TRACKING THE PROCEEDS OF ORGANISED CRIME – THE MARCOS CASE

Dr David Chaikin Barrister, NSW

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Grand Corruption

International lawyers have paid little attention to the problem of fraudulent enrichment and corruption by heads of state/government and top state officials. The organised and systematic plundering of national treasuries or "indigenous spoliation" of assets by political and military elites has ravaged many developing countries, exacerbating poverty and undermining economic and social development.

When a greedy authoritarian leader or despot is in power, there are few, if any opportunities, for taking legal action to prevent or interdict stolen monies. However, if the dictator or authoritarian leader is deposed, the new government may seek the assistance of foreign government and courts to investigate and ultimately to recover stolen assets, which are located abroad².

Although grand corruption is not a new problem, it has more serious consequences today when practised by dictators or authoritarian leaders. Even if the dictator is overthrown, this does mean that the stolen monies will be recovered. Indeed, the modern experience is that dictators are able to keep their loot, which is deposited, outside their country. The mobility of wealth prevents effective recovery of the assets and the sheer size of the stolen monies has major economic consequences for development. It has been often stated that corruption by the political elite is perhaps the most important obstacle to economic development³. There is plenty of evidence that grand or high-level corruption may bankrupt a country.

Consider the following examples:

The former Shah of Iran was alleged to have "accepted bribes, misappropriated, embezzled or converted \$35 billion in Iranian funds" over 25 years of his reign, largely using various foundations and charities to conceal his illegal acts. The new Islamic regime of Ayatollah Khomenei sued the Shah and Empress in the United States but the New York Court of Appeals dismissed the case on the ground that the Islamic Republic had not established a substantial nexus or connection between the act complained of, and the forum where the action was brought⁴. The court reached this decision, even though the record did not establish that there was an alternative forum where the action could be maintained. The court did not refer to the fact that the Islamic Republic had through its agents and supporters seized American hostages in the American Embassy in Tehran, but it appears that the continuing hostile relationship between the Islamic Republic and the United States Government underpinned the judicial determination.

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^{1 &}quot;Indigenous spoliation" is the " illegal act of depredation which is committed for private ends by constitutionally responsible rulers, public officials or private individuals": Kofele-Kale, N (1995) <u>International Law of Responsibility for Economic Crimes (Kluwer)</u> at 10. See also Reisman,W M (1989) Harnessing International Law to Restrain and Recapture Indigenous Spoliation, 83 <u>American Journal of International Law</u> at 56-57 2 See Chaikin, D (1983) <u>Mutual Assistance in Criminal Matters: A Commonwealth Perspective.</u>

³ See Consultative Group (1985) Vulnerability: Small States in a Global Society; Rider, B (1980) <u>The Promotion</u> and Development of International Co-operation to Combat Commercial and Economic Crime.

⁴ See <u>Islamic Republic v Pahlavi</u>, 467 NE 2d 245 (NY Ct. App. 1984).

Papa Doc Duvalier and his son, Jean Claude Duvalier, as Presidents of Haiti from 1957 to 1986 were alleged to have used the entire machinery of the state to extract between \$500 million and \$2 billion. It is estimated that from 1960 to 1967, 87% of government expenditure was paid directly or indirectly to Duvalier and his supporters. Only the Government of Haiti ever recovered a relatively small amount of money. In 1986 the Republic of Haiti sued the Duvalier family in France, claiming that they had embezzled over \$120 million from the Republic. Initially the Court of Appeal in Aix found that the Republic's claim was justiciable because it involved the restitution of funds, which had been misappropriated by the defendants. But the French Court of Cassation ultimately ruled that it would not exercise jurisdiction over the Republic's claim because it was founded on the "exercise of public power." 5

The former communist leader of Romania, Nicholas Ceausescu acted as a "feudal lord over his estate - as a resource to be plundered at will." During his over 20 years in power Ceausescu allegedly stole millions of dollars for the benefit of his family, while Romania's people lived in abject poverty. In December 1989 Ceausescu was executed in Romania during the "Democratic Revolution." Under a Romanian law decreed by Ceausescu, no citizen of Romania was permitted to own or control assets outside the country. In 1990 the Romanian government engaged a private group of Canadian investigators to trace the illicit foreign assets of Ceausescu. Although the Canadian investigators traced significant assets corruptly diverted by Ceausescu, this was not followed-up by the Romanian government in a forthright fashion.

Mobutu Sese Seiko of Zaire and his allies were alleged to have stole billions of dollars from one of the poorest countries in the world; and yet the Swiss authorities and banks have only found \$3.4 million of Mobutu's assets in Switzerland. Mobutu's untimely death while in exile and the international legitimacy of the new government has complicated the recovery process. Similarly the self proclaimed Emperor Bokassa of the Central African Republic allegedly looted his country to the point of starvation, while former President Siaka Stevens of Sierre Leone, President Ahijo of Cameroon, and former President Amin of Uganda are all accused of looting the treasuries of their respective countries. The attempts to recover these monies have been largely ineffective.⁷

The Problems of Recovery

The problems facing new governments in recovering corruption proceeds involve matters of a sensitive political, legal and international relations nature. Even if the new government is "recognised" by the international community, this does not automatically mean that it will gain the co-operation of foreign countries. The "political colouring" of the new government and its bilateral relations with other states are important matters. Foreign states will expect and demand that the new government complies with the norms of international mutual assistance, which includes certain standards of human rights. This may prove to be difficult and time consuming in cases where a dictator has subverted the legal infrastructure of a country. A new constitution may need to be promulgated. An independent judiciary and a

⁵ See <u>Republic of Haiti v Duvalier</u>, Aix, 25 April 1988, 1988 C Lunet 779; Cass.Civ. I, 29 May 1990, 1991 Clunet 137; Collins, L (1994) <u>Essays in International Litigation and the Conflict of Laws</u> at 120-122.

⁶ See Possamai, M (1985) <u>The Missing Millions: Perspectives on the Tracing and Recovery of Assets Corruptly</u> Acquired by Heads of State, Government Officials and Others.

⁷ For the African experience of corruption of the political elite, see Kofele-Kale, supra no 1.

non-corrupt civil service and law enforcement bureaucracy (which may include the police and specialised agencies) may need to be developed and/or strengthened. The absence of any of these elements may thwart the recovery process.

There are other practical investigatory and legal problems. Firstly, the illicit assets must be located and the deposed dictator and/or his family must be shown to be the owner, controller or the beneficiary of the assets.. The tracing of assets is an extremely complex task, which had been made more difficult in a world where wealth is mobile and money laundering more sophisticated. The facilities of tax havens and the instruments of bank secrecy must be overcome.

Secondly, the recovery of illicit monies may take a considerable period of time because of procedural and substantive laws in the requested country. Third party (non-governmental) claims on the same assets will complicate the recovery process. The significant practical investigatory and legal problems in tracing and recovery of assets in an offshore setting should not be underestimated. Even well resourced international banks write off billions of dollars each year in bad debts, which are sourced through fraud. The usual procedures for tracing of assets by liquidators and official receivers often do not result in adequate recovery.

Few international investigations are supported by adequate intelligence and surveillance systems. The traditional passive methods of obtaining information are often unsuitable in the context of detecting serious economic crime. The difficult and often time consuming task of penetrating the target, especially one that is protected by organised crime or powerful elements in the government, points to the need for alternative mechanisms.

Traditional legal doctrines, such as the concept of state sovereignty and immunity doctrines - act of state and sovereign immunity - also may have the unintended effect of providing "legal cover" so as to assist corrupt political elites in plundering their economies. Where the dictator takes control of the institutions of government, where there is no distinction between the head of state and the state itself, and where the law is enacted to "legitimise" if not justify the economic plunder, then the domestic law of the dictator may authorise what the international community considers to be "economic crimes." In effect, the State sanctions the abuse of political power for economic ends. There is no legal distinction between the funds of the State and those of the ruling class, so that the question of "illegality" as a matter of domestic law does not arise.

Furthermore, if the dictator is deposed and the State brings into play a new constitution and laws which retrospectively criminalize "acts of spoliation" by the former leader, then the question arises as to whether courts in other countries will recognise retrospective criminal acts. Under the laws of most countries, the answer to this question is negative.

The Criminality of Marcos⁸

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

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⁸ For a description of the multibillion dollar theft, laundering scams, and co-operation with organised crime on the part of Marcoses, see Bonner, R (1987) <u>Waltzing with a Dictator</u>, chs 11-12; Seagrave, S (1988) <u>The Marcos Dynasty</u>, chs 4, 9, 15-17. See also the comprehensive analysis of Manapat, M (1991) <u>Some Are Smarter Than</u> Others: The History of Marcos' Crony Capitalism.

Ferdinand Marcos' corrupt activities commenced while he was a congressman and head of the import control board, which allowed him to gather large bribes in return for approving import licenses. As congressmen, Marcos soon became a millionaire largely based on his 10% cut from government deals. When Marcos became President, he acquired an epic appetite for bribery. What distinguished Ferdinand Marcos, from other Filipino corrupt politicians was the scale of his corruption. He was not bound by the "socially acceptable" norms of plunder.

