[Global Corruption Report, 2004] Legal hurdles

6 Legal hurdles: immunity, extradition and the repatriation of stolen wealth

Numerous legal obstacles lie in the way of bringing corrupt politicians to justice and returning stolen wealth to its rightful owners. Véronique Pujas assesses the instruments of immunity and extradition, and Transparency International provides a table that reflects recent legal developments in immunity in a number of countries – not all for the better. Tim Daniel looks at the provisions of the United Nations Convention against Corruption, which offers some promise of enhancing international judicial cooperation.

Recent case material clarifies what is at stake: José Ugaz reflects on the campaign to extradite former Peruvian president Alberto Fujimori; Gherardo Colombo summarises the legal changes that extended immunity in Italy, while Donatella della Porta reflects on the way conflict of interest threatens media freedom in the country; and Jeremy Carver examines efforts to return to the people of Pakistan the substantial state assets allegedly stolen by Benazir Bhutto while she served as Pakistan's prime minister.

Immunity and extradition: obstacles to justice

Véronique Pujas[1]

The judicial fight against political corruption faces many obstacles, particularly the legal immunity that many politicians enjoy and the difficulty of prosecuting individuals who have fled their country to escape justice.

Immunity and extradition are two dimensions of a deeper problem: one of the main weaknesses of the legal and institutional structures created to fight corruption is the lack of control and accountability of politicians and civil servants at the highest level of decision-making, in both national governments and intergovernmental organisations. This lack of accountability is exacerbated by the increasing gap in legal protection between normal citizens, whose rights and freedoms are being progressively undermined by new legal tools in conventions to fight transnational crimes, and ruling elites who fall outside any jurisdiction.

Immunity and its limits

The first of these obstacles to justice, immunity, results from a historical principle that those in charge of public affairs should have legal protection. Politicians are generally granted immunity for actions they carry out and speeches they make in performance

of their duties, as a way of preventing politically motivated legal attacks. The rationale is to protect the office that the politician holds – not the politician – as a means of guaranteeing the continuity of the office and the separation of powers.

Even if such legal safeguards are necessary to guarantee democratic regimes, the rationale for immunity is undermined when illegitimate practices by the political elite are uncovered – or if the shield of immunity is used simply as a means to escape justice. For this reason limits are generally placed on immunity – for instance, there is often no immunity when a politician is caught in flagrante delicto – and there are typically procedures through which immunity can be lifted for serious crimes such as high treason, abuse of power or gross mismanagement in office. Corruption charges are a case in point.

However, politicians – and particularly heads of state – have in some cases much wider immunity. They are often granted immunity from all prosecution, not just in cases relating to their work as politicians. They are sometimes granted immunity extending back to before their term of office, and in some cases are given lifetime immunity. Even where immunity is not so extensive, the disclosure of corruption allegations is no guarantee that a politician will face trial. Members of parliament may be reluctant to vote to overturn immunity, possibly because of parliamentary and government solidarity, or in some cases because of collusion. Corrupt politicians may be reluctant to see a fellow politician sent to court for fear of setting a precedent that might result in their own subsequent impeachment.

Worryingly, the trend in many countries in the last few years has been for politicians to respond to increasingly active judiciaries by changing the law, strengthening immunity and further insulating themselves from prosecution. In June 2003 the Italian government pushed through legislation to expand immunity for a handful of senior political figures, including the prime minister, who was at the time facing trial for corruption (see Boxes 6.3 and 6.4 on Italy, pages 95 and 97). In Kazakhstan, a new constitutional law came into force in July 2000 that gave lifetime immunity – except for high treason – to the country's first president, Nursultan Nazarbaev (though not to future presidents). In Kyrgyzstan, a referendum in February 2003 strengthened the immunity of the president and all members of parliament, while a law in June 2003 granted lifelong immunity to President Askar Akayev and to two former Communist Party bosses who led the country during the Soviet era.

The French government also initiated parliamentary proceedings in mid-2003 to change the constitution on the political accountability of the president. In response to the controversy over President Jacques Chirac's immunity during his first term of office, following a series of corruption allegations relating to the time before he became president,[2] the government took steps to clarify the law on the issue. While introducing an impeachment procedure for 'non-respect of duties' (which is not clearly defined), the new legislation will clearly affirm the president's legal immunity while in office – during his time in office it will not be possible to prosecute the president for offences committed before he entered office.[3] The proposal would replace the current impeachment proceedings, which are a mixture of judicial and political provisions, by a purely political procedure (with the two houses of parliament acting as a high court).

At the end of his term in office, however, the president will return to being an ordinary citizen before the law.

It is not only national politicians who enjoy a special legal status – political leaders of intergovernmental organisations may also possess immunity. What is more, the leaders of international bodies often do not face elections, which serve in many countries as the final 'fuse wire mechanism' for corrupt politicians. In the case of the European Commission (EC), however, the immunity of former commissioner Edith Cresson was lifted and in March 2003 she was charged with fraud, forgery and abuse of confidence. So far she is only facing legal procedures in Belgium, where the EC's headquarters are located, but the EC is also investigating the case, which could result in a trial before the European Court of Justice. The need to strengthen political accountability, particularly in cases of abuse of power and misuse of public funds, applies as much to international as to national politicians.

