tracing the assets. Even when a procedure for granting MLA is put in place, it may prove inadequate considering the complexity involved in corruption cases, as recognized by the Swiss Supreme Court in the Duvalier case.

Clear regulations on MLA must at least contain provisions concerning the measures that can be executed, the list of authorized persons who can ask and grant assistance and the channels through which requests are exchanged. It is also recommended that the legal framework provide for a mechanism for the return of assets, such as the possibility of making an asset-sharing agreement[424]. Those provisions can be set forth by national legislation, such as the EIMP in Switzerland, or by bilateral or multilateral treaty[425].

A second major source of embarrassment for asset recovery is the differences between existing legal systems[426]. Common law and civil law systems might provide for different or even incompatible terminology[427], requirements or instruments for gathering evidence[428] or imposing coercive measures[429] or burden of proof for achieving conviction or confiscation[430]. Therefore, while in the adversarial system in the US the parties are expected to bring their own evidence to meet their burden of proof, in the inquisitorial system in Switzerland, the

[423] Pieth (2008) *supra* note 8, at 17.
[424] Stephenson et al. (2011) *supra* note 418, at 78
[425] *Ibid.* 49.
[426] *Ibid.* 47-49, Webb (2005) *supra* note 15, at 211; Secretary-General. (2006) *supra* note 419, at 9, and Jorge (2008) *supra* note 11, at XVII.
[427] Stephenson et al. (2011) *supra* note 418, at 47.
[428] Secretary-General. (2006) *supra* note 419, at 9 and Stephenson et al. (2011) *supra* note 418, at 48.
[429] Stephenson et al. (2011) *supra* note 418, at 48.
[430] Webb (2005) *supra* note 11, at 211 and Stephenson et al. (2011) *supra* note 418, at 60.

evidence must be gathered by a neutral third party, the investigating judge, and lawyers are forbidden to investigate in favor of their clients. Countries also allow for different authorities to execute specific measures. In Switzerland, assets can be frozen by the prosecutor or even the Federal Council, while in Brazil and many other jurisdictions this measure is under the exclusive competence of a judge. The reliance on the expertise of hired local lawyers has proven to be an effective tool for overcoming those differences.

Inadequate criminalization can also bar cooperation between jurisdictions. For certain measures to be executed, especially those of a coercive nature, usually legal systems require that the conduct must be a crime in both requesting and requested jurisdiction[431]. It can also be an impediment for starting an investigation in the foreign country. This is especially concerning in regard of the offence of money laundering, because countries can provide for very different predicate offences. As seen above, a criminal investigation for money laundering could not be initiated in Luxembourg against the Abacha clan because the offences committed by that criminal organization were not at the time predicate offences to money laundering.

Moreover, the criminalization of certain conducts, such as money laundering, participating in a criminal organization or illicit enrichment, or imposing a reverse burden of proof in regard to certain conduct, can facilitate the return of assets[432]. The provision under Article 59 of the Swiss Criminal Code, which imposes a presumption of illegality of the assets held by a criminal organization, was fundamental to enabling the anticipated return of the assets of Marcos and Abacha. A similar provision is also present in the US Racketeer Influenced and Corruption Organizations Act (RICO)[433].

The possibility of anticipated return, however, is an exception under Swiss law and is not possible in many other jurisdictions. The rule is that a final decision of confiscation will always be necessary for the return of assets to be

[431] Pieth (2008) *supra* note 8, at 13 and Stephenson et al. (2011) *supra* note 418, at 81.
[432] *Ibid.* 15. Bertossa (2008) *supra* note 96, at 26.
[433] Pieth (2008) *supra* note 8, at 15.

authorized by the requested country[434]. It should be recalled that in some jurisdictions the confiscation is only possible in the face of a criminal conviction[435]. However, a final conviction is simply not possible in the requesting country because a criminal proceeding cannot be started *in absentia,* as occurred in the Philippines in Marcos case, and the offender is unavailable or dead. If the requested country does not recognize a non-conviction based confiscation, the repatriation of assets is blocked.

When the domestic legal system allows for the extended use of appeals by defendants, a final decision also becomes a long shot[436]. Furthermore, the excessive length of the criminal proceeding may oblige the requesting country continually to demonstrate that a final conviction is still a possible outcome for securing the maintenance of seized assets overseas.

The abuse of legal remedies by the holders of the assets is not only a problem of the criminal proceedings of the state of origin, but, as seen in all analysed cases, usually results in a significant delay to MLA. Legislative reforms might be necessary to impose a more summary procedure for the execution of MLA and for dismissing unfounded appeals without overly restricting due process rights.

Allowing for the intervention of third parties and other bureaucratic requirements in MLA proceedings also have direct implications for the ability of a state to respond quickly to a foreign request and avoid the dissipation of assets[437]. Examples include the necessary notification of the asset holder before imposing a restraining order or the requirement of the initiation of a criminal proceeding on the country of origin to grant assistance[438].

Another problem is that when drafters of national criminal codes provided for statutes of limitations, they appear not to have had in mind cases of high complexity requiring the involvement of different jurisdictions. Large-scale corruption asset recovery cases require significant time to investigate and assess

[434] Secretary-General (2006) *supra* note 419, at 9 and Pieth (2008) *supra* note 8, at 12-14.
[435] Stephenson et al. (2011) *supra* note 418, at 66.
[436] *Ibid.* 90 and Bertossa (2003) *supra* note 54, at 178.
[437] Stephenson et al. (2011) *supra* note 418, at 54-55.
[438] *Ibid.* 54-55.

the evidence[439]. This was the reason behind the refusal of MLA in the Duvalier case. Stephenson et al. recommend that the statute of limitations on these cases be abolished or at least extended, by providing for other circumstances for interruption of the limitation period or suggesting that alternatives such as civil forfeiture be available in the case of expiration[440]. Because corruption is an issue of international concern, the urgency to adapt traditional criminal codes to modern procedural challenges is certainly justified.

Some states impose very strict limitations on providing MLA to execute a broad and undetermined search for assets, known as "fishing expeditions". Refusals based on "fishing expeditions" usually occur when the requested country has a very restrictive banking secrecy[441] without providing detailed primary evidence of the crime, which is not always available in the requesting country[442]. The other justification is an operational one: the jurisdiction does not possess a centralized database of banking accounts[443] and it is simply unmanageable to send blank disclosure orders to hundreds of banks. According to Pieth, available solutions include strengthening investigation tools in the requesting country, publicizing information on the case to encourage suspicious transaction reports by financial institutions, and using international organizations as a pressure mechanism for achieving more flexibility in secrecy legislation[444].

Finally, some states do not have legal powers to impose restraining orders on assets without a formal MLA request when there is no link connecting that jurisdiction to the crime[445]. As explained above, a similar power by the Swiss Federal Council was essential to keep Duvalier's assets frozen. When a very bureaucratic MLA proceeding is put in place or a suspension of a previously obtained freezing order is granted, it is almost certain that, without such a tool, the assets will soon be dissipated.

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[439] *Ibid.* 75.
[440] *Ibid.* 75.
[441] *Ibid.* 58.
[442] Pieth (2008) *supra* note 8, at 10.
[443] Stephenson et al. (2011) *supra* note 418, at 94.
[444] Pieth (2008) *supra* note 8, at 10.
[445] Bertossa (2008) *supra* note 96, at 23.

1.6.3. Structural or systemic obstacles

As asset recovery processes are usually quite costly, some countries might have the political will to pursue criminals, but lack the financial and human resources to do so. That is the case of states with collapsing or unavailable political and legal institutions, known as failing states[446]. In those cases, there should be mechanisms available in jurisdictions where the assets are located spontaneously to institute procedures to return the stolen assets. The Swiss LRAI is certainly a first step in that direction.

In other cases, structures are available, but they are poorly equipped or facing a heavy workload[447], which can impair their ability to respond to complex cases in a timely and effective manner. It might also be the case that local authorities are not familiar with the legislation of foreign jurisdictions and the requirements of a MLA procedure[448], making it necessary to provide them with adequate training and making information on international legal cooperation publicly available.

Directly linked to the capability of local authorities to investigate and prosecute complex corruption cases is the availability of public registries where assets can be more easily traced[449].According to Stephenson et al:

> "To enable originating jurisdictions to identify and include the necessary information in requests for the seizing or confiscation of assets, jurisdictions should develop and maintain publicly available registries, such as company registries, land registries, registries of non-profit organizations, and other databases. If possible, such registries should be centralized and maintained in electronic and real-time format, so that are searchable and updated at all times. The availability of will minimize delay by making it easier for originating jurisdictions to obtain the necessary information to make a successful MLA request."[450]

Finally, the deficiency in implementing anti-money laundering measures and controls prevents the identification of suspicious activities and the

[446] Pieth (2008) *supra* note 8, at 14.
[447] Stephenson et al. (2011) *supra* note 418, at 31.
[448] *Ibid.* 31.
[449] *Ibid.* 92.
[450] *Ibid.* 92.

initiation of investigations, and encourages criminals to freely continue to use the financial system to shield their illegal gains from the detection[451]. All the cases analysed above involved the transfer of considerable amounts of money by politically exposed persons which should have at least led to the imposition of enhanced monitoring of those accounts under normal due diligence regulations. However, only in the Propinoduto case did the investigations result in the conviction of bank employees for facilitating the laundering of corrupt monies.