The Marcos rule was economically disastrous for the Philippines⁹. The causes of this are varied, and were greatly facilitated by the abuses of the Marcoses and their cronies. The evidence of their predatory criminality is found in various published material¹⁰. A RICO¹¹ claim brought in 1989 in California in the United States sets out in some 100 pages the details of how Ferdinand Marcos, Imelda Marcos and others conspired to loot, divert and launder public assets for their personal use and benefit. The RICO claim estimated that \$5 billion in ill-gotten wealth was taken by the Marcoses, their associates and accomplices. But there is other material suggesting that Marcos took even greater amounts of money.¹²

According to Jovito Salonga, the first chairman of the Philippine Presidential Commission on Good Government(PCGG)¹³, there were three main sources of the Marcos loot¹⁴. Firstly, Ferdinand Marcos arranged and was the beneficiary of large-scale diversion of entitlements to foreign economic assistance, including reparation funds from Japan and economic aid from the United States. Both the Japanese and the American governments have denied this. Secondly, there were the Philcag funds. While as President of the Senate, Ferdinand Marcos opposed the sending of Filipino troops to Vietnam, a few months after becoming President, Marcos approved the sending of Philcag engineers to Vietnam, a measure for which he was amply rewarded by the US government. It was not merely military aid but most importantly the huge discretionary funds that were put at his disposal which are alleged to have found its way into his

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⁹ See Boyce, J (1993) <u>The Political Economy of Growth and Impoverishment in the Marcos Era</u> chs 9, 10; Hill, H and Jayasuriya, S (1985) <u>The Philippines: Growth, Debt and Crisis, Economic Performance during the Marcos Era.</u> Kunio, Y (1994) <u>The Nation State and Economic Growth: The Philippines and Thailand.</u>

¹⁰ See for example, US Congressman Stephen Solarez's observations at p 16 of the <u>Investigation of Philippine Investments in the United States</u>, (1986) Hearings before the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representatives (99th Cong. 1st & 2nd Sess., 263).

¹¹ Republic of the Philippines v Ferdinand E Marcos, Imelda R Marcos et al., United States District Court for the Central District of California, Case No CV 86-3859-MRP (Gx). See also proceedings in the United States District Court for the District of Hawaii, namely Case No 86-0213, (The Central Bank of the Philippines v Ferdinand E Marcos, et al) which concerns the ownership of certain currency, securities, gems, antiques and other property, as catalogued by the United States Customs Service in its inventory dated 10 March 1986. These civil actions were ultimately settled whereby the Philippine Government agreed to dismiss its US civil claims against the Marcoses, while the Marcoses agreed to transfer certain U.S. assets to the Philippines: see Settlement Agreement and Partial Release of Claim, Signed on 25 October 1991.

¹² See for example, the Special Committee on Public Accountability, (1991) Report on the Inquiry on Operation Big Bird, Republic of the Philippines House of Representatives, at 13, 17, 33-36; Manapat, supra no 8 ch. 1; Crewdson, J. (1986) "Marcos Graft Staggering: Investigators Trace Billions in Holdings," The Chicago Tribune, 23 March, at 1-21; Malone, W.S. (1987) "Ferdinand E Marcos: A Trail of Corruption" Investigative Report for the Public Broadcasting System WGBH Educational Foundation (1987) "In Search of the Marcos Millions", Transcript of Front-line No 511. broadcast by the Public Broadcasting System on 26 May 1986;

¹³ The PCGG was created by Presidential executive order on 28 February 1986. It was empowered and directed to seek"(t)he recovery of all ill-gotten wealth accumulated by former President Ferdinand E Marcos, his immediate family, relatives, subordinates and close associates whether located in the Philippines or abroad." It has extensive powers, including the power to sequestrate property: See Rodriguez, R (1998) <u>The PCGG Reporter:</u> Cases and Materials.

¹⁴ See C de Quiros, C (1997) Dead End: How Marcos Ambushed Philippine Democracy at 59-61.

pocket. The third source of Marcos funds was the kickbacks from public works contracts, which reached new heights of plunder under Marcos. During the Marcos regime there was an increase in the level of government intervention in the Philippines, which Marcos abused by selling or renting "privileges", particularly economic monopolies to favoured families and businessmen. Marcos institutionalised this practice, which involved 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.

There were also alleged instances of plain outright theft of public assets. These included direct withdrawals of monies from the public treasury and the gold stocks of the State. Such withdrawals were covered up in an elaborate fashion. In this respect, Ferdinand Marcos was accused of corruption and corrupt practices under Law No 3019 of the Philippines and Articles 210 to 221 of the Philippine Criminal Code.

Marcos's opportunity for plunder was related to the length of time that he stayed in power. By winning the 1969 election, Marcos became the first Philippine president to have done so a second time. His declaration of martial law in 1972 enabled him to rule the Philippines for another 14 years in circumstances where the Philippine Constitution banned a third presidential term.

For various geo-political reasons, the Marcos regime was strongly supported by the United States ¹⁵ and its allies. For example, 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. The large scale borrowing from official lenders and foreign banks was seen as a major pillar of economic development.

Unfortunately, a substantial part of the Philippines external borrowing was recycled out of the country via capital flight, which for the most part was in violation of Philippines law. ¹⁶ Former President Marcos must take the lion's share of responsibility for this capital flight. By 1985 the Philippines had the heaviest external debt burden (measured by its ratio to national income) of any country in East and South East Asia. A key new feature was that while the external debt was largely public, the external assets were strictly private.

It is difficult to believe that the United States government was unaware of the economic abuses carried out for the benefit of the Marcoses and their cronies. The display of public indifference by the United States Government to Marcos's predatory activities may be justified as Realpolitik since Marcos was an important strategic ally during the Cold War. However, this had the side effect of giving comfort to Swiss banks and other financial institutions that could claim that they were dealing with a legitimate ruler and who turned a "blind eye" to the source of Marcos's wealth.

¹⁵ See Kessler, R J (1986) Marcos and the Americans, Foreign Policy, No 63, at 40-57; Thompson, M (1995) <u>The Anti-Marcos Struggle</u> at 47-48, 65-66; Hamilton-Paterson, J (1999) <u>America's Boy: The Marcoses and the Philippines.</u>

¹⁶ See Boyce, J & Zarsky, L (1988) Capital Flight from the Philippines, 1962-1986, <u>Journal of Philippine</u> <u>Development</u>, Vol. 15, No. 2, at 191-222

The Marcos Couple Fail the Net Worth Analysis Test

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

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

The Marcoses of the Philippines are a useful example of a political couple that failed the "net worth test." A financial analysis based on the Marcos's income tax returns for the financial years 1966 to 1985 reveal the following:

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

Although Ferdinand Marcos was barred by law from practising his law profession during his entire 20 years as President, he claimed that his legal fees represented "receivables from prior years". When Ferdinand and Imelda Marcos became the First Couple in 1965, their net worth was only Pesos ("P") 120,000, i.e. US\$7,000. When they were thrown out of the Philippines in 1986, their estimated assets amounted to more than \$5 billion. Indeed, the Swiss accounts of the Marcoses, which were frozen in 1986, amounted to approximately US\$357 million, such a sum far exceeding the Marcoses legitimate increase in net worth.

Laundering of Marcos Assets and Swiss Bank Secrecy

A major obstacle in recovering the hidden wealth of the Marcoses is that the ex-President was a master manipulator of financial transactions and used an extensive and complex system of laundering monies through Swiss and offshore banks ¹⁷. Marcos did not generally use his own name in illegal transactions; instead, he used nominees such as friends, cronies and layers of foundations and companies to conceal his activities. The Marcoses thrived on the idea of secret names. For example, in a letter dated 18 October 1968, Marcos informed his Swiss bank that the "word John Lewis will have the same value as our own personal signatures." Later President Marcos chose the pseudonym William Saunders while Imelda Marcos chose the name Jane Ryan in transacting business with their Swiss banks.

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¹⁷ For an understanding of money laundering, see Chaikin, D (1991) Money Laundering: An Investigatory Perspective, <u>Criminal Law Forum</u>, vol 2, at 467-510; Chaikin, D (1993) Money Laundering as a Supranational Crime, <u>Principles and Procedures for a New Transnational Criminal Law</u>, Eiser A and Lagodny O (eds).

The Marcoses used every laundering scheme that was available to conceal their investments. At the same time his Swiss banks offered him various instruments of bank secrecy to protect his interests, such as numbered accounts, Liechtenstein foundations and attorneys with professional secrecy obligations.

The obligation of secrecy in Swiss law is found in various legislative provisions. ¹⁸ Article 47.1 of the Swiss Federal Banking Law provides that no person (including an officer, employee, authorised agent, auditor) may divulge any information whatsoever about any matter dealt with in the course of his relationship with the bank. This obligation of secrecy includes knowledge of whether someone is a client, no matter whether temporarily or permanently, whether the client is Swiss or a foreigner, whether he resides in Switzerland or abroad and whether the bank transacts business for him only in Switzerland or abroad as well.

Swiss bank secrecy has gained a formidable reputation because the Swiss authorities take seriously breaches of bank secrecy (which amount to a criminal offence) and because Swiss bankers fiercely protect the privacy of their customers by various practices and technological systems. For example, accounts of wealthy customers are usually listed by numbers or codes, which are known only to a limited number of employees of the banks.

But it is not merely the concept and practice of bank secrecy, which is important. The Swiss banks offered Marcos the use of corporate vehicles to protect his interests. For example, Marcos's Swiss bank accounts, which were, originally in his own name were replaced by Swiss bank accounts in the name of various Liechtenstein Foundations. Thus Marcos's name did not appear as the account holder. The advantages of a Liechtenstein Foundation is that the identity of the beneficial owner is concealed in a private fiduciary agreement and the existence of a Liechtenstein Foundation does not generally appear in a publicly available record. ²⁰

The Liechtenstein foundations provided a hub of secrecy of the Marcos's Swiss accounts. Of the 16 foundations that were documented only five survived. There was a pattern of money laundering whereby the names of foundations were changed, large sums of money were then transferred from the existing foundations to newly established foundations, and finally the old foundations were liquidated.