Facilitating extradition

The anachronism of extensive immunity is reinforced by the difficulty of implementing the appropriate legal tools for transnational prosecution of senior politicians. In some cases the challenge of prosecuting a corrupt politician who has escaped from a country's jurisdiction is next to impossible. Political asylum permitted corrupt former dictators, such as Mobutu Sese Seko of Zaire and 'Baby Doc' Duvalier of Haiti, to avoid justice. Bettino Craxi, the longest-serving head of a post-war government in Italy, escaped to Tunisia in 1994 after being convicted on multiple corruption charges. He died in 2000 in Tunisia, which has no extradition agreement with Italy. Peru's former president, Alberto Fujimori, left for Japan in 2000 and still lives there, in spite of an ongoing campaign for his extradition, which Japan has rejected (see Box 6.2, 'Campaigning for Fujimori's extradition', page 94). Most recently Madagascar's former president Didier Ratsiraka went into exile in France, avoiding the 10 years of hard labour to which a Madagascar court sentenced him in August 2003 for theft of public funds.[4] These cases, as well as the prominent attempt to prosecute Augusto Pinochet for human rights abuses, have revealed current extradition arrangements to be far too cumbersome.

There have been some recent improvements in the legal tools to prosecute transnational crime, even if their implementation remains in doubt.[5] The European Arrest Warrant (EAW), on which political agreement by EU ministers was reached in December 2001, is the first concrete measure in criminal law that implements the principle of mutual recognition. For 32 specific criminal offences, including corruption, the EAW bypasses the need for bilateral extradition treaties, abolishing the role of political approval and traditional extradition procedures. EU member states have a deadline of December 2003 to pass the proposal into national laws, but there is likely to be a delay.[6]

However, it is unclear how the EAW will operate in practice. The EAW assumes mutual trust between countries in legal decisions, but there is no consensus on minimum standards of civil rights protection[7] – and judicial determination of these issues is not allowed because of an EU intergovernmental rule that provides for a slow build-up of

European judicial cooperation. Moreover there are exceptions to the abolition of traditional extradition procedures. For instance, a national amnesty law covering crimes of corruption could allow a way out for a ruling elite. Above all, the definition of 'corruption' in some national laws remains so limited that other criminal offences (such as '*abus de biens sociaux*' in France) – which are outside the scope of the EAW – are usually used in corruption cases. Equally, the EAW will not be executed if the judicial authorities of the executing member state have already taken action in the case, either by prosecuting or deciding not to.

Ultimately, the EAW will not remove the need for EU countries to have bilateral extradition agreements with non-EU countries. Motivated officially by the campaign against terrorism, the US and others have pursued bilateral and multilateral agreements on extradition and legal assistance.[8] However, the US administration has also been actively pursuing bilateral immunity agreements for US citizens from the International Criminal Court,[9] which was established in 2002 and represented a major step forward for international justice. While the International Criminal Court has no jurisdiction over corruption, this latter trend nevertheless undermines the principle of global equality before the law.

The United Nations Convention against Corruption could offer a way forward.[10] The convention addresses some of the weakest aspects of the fight against corruption, such as the need for a common definition of corruption, but some key issues – such as corruption among international public officials and immunity – have not yet been addressed and it will be difficult to reach a consensus among the 110 countries involved.

Notes

1. Véronique Pujas is research fellow at the Centre National de la Recherche Scientifique and teaches at the Institut d'Etudes Politiques, France.
2. Allegations have been made of Chirac's involvement in several apparent cases of corruption relating to his time as mayor of Paris (1977–95), including: vote-rigging; a fake job scam in which activists from his former RPR party were allegedly paid by the Paris town hall; illegal financing of the RPR through a system of illegal commissions paid by building companies involved in municipal contracts; luxury foreign trips for himself, his family and friends financed by used banknotes of unclear origin; and the reimbursement of more than US $1 million of personal grocery bills during his time as mayor.
3. According to the proposed amendment to the constitution, 'During his mandate, the president cannot be required to give testimony before any jurisdiction or administrative authority, nor be the object of an inquiry, investigation or pursuit.'
4. *Le Monde* (France), 11 August 2003; CNN.com, 7 August 2003.
5. A number of key conventions have still not been ratified by all member countries, for example the 1995 and 1996 European Conventions on Extradition.
6. www.euobserver.com, 9 September 2003.
7. This concern applies to the right to multinational defence teams; the right to legal aid; the right to sufficient time and opportunity for the preparation of the defence and the due process of law; the right to access records; and undisturbed communication and correspondence with the defence attorney.

8. For example, in June 2003 an EU–US agreement was signed. Supplementing bilateral agreements, it covers mutual legal assistance, ranging from cooperation on exchange of banking information to joint investigative teams. See www.euobserver.com
9. Several dozen countries have apparently signed such agreements. See www.hrw.org/campaigns/icc/us.htm and www.iccnow.org/documents/otherissuesimpunityagreem.html
10. Final round of negotiations in Vienna, 21 July–1 August 2003.