Table 1. Obstacles to asset recovery
Political obstacles
Lack of political will
Lack of confidence
Legal obstacles
Lack or inadequate legal framework for providing MLA
Differences between legal systems
Inadequate criminalization
Requirement of a final decision for repatriation
Non recognition of non-conviction-based confiscations
Abuse of the legal system by holders of the assets
Incapacity to provide quick responses to prevent dissipation of assets
Inadequate statute of limitations
Inadmissibility of "fishing expeditions"
Strict banking secrecy
Lack of powers to impose restraining orders without a MLA request

[451] *Ibid.* 33

Structural or systemic obstacles
Lack of resources
Inadequate structure for investigating and prosecuting offences and/or granting MLA
Lack of specific expertise and training
Lack of publicly available registries
Deficient money laundering controls

CHAPTER 2 – ASSESSING THE ENFORCEABILITY AND IMPLEMENTATION OF UNCAC PROVISIONS ON ASSET RECOVERY

In order for an international instrument to induce national legal systems to overlook its limitations and unite different legal systems behind a common solution to an international problem, it must have mechanisms to secure a certain irreversibility of the changes it proposes[452]. One way to achieve this is by presenting mandatory and clearly drafted legal provisions with precise and objective content[453]. Another way is by providing a strengthened implementation mechanism able to pressure States Parties to internalize the internationally accepted solutions[454].

The United Nations Convention against Corruption (UNCAC), as the first comprehensive universal instrument[455] on that matter[456], represents the best prospect to date for achieving the harmonization of national legal orders in order to fight corruption more effectively. The present Chapter aims to assess how obstacles to asset recovery identified in Chapter 1 have been addressed in the UNCAC and to verify whether the remedies provided can lead to a concrete "internationalization of criminal law" regarding corruption or whether the convention resembles a consolidation of best practices with hardly any enforceability. A second objective is to evaluate, in cases where appropriate remedies have been provided, whether they have been effectively implemented by States Parties.

[452] M. Delmas-Marty. (2005) *supra* note 35, at 7-8.
[453] *Ibid.* 7.
[454] *Ibid.* 14.
[455] Before the UNCAC, corruption has been addressed by different regional instruments such as: Inter-American Convention against Corruption, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, the Council of Europe's Criminal Law Convention on Corruption and Civil Law Convention on Corruption and the African Union Convention on Preventing and Combating Corruption. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development, also has a universal character since it is open for signature by non-OECD members, but it has a very limited scope, namely the bribery of foreign officials.
[456] Webb (2005) *supra* note 15, at 205.

2.1. Overview of the UNCAC

The UNCAC is the result of the work of an Ad Hoc Committee established by the General Assembly to draft "an effective legal instrument against corruption"[457]. The General Assembly specially ordered the preparation of a report "analysing all relevant international legal instruments, other documents and recommendations addressing corruption"[458]. UNCAC was therefore intended to build upon the experience of previous international conventions, improving and giving effectiveness to the solutions proposed. Negotiations took place during seven sessions from 21 January 2002 until 1 October 2003[459]. The final text was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 and submitted to a High-Level Political Signing Conference at Merida, Mexico in December 2003. It entered into force on 14 December 2005 and by July 2011 it had 152 States Parties.

As announced it its preamble, drafters of the UNCAC in fact adopted a "comprehensive and multidisciplinary approach"[460] since the convention comprises in a single undertaking the various aspects which must be addressed to strike a global threat: prevention; criminalization and strengthening of law enforcement; international cooperation, including asset recovery; and technical assistance. It must be noted, however, that provisions vary in terms of obligations on States Parties[461]. Only part of the provisions is of mandatory implementation. Others only urge states to make an effort towards implementation or are simply optional[462].

Preventive measures are dealt in articles 5 to 14 and encompass the obligation of developing and implementing anti-corruption policies[463], instituting a

[457] G.A. Resolution 55/61. Fifth session. 22 January 2001. UN doc. A/Res/55/61
[458] *Ibid.* §3.
[459] Travaux preparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption. UNODC (2010) vii. at: http://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html.
[460] See paragraph 5 of the preamble.
[461] R.R. Babu, *The United Nations Convention against Corruption: a critical overview,* Asian African Legal Consultative Organization, New Delhi. (2006) 8.
[462] *Ibid.* 8.
[463] See Article 5

body responsible for preventing corruption[464], establishing appropriate systems of procurement[465], enhancing transparency[466], strengthening the integrity of the judiciary and the prosecution services[467] and promoting the active participation of society to fight corruption[468].

The Convention also urges states to consider creating mechanisms to review their legal instruments and administrative measure regarding corruption[469], strengthening "the system for the recruitment, hiring, retention, promotion and retirement of civil servants and […] other non-elected public officials"[470], to institute codes or standard of conduct for public officials[471] and implementing measures to prevent corruption within the private sector[472]. Among the preventative measures, the obligation to put in place a system to prevent money laundering provided in article 14 is one of the most relevant for the purposes of asset recovery and for that reason, it will be dealt in more detail in section 2.2.

UNCAC also sets out the obligation to criminalize the following conducts bribery of national[473] and international public officials and officials of public international organizations[474]; embezzlement, misappropriation or other diversion of property[475], money laundering[476] and obstruction of justice[477]. Criminalization of other conducts such as trading in influence[478], abuse of functions[479], illicit

[464] See Article 6
[465] See Article 9
[466] See Article 10
[467] See Article 11
[468] See Article 13
[469] See Article 5(3).
[470] See Article 7
[471] See Article 8
[472] See Article 12
[473] See Article 15
[474] See Article 16
[475] See Article 17
[476] See Article 23. States are only required to criminalize the conducts described in article 23(1)(a). The criminalization of "the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime" and "Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of" money laundering are subject to the compatibility with the respective legal system. See Article 23(1)(b).
[477] See Article 25
[478] See Article 18
[479] See Article 19

enrichment[480], bribery in the private sector[481], embezzlement of property in the private sector[482] and concealment[483] is non-mandatory. In addition, there are specific provisions calling for the establishment of liability of legal persons[484] and the criminalization of participation[485]. Establishing attempt and preparation as a criminal offence was also not mandatory[486].

Chapter III, however, deals not only with the criminalization of offences but also with the strengthening of law enforcement, and sets forth provisions on the enhancement of the structure and resources of the criminal law system, the enactment of legal tools and mechanisms necessary to the repression of corruption and on cooperation with and among authorities, at national and international level.

UNCAC also provides for an extensive regulation of international cooperation. Among other things, it establishes different purposes for which cooperation may be sought, such as extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, and provides for procedural rules, such as minimal requirements of requests and grounds for refusal.

An entire chapter is dedicated to international cooperation for the purpose of asset recovery, which reflects the fact that the return of stolen assets was considered a priority by the drafters[487]. As will be discussed below, the provisions dealing with asset recovery are not, however, limited to those inserted in chapter V. Actually, the provisions of all different areas covered by the convention aim at offering the necessary tools which can culminate in an effective repatriation of looted assets. As correctly put by Claman, "it [the structure of the UNCAC] allowed asset recovery to be treated as a cohesive sum of its various constituent parts – from prevention and detection to restraint and recovery to final

[480] See Article 20
[481] See Article 21
[482] Se Article 22
[483] See Article 24
[484] Article 26
[485] Article 27(1).
[486] Article 27(2) and (3).
[487] Webb (2005) *supra* note 15, at 207 and Claman (2008) *supra* note 46, at 333.

repatriation"[488]. For that reason, the main responses to the obstacles to asset recovery are not exhausted in the provisions of chapter V, but are also to be found in other relevant sections of the UNCAC.

The last topic covered by UNCAC is technical assistance and information exchange. The part enumerates the areas in which training and capacity building programs and studies must be developed and calls upon states to foster those activities abroad, mainly in developing countries, either directly or through regional and international organizations.

2.2. Addressing asset recovery obstacles through UNCAC

The wording of the preamble[489] demonstrates that the drafters considered previous efforts to recover assets unsatisfactory[490]. It was expected that the new instrument should be able to meet the expectations of both the states from where assets were stolen and those of the states where the assets were located[491], by consolidating collected best practices and possibly instituting innovative mechanisms.

The structure of chapter V of the UNCAC indicates that drafters of the UNCAC also regarded the asset recovery procedure as a four-phase process. Measures leading to the tracing of assets are dealt with in article 52, entitled "prevention and detection of transfers of proceeds of crimes". The freezing and seizing of assets and the confiscation judicial procedure are dealt with in articles 53, 54 and 55, while actions for the actual return of assets are regulated under article 57.

Nevertheless, as explained above, the rules regarding the steps leading to the recovery of assets are not restricted to those of chapter V. Furthermore, some obstacles to asset recovery can impact on more than one phase of the process. Therefore, for practical reasons, the solutions given by UNCAC to the

[488] Claman (2008) *supra* note 46, at 333.
[489] "*Determined* to prevent, detect and deter *in a more effective manner* international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery" [emphasis added].
[490] Claman (2008) *supra* note 46, at 333-335.
[491] *Ibid.* 333-335.

obstacles to asset recovery will not be analysed according to the numerical order of the legal provisions. Instead, they will be assessed according to the nature of the problem they address, bringing together different provisions that are directed to the same or similar obstacles.