Super secrecy was facilitated in Switzerland by the use of lawyers or notaries in setting up Swiss bank accounts. Ordinarily, a Swiss bank was required to identify its customers so as to prevent the anonymous and illicit investment of assets. However, clients could conceal their identity by using lawyers who would front for their clients. The banks required the lawyers to sign the notorious Form B^{21} in which they declared that they were familiar with the beneficial owner of the account and that they were unaware of any improper business of the owner. This form allowed lawyers to vouch for their client's good standing and in effect also allowed the banks to claim that they did not know the true owner of the account.

¹⁸ See Aubert M et al, (1995) <u>Le secret bancaire suisse</u>; Aubert, M (1997) <u>Swiss Bank Secrecy: General Extent and Recent Developments</u>.

Protective measures for private banking accounts include: US branches of Swiss banks are denied access to Swiss banks' headquarters computers; installation of different search systems in relation to different branches; establishment of at least 3 levels of security in accessing numbered accounts; and the installation of surveillance and/or auditing systems during time of access to the computer of the PBAN (private banking account network): See Chaikin, D (1999), Electronic Threat and Defence: The Internet and the Swiss Banks.

²⁰ See Ramati, U.E (1993) <u>Liechtenstein's Uncertain Foundations</u>; Trendling, F (1999), <u>The Liechtenstein Foundation</u>: A <u>Living Will</u>.

For other abuses of Swiss bank secrecy, see Ziegler, J (1978) <u>Switzerland Exposed</u>; Clarke, T & Tigue Jr JJ (1975) <u>Dirty Money: Swiss Banks, the Mafia, Money Laundering and White Collar Crime.</u>

Swiss financial intermediaries used this secrecy vehicle to assist President Marcos. For example, one of the documents found at the Malacanang Palace was a letter dated 19 May 1983 from a Senior Vice President of a major Swiss bank to President Marcos informing him that because of changes in Swiss banking law, the attorneys of his Liechtenstein foundation, who were also employees of the bank, have resigned and have been replaced by new attorneys from a prominent Geneva law firm. The advantage of this change was that "the independent lawyer (can offer) ... the additional secrecy of his professional privilege".

Finally, Swiss bank secrecy is subject to two main exceptions, namely the consent of the customer or Swiss court order. For example, article 47.4 of the Swiss Federal Banking Law provides that the secrecy obligation imposed by article 47.1 does not override Federal and Cantonal rules regarding the obligation to testify and furnish information to a government authority. In the context of international judicial assistance, Switzerland did eventually provide the Philippine Government with bank documents relating to the Marcoses, but this did not prove to be useful in relation to the discovery of new Marcos accounts.

Initial Discovery of the Marcos Fortune

In anticipation of his removal from power, Ferdinand Marcos attempted to conceal all evidence relating to his overseas wealth. In early February 1986 President Marcos arranged for 6 heavy-duty shredders to be installed at the Malacanang Presidential Palace. The shredders were so overused that after two weeks four off them broke down. The two remaining shredders continued to function even as Marcos fled Manila in the evening of 25 February 1986.²²

Despite the destruction and removal of vital documents at the Palace, Philippines Government investigators found a trove of documents several inches thick relating to the Marcoses' Swiss accounts at the Palace. In the early hours of the morning of 26 February, President Corazon Aquino requested her Executive Secretary Joker Arroyo and Mr Pontenciano A Roque to be taken to the Presidential living quarters. Mr Roque entered the Presidential bedroom and opened up a file safe containing "sheafs of documents regarding Mr Marcos' papers and bank accounts with Swiss banks and other papers referring to various financial transactions." ²³ These so called "Malacanang documents" were indexed, sorted and analysed by a team of volunteers at the newly created Presidential Commission on Good Government. They subsequently formed the basis for the Republic of Philippine's mutual assistance request to the Swiss authorities and the initial criminal complaints against Ferdinand Marcos.

The Malacanang documents evidenced that former President Marcos had significant deposits in Swiss banks. The documents revealed²⁴ that the Marcoses and their cronies had 60 account numbers at 6 Swiss banks under the name of no less than 17 Foundations, Establishments and companies, including codenames and pseudonyms William Saunders and Jane Ryan. With painstaking analysis, the Philippines Government documented Marcos's bank accounts at Credit Suisse in Zurich, at Swiss Banking Corporation in Fribourg and Geneva and to a lesser extent at various private banks.

²² See Manapat, supra no. 8, at 466.

²³ Affidavit of Pontenciano A Roque sworn on 20 June 1986 in the Municipality of Makati, Metro Manila, the Republic of the Philippines.

²⁴ See PCGG, (1991) <u>Consolidated Report on Swiss Documents</u>, especially annex 1 which lists the Malacanang bank account numbers and account holders: See also Manapat, supra no. 8 at 462-482.

The Malacanang documents revealed that hundreds of millions of dollars of Marcos money was sheltered by using Liechtenstein foundations with bank accounts at Credit Suisse. But none of the bank statements left at the Palace showed the current position of the bank accounts. Nor did the documentation provide a picture of how the accounts had grown through investment earnings and the injection of new funds.

The significance of the Malacanang documents is that they established investigatory leads concerning the secret Marcos assets in Switzerland. They provided the starting point for any analysis of the size of the Marcos's Swiss wealth. Indeed, based on the Malacanang documentation and from other sources, in April 1986 the Philippines Government asserted that the Marcoses had accumulated illicit wealth of over \$5 billion dollars, and that at least \$1 billion had been transferred to Swiss bank accounts. In the absence of such documentation, the Philippine Government would have relied totally on the goodwill of Switzerland to identify any of the secret Marcos assets in Swiss banks.

Operation Big Bird and Philippines Ma Request

Operation Big Bird²⁵ was a plan devised by a Filipino banker, Michael Cesar U de Guzman, to recover the Marcos fortune in various European financial centres, principally in Switzerland. It was hatched shortly after the EDSA revolution. De Guzman, who knew the son of Marcos's security chief, flew to Hawaii and obtained powers of attorney from both Ferdinand and Imelda Marcos. De Guzman then flew to Zurich and on 24 March 1986 requested Credit Suisse to transfer the money and assets of various Marcos controlled Liechtenstein foundations to Exportfinanzierungsbank, an Austrian bank controlled by De Guzman. According to De Guzman²⁶ Credit Suisse officers stonewalled him and told him to come back the next day ²⁷. Meanwhile, Credit Suisse informed the Swiss authorities that a Marcos agent was seeking to withdrawal \$213 million. Later that evening the Swiss Federal Council imposed an emergency freeze order on the Marcos assets.

The Federal Council's unilateral freeze order was unprecedented in Swiss banking history. It was essentially a foreign policy decision, for its legal justification was based on Article 102 paragraph 8 (external affairs power) of the Swiss Constitution. Publicly it was stated at the time that the freeze order was made in anticipation of a claim by the Philippine Government. The effect of the freeze order was that all Swiss banks were prohibited from transferring monies in any account identifiable with the Marcoses.

²⁵ The sources for the material on Operation Big Bird include the following: Special Committee on Public Accountability, supra no. 12, the evidence presented to the Special Committee, and various newspaper reports, including the Manila Standard dated 12 July and 13 July 1989.

²⁶ Affidavit of Michael de Guzman, sworn on 28 July 1986 in Zurich, Switzerland. This affidavit was submitted by the Philippine authorities to the Swiss authorities. If Guzman's affidavit is false, he can be subject to a Swiss request for extradition pursuant to the Swiss/Philippine Extradition Treaty and face charges under article 253 of the Swiss Penal Code. See also Evidence of De Guzman dated 11-12 July 1989 as reported verbatim in the Manila Standard 12-13 July 1989.; see also the Special Committee on Public Accountability, supra no. 12 at 3-5.

According to the evidence of Michael De Guzman, he approached Marcos's personal banker at Credit Suisse who refused to accept the powers of attorney given by the Marcoses to De Guzman and refused to act on De Guzman's instructions to transfer the Marcos assets to an Austrian bank. According to De Guzman, he was told that it was unnecessary to transfer the funds because the Marcos assets had been redocumented to "ensure that neither the Philippine Government nor the Swiss authorities would be successful in the sequestration of the Marcos deposits and investments." (Affidavit, supra no 26)

The Federal Council Order was criticised by the Swiss Bankers Association who asserted that the decision was arbitrary and inappropriate in that it would compromise Switzerland's reputation as a haven of banking secrecy. On the other hand, the Philippine government welcomed the freezing order. At this time, it was confident that the Swiss legal system would provide an expeditious mechanism to recover the ill-gotten fortune of the Marcoses. The Philippine Government hired 3 politically well-connected and highly competent lawyers from Zurich, Geneva and Lugano to handle its case.

By diplomatic notes dated 18 April 1986 (informal request) and 25 April 1986 (formal request), the Government of the Philippines sought the continuation of the freeze order. The filing of a formal mutual assistance request was accompanied by a detailed brief setting out the criminal charges, which were being investigated in relation to Ferdinand Marcos and the evidence of Marcos's Swiss bank accounts. Relying on the Philippine Government's requests, the Swiss Federal Office for Police Matters ("FOPM") then issued a freeze order in substitution for the exceptional freezing order of the Federal Council.

Meanwhile, De Guzman had joined forces with General Jose Almonte, a distinguished Filipino army officer, in order to recover the Marcos monies. De Guzman tried again to withdraw the Marcos money at Credit Suisse but without success. He then sought the assistance of the Philippine Solicitor General and the PCGG. On 4 July 1986 Philippine Solicitor General Ordonez filed a request with the Swiss FOPM asking Credit Suisse to transfer monies in 11 Foundations with total deposits of \$213 million to a Philippine Government account in Exportfinanzierungsbank. Solicitor General Ordonez and General Almonte on behalf of the Philippine Government and De Guzman as the duly authorised representative of the Marcoses signed the request

On 7 July 1986, the Swiss FOPM issued an order defreezing the identified deposits of the late President Ferdinand Marcos and Mrs Marcos at Credit Suisse. On the next day the Judge of Instruction of Zurich issued an order directing Credit Suisse to release and transfer the defreezed Marcos deposits (specified in the Philippine request) to the account of the Philippine Government at Exportfinanzierungsbank in Vienna.