Table 6.1: Recent developments on immunity[a]
Transparency International

Country	Developments
Positive developments	
Nepal	The Impeachment Act was amended in September 2002 allowing the commission for investigation of abuse of authority to initiate proceedings against the prime minister and against members of parliament without first having to consult with the speaker.
Nicaragua	Former president Arnoldo Alemán's immunity was overturned by a vote in parliament in December 2002.
Zambia	The supreme court validated a parliamentary vote that stripped former president Frederick Chiluba of his immunity in February 2003.
Negative developments	
Azerbaijan	In December 2002 parliament gave partial approval to a legislative amendment that would allow former parliamentarians to retain their diplomatic passports, which guarantee immunity while the holder is abroad. The amendments still have to pass two more voting procedures.
France	The government proposed legislation on the president's immunity in mid-2003, setting out a procedure for impeachment in case of 'non-respect of duties'. However, the proposal would also affirm the president's immunity while in office, including for crimes committed before entering office.
Greece	Legislation approved in February 2003 stipulates that government officials cannot be prosecuted, investigated or imprisoned without the consent of parliament. The new law gives parliament power to halt investigations and imposes a strict statute of limitations on prosecutions.
Guatemala	Legislation approved in December 2002 gives the congressional commissions unlimited time to decide whether to lift the immunity of the accused, except in the cases of judges or magistrates, when a decision must be taken within two months.
Italy	June 2003 legislation grants immunity from trial to five key office-holders, including the prime minister, while in office. The immunity applies to all crimes, even those committed before their terms of office began.
Kyrgyz Republic	A law passed in June 2003 grants lifelong immunity from prosecution to the first (and current) president and two former Communist Party first secretaries who are now parliamentarians.

[a] Developments from the period July 2002–June 2003, taken from the 34 country reports included in Chapter 8 of this volume.

Box 6.1: Sua Rimoni Ah Chong: TI Integrity Awards winner 2003

Sua Rimoni Ah Chong, the former controller and chief auditor of Samoa in the South Pacific, faced serious threats when he exposed financial crime at the highest levels of government.

From 1992 to 1995 Ah Chong refused to authorise illegal payments to cabinet ministers. When in 1994 his annual report to parliament implicated six out of 13 ministers over improper activities and payments, the cabinet appointed a commission of inquiry, not into the irregularities, but into the chief auditor. The committee's members included many of the people criticised in Ah Chong's report.

Ah Chong paid a high price for standing up to corrupt ministers. He was suspended in July 1995 and later, after the constitution was amended for that purpose, dismissed. He is still fighting a legal battle against his suspension and dismissal. Receiving the award, Chong said it would send a clear message to his government that 'there was no place for corruption in society' and encourage other Samoans to stand up against graft.

Box 6.2: Campaigning for Fujimori's extradition

After 10 years of increasingly authoritarian government, the regime of Peru's President Alberto Fujimori finally collapsed in November 2000 in the face of popular unrest, triggered by his use of fraud to win re-election and allegations of illegal arms dealing and the bribery of members of congress. On 13 November 2000, he left Peru to travel to a meeting in Brunei. But his ultimate destination was Japan, from where he faxed his resignation on the same day that the attorney general's office launched an investigation against him for drug trafficking.

Since then, evidence has mounted that during his last five years in power Fujimori and his principal adviser, Vladimiro Montesinos, formed a criminal organisation that violated human rights and indulged in economic corruption, money laundering and drug trafficking. The plunder of public funds appears to have been the rule.

Though Fujimori was born in Peru, which is a constitutional requirement for Peru's president, he was able to use his parents' origin to apply for Japanese nationality. In spite of the serious allegations against him, Japan granted him citizenship, effectively bestowing

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international immunity on him as well, since Japanese law does not permit the extradition of its nationals. Fujimori had found a safe haven from the enormous charges against him. Despite numerous requests by the Peruvian government in the past three years, the Japanese government has shown no sign of a change of mind.

In April 2003 a campaign began to raise awareness of the need for Japan to surrender the fugitive former president to justice. The 'Fujimori Extraditable' campaign was initiated by the Peru Solidarity Network (which includes the National Coordinating Committee for Human Rights in Peru), Amnesty International and Peace Boat, and is supported by a number of Japanese and international organisations (including Transparency International). The campaign's spearhead is a website, with information in Spanish, English and Japanese: www.fujimoriextraditable.com.pe.

As the former special state attorney in charge of the Fujimori and Montesinos investigations, I visited Tokyo to explain in public presentations and meetings with the Japanese authorities precisely why the ex-president is wanted in Peru. The same demand was made in May 2003 to the general assembly of the 11th International Anti-corruption Conference which, in its conclusions, exhorted the government of Japan to hand Fujimori over for trial.

In July 2003 the Peruvian authorities presented the Japanese authorities with the first formal request for Fujimori's extradition, based on charges of human rights violations. In response, an official of the ministry of foreign affairs stated that Japan did not intend to overturn its policy of not extraditing Japanese citizens. Peru's foreign affairs minister responded with a protest note and a warning that if Japan continued to refuse its request, Peru would either appeal to the International Court of Justice in The Hague or open a criminal case against Fujimori in the Japanese courts.

The day the extradition request was made in Tokyo, Peruvian NGOs demonstrated in front of the Japanese Embassy in Lima. The 'Fujimori Extraditable' campaign will continue over the coming months. In the latest phase of the campaign, NGOs around the world are sending letters to the Japanese ministers of foreign affairs and justice, demanding Fujimori's extradition.

José Ugaz (president of Proética, Peru)

Box 6.3: New immunity law breaks with Italy's constitutional history

A law passed in June 2003, which prevents five of the most senior public office-holders in Italy – including the prime minister – from being charged with common crimes, runs counter to the principles that have underpinned immunity law since the Italian constitution was written.