2.2.1. Legal framework for MLA

The first legal obstacle identified in concrete cases was the lack or inadequate framework for mutual legal assistance. Article 46 of the UNCAC provides a fairly comprehensive set of procedural rules of MLA. According to article 46(7) those procedural rules shall apply to requests if the State Parties are not bound by another treaty. Even in cases where there is another MLA treaty in force, States may agree to use the provisions of UNCAC.

This procedure can also be applied to requests with the purpose of freezing and confiscating assets, according to articles 46(3)(j)and (k) and article 55(3) of the UNCAC. However, the use of UNCAC as framework for MLA for the purpose of these two specific measures was left to the discretion of State Parties in article 55(6). Therefore, there is no obligation under UNCAC for those countries which lack an appropriate MLA framework for granting requests to freeze and confiscate assets to adopt the procedure of articles 46 and 55.

Also included in the UNCAC in non-mandatory language is the enabling of the spontaneous transmission of information about ongoing investigations to foreign authorities[492]. Without a legally binding obligation, it is doubtful that jurisdictions whose legal orders do not permit such sharing without a formal MLA request will be encouraged to promote legal reforms in this sense.

In the absence of a legal basis for MLA, or simply to overcome its eventual ineffectiveness, the initiation of proceedings directly in a foreign jurisdiction has proven to be an efficient alternative in state practice. The division between measures of direct recovery (article 53) and recovery though international cooperation (article 54 and 55) represents the incorporation into the

[492] Article 46(4)

text of the Convention of what has been observed in previous recovery cases: the adoption of different legal strategies. Those articles use mandatory language, which means that the state where the assets are located must allow the adoption of both strategies by the "victim" state seeking repatriation.

Article 53 brings forth three alternatives for the initiation of independent proceedings by a State in a foreign jurisdiction: a) through a civil action to establish title or ownership of property[493]; b) through an action to seek compensation or damages[494] and c) through the recognition of a State as the legitimate owner of property acquired through the commission of an offence in a confiscation procedure[495]. This provision seeks to solve the problem of those jurisdictions that did not permit foreign governments to act as private litigants[496].

UNCAC also offers a legal framework for the final disposal of assets in article 57. In the case of embezzlement of public funds or of laundering of embezzled public funds, the assets are to be returned to the requesting State[497]. This is a progressive provision, because for the first time in an international instrument it was universally recognized that States which have seen public funds diverted are the most harmed by corruption[498] and the ultimate purpose of global efforts must be to secure return of those assets. The proceeds deriving from other offences prescribed in the convention are to be returned upon evidence of prior ownership or damage to the requesting State party[499].

2.2.2. Differences between legal systems

Many UNCAC provisions on asset recovery also aim at overcoming some basic differences between civil law and common law systems without imposing the prevalence of one system over another. The solutions generally proposed in

[493] Article 53(a)
[494] Article 53(b)
[495] Article 53(c)
[496] Claman (2008) *supra* note 46, at 341.
[497] Article 57(3)(a)
[498] As expressed by the Secretary General in the Foreword of UNCAC: "Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment."
[499] Article 57(3)(b).

UNCAC are to accept different legal responses which achieve similar results or the encouragement of states to put in place measures of the mutual recognition of procedure.

An example of the first solution is the direct recovery proposed under article 53, which can mitigate differences between legal orders[500]. Foreign governments are allowed to participate in domestic proceedings in another jurisdiction either through an independent civil action based in some kind of liability – more reflective of a common law tradition – or through direct participation in the criminal proceeding as victim or third party – a solution usually adopted in civil law systems. UNCAC determines that States Parties implement reforms to allow for all alternatives to be available and it will be at the discretion of the victim country to choose which one is appropriate [501].

Another example is the alternatives proposed in article 54 for granting MLA to confiscate assets. According to article 54(1)(a) and (b), in order to execute a request of another State Party the country can choose either to give effect to a foreign order or to seek an order of confiscation by opening a domestic proceeding. The first alternative was usually the one adopted by those states which accept their authorities to act just as an extension of a foreign jurisdiction[502]. The second alternative was the solution given by states in which "property rights required confiscation judgments affecting assets within their jurisdiction to be rendered only by their own courts"[503].

Past conventions presented these responses to MLA requests as alternatives, meaning that States Parties could opt to adopt one or the other[504]. The innovation included in UNCAC is that drafters obliged States Parties to overcome eventual differences between legal systems and provide for both alternatives to be

[500] Webb (2005) *supra* note 15, at 211.
[501] Claman (2008) *supra* note 46, at 341.
[502] *Ibid.* 342.
[503] *Ibid.* 342.
[504] *Ibid.* 342. See article 13(1)(a) and (b) of the United Nations Convention Against Transnational Organized Crime and article 5 (4)(a)(i) and (ii)of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

available[505]. The adoption of only one type of response to MLA request left gaps in practice[506]. As explained by Claman:

> where a country only has legal authority to enforce a foreign confiscation order, but cannot initiate its own action in response to a foreign request, it may not be able to provide meaningful assistance to a Requesting State that does not have a criminal defendant to prosecute. Similarly, where a nation is unable to enforce a foreign order, mutual legal assistance may be frustrated if initiation of independent confiscation proceedings by the Requested State proves too costly or the challenge of litigating complex issues of foreign law and facts renders the action unsuccessful[507]

As a result, UNCAC unites in one provision the advantages of different legal traditions and makes it mandatory for States Parties to harmonize the way they respond to requests, which facilitates the understanding of how MLA procedure works in foreign jurisdictions.

Article 46(17), as well, establishes that the request should be executed in accordance with the domestic law of the requested state, but it provides that another procedure can be specified in the request and be followed by the requested state when it does not violates its domestic law. In that same direction, the provision that deals with spontaneous information allows authorities from states whose legal systems impose disclosure obligations to disclose to the accused the documents transmitted if they contain exculpatory information as long as it notifies the transmitting jurisdiction in advance[508].

2.2.3. Obligation to criminalize

In regard to obstacles imposed by inadequate criminalization, UNCAC did not abolish the requirement of dual criminality for the admissibility of MLA request, although a proposal was made in the fifth session by Argentina, Benin, Brazil, Brunei Darussalam, Colombia, India, Indonesia, Iran, Mexico, Pakistan and the Philippines[509]. The proposal read:

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[505] Claman (2008) *supra* note 46, at 343.
[506] *Ibid.* 343.
[507] *Ibid.* 343.
[508] Article 46(5).
[509] Travaux Preparatoire (2010) *supra* note 463, at 391, footnote 32.

> Without prejudice to the fundamental principles of their domestic law, States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party may refuse to render such assistance when the offences that have motivated the request are related only to fiscal matters[510]

In the text which prevailed, absence of dual criminality remained as a ground for refusal, except in cases which do not involve coercive measures[511] and the dismissal of this requirement is compatible with basic concepts of the respective domestic legal system[512]. As asset recovery measures are almost always of coercive nature, UNCAC does not represent a great innovation on that matter. Article 43(2) stresses, however, that dual criminality does not consist of offences denominated by the same terminology or under the same category. It suffices that the conducts underlying the offences are similar.

Making it obligatory to criminalize certain conduct may also address the problems arising from the requirement of dual criminality, but as explained above, only part of the offences described in UNCAC are phrased in mandatory language. One such non-mandatory offence is illicit enrichment. This offence is not an innovation of UNCAC, since it was already present in both the Inter-American Convention against Corruption[513] and the African Union Convention on Preventing and Combating Corruption[514]. The advantage of criminalizing illicit enrichment is that it relieves the prosecution of the burden of proving a link between the wealth and the commission of corruption by the defendant, although it retains the burden of proving the disproportion between the legal earnings and the wealth[515].

Also written in a non-mandatory language is the provision that encourages state parties to impose a reverse burden of proof regarding the origin of alleged proceeds of crimes[516]. As repeatedly described in previous sections, it is too heavy a burden upon the prosecution to bring evidence of direct link between each crime committed and the assets aimed for seizure or freezing. Once the

[510] *Ibid.* 391, footnote 32.
[511] Webb (2008) *supra* note 15, at 210.
[512] See article 46(9)(b).
[513] See article IX
[514] See article 8
[515] Babu (2006) *supra* note 465, at 15.
[516] See article 31(8).

prosecution can adduce sufficient evidence of the commission of the offences, it is useful to have a presumption of illegality regarding the assets traced, which can still be removed by the defence, without great prejudice to due process rights.

In regard to money laundering, article 23(2)(b) obliges States Parties to set as predicate offences all the offences of mandatory criminalization under the Convention. Furthermore, provided that dual criminality is respected, States Parties are required to exercise jurisdiction over money laundering even in the case that the predicate offence was committed abroad[517]. If those articles are implemented, there will be no further impediments for the opening of criminal proceedings in the jurisdiction where the assets are located, as occurred successfully in the Abacha, TRT-SP and Propinoduto cases.