However, the money was never sent to the Vienna bank. Solicitor General Ordonez had become disillusioned with Operation Big Bird and was concerned about a possible diversion of the funds. PCGG's Swiss lawyers who received information that the Vienna bank was in financial trouble supported his concerns. On instructions of Ordonez, and without informing General Almonte or De Guzman, on 9 July 1986 the Swiss lawyers of the PCGG requested the Swiss FOPM to direct the transfer the Marcos monies to a new destination, namely an account of the Philippine Government to be opened at Credit Suisse. A similar request was sent to Credit Suisse. Before complying with this new request, Credit Suisse contacted the son of Ferdinand Marcos. This gave Ferdinand Marcos time to execute a revocation of his power of attorney, which was sent by facsimile to his Swiss lawyer, Bruno de Preux (of the law firm Tavernier, Gillioz, de Preux, Dorsaz in Geneva) on 11 July 1986 and presented to the Swiss authorities on 13 July 1986. Subsequently, on 20 July 1986 the Swiss authorities rescinded the defreeze order. The monies thus stayed in Credit Suisse under the name of the Marcos foundations and subject to a freeze order.

²⁸. Ferdinand Marcos' Swiss law firm also criticised the Federal Council's order: see Tavernier, E (1987), Legislative Developments in Swiss Banking, <u>International Financial Law Review</u> 29.

²⁹ The decision to rescind the defreeze order was criticised for a number of reasons, including the fact that De Guzman's power of attorney in relation to Imelda Marcos was still valid and subsisting. See letter from Solicitor General Ordonez, General Almonte and Michael De Guzman to Dr Lionel Frei of the Swiss FOPM dated 13 August 1986.

The Philippine government did not recover any money from Operation Big Bird. The failure of this operation was subject to a Philippine House of Representatives enquiry and report 30 under the Chairmanship of the Honourable Victorico Chaves. The Chaves report suggested that had the operation not been stopped the Philippine Government would have immediately recovered the \$213 million in July 1986 from Credit Suisse and its affiliates and that this would have "paved the way to the recovery of the other deposits of the Marcoses with the Swiss banks" which was estimated by the Chaves Report to be at least \$3 billion.

The Chaves Report pinned responsibility for the derailment of the recovery operation on the PCGG Chairman and the PCGG's Swiss lawyers. It rejected the view of the Swiss attorneys³¹ and PCGG Chairman Salonga that they had saved the Philippine Government from a massive theft. It concluded that if the funds were remitted to the Vienna bank to the account of Philippine government, whose authorised joint signatories were Solicitor General Ordonez and General Almonte, there was no realistic chance that De Guzman would have stolen the money. Indeed, De Guzman expected to receive a commission of \$40 million (ie a 20% commission on the \$213 million) if the monies were recovered, and thus he had an interest in ensuring that recovery did take place.

Tracing and Recovery of the Marcos Money in Switzerland

The Republic of the Philippines has no international judicial assistance in criminal matters treaty with Switzerland. In the Marcos case, Swiss co-operation with the Philippines was based on the 1981 Swiss Federal Law on International Legal Assistance in Criminal Matters (EIMP), the 1982 implementing ordinance (OEIMP), together with various procedural and enforcement provisions in the laws of the cantons of Switzerland³². Not surprisingly a team of attorneys for the Marcos family and their corporate fronts waged a vigorously battle against the Philippine government. It is interesting to note that the Marcoses have never explained how they could fund this expensive litigation over 13 years, given that their assets in the Philippines, United States and Switzerland were frozen in the early part of 1986.

The Swiss litigation essentially has involved three "stages". Firstly, the Marcoses, the Swiss banks and various foundations opposed the granting of the requested legal assistance and the preliminary measures, that is the freezing of the bank accounts. This stage of litigation proceeded through various cantonal supreme courts, and ultimately was heard by the federal (Supreme) court in Lausanne which ruled on 1 July 1987 in favour of the Philippines government. The court ruled that the assistance was available to a non-judicial authority, such as the PCGG, which was conducting preliminary investigations into alleged crimes of the Marcoses and their associates.

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³⁰ Supra no 12

³¹ See Statement issued by the Swiss lawyers of the PCGG dated 20 July 1989. See also Ordonez, S (1999) <u>Life Cycle</u>: 50 Years in Law and Letters at 119.

³² See Frei, B (1998) <u>International Mutual Assistance in Criminal Matters Guideline</u> that is produced under the auspice of the Swiss FOPM.

The second stage concerned whether and when the information and details concerning the bank accounts would be transmitted to the Philippine government. It took another three years before the courts in Switzerland reached a final decision. On 21 December 1990 the Swiss Federal Supreme Court³³ ruled that the Swiss authorities were entitled to transmit bank documentation to the Philippine Government. The court observed that although no charges had been brought against the Marcoses or their accomplices, the Philippine Government had expressed a clear intention to institute criminal proceedings before the Sandiganbayan (antigraft) court. The court accepted that the Philippine Government had delayed opening a criminal proceeding pending the transmission of the banking information from Switzerland.

The third and final stage of the litigation concerned whether and when the assets in the Swiss bank accounts would be returned to the Philippines. The Swiss Supreme court in its decision of 20 December 1990 accepted in principles that the frozen assets should be returned to the Philippines. But the Court set out certain preconditions before the frozen assets would be transferred to the Philippines. Firstly, the Philippines Government must file a criminal charge and/or bring a forfeiture proceeding against Mrs Marcos in the Philippines within one year that is by 21 December 1991. If a criminal prosecution or forfeiture proceeding was not instituted within this period, not only would the assets not be returned to the Philippines but also the freezing order would be lifted. Secondly, the assets would only be repatriated to the Philippines when the Sandiganbayan or another Philippines court competent in criminal matters made a final decision concerning the criminal prosecution and/or forfeiture. That is, the Philippine courts must render a final judgment that the assets are stolen or illicit property and are confiscated and/or are returned to their original owner, the Philippine Government. Thirdly, the criminal prosecution and/or the forfeiture proceeding are required to comply with the procedural requirements of due process and rights of the accused under the Swiss Constitution and the European Convention on Human Rights

No Philippine government official would have predicted that the Swiss courts would impose such strict conditions before repatriating the illicit Marcos assets. This led Mr Gunigundo, the chairman of the PCGG, to voice considerable reservations about the utility of EIMP, which is the Swiss law on judicial assistance. In 1996 Mr Gunigundo made the following comment

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

Despite this statement, Mr Gunigundo made a deal whereby the Swiss authorities agreed to transfer the frozen Marcos assets prior to the rendering of a legally valid and final decision of the Philippine courts in respect of the forfeiture petition filed on 17 December 1991.³⁴ A new mutual assistance request was made by the PCGG on 10 August 1995 whereby it sought the transfer of the frozen assets deposited in the Swiss banks to the Philippine National Bank ("PNB"). On 21 August 1995 the Office of the District Attorney of Zurich ordered the "anticipatory transfer" of the frozen assets to an escrow account with the PNB. The Swiss

³³ See Estate/Heirs of Ferdinand Marcos, Imelda Romualdez- Marcos and Aquamina Corporation v Republic of the Philippines (Swiss Federal Supreme Court, First Instance, 21 December 1990).

³⁴ See Republic of the Philippines v Ferdinand Marcos (represented by his Estate and Heirs) and Imelda Romualdez Marcos, Forfeiture Petition under Republic Act 1379, filed on 17 December in the Sandiganbayan, First Division, Manila (Case No. 0141).

banks, namely Credit Suisse and Swiss Bank Corporation, were ordered to liquidate the frozen Marcos assets and transfer the resulting proceeds, as well as certain deposits, to corresponding accounts (in the names of the same clients) at the PNB. The Marcoses, the Liechtenstein Foundations, the Swiss Banks and a number of other parties filed appeals against the orders of the District Attorney of Zurich.

In December 1997 and January 1998 the Swiss Federal Supreme Court³⁵ issued a series of judgments in relation to the decisions of the District Attorney of Zurich. The Swiss Federal Supreme Court upheld an appeal against the judgment of the Superior Court, which had quashed the decisions of the District Attorney of Zurich. The Swiss Supreme Court observed that the new Philippines Government request for anticipatory restitution of the frozen assets constituted a request to reverse its own judgment dated 21 December 1991. Such a reversal was valid if new and cogent evidence was presented to the Court and where there was no interest worth of protection standing against such a reversal.

The Supreme Court relied on changes in factual and legal circumstances, particularly the revision of article 74 of the Swiss mutual assistance law, which permits the restitution of assets **at any stage** of foreign criminal proceedings. Although restitution of assets under article 74 generally requires a "valid and enforceable decision of the requesting state", in exceptional circumstances "anticipatory restitution" may be permitted. This change in law was as a direct result of the experience in the Marcos case.

The Supreme Court summarised the relevant circumstances:

"With reference to the present case of the Marcos estate - it is contrary to the interests of Switzerland, if this country turns into a haven for fugitive capital or criminal monies. ... It is the primary duty of the legislator, the banks and the banking organisations to ensure that the heads of dictatorial regimes cannot - as has happened in the present case - deposit millions of obviously criminal monies in Swiss bank accounts, if such monies nevertheless are discovered in Switzerland and their restitution requested by the aggrieved foreign state, the mutual assistance administrations and the courts are required to make a decision. (T)he application of the law must take into consideration the public order or other vital interests of Switzerland. ... The Federal Supreme Court has repeatedly taken into account the reputation of Switzerland. ... The order of the Office of the District Attorney of the Canton of Zurich points out the obvious fact that it is in the interests of Switzerland to effect as far as possible the delivery of the Marcos monies as granted in principle. The anticipatory restitution serves this purpose."