Immunity in the 1948 constitution

The constitution that came into force in 1948 provided full immunity for the president and for members of parliament, but only a more limited immunity from trial for members of the government (the prime minister and ministers):

- *Members of parliament* were given full immunity from prosecution for votes given, and opinions expressed, during the performance of their duties as parliamentarians.

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This provision is particularly comprehensible if one considers that the constitution was written shortly after the fall of fascism, when freedom of expression had been severely restricted.

- No *member of parliament* could undergo *any* criminal prosecution or trial without the authorisation of his chamber of parliament; nor could he be subject without similar authorisation to any restriction on personal freedom (with a small number of exceptions) or freedom to write or speak. The justification of this 'trial' immunity was to prevent criminal trials from being started as a means of limiting a parliamentarian's political freedom.
- The *president* was given full immunity *only* for actions carried out in performance of duties, except in cases of high treason or attacks on the constitution. The latter crimes are not referred to the ordinary judiciary, but to parliament acting as public prosecutor and to the constitutional court (extended to include a small number of citizens) acting as judge.
- The same trial immunity (with parliament acting as public prosecutor and the constitutional court acting as judge) was provided for *members of the government*, with regard to actions carried out in performance of duties. For any other crimes they might commit, they would instead be referred to the ordinary judiciary.

Subsequent modifications to the law on immunity

Over the years the rules on immunity have been modified in a number of ways. In 1989, the competence to prosecute, try and judge *members of the government* – including crimes committed in performance of their duties – was entrusted to the ordinary judiciary, with the judge chosen through a specific procedure to guarantee impartiality. As a counterbalance, authorisation by parliament was required for crimes committed in performance of duties, though parliament could only block prosecution if it judged that the individual in question had acted in order to safeguard a public interest with constitutional weight, or to pursue a political interest.[1] The effect was to make the prosecution of members of government easier and more frequent.

By 1993, it had become clear that the system of authorisation required for prosecuting *members of parliament* was having a negative outcome; parliament frequently rejected authorisation requests forwarded by magistrates, facilitating growing corruption. The requirement of parliamentary approval was therefore abolished in 1993. Since then parliamentarians have only had immunity from trial in relation to personal and correspondence freedoms (in addition to full immunity for votes cast and opinions expressed while performing their duty). By freeing prosecutors from the need for parliamentary approval, the reform facilitated the investigation of crimes committed by members of parliament, particularly corruption.

A law passed in June 2003, however, gives immunity from trial to *five key office-holders*: the president (apart from crimes of high treason and violations of the constitution), the speaker of the senate, the speaker of the chamber of deputies, the prime minister (apart from crimes committed while carrying out his duties) and the speaker of the constitutional court. This immunity applies to *all* crimes, even those committed before their term of office, and lasts until they leave office. It grants immunity with no certain end, since in Italy there are no limits to reappointment for the first four offices. The supposed rationale is to prevent office-holders from being hindered in the performance of their duties.

Until the most recent change in the law, the various modifications to the rules on immunity all reinforced two key principles implicit in the 1948 constitution:

(a) Those who make laws (parliament), as well as those with the power to check if laws are constitutional (the constitutional court), and those who organise the judiciary (the superior council of magistrates), should generally not be accountable for their votes or opinions they express connected to their functions (though there are relevant differences between the institutions). The rationale is to ensure them substantial freedom to perform their duties. Apart from the members of the superior council of magistrates, parliamentary authorisation is required for the most invasive summons or orders (for example, arrest, phone interception or search and seizure).
(b) In contrast, members of the government should not have immunity, although parliament should be able to deny authorisation for trials if it judges that an alleged crime was committed in performance of duties for 'reasons of state'. The rationale for this lack of immunity is clear: those who implement the nation's policies must be accountable for what they do.

The 2003 law, which expands the immunity of the highest constitutional offices to prevent them from being charged with common crimes, runs counter to these principles. Many doubts have been raised about the constitutionality of this new law, and recently the Milan court appealed to the constitutional court for a decision on the issue.[2]

Gherardo Colombo (deputy public prosecutor in Milan, Italy)

Notes

1. The Italian constitution calls for a strict separation of powers between legislature, executive and judiciary.
2. The constitution is paramount in Italian law, and it is the constitutional court's role to guarantee this. It is possible to modify the constitution, but only by constitutional bills submitted to parliament and to referendum.

Box 6.4: Controlling the media in Italy

On 14 September 2002, approximately half a million Italians took to the streets in Rome in the name of freedom of information and the independence of the judiciary. The target of their protest was Prime Minister Silvio Berlusconi, whom they accused of jeopardising the basic principles of liberal democracy. The protesters expressed their opposition to laws proposed, or passed, by the government on justice issues, which they believed were intended to save the prime minister in the ongoing proceedings against him on corruption charges. These laws depenalised some economic crimes and were expected to reduce the independence of the judiciary.

The protesters also claimed that freedom of information was under attack. The lack of an effective law on conflict of interest in Italy (and the failure of the previous centre-left government to pass one) had allowed Berlusconi to maintain control of his own media empire after he was elected prime minister. Not only did he continue to own the three main private television channels, controlled by Mediaset, but as head of government he also controlled the three public television channels. This situation would be deemed

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unconstitutional in most democracies because of the distortion it introduces into the formation of opinion, whose freedom underpins democratic accountability. To make matters worse, in July 2003 the senate's public works commission approved a media bill that would make it possible for the prime minister to expand his media holdings even further: the law removes prohibitions on newspaper ownership and raises limits on advertising revenues.