2.2.4. Anticipated repatriation

Another legal tool treated just as a possibility in the UNCAC is the waiving of a definitive decision as a requirement for repatriation[518]. This proposition was only included in the text of the Convention during its sixth session[519]. The *travaux preparatoires* indicate however that the drafters had in mind the possibility of waiver in limited situations, since the interpretative note recorded that "[t]he requested State party should consider the waiver of the requirement for final judgement in the cases where final judgement cannot be

[517] Article 23(2)(c)

[518] "Article 57

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and *on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party*, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and *on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party*, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;" [emphasis added]

[519] It was included in an amendment proposed by China and also in the revised text suggested by an open-ended informal working group coordinated by India. It was finally included in the rolling text discussed and approved in that session. See Travaux Preparatoire (2010) *supra* note 463, at 512-513.

obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases."[520] Although the meaning of "other appropriate cases" might be debatable, it seems that the cases envisaged were much more restricted than situations where "the criminal origin of the assets is indisputable", the criteria for anticipated return consolidated in Swiss case-law.

2.2.5. Non-conviction based confiscation

Recovery through MLA assistance founded on a non-conviction based confiscation decision was also made optional, according to Article 54(1)(c) of UNCAC. The possibility of recognition of confiscation decisions not based in a criminal conviction was included in the discussed text since the fourth session and was based in a proposal submitted by the United States, responsible for coordinating an informal working group on chapter V[521]. Commentators indicate that this is one of the major shortcomings of the new Convention[522]. In a great number of situations even starting a criminal proceeding is very unlikely, because the offender might enjoy some immunity, have fled the jurisdiction or is dead, as happens in most cases involving the looting of assets by a dictator or head of government[523]. Therefore, any advantage to asset recovery coming from this provision will depend on its voluntary implementation by states parties.

2.2.6. Abuse of legal remedies by the holders of the assets

Although one of the purposes of the Convention is "to promote and strengthen measures to prevent and combat corruption more efficiently and effectively"[524], there is no provision in the Convention specifically dealing with problems deriving from the excessive use of appeals by the defendants and other third parties. Article 46(24) deals with the general necessity of giving expediency to MLA procedure by determining that:

[520] Travaux preparatoire (2010) *supra* note 463, at 516.
[521] Travaux preparatoire (2010) *supra* note 463, at 470.
[522] Claman (2008) *supra* note 46, at 346-347
[523] *Ibid.* 347.
[524] Article 1(a).

> The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

The drafters, however, seemed to have placed greater emphasis on the exchange of information on the status of the request rather than proposing any particular procedural reform which could be undertaken by states to achieve the purpose of actually accelerating the response. The vagueness of the terms in which the provision was drafted makes it closer to a declaration of good intentions than an effective instrument for improving asset recovery.

2.2.7. Efficient response to freezing and seizing requests

One of the barriers identified in Chapter 1 was the incapacity of states to provide quick responses to prevent dissipation of assets. First, ordinary difficulties deriving from processing requests between two jurisdictions may pose difficulties to meeting the short deadlines demanded in those cases. As noted by Pieth, "it needs to be possible for a financial centre to freeze assets on a provisional basis within twenty-four hours – anything else is ineffective"[525]. Sometimes other overly stringent requirements are imposed by the requested jurisdiction, such as proof of initiation of criminal proceedings in the requesting country or the necessary notification of the holder of the asset before the granting of the assistance.

UNCAC offers some solutions for this issue. First, as mentioned, the Convention displays innovation by incorporating as legal text the practice of governments of taking direct action in foreign courts to overcome the deficiencies of MLA[526]. So, States Parties are now compelled to allow foreign governments to

[525] Pieth (2008) *supra* note 8, at 11.
[526] See article 53.

initiate proceedings in their courts, which may include the enactment of provisional measures to secure assets from dissipation.

Furthermore, article 54(2)(c) expands the possibilities of obtaining the freezing of assets in circumstances where there is no foreign judicial order to execute[527] or no confiscating proceedings have been initiated[528] by domestic authorities[529]. According to that article, additional measures can be imposed by competent authorities to preserve property for a future confiscation. The article even provides examples of such exceptional situations, namely the existence of "a foreign arrest or criminal charge related to the acquisition of such property"[530].

Article 54(2)(c), therefore, opens up the possibility for states not only to accept to impose restraining orders before the initiation of a criminal proceeding by the requesting jurisdiction, but also to impose the freezing of assets on their own initiative, as the Swiss Federal Council has the power to do so. As a result, this provision could also address the necessity for the requested jurisdiction to take provisional measures before any formal MLA request is received. The downside is that this is also a non-mandatory provision, so it depends on the willingness of states to implement it in order to have any practical effect[531].

2.2.8. Extended statute of limitations

The need for statutes of limitations which are more suited to the complexities involved in corruption cases was considered in article 29, which asks states to establish longer statutes of limitations for the offences covered in the Convention or at least provide for the suspension of the statute of limitation in the case of flight by the defendant. This is a mandatory provision.

[527] See article 54(2)(a)
[528] See article 54(2)(b)
[529] Claman (2008)*supra* note 46, at 348
[530] Article 54(2)(c)
[531] Claman (2008) *supra* note 46, at 348.

2.2.9. "Fishing expeditions" and banking secrecy

UNCAC also contains some provisions that may prove useful to overcoming the restrictions on "fishing expeditions" and on access to information protected by banking secrecy. In article 14(1)(b), for example, it was established that states should "ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering [...] have the ability to cooperate and exchange information at national and international levels". Other forms of informal cooperation between law enforcement authorities are provided in article 48, which, among other things, demands that states take effective measures to "cooperate with other States Parties in conducting inquiries" concerning "the movement of proceeds of crime or other property"[532]. The framework for establishing informal channels for cooperation provided by UNCAC may enable law enforcement authorities to gather sufficient information to meet the requirements of informing the precise identification of assets in MLA requests.

The convention also contains special provision directed at obstacles imposed by excessively protective banking secrecy laws. Bank secrecy cannot prevent courts and other national authorities from accessing banking records[533] or serve as grounds for refusal of cooperation[534].

2.2.10. Creation of specialized bodies

The Convention also contains provisions designed to deal with structural and systemic problems affecting the fight against corruption. One set of provisions concerns the creation of specialized bodies. Article 6 compels states to create a body responsible for implementing prevention policies, while article 36 obliges states to "ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement". The designation of a specialized body (central authority) to specifically deal with the processing of MLA requests on the issues covered by the convention is also made mandatory under article

[532] Article 48(1)(b)(ii).
[533] Article 31(7) and 40
[534] Article 46(8)

46(13). The central authority must be equipped to "ensure the speedy and proper execution or transmission of the requests received"[535].

2.2.11. Resources, training and expertise

A second set of provisions are concerned with granting those authorities the expertise and the instruments necessary to perform their functions. chapter VI is dedicated to obligations regarding training and other capacity building initiatives[536], which includes the expertise necessary to recover assets abroad, such as the preparation of MLA requests, the prevention of the transfer, the detection and the freezing of criminal proceeds.

Important provisions are also found in other parts of the Convention, such as the possibility of instituting joint investigative bodies between different states parties[537] and the obligation to allow the use of special investigative techniques[538].

[535] Article 46(13)

536 Article 60 brings forth a list of areas which should be dealt with in training programmes:
"(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;
(b) Building capacity in the development and planning of strategic anticorruption policy;
(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;
(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;
(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;
(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;
(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;
(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;
(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and
(j) Training in national and international regulations and in languages."

[537] See article 49

[538] See article 50.

2.2.12. Money-laundering preventive system

UNCAC also advances in regard to the establishment of an adequate system for the prevention and control of money laundering. Some of the provisions already set forth in the United Nations Convention against Transnational Organized Crime (UNTOC) regarding the establishment of a regime of preventive measures upon private actors were improved in the text of UNCAC. Therefore, it not only repeats the obligation of financial and non-financial institutions to implement measures of know-your-customers, record keeping and reporting of suspicious transactions, but also establishes that those institutions must be compelled to identify the beneficial owner[539], meaning the natural person benefiting from the assets[540].

However, the provision calling for the institution of a financial intelligence unit is not binding on the State Parties[541] which weakens the concrete capacity of states to process suspicious transactions reports and provide useful information to law enforcement authorities which could lead to the opening of a case.

Another important innovation brought forth by UNCAC in article 52 is the additional obligation on financial institutions to implement an enhanced scrutiny on high-value accounts "sought or maintained by or on behalf of individuals who are, or have been, entrusted with *prominent public functions and their family members and close associates*"[542], known as politically exposed persons (PEPs). The concept of applying more controls over PEPs is that they represent a higher risk of laundering money originating from the abused of their position or influence[543]. As Claman explains, financial institutions are not always in a position to identify who is a PEP domestically and especially who is a foreign PEP[544]. Therefore, states are encouraged to disseminate information to the financial sector on the identity of PEPs, at the request of another State Party or on its own

[539] Claman (2008) *supra* note 46, at 339
[540] See Article 14(1)(a).
[541] Articles 14(1)(b) and 58
[542] Article 52 (1). [emphasis added]
[543] T. S. Greenberg, L. Gray, D. Schantz, C. Gardner and M. Latham, Politically Exposed Persons Preventive Measures for the Banking Sector, StAR Initiative, World Bank and UNODC (2010) 3
[544] Claman (2008) *supra* note 46, at 340.

initiative[545]. The major problem involving the identification of PEPs is that the concept of "prominent public function" is still too vague and states have adopted different standards to identify a person as a PEP[546]. There are variations on how broad the definition can be[547]. Therefore, if the introduction of the concept of PEPs in UNCAC was an unquestionable advance, further guidance is needed to facilitate the implementation of article 52.