The Supreme Court then went on to state:

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"Today's state of knowledge does not allow serious doubts about the illegal provenance of the seized monies. The incompleteness of the records makes it impossible to attribute the individual assets to specific offences, and it is possible therefore that also legal assets of the Marcos families were deposited with the foundations. However, such legal assets could, as established correctly by the claimant only be minor sums compared to the total amount of the assets seized. With respect to the overwhelming majority of the assets seized the facts are sufficiently clear to allow the assumption of illegal provenance.

The Swiss Supreme Court issued 2 corresponding judgments on 10 December 1997, 6 corresponding judgments on 7 January 1998 and 2 corresponding judgments on 15 January 1998. See for example, <u>Federal Police</u>

<u>Department v Aquamina Corporation</u> (10 December 1997); <u>Republic of the Philippines v Estate of Ferdinand Marcos</u>, <u>Imelda Marcos</u> (7 January 1998); <u>Credit Suisse v Republic of the Philippines</u> (15 January 1998).

Under these circumstances an anticipatory restitution of the assets is possible in principal if there is 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 restitute the monies seized must be taken in the Philippines where the criminal actions were committed."

The Supreme Court then closely examined whether the Philippine proceedings satisfied various human rights principles, including the right to a fair trial as defined by the European Convention on Human Rights. In answering this question in a positive fashion the Swiss Supreme Court noted the following factors: the disposal of the assets will be determined by judicial proceedings in the Philippines; the Philippine Government is bound by the International Covenant of Civil and Political Rights; the Philippine Constitution and laws grant the defendants expansive rights which have in fact been applied in the case of the Marcoses in the Philippines; and the Swiss Parliament has expressed trust in the Philippine judiciary by reason of its ratification of an extradition treaty with the Philippines.

Subsequently, in April, June and July 1998 Credit Suisse and Swiss Banking Corporation transferred to the Philippine National Bank funds and securities to the aggregate value of US \$567,216,397³⁶ to be deposited in escrow in the name of the five entities, namely Aquamina Corporation, Avertina Foundation, Palmy Foundation, Vibur Foundation and Foundation Maler. Although the depository institutions were changed from two Swiss banks to a Philippine bank, the funds were not available for use by the Philippine Government. Indeed, there was an "illusion" presented in various news-reports that the monies had been "returned to the Philippines." But control of the monies rested largely with the Zurich District Attorney who set the guidelines for investment and management of the escrow funds³⁷ and whose office alone had power to amend or revise those guidelines. Accordingly, the assets could only be invested in the money market or in securities with a Standard and Poor rating of at least "AA", thereby excluding any investment in Filipino banks, corporates or government institutions. Furthermore, none of the assets could be invested in US financial institutions (because of the concerns about US court enforcement jurisdiction in relation to the Human Rights Judgment), thereby resulting in investments, which favoured largely European-based banks.

Are There any Hidden Marcos Assets in Switzerland?

1. Failure of the Swiss authorities to provide comprehensive bank documentation

On 21 December 1990 the Swiss Federal Supreme Court authorised the transfer of the Swiss bank documents to the Philippine Government. The Supreme Court set a one-year deadline for the Philippine Government to file a confiscation/restitution case in the Philippines on the understanding that the Swiss bank documents were needed to file a case in the Philippines. Failure to meet this deadline would result in the unfreezing of the Marcos accounts.

On 18 January 1991 the Swiss authorities turned over the first batch of "Swiss bank documents" to the Philippine Embassy in Berne. The documents were so incomplete that the Philippine President Cory Aquino requested the then Solicitor General Francisco Chavez to

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³⁶ This sum consisted of the original sum of approximately \$356 million plus interest and investment earnings: see Philippine National Bank, Manifestation and Compliance filed on 10 March 1999 in the Sandiganbayan First Division Manila in Republic of the Philippines v Ferdinand E Marcos et al, Civil Case No 0141.

³⁷ See Memorandum of the Trust Banking Group of the Philippine National Bank, 24 April 1998.

travel to Switzerland to retrieve the "lacking" or "missing documents." Chavez flew to Switzerland in April 1991 but returned to Manila empty handed. In July 1991 Chavez flew once again to Switzerland and called a press conference complaining about the Swiss attitude to the production of vital documents. On this occasion Chavez retrieved vital documents from the District Attorney of Zurich in relation to the Marcoses' accounts. Finally, in mid October 1991 just 6 weeks before the Swiss Tribunal's deadline, the Swiss authorities handed over additional documents to the Philippine Solicitor General. The Office of the Solicitor General worked non-stop to translate the documents and to prepare the forfeiture petition which was filed on 17 December 199.

Why then did it take more than 10 months for the District Attorney of Zurich to transmit the "Swiss bank documents" to the Philippine Government? One explanation is that unlike many other countries, the Swiss authorities do not hand over bank documents without reviewing them to ensure that secrets held by a "non-participating third party" are protected. Although this is presented as a legitimate and laudable objective, in practice it has resulted in documents being "edited" or not transmitted, thereby limiting the creation of a paper trail to undisclosed bank accounts. There is also the principle that the Swiss authorities and Swiss banks do not countenance "fishing expeditions." From an investigatory perspective, this results in inadequate assistance to those who are interested in following the paper trail.

In the Marcos case, the Swiss authorities did not transmit a significant amount of documents, which were requested by the Philippines Government. The PCGG in a report dated 30 May 1991 observed that:

"After comparing with the documents received from the Swiss authorities we noted that ... they denied us records on 51 accounts already identified by the Commission." 39

In June 1991, David Castro, the then chairman of the PCGG, expressed his frustration with the Swiss banks:

"At present, Swiss authorities and banks have turned over documents proving the existence of only 10% of the \$3.5 billion claim (made by the first Solicitor General in March 1986). The situation has prompted the PCGG to conclude that it is being held hostage by the Swiss banks."⁴⁰

Mr Castro questioned the bona fides of the Swiss banks in giving full discovery of the Marcos bank accounts. His view was widely shared among senior Philippines government officials, including the then Solicitor General of the Philippines, Mr Chavez.

³⁸ For the problems and potential abuse of this principle, see Frei, L (1980) Three Years of the Judicial Assistance Treaty with the US at 17-20. Under the 1996 amendments to the Swiss law the term "non-participatory third parties" is removed from the Federal Law on International Mutual Legal Assistance in Criminal Matters. The Swiss FOPM has stated that all papers of "potential relevance" for the foreign criminal proceeding should be transmitted to the requesting state. See Frei, supra no. 32 at 15.

³⁹ PCGG Research Department, <u>Consolidated Report on Swiss Documents</u>, (PCGG, 30 May 1991). See also the letter from PCGG Commissioner Arthur D Defensor to Philippine Ambassador Hon Ascalon dated 20 June 1991. The Solicitor General of the Philippines was still receiving bank documents from the Swiss authorities in relation to its original request as late as October 1992

⁴⁰ See Castro, D (1991) A Primer on the PCGG: Issues and Answers.

From an investigatory perspective, there are a number of other perplexing aspects:

According to the documents supplied by the Swiss authorities, the Marcoses had current and existing bank accounts (as at 1986) under the name of 4 Liechtenstein foundations and 1 Panamanian corporation. All the accounts of the other 12 foundations had been closed and transferred to new entities. In all cases, the account number and the names of the Liechtenstein foundation were known to the Philippine Government prior to the transmission of the Swiss bank documents to the Philippines. Why did the Swiss banks and the Swiss authorities not discover any new Marcos accounts?

Despite the fact that Malacanang documents indicated that the Marcoses had accounts with four "private banks" in Geneva and Zurich, the accounts that were frozen in 1986 did not include accounts at any private bank. Why did the Marcoses not use any of the very secretive Swiss private banks to invest and launder their assets?

Of the then Big Three Banks, only Credit Suisse and the Swiss Banking Corporation admitted that the Marcoses had accounts. No document was produced by the then Union Bank of Switzerland (UBS) that suggested that the Marcoses kept accounts there. Why did the Marcoses not use the largest bank in Switzerland, which is famous for its private asset management, including its gold accounts?⁴¹

It is surprising that when the Swiss authorities disclosed to the Philippine Government the Marcos accounts that had been frozen, not one of those accounts had been opened by a Swiss attorney utilising the "supra secrecy" device of Form B. Why is it that in 1986 the Marcoses did not take advantage of Form B by using Swiss lawyers to open up bank accounts? Why did the Swiss authorities not question the Marcoses' Swiss attorneys to determine whether they were secretly fronting for the Marcoses in their financial arrangements in Switzerland?

Of the over 50 documents found in Ferdinand Marcos's personal safe at Malacanang Palace, 14 of those documents related to the Sandy Foundation which has been described as having "octopus-like multifarious subsidiary accounts." The Swiss authorities have claimed that no Sandy Foundation was ever registered in Liechtenstein and that instead a Xandy Foundation was registered. But even if this were true⁴², why would Marcos have kept the constitutional documents of a non-existent foundation in his safe? And why would Marcos have specifically mentioned the name "Sandy Foundation" to his agent in 1986 ⁴³?

GP: "Except the small one"

PM: "What does a small one mean?"

⁴¹ See the transcript of interview between the Director of Communications of UBS ("GP") and German documentary film maker, Peter Mueller ("PM") of Stern TV in October 1991:

PM: "There is not one single account of Ferdinand Marcos at UBS?"

GP: " I told you he didn't have one."

PM: "None at all?"

GP: "A few million."

 $^{^{42}}$ For the evidence that the Marcoses used the Sandy Foundation, see Chavez, F (1999) <u>Submission to the Philippine Senate Blue Ribbon Committee.</u>

⁴³ See affidavit of Michael De Guzman, supra no. 26.