The public protest about lack of media freedom was closely linked to concerns about judicial independence: protesters alleged that Berlusconi used his control of the media to reduce coverage of corruption and to attack the opposition and judges. In recent years, Berlusconi and others close to him have started judicial proceedings in civil courts (which could lead to high fines) against a number of journalists, scholars and judges who have accused them of being involved in corrupt deals. Moreover, under an immunity law pushed through parliament in early summer 2003, the prime minister will not have to appear in court while he remains in office.

That Berlusconi's control of a media empire threatens a main pillar of democracy – namely, freedom of information – is an opinion not only held by demonstrators. The Federazione Nazionale della Stampa, the union of Italian journalists, spoke of an 'unsustainable situation that prefigures a systematic repression of freedom of information'.[1] Usigrai, the union of public TV journalists, also denounced Berlusconi's media dominance as a serious attack on the freedom and autonomy of the press.[2] In June 2003, the journalists' union called for a national day of strikes in defence of freedom of information and journalistic independence, citing attempts by the government to delegitimise the role of the free press via alleged 'dangerous intimidation'. At risk were not only the independence of public radio and television, but also the very survival of a free and pluralistic press, they argued.[3]

International organisations have also expressed concern about Berlusconi's conflict of interest. As early as June 2001, the OSCE representative on media freedom raised the issue at the OSCE Permanent Council. He pointed to the risks involved when a democratically elected government controls the television media. In 2002, the OSCE representative wrote to Berlusconi asking for clarification about the removal from RAI, the public broadcaster, of two well-known and successful journalists, Michele Santoro and Enzo Biagi, both of whom had criticised the government. Critics accused Berlusconi of silencing them. In November 2002 and again in August 2003, the European Parliament, making specific reference to the Italian situation, expressed its concern about the negative effect of media concentration on fundamental democratic rights.[4]

Research into media content indicates that there is distortion in the Italian media. A study on political communication at the University of Pavia has revealed a repeated imbalance in the appearance of the various political parties, especially on the Mediaset channels, with far more coverage of Berlusconi's party Forza Italia and Berlusconi himself than of the opposition.[5] Between June 2001 and January 2002, the length of coverage of Berlusconi was twice that of Francesco Rutelli, head of the centre-left coalition.[6] In channels run by Mediaset, political communication takes place more during political spots and entertainment broadcasting than in political debates. The news itself emphasises issues such as crime or immigration, which may 'prime' the public for the political appeals of Berlusconi's centre-right coalition.

Critics argue that liberal democratic principles, particularly the free formation of public opinion, are endangered in Italy, and that Berlusconi's private holdings and public responsibilities create a conflict of government, media and business interests. The role of the media is becoming increasingly delicate, if not compromised, by its link to big business ▷

in contemporary democracies. The case of Silvio Berlusconi – particularly its implications for the independence of the judiciary – makes this all too clear.

Donatella della Porta (European University Institute, Italy)

Notes

1. Federazione Nazionale della Stampa, Press release 8 May 2003.
2. Usigrai, Press release 8 May 2003.
3. Federazione Nazionale della Stampa, Press release 21 May 2003.
4. See www.europarl.eu.int/meetdocs/committees/cult/cult20030707/501707en.pdf and www.socialrights.org/en/news51.html
5. Giacomo Sani, *Mass media e elezioni* (Bologna: Il Mulino, 2001).
6. www.osservatorio.it/cares_visual1.php?pub=archives

Box 6.5: Abdelhaï Beliardouh: posthumous TI Integrity Awards winner 2003

Abdelhaï Beliardouh was local correspondent for the daily *El Watan* at Tébessa, 600 kilometres southeast of Algiers. On 20 July 2002, he was kidnapped by a gang of armed men. After beating him for several hours, the group finally released Beliardouh. *El Watan* had run an article that day in which the journalist reported the alleged arrest of the president of the local chamber of commerce and industry, an importer, 'for having links with terrorist networks'. The importer was immediately suspected of heading the gang that attacked Beliardouh.

The incident enraged public opinion and drew condemnation from human rights organisations, political parties and the media at home and abroad. Though Beliardouh launched a legal action, the gang's alleged ringleader was released. The only action taken by the authorities was to strip the importer of his functions as president of the chamber of commerce and industry.

Traumatised and discouraged, Beliardouh tried to take his life on 19 October by swallowing acid. He spent a month in agony before dying on 20 November 2002.

In the last few years before his death, Beliardouh had become famous for his investigative articles on the local criminal underworld, grand corruption practices in the import trade and links with terrorism. The Tébessa region, on the Tunisian border, is notorious for smuggling and persistent terrorism.

Repatriation of looted state assets: selected case studies and the UN Convention against Corruption

Tim Daniel[1]

States and businesses have become increasingly aware of the damage corruption causes populations around the world. The dangerous combination of immunity from prosecution and unlimited personal power allows corrupt leaders to devastate their countries by systematic looting of their wealth. The drafting of the United Nations Convention against Corruption is therefore timely (see 'The UN Convention against Corruption', Chapter 7, page 111).[2] Of particular interest is the convention's chapter on asset recovery.