2.2.13. Political commitment

Political obstacles to asset recovery are not limited to any specific provision of the UNCAC, but, as explains Webb, the Convention itself and the efforts to draft a globally accepted set of rules on asset recovery represented a major political commitment towards the fight against corruption[548] and the level of ratification, more than 150 by July 2011, demonstrates that countries recognize UNCAC as an important legal tool for achieving national expectations on that issue.

2.3. The review mechanism

The existence of binding provisions does not necessarily secure compliance. In order for those legal obligations to be "translated into visible, meaningful, and sustainable changes on the ground" it is necessary that mechanisms to encourage compliance are put in place[549]. One way to do that is to test implementation through periodic evaluations. Those evaluations will show to what extent harmonization of national legal orders was achieved. But the system of evaluation itself must include some kind of sanctioning device, otherwise states might be induced to be lenient to each other or simply decide not to participate in the review process[550].

[545] Article 52(2)(b)
[546] Greenberg et al. (2010) *supra* note 547, at 25
[547] *Ibid.* 25.
[548] Webb (2005) *supra* note 15, at 211.
[549] *Ibid.* 219
[550] A case of unsuccessful system of review of implementation usually quoted by commentators is the one put in place by OAS in regard to the Inter-American Convention against Corruption. It was adopted

Drafters of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, for example, decided to include a provision establishing a monitoring mechanism[551]. The Working Group on Bribery decided to implement a review mechanism in 3 phases[552]. Phase 1 constituted an evaluation of the legal texts that internalized in the domestic legal orders the obligations under the OECD Convention. Phase 2 assessed implementation of those legal texts[553]. Phase 3 turned the assessment of implementation into a permanent mechanism "involving systematic on-site visits as a shorter and more focused assessment mechanism than for Phase 2"[554]. The last phase is supposed to take place between 2009 and 2014.

Where a robust mechanism of review of implementation is put in place, it is capable of even encouraging the enforcement of non-binding provisions. The deputy-director of central authority of Brazil, for example, stated that central authority has encouraged practitioners to use multilateral treaties as a legal basis for MLA requests even in cases where a bilateral treaty is also available, due to the increasing necessity of providing statistics of enforcement of those instruments to international organizations[555]. This is also the case with the implementation of the Financial Action Task Force (FATF)[556] 40+9 Recommendations[557].

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in 2001, but until 2003 it did not produce any results. See Webb (2005) *supra* note 15, at 219 and Babu (2006) *supra* note 465, at 28-29.

[551] "Article 12
Monitoring and Follow-up
The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body".

[552] See OECD, Country monitoring of the OECD Anti-Bribery Convention, at http://www.oecd.org/document/12/0,3746,en_2649_34855_35692940_1_1_1_1,00.html

[553] Assessments of implementation of Phase 2 took place between 2002 and 2009. See OECD, Working Group on Bribery in International Business Transactions, Compilation of Recommendations made in the Phase 2 Reports, OECD, Anti-corruption division (2010).

[554] OECD, Phase 3 country monitoring of the OECD Anti-Bribery Convention, at http://www.oecd.org/document/31/0,3746,en_2649_34855_44684959_1_1_1_1,00.html

[555] Views expressed by the deputy director, Ms. Camila Colares, in interview conducted on 8 April 2011.

[556] The section on the review mechanism of implementation of FATF's Recommendations is based in part on research conducted for my paper on International Relations as part of the Leiden Advanced LLM programme.

[557] The Financial Action Task Force (FATF) is an intergovernmental body created in 1989 by the G7 with the mandate to "to assess the results of cooperation already undertaken in order to prevent the

In order to secure enforcement of its recommendations, a strengthened peer-review mechanism was put in place by the FATF and the FATF Style Regional Bodies (FSRBs), which resembles the one adopted by the OECD to review the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In the first stage of the mutual evaluation, the reviewed state is asked to answer a questionnaire[558]. Implementation of each Recommendation is analysed in regard to objective criteria specified in the questionnaire[559].

In the following stage, a group of expert evaluators compare the answers to the questionnaire with information collected during on-site interviews with governmental authorities and private sector representatives[560]. The reviewed country is then invited to comment on a draft report. The final result of the evaluation is presented as a report which shall be approved in a plenary meeting of the FATF and then made public in FATF website[561].

The main objective of the mutual evaluation is to verify whether legal and administrative measures are put in place to comply with the Recommendations and if those measures are in fact effective[562]. In order to prove effectiveness, the assessed country has to provide the assessors with numbers and

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utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance" (See G7, Economic Declaration from the G7 Summit, Paris (1989) at http://www.g8.utoronto.ca/summit/1989paris/communique/drug.html.). Although the FATF is composed only of 34 member jurisdictions and 2 regional organizations, it encouraged the creation of FATF Style Regional Bodies (FSRBs), which are considered Associate Members to the FATF and enforce the standards at the regional level. The 40+9 Recommendations issued by the FATF are the main international guidelines on reforms which should be undertaken by governments in with respect to money laundering, the financing of terrorism and related offences, and are adopted as benchmark on the subject by international organizations such as the IMF and the World Bank. Recommendations encompass the following issues: criminalization of money laundering and other related offences, measures to deprive criminals of criminal proceeds and other resources that finance criminal activities, regulation of financial and non-financial sector, creation of a unit responsible to receive and analyze reports of suspicious transactions by the financial and other vulnerable sectors, law enforcement, cooperation between national authorities and international cooperation.

[558] FATF, AML/CFT Evaluations and Assessments Handbook for Countries and Assessors, April 2009 5 at. http://www.fatf-gafi.org/dataoecd/7/42/38896285.pdf

[559] FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations", 27 February 2004. (Updated as February 2009) 5 at http://www.oecd.org/dataoecd/16/54/40339628.pdf.

[560] FATF (2009) *supra* note 562, at 9.

[561] FATF publishes both a full report and an executive-summary of the findings.

[562] FATF (2004) *supra* note 563, at 3-5.

statistics, such as the number of prosecutions and convictions, the number of suspicious transaction reports, and the value of the criminal assets confiscated[563].

In the assessments, each Recommendation is considered either compliant, largely compliant, partially compliant or non-compliant[564]. If the result of the evaluation is considered unsatisfactory, meaning that the country's implementation received a large number of partially compliant or non-compliant marks, the state is immediately put in an enhanced follow-up mechanism and is required to report within a certain period to FATF's International Cooperation Review Group[565]. A continuous reluctance by a state to effectively comply with the Recommendations can lead to a series of actions by the FATF, such as high level visits to the country, the inclusion of the state in a list of high risk and non-cooperative jurisdictions and finally the issuing of alerts to the global financial system[566]

For international law standards, FATF Recommendations are not binding instruments, because they were not submitted to the process of political approval of other primary sources of law and would not result in international responsibility in case of breach[567]. They are to be considered, therefore, *soft law.* However, the mechanism created by the members of the FATF to assess and monitor the compliance with of its Recommendations is highly conducive to implementation[568], making the Recommendations a "*soft law hardly binding"*[569]. A potential blacklisting of a non-compliant country certainly can lead to concrete

[563] *Ibid.* 7
[564] *Ibid.* 6.
[565] FATF, Identifying and responding to the threat of high-risk jurisdictions, at http://www.fatf-gafi.org/document/62/0,3746,en_32250379_32236992_43575998_1_1_1_1,00.html
[566] *Ibid.* and A. Scherrer, *Explaining Compliance with International Commitments to Combat Financial Crime: The G8 and FATF,* paper Presented at the 47th Annual Convention of the International Studies Association, San Diego, 22-25 March 2006, at 10
[567] Machado (2004) *supra* note 34, at 47 and 51.
[568] K. W. Abbott and D. Snidal, *Hard and Soft Law in International Governance,* 54 International Organization, 3, Summer (2000) 440.
[569] According to Machado, *soft law hardly binding* are instruments that "share two characteristics: the lack of legal force of its provisions – because they do not constitute an international legal obligation – and the existence of effective mechanisms that encourage its implementation"[Freely translated from Portuguese by the author] (2004) *supra* note 34, at 210.

economic and political costs to that jurisdiction and, therefore, functions as a pressure mechanism for enforcement[570].

FATF Recommendations are already a means to secure implementation of provisions of other conventions. Recommendation 1, for example, reads that:

> *Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).*

This may be the reason why States Parties were already in compliance with certain UNCAC provisions which are identical or similar to provisions in the abovementioned conventions, such as the criminalization of money laundering, as it will be discussed later. The methodology of mutual evaluation of the FATF is currently under a process of review and members are considering including some of the provisions of the UNCAC as parameters to assess compliance[571]. If that really occurs, the FATF can serve as an important mechanism to encourage enforcement of UNCAC[572].