Why did the Swiss authorities not follow-up the revelations of Operation Big Bird wherein it was suggested that the Swiss banks may have "redocumented" the accounts during the time that Ferdinand Marcos was in Hawaii and prior to the freeze order in March 1986?⁴⁴

In summary, 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. The main value of the Swiss bank documentation was twofold: firstly, it provided concrete evidence that Imelda Marcos actively participated in the opening and maintaining of the Swiss bank accounts; and secondly, it provided documents in an authenticated form which could be used in civil and criminal proceedings in the Philippines.

2. Inadequate international investigations by the PCGG and its Swiss lawyers

Another problem is that the Swiss lawyers hired by the Philippine Government have not provided any material assistance in identifying new Marcos accounts. For example, in 1989 Dr Salvioni⁴⁵, the then principal Swiss lawyer for the PCGG, stated that he was not in a position and did not have the means to identify any secret bank accounts of the Marcoses in Switzerland. He expressed the view that it was up to the Philippine Government to identify such accounts. Similarly, Dr Martin Kurer, the current Swiss lawyer for the PCGG has admitted the limitations that he is subject to in assisting the Philippine authorities to discover new Marcos accounts.

Unlike lawyers in many other jurisdictions, Swiss lawyers are not permitted to gather evidence on behalf of foreign clients, including foreign governments. Any Swiss lawyer "who questions persons or examines documents on Swiss territory in order to testify before a foreign court must take into account that he may become the subject of a (Swiss) penal proceeding for illegal action for a foreign state" under article 271 of the Swiss Penal Code or even economic espionage under article 273 of the Swiss Penal Code. For example, in 1991 one of the Swiss lawyers hired by PCGG Chairman Castro to trace and recover alleged Marcos gold accounts at UBS was threatened by the District Attorney of Zurich with criminal charges. Soon after the threat, the Swiss law firm unilaterally resigned from its PCGG mandate.

The Philippine Government must also take responsibility for the failure to discover and recover new Marcos accounts, not only in Switzerland but elsewhere. The Philippine Government concentrated on going after the Marcos bank assets in the Philippines, Switzerland and the United States. Partly because of resource limitations, it did not actively pursue suspected Marcos assets in Hong Kong, Singapore, Japan, German, England, Cayman Islands, Morocco and Libya^{.48}

Furthermore, after receiving the Swiss bank documentation in 1991, the PCGG should have made additional requests to the Swiss authorities in relation to new accounts, which the documents suggested might exist. For example, the Swiss bank documents showed that while the late President Marcos was in Hawaii in March 1986, nearly \$60 million was transferred on

⁴⁴ See footnote at supra nos. 26 and 27.

⁴⁵ See Special Committee on Public Accountability Report, supra no.12, p 35.

Frei, supra no.32 at 36.

⁴⁷ The threat is contained in the official request by the District Attorney of Zurich to the German authorities for legal assistance including arrest and extradition of Reiner Jacobi, dated 9 July 1991. See also the official letter of resignation from Dr Reichenbach addressed to David Castro dated 23 July 1991. The technique of threatening lawyers mandated to trace new Marcos accounts was also used in 1997 and 1999.

⁴⁸ Castro, supra no. 41 at 17.

the same day from one Marcos Liechtenstein foundation to a Swiss company in Zug. Since a Liechtenstein foundation is essentially an" investment holding vehicle", any remittance from a foundation should be assumed to be for the benefit of one of the beneficiaries of the foundation.

The evidence suggests that the PCGG did not carry out any international tracing exercise in relation to the Swiss accounts of the Marcoses. There has been little, if any, adequate follow-up by the PCGG in respect of determining the underlying identity of the payees of the various Marcos foundations and/or their relationship to the Marcoses.

3. Secret PCGG investigations and the charge of economic espionage

PCGG Chairman David Castro was determined to find out whether there were any secret assets of the Marcoses in Switzerland. He had already given his support to Operation Domino, a covert investigation by an Australian citizen, Mr Reiner Jacobi, which was aimed at proving that Marcos had accumulated illicit wealth, especially gold, during his regime⁴⁹. Indeed, in 1991 PCGG Chairman Castro appointed Jacobi as head of European intelligence for the PCGG.

In 1991 the Swiss lawyers for the PCGG informed the District Attorney of Zurich that there existed a Swiss-based informant who could establish that the Swiss banks had lied about various secret Marcos cash and gold accounts in Switzerland. The District Attorney of Zurich then interviewed the informant and, instead of launching a criminal investigation into the Swiss banks, he opened a criminal investigation into the informant and his associates, including Mr Jacobi. Afterwards the District Attorney of Zurich requested the extradition of Mr Jacobi from Germany in relation to charges of economic espionage and prohibited action on behalf of a foreign state. On 17 July 1991 the Higher Regional Court of Munich rejected the Swiss extradition request of Mr Jacobi on the ground that the charges were of a "political character."

The controversy surrounding the alleged illegal penetration of Swiss bank accounts and Mr Jacobi reached a climax on 19 July 1991 when the District Attorney of Zurich announced that he was suspending international judicial assistance in relation to the Marcos case because of the "serious violation of the sovereignty of the Canton of Zurich and of the contempt of the provisions governing letters rogatory." Only after the Philippine Government distanced itself from Mr Jacobi, by cancelling Mr Jacobi's official appointment, and after some "fencemending" by Philippine diplomats, did the Swiss authorities resume judicial assistance to the Philippine Government.

But the Philippine Government secretly renewed its relationship with Mr Jacobi in December 1991. And between 1992 and 1997, PCGG Chairman Magtanggol Gunigundo requested Jacobi to complete his secret work of verifying Marcos's gold accounts. ⁵¹ The Philippine Government was prepared to continue to work with Mr Jacobi even after the 1991 incident because it had no confidence in the Swiss legal and political system.

⁵⁰ See letter dated 19 July 1991 from Zurich District Attorney Peter Cosandey to Mr Beat Frey of the Swiss Federal Office for Police Matters. Dr Colander also blackballed PCGG Chairman Castro by refusing to act on any new request from Attorney Castro and/or his proxies and by refusing to co-operate with him.

⁴⁹ Since 1994 Dr Chaikin has acted as the attorney of Mr Reiner Jacobi in relation to his efforts to trace and recover the Marcos assets. See also the film Operation Domino, a joint production of Channel 4 of England and Vox TV of Germany, which was broadcast in January 1994.

⁵¹ See Chaikin, D (1999), <u>A Chronology of Mr. Rainer Jacobi's Relationship with the Philippine Government</u> and the Tracing and Recovery of the Illicit Assets of Former President Marcos

There are real questions as to whether the Swiss banks have disclosed all the accounts of former President Marcos, particularly since very little precious metals, especially gold, was found in the frozen Swiss Marcos accounts. There is substantial evidence 52 that Marcos traded extensively in gold and that he had significant overseas gold deposits. On the other hand, certain Marcos attorneys supported by various Swiss parties have claimed that the Marcos gold is a figment of imagination, albeit that both former President Marcos and his wife Imelda have admitted on numerous occasions that the Marcoses had huge gold accounts or deposits.

4. PCGG requests of the Swiss authorities/The Philippine Senate Blue Ribbon Committee/ The Criminal Complaint in Switzerland

In June 1998 PCGG Chairman Gunigundo made a request of the Swiss authorities to freeze the account(s) at UBS of Irene Araneta, the youngest daughter of former President. On 18 August 1999 by Judge Felix de Guzman, the new Chairman of the PCGG, made a renewed request to freeze the accounts. The Swiss authorities did not respond to these requests. President Estrada then dismissed Judge Felix de Guzman and appointed Magdangal B Elma as the new Chairman of the PCGG. In November 1998 Chairman Elma made an "oral enquiry" concerning the account. On 18 January 1999 Dr Dieter Jann, the new District Attorney of Zurich stated that there was no account number #885931 at UBS because this number was not in line with the numbering system of accounts at UBS.

The statement of the Zurich District Attorney of Zurich that there is no account number #885931 at UBS ⁵³is now the subject of a Philippine Senate enquiry. In June 1999 the Philippine Senate Committee on Accountability of Public Officers and Investigations ("Blue Ribbon Committee") commenced an inquiry into the "alleged existence of a PCGG-Swiss banker's conspiracy to hide and divide the Marcos wealth." Although that inquiry has held 8 public hearings and is still continuing, the chairman of the Blue Ribbon Committee has already stated that prima facie there appears to be evidence that the Marcoses have secret accounts in Switzerland.⁵⁴

At the same time, a criminal complaint has been filed in Switzerland concerning alleged "anomalous and irregular conduct" by various persons in relation to alleged secret Marcos accounts. The Deputy Attorney General of Switzerland ⁵⁵has characterised the allegations in the following terms:

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⁵² See Manapat, supra no.8 at 444-454; Castro, supra no 41 at 5. Chaikin, D (1999) <u>Tracing and Recovery of the Marcos Assets</u>; Chaikin, D (1998) <u>Cronyism and Government Corruption</u>; McDougald, C (1997) <u>The Buddha, the Gold and the Myth</u>; San Juan, E (1998) <u>Marcos Legacy Revisited</u>: <u>Raiders of the Lost Gold.</u> Cf the assertion that in 1994 the District Attorney of Zurich thoroughly investigated the existence of the alleged gold at Kloten airport in Zurich and found nothing. For a detailed and critical analysis of the District Attorney of Zurich's investigation, see Chavez, supra no. 43 at 39-44.

For evidence that client account #886931 does exist at UBS, see Chavez, supra no 43 at 2-15.

Dr Chaikin gave oral evidence to that inquiry in Manila on 23-24 September 1999 and tendered three personal affidavits dated 23 September 1999 to that enquiry concerning the alleged secret Marcos accounts in Switzerland.