Before turning to the convention's salient provisions, it is worthwhile to examine three of the most notorious cases of looting by heads of state in the past decade – and the efforts made to repatriate the funds (see Box 1.1, 'Where did the money go?', page 13). All three share a common feature in that they concern assets deposited in Swiss banks. Strict banking secrecy once earned Switzerland notoriety as a safe haven for illicit funds: one-third of the world's illegal wealth was estimated, at one point, to have been secreted with Swiss banks. The watershed legal action taken on behalf of Holocaust victims in the late 1990s played a major role in opening up the Swiss banking sector. With the appointment of uncompromising examining judges such as Carla del Ponte and Bernard Bertossa, armed with powers to force disclosure and freeze assets, Switzerland quickly developed a legal climate that now leads the global fight against money laundering. While the transformation did not happen without complication or criticism, Switzerland's experience points the way forward for states that subscribe to the new UN convention. In this regard, Switzerland's admission to the UN in September 2002 was another positive step.

Mobutu Sese Seko

Estimates vary on the amount that Mobutu Sese Seko looted from the Democratic Republic of Congo, formerly Zaire. During the 32 years in which he held power, the country received more than US $12 billion in aid, mainly from the World Bank. Much of that funding vanished, but Mobutu himself claimed to be worth less than US $50 million.

The day before Mobutu was toppled in May 1997, the Swiss authorities ordered all 406 Swiss banks to undertake a systematic search for Mobutu's accounts. They found just US $4 million. The authorities then wrote to the new government in Kinshasa asking for clarification of the ownership of the funds. By 1999 – two years later – there was still no reply from President Laurent Kabila. Why not? As one European politician put it: 'Kabila has simply replaced Mobutu with Mobutuism.'[3] The relatively paltry sum of US $4 million was not worth the trouble and expense of proving ownership. Yet even if the Kabila government had furnished proof of ownership, the Swiss probably would not have repatriated the money, as the following two cases show.

Ferdinand Marcos

Repatriation was a major issue in the case of former president Ferdinand Marcos of the Philippines, and his family. Only after protracted litigation did the Swiss authorities finally agree to assist the Presidential Commission on Good Governance (PCGG), a non-judicial authority investigating the Marcos family. The decision was taken though no charges had been brought against the Marcoses in the Philippines, where the authorities were awaiting evidence from the Swiss. After considering whether assets held in Swiss accounts would be returned to the Philippines, the Swiss supreme court ruled that the assets should indeed be returned, but subject to the following requirements:

- The government of the Philippines must file a criminal charge and/or bring forfeiture proceedings against the Marcoses within one year, failing which the assets would be unfrozen.
- A Philippine court with appropriate criminal jurisdiction must hand down final judgment confirming that the assets were stolen or illicit property to be confiscated and returned to their rightful owner, the government of the Philippines.
- Any criminal prosecution and forfeiture proceedings must comply with the procedural requirements of due process and rights of the accused under the Swiss constitution and the European Convention on Human Rights.

These stipulations prompted the PCGG's chairman to criticise the Swiss law on international legal assistance in criminal matters (EIMP) and to accuse the Swiss authorities of attempting to thwart countries' efforts to repatriate stolen funds. In the end, the PCGG signed an agreement with the Swiss under which the 'anticipatory restitution' provision of the EIMP was used to allow repatriation before final judgment was obtained in the Philippines.[4] The UN Convention would permit a similar step if the requested state waives the requirement of a final judgment in the requesting state.[5]

There was, however, a further sting in the tail of the supreme court decision: the transfer of assets, which amounted to some US $657 million, had to be made to an account in the Philippine National Bank, over which the Zurich district attorney retained control, including the choice of investments made. In this way, the Swiss authorities ensured that the funds remained under their control until they were satisfied with the conduct of the government of the Philippines. In August 2003, the Zurich attorney finally announced the release of Marcos' frozen assets to the government, five years after they were deposited and 14 years after his death in Hawaii in 1989. The announcement followed a ruling by the Philippine supreme court in July 2003 that the Marcos family had 'failed to justify the lawful nature of their acquisition' of the Swiss funds.[6] This is a helpful ruling, the principle of which is incorporated in the UN Convention (see below).[7]

Sani Abacha

General Sani Abacha was military dictator of Nigeria from 1993 to 10 June 1998, when he died suddenly of a heart attack. Estimates of the amount he looted during five years

in office vary from US $2 billion to US $5 billion. The upper limit represents about 10 per cent of Nigeria's annual income from oil over five years.[8] Abacha was replaced by another military ruler, General Abdulsalami Abubakar, who returned Nigeria to democratic rule. Elections were held in early 1999 and Olusegun Obasanjo was sworn in as president at the end of May of the same year.

Before Obasanjo took office, Abubakar's interim government delivered a clear message to the Abacha clan: Abacha had looted huge sums, and they had to be restored. The government recovered some US $825 million and paid it into a special account at the Bank of International Settlements in Basle, Switzerland. Most of this sum was later spent on housing projects, education and allocations to Nigeria's 36 states.

While a large amount was 'voluntarily' returned, more remained frozen in other jurisdictions, including US $1.3 billion in Switzerland, Luxembourg and Liechtenstein. Five years after Abacha's death, none of this money has been returned and the Obasanjo government is still trying to reach a settlement.