During the negotiations over UNCAC there were three proposals on the table regarding the institution of an implementation review mechanism[573]. The first position was to provide a robust mechanism already in the text of the Convention, which would represent an innovation in regard to previous instruments such as the UNTOC[574]. In the first session, Mexico proposed that the Conference of the State Parties (COSP) should be responsible for reviewing the implementation of UNCAC "through a systematic follow-up programme"[575]. That proposal was further developed during the fourth session, where it was suggested that the COSP, among other things, should conduct the periodic review evaluations

[570] *Ibid.* 210.
[571] See FATF, Meeting of Expert Group B (EGB). Recommendation 35: Inclusion of the UN Convention on Corruption. 6-7 May 2010, Working Group on Evaluation and Implementation, Ministry of Finance, Vienna, Austria. Doc. N. FATF/WGEI(2010)48, 20 April 2010.
[572] The Working Group on Evaluation on Implementation of the FATF is considering including in the mutual evaluation mechanism of Recommendation 35 the assessment of implementation of the following articles of the UNCAC: 5-6, 11, 12-2(c), 14-24, 26-33, 36-38, 40, 42-44, 46-60, 62, 65. *Ibid.* 3
[573] Babu. (2006) *supra* note 465, at 26.
[574] Travaux Preparatoire (2010) *supra* note 463, at 555.
[575] *Ibid.* 557, footnote 1.

annually[576] and facilitate the implementation of the Convention through economic development and assistance[577].

A second proposal was to establish a body dedicated to reviewing the implementation of UNCAC[578], but leaving the structure to be decided later on by the COSP. The third position was to retain the option taken in the UNTOC and leave the decision of implementing a mechanism for the review of the Convention to a future deliberation by the COSP[579]. The position finally adopted was the third one, which left up to the COSP the decision to establish a review mechanism "if it deems necessary"[580].

At the first session of the COSP, the discussions on the creation of a mechanism of periodic review were resumed. The states parties decided to create an open-ended intergovernmental expert working group to present recommendations to the COSP on the issue[581]. The States established, however, some parameters to guide the work of the working group. The review mechanism should:

> (a) Be transparent, efficient, non-intrusive, inclusive and impartial;
> (b) Not produce any form of ranking;
> (c) Provide opportunities to share good practices and challenges;
> (d) Complement existing international and regional review mechanisms in order that the Conference of the States Parties may, as appropriate, cooperate with them and avoid duplication of effort[582]

In the same session it was decided that a self-assessment checklist should be designed by the secretariat and distributed to states parties in order to gather information on the implementation of the UNCAC[583]. Little progress was made at the second session of the COSP, because states could not agree on same

[576] Article 76 (4)(b) of the fourth session draft proposal (A/AC.261/3/Rev.3) Travaux Preparatoire (2010) *supra* note 463, at 561.
[577] Article 76 (4)(a) of the fourth session draft proposal (A/AC.261/3/Rev.3) Travaux Preparatoire (2010) *supra* note 463, at 560.
[578] Travaux preparatoire (2010) *supra* note 463, at 558.
[579] Travaux preparatoire (2010) *supra* note 463, at 555.
[580] Article 63(7).
[581] Resolution 1/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its first session held in Amman from 10 to 14 December 2006.
[582] *Ibid.* §3.
[583] Resolution 1/2 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its first session held in Amman from 10 to 14 December 2006.

key issues regarding the functioning of the mechanism. Some states expressed concern in regard to publicizing of the analytical reports on the respective implementation[584]. In their view, the publication of any report should be subject to the acquiescence of the reviewed state. Another debated issue was the provision of adequate funding for the development and functioning of the mechanism[585].

There was agreement, on the other hand, that the review process should not lead to the creation of any ranking[586]. States were concerned that the implementation of a review mechanism could result in a blacklisting process, as it occurred in regard to the evaluations conducted in other international institutions[587]. In Resolution 2/1, the COSP made clear that the mechanism "should be non-adversarial and non-punitive and should promote universal adherence to the Convention"[588] and should aim at assisting "States parties in the effective implementation of the Convention"[589].

After five intersessional meetings of the open-ended intergovernmental working group and heavy discussions during the third session of the COSP, the structure of the mechanism for the review of implementation was finally agreed upon in November 2009[590]. The review will take place in two cycles of five year each[591]. On the first four years of each cycle, one fourth of the States parties will be reviewed. The first cycle will review implementation of criminalization and law

[584] Conference of the States Parties to the United Nations Convention against Corruption, Report on the meeting of the Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption held in Vienna from 29 to 31 August 2007, Doc CAC/COSP/2008/3. at 9

[585] *Ibid.* 9.

[586] *Ibid.* 10.

[587] Mainly the creation of the list of Non-Cooperative Countries and Territories by the FAFT.

[588] Paragraph 3(c) of Resolution 2/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its second session held in Nusa Dua, Indonesia, from 28 January to 1 February 2008.

[589] Paragraph 3(a) of Resolution 2/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its second session held in Nusa Dua, Indonesia, from 28 January to 1 February 2008.

[590] Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009.

[591] Paragraph 3 of Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009.

enforcement and international cooperation, and the second cycle will be dedicated to preventive measures and asset recovery[592].

The model agreed for the mechanism was peer-review. It was also agreed that the review should take a geographical approach, therefore "one of the two reviewing States parties shall be from the same geographical region"[593] and if possible, be a State with a similar legal system as the State party under review. The reviewing States are to be selected by drawing of lots, but States should not conduct mutual reviews[594].

The State under review is supposed to respond to a self-assessment checklist pointing out the measures taken to implement UNCAC, its successes and challenges[595]. A desk review will then analyse the responses and engage in a dialogue with the state under review to obtain clarifications or additional information[596]. If agreed by the state under review, the desk review can complement its analysis through direct dialogue with national stakeholders of the country under review, through, for example, on-site visits. After gathering the necessary information, the reviewing states will prepare a country review report, which "shall identify successes, good practices and challenges and make observations for the implementation of the Convention"[597]. While the report will remain confidential, an executive summary of the report will be made public by the UN[598].

The secretariat was charged with the task of drawing up guidelines and training governmental experts who will conduct the country reviews[599]. The COSP also agreed to a follow-up procedure, in which states will communicate progress achieved through a self-assessment checklist[600].

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[592] Paragraph 4 of Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009.
[593] Annex I to Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009 at 8
[594] *Ibid.* 8.
[595] *Ibid.* 9.
[596] *Ibid.* 9.
[597] *Ibid.* 10.
[598] *Ibid.* 10.
[599] *Ibid.* 8 and 10.
[600] *Ibid.* 10-11.

Although the mechanism of review of implementation is very recent and has not yet achieved its first results[601], some observations can be made on the overall procedure. The first concern is the division of the review process into two cycles. The UNCAC was drafted to be a comprehensive instrument and should be read holistically. Some of the provisions regarding law enforcement and international cooperation are crucial for the functioning of the asset recovery system provided in chapter V and also for the implementation of preventive measures and vice-versa. It may prove difficult in practice to reconcile the findings of the second cycle of the review with the analysis made at least five years before during the first cycle, since a number of significant reforms could have been put in place[602]. The reviewers from the second cycle would end up finding themselves in the difficult situation of having to reassess the implementation of some of the relevant provisions of the first cycle.

Second, although the COSP had agreed that the mechanism should be transparent[603], the reluctance of some states to make public the review may impact on the ability of the mechanism to function as an instrument of pressure for implementation. It is not certain, for example, to what extent an executive summary can provide sufficient information for civil society to monitor changes and reforms and make comparisons with measures adopted in other jurisdictions. The absence of any provision on responses to cases of severe lack of compliance, such as enhanced follow-up mechanisms and notification of the relevant authorities, indicates that the review mechanism may still lack enough teeth to improve the enforcement of UNCAC.

Another possible shortcoming of the review mechanism is that on-site visits are controlled by state consent. As seen in relation to the FATF's mutual evaluation mechanism, on-site visits permit the evaluator to obtain relevant information from local authorities and from private actors about enforcement who sometimes contradict the answers given by the government in the questionnaire.

[601]By July 2011, the executive summaries of the reviews conducted during the first year of the mechanism were still not available.

[602]This concern was particularly expressed by Mr. Pedro Gomes Pereira, asset recovery expert from the Basel Institute for Governance, during interview held on the 25 of April 2011.

[603] Resolution 1/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its first session held in Amman from 10 to 14 December 2006. §3

Such contradictions may be due to the fact that responsibility for answering the questionnaire may be centralized in an organ which does not possess all the relevant information. Another reason may be that the organ responsible for providing the answers wants to control or limit the information provided in order to avoid a negative evaluation. Therefore, on-site visits are important for evaluators to have a clearer picture of the actual implementation of UNCAC provisions in the reviewed State. Since the results of the first evaluations have not been publicized yet, it is not possible to foresee whether state consent to on-site visits will be the rule or the exception.