⁵⁵ See letter from Dr F Banziger of the Office of the Attorney General of Switzerland dated 29 July 1999 to Mr Frank Chavez.

"You are charging the above mentioned persons - explicitly or implicitly - of a number of illicit acts. Translated into Swiss legal terminology, these alleged acts may be summarised as money laundering; passive corruption; abuse of authority and aiding the perpetrator(s) of an offence; failure to exercise due diligence in banking operations; malfeasance and/or non feasance in office by cantonal magistrates; and infringement of the lawyers' code of professional conduct."

Since the above-mentioned offences do not fall within the jurisdiction of the Swiss Attorney-General's Office, the criminal complaint was forwarded to the public prosecutor's offices in Zurich and Geneva. In some quarters in Switzerland the criminal complaint has been treated as "maverick" and without merit. But an examination of the terms of the complaint dated 12 June 1999 made by the former Solicitor General of the Philippines and a review of the underlying documentary, audio and video evidence suggests otherwise.

Human Rights Litigation and the Tracking of the Marcos Assets

The recovery of assets from a former head of state/government may involve competing claims made by third non-governmental parties. In the case of the Marcos assets, claims have been made by third party creditors, including unpaid lawyers, suspected bogus claimants, and by various torture victims of the Marcos regime.

The victims of Marcos's human right abuses are the most significant non-government claimants. During Marcos's rule, the political opposition was suppressed and massive human rights abuses were inflicted on a large number of mainly poor Filipinos. In the United States nearly 10,000 victims (and/or relatives) of summary execution, torture, disappearance and arbitrary detention brought a class action suit under a unique United States federal law. The Alien Tort Claims Act gives US federal courts jurisdiction over "any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States." The class action suit alleged that former President Marcos was responsible for acts of torture, an international crime.

The class action suit raised numerous complex procedural and substantive issues, which deserve separate study⁵⁶. At the request of the class Plaintiffs, the trial was trifurcated into three stages: liability; exemplary damages; and compensatory damages. On 24 September 1992 the Plaintiffs won a favourable liability verdict. On 23 February 1994 the jury awarded \$1.2 billion in punitive damages, which was an aggregate award to be divided pro rate among all the Plaintiffs. Finally, in January 1995 the jury awarded the Plaintiff class the sum of \$759 million in compensatory damages. The judgment, including the total damages of nearly \$2 billion, was upheld on appeal to the United States Court of Appeals for the Ninth Circuit.

Request for legal assistance in civil matters

As part of the litigation "discovery process", the lawyers for the human rights victims obtained in 1993 subpoenas against various Swiss banks to produce their records (concerning Marcos accounts and assets) in the Southern District of New York for the purpose of obtaining critical evidence for use at the trial on exemplary damages. On the day of the hearing of the contested subpoenas, the Swiss Embassy in Washington intervened and requested that the subpoenas be quashed and the Plaintiffs required to proceed by way of

⁵⁶ For example, former President Marcos, who lived in Hawaii, (and subsequently after his death, his Estate) sought unsuccessfully to dismiss the suit on the grounds of act of state doctrine, head of state immunity, lack of personal jurisdiction and lack of subject matter jurisdiction under the Alien Tort Claims Act.

request for international legal assistance. The New York court then quashed the subpoenas and the Hawaii court issued a request for international legal assistance to the Swiss Cantons of Zurich, Geneva and Fribourg. Underlying this decision was the implied assurance or assumption that the Swiss courts would grant legal assistance.⁵⁷

The extensive scope of the US court request was designed to flush out documents from the Swiss banks, which had not been previously produced even to the Philippine Government. The lawyers of the Human Rights Victims were aware of the Swiss documents that had been produced in 1991 and had been used in the 1991 Forfeiture Petition against the Marcoses in the Philippines. It was hoped that the 1993 request of the US court would generate evidence of hitherto undisclosed Marcos accounts.

The US court request in relation to civil matters was dealt with in accordance with Swiss Cantonal law, given that in 1993 there was no treaty between Switzerland and the United States granting legal assistance in civil matters. On 18 November 1993 the Administrative Court of the Higher Court of the Canton of Zurich denied the request of the United States District Court for the District of Hawaii for judicial assistance in identifying the Marcos bank accounts in Switzerland, including those in the name of various foundations, including "Sandy Foundation." Similarly courts in the Cantons of Geneva and Fribourg also denied the request of the United States court citing the decision of the Zurich court.

The Zurich court rejected the US court's request on a number of grounds including the failure of the request to specify the actual proof needed for the case, The court said that it was objectionable that the US request demanded that the custodian of the documents be identified and questioned under summons about those documents. The court stated that:

"The demand for legal assistance ... intends in general to be an investigation of the evidence, which is foreign and prohibited by the Zurich and Swiss legal system. It is not limited to the taking of evidence which is necessary and relevant for the disputed subject matter but instead demands the submission of all bank documents (from 17 banks⁵⁸ and institutions) for a time period of 21 years including all activities in at least 25 accounts and neglects to name in particular which documents for which purpose are demanded."⁵⁹

Permanent Injunction and the doctrine of sovereign immunity

The Human Rights Litigation judgment of February 1995 included a permanent injunction preventing the Marcos Estate and its agents or representatives from transferring, concealing or disposing of any assets belonging to the Estate. The US Federal District Court subsequently modified that order to include expressly the Philippine Government as "agent, representative,"

⁵⁷ See Affidavit of Robert A Swift, Lead Counsel for the Human Rights Victims, executed on 27 September 1997 in <u>Argenal v Union Bank of Switzerland and the Ferdinand E Marcos Human Rights Litigation</u>, United States District Court, Central District of California, Case No CV 97-6605R.

⁵⁸ The banks included Credit Suisse, Zurich, Swiss Bank Corporation, Zurich, Swiss Volksbank, Zurich, Lombard Osier Zurich AG, Zurich, Finanz AG, Zurich, and Banque ARIBAs AG, Zurich

⁵⁹ See Administrative Commission Order in the Matter of Estate of Ferdinand E Marcos, Avertina Foundation, Palmy Foundation and Vibur Foundation, Decision of the Higher Court of the Canton of Zurich, 22 November 1993.

aider and abettor" of the Defendant's Estate. This was appealed to the Court of Appeals 60 which overturned the District Court judgment on the ground that it had no jurisdiction over the Republic of the Philippines by reason of the doctrine of sovereign immunity. The Court of Appeals held that the "commercial activity" exception to doctrine of sovereign immunity did not apply because the Republic of the Philippines was attempting to recover misappropriated assets, which was an exercise of government power. Consequently, the district court lacked jurisdiction and had no power to enforce its injunction.

Post Judgment Enforcement Proceedings against the Swiss banks

The lawyers for the Human Rights Victims have taken a number of steps against the Swiss banks to collect the \$2 billion judgment. Following the registration of the judgment in California, writs of execution and notices of levy were delivered against the branch offices of Credit Suisse and Swiss Bank Corporation in California. After the Plaintiffs indicated that they were seeking assets and information from the Bank's offices in Switzerland, both Banks filed motions to vacate and quash the notices of levy. The District Court denied the Bank's motions and ordered the Banks to deposit into court "all assets in the possession of the Banks that are the subject matter of this proceeding." On appeal the Court of Appeals 1 reversed the District Court order. The Court of Appeals held that the service of notice of levy at the Bank's Californian offices were ineffective because none of the Marcos Estate assets were held in bank accounts located in California. Similarly, the Court of Appeals ruled that the writs of execution were made without lawful authority, especially in circumstances where the banks were not parties before the court in the substantive case.

The Plaintiffs lawyers then filed the "Rosales action" against the Banks, seeking the following relief: (1) an injunction restraining the Banks from transferring or otherwise conveying any funds or assets held by the Banks on behalf of the Marcos Estate, except as ordered by the District Court; (2) a declaration that the Chin judicial assignment was valid and binding on the Banks. (The "Chin assignment" which was signed by the Clerk of the US District Court for the District of Hawaii, in July 1995 purportedly assigned all "rights, title and interest" of the Marcos Estate in any bank accounts maintained in Switzerland to Robert A Swift "for the benefit of" the Class Plaintiffs).

The District Court denied the Bank's motion to dismiss the Rosales action. Furthermore, the District Court issued an order compelling the Banks to respond to the Plaintiff's discovery requests, which included interrogatories seeking detailed information about alleged accounts in Switzerland and a wide variety of documents maintained at the Bank's offices in Switzerland. It was accepted that the Swiss Banks would violate Swiss Banking secrecy if they complied with the District Court's order but that if they failed to comply with the District Court order they would be in contempt of court.⁶²

^{60 &}lt;u>In re Estate of Ferdinand Marcos Human Rights Litigation, Hilao v Estate of Ferdinand Marcos</u>, 94 F 3d 539 (9th Cir 1996)

⁶¹ Hilao v Estate of Marcos, 95 F. 3d 848 (9th Cir. 1996)

⁶² In a separate ruling the United States District Court granted the Plaintiff's motion of contempt against Ferdinand R Marcos and Imelda R Marcos. This ruling was upheld on appeal (see <u>Hilao v Estate of Ferdinand E Marcos</u>, 103 F. 3d 762 (9th Cir. 1996). The evidence of the contempt included the entering into the 1992 compromise agreement with the Philippine government to transfer and split the Estate's assets.

On appeal the Court of Appeal ⁶³ ruled that the District Court orders violated the "act of state doctrine." The Court of Appeal observed that the relief sought would require a United States court to "question the validity of the freeze orders" made by the Swiss authorities in response to the request for legal assistance made by the Philippine Government. Indeed, according to the Court of Appeal, the District Court order compelling the Banks to transfer Estate assets in Switzerland would be in direct contravention of the Swiss freeze orders and would amount to a declaration by a United States court that an official act of Switzerland was invalid. Furthermore, it would "render nugatory" Switzerland's attempts to provide legal assistance to the Republic of the Philippines by protecting the Estate's assets by freezing them.