In April 2003, the Swiss supreme court handed down a judgment that rejected numerous appeals by the Abachas' lawyers, who had sought to prevent the transmission of incriminating documents and, ultimately, the repatriation of the remaining funds. The judgment stopped short of ordering their repatriation. As in the Marcos case, it was preoccupied with ensuring that the defendants receive a fair trial and that their human rights be observed. Following a meeting with the Swiss president in October 2003, however, Obasanjo announced that a mutual agreement had been reached whereby the Swiss would soon repatriate the US $618 million frozen in Switzerland against assurances from Nigeria that the returned funds would be devoted to improving education, health, agriculture and infrastructure.

Box 6.6: The hunt for looted state assets: the case of Benazir Bhutto

Benazir Bhutto served twice as prime minister of Pakistan, and was twice removed for widespread abuse of public office. Pakistani authorities were fortunate to obtain early hard evidence implicating Bhutto and her family.

Key documents copied from the files of her lawyer in Switzerland revealed that significant commissions were paid by contractors in a series of deals between shell offshore companies and foreign corporations contracted by the government of Pakistan. In all cases, the beneficial owners of the various companies were Bhutto family members, usually Asif Ali Zardari, Bhutto's husband, commonly known as 'Mr Ten Per Cent' during his wife's first term – and 'Mr Forty Per Cent' after he assumed the post of minister of investment during her second.

In late 1997, Pakistan's attorney general promptly sent requests for assistance to his opposite numbers in Switzerland, Britain and the United States, three of the many countries identified as having some connection with these commission contracts. Only Switzerland provided swift and effective responses. The then Swiss attorney general, Carla del Ponte, instructed the federal police in Berne to cooperate with the Pakistani authorities and appointed judge Daniel Devaud in Geneva to take charge of judicial aspects of the investigation.

There were several strands to the initial evidence, implicating different companies in public contracts with Pakistan, each with a subset of offshore companies controlled by Jens Schlegelmilch, the Bhutto family lawyer in Geneva. One of the earliest steps taken was to identify Swiss bank accounts in the names of the Bhutto family, their front companies and known associates, and to freeze any balances in them. The order resulted in the freezing of no fewer than 500 separate accounts containing in excess of US $80 million, funds that remain frozen to this day.

The gap between freezing funds and repatriating them to another country is formidable, as Pakistan was just starting to discover.

For Switzerland to transfer the blocked funds to Pakistan required a conviction in Pakistan against Bhutto, her husband and possibly others for an offence that would allow judge Devaud to order the transfer. Alternatively, Bhutto would have had to be convicted in Switzerland for an offence giving rise to similar powers.

In July 2003, after more than five years, Devaud convicted Bhutto and her husband of money laundering, sentencing them to six months' imprisonment suspended for three years, and ordered the transfer to Pakistan of some US $12 million.[1] His decisions are now under appeal, and may take another year to resolve.

Examining why it took so long to arrive at this still-not-final result sheds light on what obstacles could be encountered in similar situations.

From the half a dozen offences disclosed by the initial documents, Devaud deliberately selected one in which those paying the commissions were Swiss companies. This tactic enabled him to investigate and seize within Switzerland documents covering all aspects of the offence, whether from the companies or from Bhutto's lawyer. In this way, he did not need to rely on assistance from other countries.

Corruption was not a criminal offence in Switzerland until 2001, long after the frozen accounts had been filled with cash. But money laundering was an offence. Provided that Bhutto and Zardari could be prosecuted in Pakistan, anyone dealing with the corrupt proceeds could be indicted in Switzerland. Accordingly, Devaud issued indictments against five parties: Bhutto and Zardari outside Switzerland, and Schlegelmilch and the responsible executives of two Swiss companies within his own jurisdiction. Backed with the indictments, he ordered the seizure of documents and sought to interrogate the accused as investigating magistrate.

At an early date, he ordered that Pakistan be a 'civil party' to the proceedings, as the victim of the alleged criminal activity. The commissions paid as bribes for the benefit of Bhutto, her husband and mother should have been accounted to the Republic of Pakistan, whose interests Bhutto had been bound to protect. As a civil party, the Pakistani authorities would have access to the entire file of the proceedings, and could be compensated for any losses established.

Devaud's judgments on what became known as the SGS-Cotecna case disclose that, during Bhutto's first term of office, the Swiss company Cotecna was awarded a contract by Pakistan's ministry of finance to take over pre-shipment inspection of goods entering Karachi port. Cotecna had agreed to pay a commission of 6 per cent of the contract receipts to Mariston Securities Inc., an offshore company formed by Schlegelmilch and beneficially owned by Bhutto's mother. Mariston received US $1.2 million before the contract was terminated after Bhutto was first ejected from office.[2]

On her return in 1993, Bhutto appointed herself minister of finance. A contract with similar terms was awarded to SGS, a Swiss inspection company that owned much of Cotecna and had agreed to share both the revenue – and the obligation to pay bribes.

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Schlegelmilch created a new offshore company, Bomer Finance Inc., whose beneficial owner was Zardari, though Bhutto controlled its assets. Two other companies were involved: Mariston and Nassam Overseas Inc., a company beneficially owned by Bhutto's then brother-in-law. The commission between them rose to 9 per cent. Additionally, Schlegelmilch himself was to receive a commission of 1.25 per cent of contract receipts.