During the 3rd session of the COSP, States were asked to appoint 15 experts, providing the Secretariat with their "information on their professional background, their current positions, relevant offices held and activities carried out and their areas of expertise as required for the respective review cycle"[604] Some guidelines for conduct of country reviews were drafted by the Secretariat[605], but they mostly contain rules on the procedure of review, but not a description on the main substantive aspects which should be verified by the experts while assessing implementation. The guidelines only ask experts to prepare for the review by reading the "Legislative Guide for the Implementation of the United Nations Convention against Corruption"[606]. Detailed information on the training programmes for experts, such as the duration and content, were not provided either, which makes it difficult to verify whether such training will be able to provide experts with the necessary tools and information for analyzing the complex and innovative character of some provisions of the UNCAC.

Finally, no checks on the balance of the content of the report are provided in the procedure described in the Resolution 3/1 of the COSP. There is no provision so far on the possibility for other States Parties which do not participate as reviewers to submit comments on the report, nor on the possibility of the reviewed State to challenge some of the findings of the report before the Plenary of the COSP, for example.

[604] Annex I to Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009. 8.
[605] Appendix to Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption, adopted at its third session held in Doha from 9 to 13 November 2009.
[606] *Ibid.* 14.

2.4. Implementation of UNCAC

Although the implementation review mechanism is still in its early stages, some evaluations of some of the provisions of the UNCAC have already been accomplished. During its first session, the COSP charged the Secretariat with developing a self-assessment checklist to be filled out by states parties. Seventy-eight answers to this self-assessment checklist were used by the Stolen Asset Recovery Initiative (StAR Initiative)[607] to elaborate an analysis of reported compliance with the articles on asset recovery which was presented during the third session of the COSP[608]. Unfortunately, the report does not cover all articles analysed in the previous sections of this thesis, as it focused only on articles 23, 52, 53, 54, 55 and 57 of the UNCAC. However, it can still provide a glimpse of the enforcement of UNCAC provisions. StAR Initiative opted to divide the analysis of compliance according to geopolitical regions[609].

Based on the information compiled in the StAR Initiative report, the following section will identify how States Parties have reported compliance with mandatory and non-mandatory provisions on asset recovery. .

As for provisions regarding the direct asset recovery, the reported compliance is shown in the following tables:

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[607] The StAR Initiative is a comprehensive project launched in 2007 jointly by the United Nations Office on Drugs and Crime (UNODC) and the World Bank with the main goal of helping developing countries to recover assets using UNCAC as legal basis. At its launch, UNODC and the World Bank presented an Action Plan for StAR Initiative which demanded the involvement of several stakeholders of the asset recovery process and was directed at obstacles of different natures which were identified in the main corruption cases. (See StAR Initiative (2007) *supra* note 31, at 2).

[608] StAR Initiative. Articles of the United Nations Convention against Corruption on Asset Recovery: Analysis of Reported Compliance and Policy Recommendations. Doc. CAC/COSP/2009/CRP.9.

[609] *Ibid.* 5-6. States were divided in the following groups:

Group of African States: Algeria, Angola, Burkina Faso, Egypt, Kenya, Mauritania, Mauritius, Namibia, Nigeria, Rwanda, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania.

Asian Group: Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, China (including Hong Kong Special Administrative Region), Fiji, Indonesia, Jordan, Kyrgyzstan, Mongolia, Pakistan, Philippines, Republic of Korea, Tajikistan, Yemen.

Group of Eastern European States: Armenia, Azerbaijan, Bulgaria, Croatia, Czech Republic, Hungary, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia.

Group of Latin American and Caribbean States: Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay.

Western European and Other States: Australia, Austria, Canada, Finland, France, Germany, Greece, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America

Article 53(a) – Direct Recovery: possibility of initiating civil action to establish title or ownership of assets			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	14%	29%
Asian group	38%	25%	38%
Eastern European Group	88%	12%	0%
Group of Latin American and the Caribbean	38%	19%	44%
Western European and Others Group	94%	6%	0%

Source: StAR Initiative

Article 53(b) – Direct Recovery: possibility of initiating civil action to obtain compensation or damages			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	50%	21%	29%
Asian group	27%	27%	47%
Eastern European Group	81%	6%	13%
Group of Latin American and the Caribbean	27%	20%	53%
Western European and Others Group	100%	0%	0%

Source: StAR Initiative

Article 53(c) – Direct Recovery: possibility participating as third party in a confiscation proceeding			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	50%	21%	29%
Asian group	47%	13%	40%
Eastern European Group	69%	19%	13%
Group of Latin American and the	31%	25%	44%

Caribbean			
Western European and Others Group	88%	0%	13%

Source: StAR Initiative

UNCAC made it mandatory for all States Parties to provide for all three possibilities for direct recovery described in article 53, regardless of the legal tradition to which they belong. Nevertheless, African, Asian and the Latin American and the Caribbean regions have reported significant levels of non-compliance with all three possibilities, indicating a gap in the enforcement of direct recovery provisions by those states. As stated in the report, five of the fifteen Asian countries, one-third of the assessed states, reported non-compliance with all three alternatives for direct recovery[610]. The justification given in the report for non-compliance with article 53(a) and (b) by Latin-American and Caribbean countries was that most of them follow a civil law tradition in which civil actions to award compensation must be attached to a criminal proceeding.

On the other hand, as regards the Group of Western European and Others, a few states only reported no compliance with article 53(c), which probably represents the difficulties some common law states face to internalize an institute which is proper of the civil law system.

In summary, despite the mandatory character of Article 53, a great part of States Parties still did not put in place mechanisms to overcome the obstacles imposed by differences in legal systems.

The following table shows reported compliance with mandatory provisions regarding freezing and seizing of assets through MLA:

[610] StAR Initiative (2009) *supra* note 612, at 22.

Article 54(2)(a) – MLA: execution of a freezing or seizure order issued by foreign court or competent authority			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	21%	21%
Asian group	64%	14%	21%
Eastern European Group	93%	7%	0%
Group of Latin American and the Caribbean	64%	14%	21%
Western European and Others Group	100%	0%	0%

Source: StAR Initiative

Article 54(2)(b) – MLA: freezing or seizure orders obtained in domestic courts using evidence provided by a foreign jurisdiction			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	50%	29%	21%
Asian group	57%	29%	14%
Eastern European Group	93%	7%	0%
Group of Latin American and the Caribbean	40%	13%	47%
Western European and Others Group	94%	0%	6%

Source: StAR Initiative

A great number of countries from the Eastern European Group and from the Western European and Others group seem to have adopted legislation to allow for both forms to grant MLA for the purposes of freezing and seizing assets. A high level of non-compliance with the second alternative was reported in the Latin American and the Caribbean Group, which may be an evidence of the prevalence of legal orders from civil law tradition. However, compliance rates varying from 50 to 70% in the Africa, Asia and the Latin America and the Caribbean regions may indicate that there are still gaps for granting MLA through any of the measures provided in Article 53(2) in those regions.

As seen in the tables below, a similar analysis is applicable to the mandatory provisions regarding the execution of MLA requests for the purposes of confiscation, as the levels of compliance in the different regions are very similar to those regarding the measures provided in the second paragraph of article 54, except for the fact that the level of non-compliance in the Group of Latin American and the Caribbean is significantly higher regarding both subparagraphs of article 54(1). This demonstrates that in the latter group, some countries are able to grant MLA for freezing assets, but face legal difficulties with confiscating them. Although the report does not provide any explanation for the inability to confiscate assets which were subject to freezing orders, a possible reason is that countries may adopt a more narrow definition for proceeds of crime subject to confiscation than the one incorporated in UNCAC[611]. Some legal orders, for example, may not allow for the confiscation of indirect proceeds, such as interest. It might be the case that the proceeds are calculated in terms of gross income and not the profit[612]. Other countries might be able to freeze instrumentalities but not confiscate them[613].

Article 54(1)(a) – MLA: execution of a confiscation order issued by a foreign court			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	29%	14%
Asian group	53%	20%	27%
Eastern European Group	86%	7%	7%
Group of Latin American and the Caribbean	50%	13%	37%
Western European and Others Group	94%	6%	0%

Source: StAR Initiative

[611] According to article 2 (e): Proceeds of crime "shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence".
[612] Hofmeyr (2008) *supra* note 61, at 136.
[613] Article 91, II, a of the Brazilian Criminal Code limits the forfeiture of instrumentalities to those assets whose fabrication, selling, use, possession or detention constitutes an illicit act.

Article 54(1)(b) – MLA: confiscation orders obtained in domestic courts using evidence provided by a foreign jurisdiction			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	21%	21%
Asian group	50%	36%	14%
Eastern European Group	85%	7%	7%
Group of Latin American and the Caribbean	56%	13%	31%
Western European and Others Group	94%	6%	0%

Source: StAR Initiative

As for the non-mandatory provisions regarding MLA, as seen from the tables below, the rate of non-compliance with the provision that suggests the execution of confiscations not based on a criminal conviction are significantly higher if compared to the rates of the mandatory provisions, even in the groups which presented a very high rate of compliance with other provisions. In this sense, in the Eastern European Group, non-compliance with article 54(1)(c) doubled in comparison to the other two subparagraphs. And in the group of Western European and other states which presented no rate of non-compliance with confiscation through criminal proceedings, almost one fifth of states reported to be incapable of granting MLA to execute non-conviction based confiscation orders.