As a matter of legal doctrine, the decision of the United States Court of Appeals can be justified. The Court of Appeals ruling amounts to a deference to the traditional principles of sovereignty and the acceptance that the Plaintiffs should contest the legitimacy of the Swiss freeze orders in Switzerland. But this is practically speaking naive, particularly since the Swiss courts had already ruled that the Swiss court orders freezing the Marcos assets take precedence over any third party rights, including the civil claims of the Human Rights victims.

The difference in the legal position of the District Court and the Court of Appeal is partly explained by the extreme frustration experienced by Judge Real of the District Court with the attitude of the Swiss banks in refusing to provide any meaningful co-operation in tracing and recovering the Marcos assets. Indeed, unlike criminal cases where the United States courts have often granted extraterritorial orders against Swiss banks operating in the United States, in civil cases the Plaintiff party is likely to continue to be frustrated with Swiss bank secrecy⁶⁴. This will especially be the case where the United States Government has a negative attitude to the Plaintiff in the civil litigation, as evidenced in the Human Rights Litigation in the Marcos case.

Putting the Marcoses on Trial

The bringing of criminal charges against a deposed dictator raises difficult issues, including the following:

A criminal trial is usually heard in the presence of the defendant. Further, under the Bill of Rights chapter of the 1987 Constitution of the Republic of the Philippines the accused is entitled to meet the witnesses face to face and no trial may take place in the absence of the accused except after arraignment, provided the accused has been duly notified and his failure to appear is unjustifiable;

A criminal trial may require that the deposed dictator be extradited from a third country. It is rare for a dictator to be returned to his home country because usually he has been given sanctuary or asylum;

Even if there is an extradition treaty or arrangement with a third country, it is unlikely that that country would consent to extradition. Further, the defendant may seek to rely on various exceptions to extradition, such as the "political offence" exception, or to rely on doctrines such as "act of sovereign immunity";

^{63 &}lt;u>Credit Suisse v U.S District Court Central District of California</u>, 130 F 3d 1342 (9th. Cir, 1997)

⁶⁴ This is particularly the case where investigatory assistance is sought from Switzerland. The fact that Switzerland is now a party to the 1970 Hague Convention on the Taking of Evidence in Civil and Commercial Matters will not significantly improve matters because of the Swiss reservations to article 23 of the Convention regarding pre-trial discovery.

Extradition is not usually granted where there is a substantial risk that the accused will not obtain a fair trial in the requesting state. It may be difficult for a deposed dictator to get a fair trial because of intense political conflict in the requesting country.

In many cases, the new government does not wish to extradite a deposed dictator because of concerns about national security. For example, the Government of Corazon Aquino considered that the return of the Marcoses to the Philippines would provide a rallying point to Marcos loyalists and set the stage for a coup d'etat. There is evidence to show that Marcos was conspiring in 1987 to invade the Philippines with a military force and seize power. Indeed, US State Department officials, after learning of Marcos's covert schemes, confined him to Oahu Island in Hawaii.

Another possibility is to arrange for the trial to be heard in the place where the dictator is located, for example in the case of Marcos, Hawaii. President Aquino signed an executive order authorising the Sandiganbayan court to try cases outside the territory of the Philippines. But Solicitor General Chavez's request to the US Government that the Sandiganbayan be permitted to conduct a criminal trial within the territorial jurisdiction of the United States was rejected.

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

Ferdinand Marcos was too sick to attend his arraignment and subsequently on 28 September 1989 he died. On 20 March 1990 Imelda Marcos was arraigned and put on trial. On 2 July 1990, Imelda Marcos was acquitted on all counts. A number of reasons have been given for the acquittal, but the major weakness was the difficulty of linking Imelda Marcos to the criminal conduct of her husband. Jurors interviewed after the trial told some reporters that they could not hold the widow responsible for the crimes of her husband. The Philippine Government explained the loss in the following terms⁶⁵:

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

⁶⁵ Supra no. 34 at 1.

In the Philippines more than 100 criminal and civil cases have been brought against Mrs Marcos. For example, more than 26 criminal cases were filed in the Sandiganbayan, 37 criminal cases were brought in the Manila Regional Court and 16 criminal cases were brought in the Quezon City Regional Trial Court. The criminal cases concerned inter alia Mrs Imelda Marcos's involvement with various Liechtenstein Foundations, the looting of the Central Bank of the Philippines by the sale of US \$125 million treasury notes to various foundations. Mrs Marcos was also accused of violating the Anti-Graft law, tax fraud and misappropriation of public funds. In accordance with the law of the Philippines, the Ombudsman approved the filing of the charges by certifying that Imelda Marcos was probably guilty of the offences.

A significant problem in resolving the cases against Mrs Marcos is that under the judicial system of the Philippines, long and interminable delays are commonplace and the judiciary are inclined to postpone hearings at the request of the defence or prosecution. Mrs Marcos's lawyers have successfully exploited the Philippines judicial system and made a mockery of the notion of timely justice, by, for example, filing no less than 7 motions for dismissal/to quash the charges against her, all of which were refused by the courts. Mrs Marcos's lawyers also sought to delay the hearing of the cases by filing numerous postponements.

Nevertheless, in relation to one matter Mrs Marcos was convicted in 1993 by the First Division of the Sandiganbayan and sentenced to prison for 18 to 24 years, with a minimum of 9 to 12 years. Mrs Marcos motion for Reconsideration of her conviction and sentence was subsequently dismissed. Her appeal to the Supreme Court was also initially unsuccessful but a differently reconstituted Supreme Court reheard her case en banc and acquitted her.

Although Mrs Marcos faces numerous other criminal charges, as well as a civil forfeiture case relating to the secret deposits in Swiss banks, there appears to be reluctance by the Philippine government to vigorously pursue these cases. For example, the Government through the Solicitor General has long rested its forfeiture case in Civil Case No 0141(relating to the now \$580 million Swiss assets) by submitting the Republic's formal offer of evidence. Instead of presenting their controverting evidence, the Marcoses filed a motion for approval of a compromise agreement with the then PCGG Chairman Gunigundo. Following the decision of the Philippine Supreme Court in December 1998 to invalidate the compromise agreement between the Marcos family and the PCGG⁶⁶, there is no legal obstacle to requiring the Marcos family to present their evidence. Yet the Philippine Government has not submitted the forfeiture case for decision even though the Marcoses still refuse to present their evidence that they lawfully acquired their wealth.

⁶⁶ See <u>Chavez v PCGG</u>, Republic of the Philippines Supreme Court First Division, 9 December 1998.

Conclusion

In the 1980s and 1990s the Swiss authorities and Swiss banks co-operated with foreign law enforcement agencies in investigating drug trafficking and economic crime. This may be contrasted with the appalling record of Swiss banks in assisting developing countries in cases were their leaders have looted their national treasuries. Indeed, the case of the Philippines illustrates this proposition. For example, despite the fact that various bank accounts of the Marcoses have been frozen in Switzerland since 1986, the Philippines Government has not had access or use of the funds, albeit that in 1998 the frozen monies were transferred from two Swiss banks into escrow accounts at the Philippine National Bank. Furthermore, it was not the Swiss banks who found those Marcos accounts, but is was the Philippine Government which identified those accounts from documents left behind by deposed President Marcos. That is, the Swiss banks have only admitted to the existence of the accounts where there was overwhelming evidence establishing the accounts.

Since 1986 there have been significant changes in Swiss law ⁶⁷, which should have an effect on the acceptability of dictator's monies in Switzerland. In August 1991 the Swiss Penal Code was amended to create the offences of money laundering and lack of due diligence in financial transactions. These offences apply even where the underlying offence occurs outside the territory of Switzerland (for example, the Philippines), while the money laundering acts effectively takes place in Switzerland.

The Swiss Federal Banking Commission Guidelines on Money Laundering state the following:

"Financial intermediaries must not accept funds that they know or should suspect to be the proceeds of corruption or the misappropriation of public funds. They must therefore pay special attention to business relationships with high officials of foreign governments or persons or companies that are close to them."

The implications of the new Swiss money laundering are important in all future cases of corruption involving foreign heads of state. The question arises as to whether the Swiss bank are now required to reject heads of state of poor or developing countries as clients. In my opinion, the political reality is that the Swiss banks should act on the premise that money deposited by or on behalf of a foreign head of state is illicit or the proceeds of corruption⁶⁸.

In the case of the Marcoses, the Swiss Federal Supreme Court has held that the seized Swiss accounts must be assumed to be of "an obvious illegal provenance". Consequently, all Swiss banks are put on notice that any assets of former President Marcos, including assets of his wife or children, are to be treated as if they are the proceeds of crime. Ironically, the position is that if a Swiss bank admitted today that it had a Marcos account then this would implicate the bank in a crime under Swiss law.

⁶⁷ Other changes include the abolition of Form B, the enactment of the 1997 Federal Act on the Prevention of Money Laundering in the Financial Sector (which imposed a requirement on Swiss banks to report suspicious transactions) and the creation of the 1999 Money Laundering Reporting Office.

⁶⁸ See generally, Minority Staff Report of the US Senate Permanent Subcommittee on Investigations Hearings on Private Banking and Money Laundering: A Case Study of Opportunities and Investigations (November 9, 1999) For allegations that the Marcos monies has been laundered through various Liechtenstein banks and trustees, see Cuento and Tubeza, "Swiss body probes \$13-B Irene account", Philippine Daily Inquirer, 24 February 1999. For comprehensive recent newspaper coverage of the Marcos case, see http://www.inquirer.net