Article 54(1)(c) – MLA: non-conviction based confiscation			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	50%	14%	36%
Asian group	43%	29%	29%
Eastern European Group	64%	21%	14%
Group of Latin American and the Caribbean	38%	6%	56%

Western European and Others Group	75%	6%	19%

Source: StAR Initiative

Article 54(2)(c) – MLA: alternative measures to freeze and seize assets			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	21%	21%
Asian group	43%	36%	21%
Eastern European Group	71%	21%	7%
Group of Latin American and the Caribbean	47%	13%	40%
Western European and Others Group	71%	0%	29%

Source: StAR Initiative

Many countries from the Western European and others groups also reported to have limitations on freezing or seizing assets without the initiation of a criminal proceeding in the requesting country, and therefore are not compliant with the optional provision under article 54(2)(c). Also less than half of Asian and Latin American and Caribbean countries are fully able to use alternative measures to preserve property.

A severe gap in the enactment of legislation to allow for the return of the assets is also perceived from the answers to the self-assessment checklist. Half of the countries from Asian and Latin American and Caribbean reported they were non-compliant with the provisions of article 57(3). And just a little more than half of the African states affirmed that they are fully able to return confiscated property. Unfortunately, the report does not divide the analysis of subparagraphs of article 57(3) into its different criteria, so it does not show the rate of compliance of states as regards the possibility of waiving the requirement of a final judgment for the actual return of the assets.

Article 57(3) – Return of assets			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	57%	14%	29%
Asian group	29%	21%	50%
Eastern European Group	64%	29%	7%
Group of Latin American and the Caribbean	29%	21%	50%
Western European and Others Group	81%	6%	13%

Source: StAR Initiative

The only article which presented a very high level of compliance is article 23(1)(a) and (b), even if the second subparagraph is not binding. As seen from the tables below, except for the African Group, most countries have considered that they have criminalized money laundering in accordance with UNCAC provisions. Criminalization of money laundering was already made mandatory in the United Nations Convention against Transnational Organized Crime[614] and in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[615], and it was also inserted in Recommendation 1 of the FATF. This suggests that the offences were already provided for in national legal systems before the ratification of the UNCAC.

Article 23(1)(a) – Criminalization of money laundering			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	69%	8%	23%
Asian group	73%	27%	0%
Eastern European Group	100%	0%	0%

[614] Article 6.
[615] Article 1(b) and (c).

Group of Latin American and the Caribbean	65%	35%	0%
Western European and Others Group	100%	0%	0%

Source: StAR Initiative

Article 23(1)(b) – Criminalization acquisition, possession, use and participation as money laundering offences			
Region	Fully Compliant	Partially Compliant	Non-Compliant
African group	71%	21%	7%
Asian group	73%	27%	0%
Eastern European Group	100%	0%	0%
Group of Latin American and the Caribbean	56%	44%	0%
Western European and Others Group	100%	0%	0%

Source: StAR Initiative

2.5. Contributions of UNCAC to asset recovery practice

The entering into force of UNCAC should be celebrated for at least two important reasons. First, it represents a great political commitment towards sharing responsibilities within international community for pursuing more effective ways to secure the recovery of assets to its legitimate owners[616]. It recognized that both victim countries and countries where assets are located have to build up their institutions and legal orders to fight corruption.

Second, it consolidates in one legal text the best practices on asset recovery collected by practitioners when conducting cases over the past

[616] Claman (2008) *supra* note 46, at 335-337.

decades[617]. The innovation brought forth by the UNCAC was not, therefore, instituting revolutionary legal instruments, but presenting them in a well thought, systematized and congruent manner. Most obstacles to asset recovery have been addressed by the Convention.

However, states were still not prepared to accept incorporating, in a binding manner, creative solutions employed in a few progressive cases. As a consequence, most provisions that could result in a concrete impact on the expediency and effectiveness of asset recovery cases were written in non-mandatory language. This is seen in the provisions on non-conviction based confiscation, freezing of assets through MLA before the initiation of criminal proceedings in the requesting country, the criminalization of illicit enrichment, the reversing of the burden of proof in regard to origin of alleged criminal proceeds, the institution of a financial intelligence unit and the possibility of returning assets before a final confiscation decision is issued by the courts of the requesting state.

Even where relevant measures were imposed as a binding obligation on states parties, significant gaps of implementation are revealed by the report by StAR Initiative. Six years after it entered into force, practice has proven what commentators predicted at the time of the signature of the Convention: without a robust and coercive implementation review mechanism, it runs the risk of not being able to meet the great expectations deposited in it. The COSP seemed to have realized this danger and recently approved a peer-review mechanism. However, it remains to be proven if the new mechanism contains the structure and procedures capable of exercising the necessary pressure to secure enforcement of the Convention.

[617] Babu (2006) *supra* note 465, at 25.

CONCLUSION, OVERVIEW OF THE MAIN FINDINGS AND RECOMMENDATIONS

The main question to be answered by the thesis was whether UNCAC have set international parameters able to harmonize national legal orders in regard to corruption impacting the ability of States to effectively recover criminal proceeds overseas. In fact, UNCAC crystallizes the universal acknowledgment that States share a responsibility to provide a common solution to corruption, and that demands putting in place legal and structural reforms domestically. Therefore, the Convention must be recognized as an important step in the process of internationalizing criminal law in regards to corruption. However, as shown in Chapter 2, the shortcomings in drafting central provisions in mandatory language and structuring a review mechanism able to apply pressure for implementation demonstrate that the harmonization of national legal orders cannot yet be accomplished solely on the basis of UNCAC. The StAR Initiative report on implementation of the UNCAC clearly shows that States still did not find a definitive way of bringing together different legal traditions and adopting effective solutions to asset recovery in foreign jurisdictions.

The shortcomings of UNCAC do not mean that there is a need for a new international instrument on corruption or the development of a set of original measures to tackle the identified obstacles to asset recovery. Besides helping in the identification of the main obstacles to asset recovery, the case study approach adopted in Chapter 1 showed that good solutions were already designed and implemented with a certain degree of success in a few concrete cases. Those solutions were made available in the text of UNCAC, as described in Chapter 2. Therefore, answering the second question posed in the thesis, the main legal, structural and systemic obstacles for asset recovery were addressed in the Convention. Solutions only need to be enforced by both conferring vital provisions of UNCAC with binding force and by establishing effective implementation mechanisms. So what can be done to help actual implementation?

Apart from the evident need to better detail and adjust the review mechanism approved by the COSP, providing it with “teeth” to secure compliance, a first measure is certainly the development of detailed guidelines for the

implementation of UNCAC. In most cases, the lack of enforcement of the available tools to asset recovery is not explained by lack of political will, but simply because most of the progressive solutions are completely strange to certain jurisdictions. Initiatives such as the guidelines on the definition of PEPs, non-conviction based confiscation and barriers to asset recovery, by StAR Initiative; and the best practices on confiscation[618] by the FATF are, in that regard, most welcome.

Another suggestion is to adopt UNCAC provisions as parameters for the prevention, prosecution and international cooperation regarding corruption by other international organizations and initiatives that have more mechanisms to apply pressure for enforcement. The FATF, as explained in Chapter 2, is considering including implementation of some UNCAC provisions in their assessment of compliance with Recommendation 35[619] by Member States. The same could be done, for example, by the World Bank and the IMF, when approving the financing of technical and development assistance.

Harmonization of the asset recovery procedure in national orders, however, must be consistent in regard to all types of corruption. As seen in Chapter 1, asset recovery cases face similar obstacles, regardless of the amounts involved. No room for discretionary application of the implemented provisions of UNCAC should be allowed in order to avoid discrimination between "small" and "grand" corruption cases. Requirements for repatriation must be precise and objective and once the standard of proof is met, requests should be immediately executed.

Finally, increasing adherence to an emergent practice of accepting that efforts at repatriation shall not be made dependent on concrete judicial actions by the victim state should be encouraged. The Security Council, for example, expressed the intention that States make "available to and for the benefit of the people of the Libyan Arab Jamahiriya" all Kadhafi and associates' assets frozen by

[618] FATF. Best Practices: Confiscation. (Recommendations 3 and 38) 19 February 2010. at: http://www.fatf-gafi.org/dataoecd/39/57/44655136.pdf.

[619] The actual text of Recommendation 35 is: "Countries should take immediate steps to become party to and implement fully the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries are also encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2002 Inter-American Convention against Terrorism."

force of Resolution 1970[620]. As discussed in Chapter 1, the Swiss LRAI is also a comprehensive legal mechanism that allows the Swiss government to assume an active role in courts to secure repatriation in case of inaction by failing states. Such measures are steps towards recognizing that some States are simply unable to pursue looted assets, despite the fact that the return of those monies is desperately needed for economic and social development. States where stolen assets are located must understand that in special cases they must change from a passive position, waiting for action by another jurisdiction, to an active one and take the initiative to repatriate assets to their legitimate owners.

[620] S.C. Resolution 1970 (2011), 6491st meeting, 26 February 2011, UN doc. S/RES/1970 (2011), operative paragraph 18.

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