The SGS–Cotecna contract took effect from 1 January 1995, and large sums were paid to both companies over the next two years. Schlegelmilch made sure that the commissions were duly paid to the various Bhutto front companies, aggregating US $12 million. All the payments – including date, amount, payer and payee – are set out in Devaud's decisions.

More than US $5 million was transferred to another front company, Hospital of the Middle East Inc. With access to bank records, Devaud was able to freeze the accounts and trap nearly all the money paid by the Swiss companies. But the final nail in the Bhutto coffin was the purchase of a diamond necklace worth £117,000 (US $195,000) from David Morris, a leading London jeweller. To pay for it, Bhutto had drawn £90,000 (US $150,000) from Bomer Finance's bank account.[3]

The six-month suspended sentence against Bhutto and her husband may seem light for such serious offences, but they were the maximum Devaud could exact. With the appeals now filed, the superior court can impose much tougher sanctions.

Devaud also ordered Bhutto and her husband to pay Pakistan the aggregate of the bribes they had received. He further ordered forfeiture of all the remaining funds of the companies and the transfer of the diamond necklace to Pakistan. By his calculation, this left Pakistan short by US $250,000, which the two were ordered to pay forthwith. When these funds reach Pakistan, they will constitute a first in terms of a state recovering directly sums paid by way of bribes to responsible politicians.

The bribes paid in the SGS–Cotecna case are large, but they pale into insignificance against the harm suffered by Pakistan as a direct result of these corrupt contracts. Pakistan is estimated to have lost more than US $2 billion in tariff revenues as a consequence of the greed of Bhutto and her family.

Jeremy Carver (Clifford Chance law firm, Britain)

Notes

1. Devaud similarly convicted Schlegelmilch with a four-month term of imprisonment, but he was unable to forfeit the proceeds from the corrupt contracts because corruption was not then a criminal offence in Switzerland, as it was in Pakistan. An unofficial translation of Devaud's three decisions can be found on the website of Pakistan's National Accountability Bureau: www.nab.gov.pk
2. The Cotecna contract with Pakistan created a public scandal because of appalling performance by Cotecna. Tariff receipts by the ministry of finance dropped alarmingly. A public investigation blamed Cotecna for the loss of more than US $1 billion of revenue.
3. Through her spokespeople, Bhutto has denied involvement in the purchased necklace, indeed in all the facts uncovered by Devaud. But she steadfastly refuses to participate in the proceedings, save through the press, claiming that Devaud is politically motivated.

Asset recovery and the UN Convention

The UN Convention chapter dedicated to asset recovery begins with the statement: 'The return of assets pursuant to this chapter is a fundamental principle of this convention and states parties shall afford one another the widest measure of cooperation and assistance in this regard.'[9] The chapter goes on to set out a collection of measures that signatories are enjoined to take to facilitate asset recovery.

One set of provisions aims to get states to require domestic financial institutions to adopt stringent 'know your customer' procedures, particularly in regard to those 'entrusted with prominent public functions and their family members and close associates' to whom 'enhanced scrutiny' provisions should apply. The package addresses many of the core issues associated with abuse of office, lax banking controls and the use of offshore banks. If every country were to pass legislation giving effect to these measures – and ensure their proper enforcement – opportunities for looting would be radically reduced.[10]

The chapter also addresses the recovery of property under individual states' domestic laws and through international cooperation on confiscation. Again, the aim is to encourage states to ensure that domestic law permits courts to order those who have committed offences established under the convention to pay compensation or damages to states that have been harmed by those offences.[11]

Further measures concern the freezing or seizure of property in a requested state, once competent authorities in a requesting state have issued orders.[12] These measures contain the important provision, referred to above, that such orders should enable the requested state to take action on the basis of 'reasonable belief' that there are sufficient grounds for the requesting state to take such actions and that the property will eventually be subject to an order of confiscation.[13] In addition, the requested state can take action simply on the grounds of reasonable belief – without the competent authority in the requesting state having to issue a freezing or seizure order.[14] This provision envisages a situation that approximates the procedure in Switzerland, where prosecuting magistrates can take action to freeze assets on the basis of reasonable belief, without court orders from requesting states. This situation contrasts sharply with the position in Britain, where the Home Office will not take action unless it is satisfied that criminal charges have been brought in the requesting country, and that those criminal charges are properly filed. Subsequent delays tend to favour the malefactor, who may use the time to move funds elsewhere.

The UN Convention also focuses on international cooperation for the purposes of confiscation. A number of its provisions deal with the submission of requests, but they place a positive obligation on the requested state to take measures to identify, trace and freeze or seize the proceeds of crime. Each signatory must furnish copies of all laws and regulations giving effect to this set of provisions and any subsequent changes to the UN secretary-general.[15]

Furthermore, each signatory of the convention is to take measures to permit it to forward information on illicitly acquired assets to another signatory without prior request, as long as it considers the disclosure of such information helpful to the initiation or carrying out of investigations that might lead to a request.[16] The convention also tracks the setting up of financial intelligence units (FIUs) in countries belonging to the Egmont Group, whose members exchange information on money laundering.[17] States that have not already done so are encouraged to set up FIUs.[18]

With respect to the return and disposition of assets, the convention sets out the requirement for requested signatories to return embezzled public funds to requesting signatories. The concept of repatriation has led to considerable difficulties, as highlighted

in the three cases cited above. A requested signatory can waive the requirement of a final judgment being given in the requesting signatory's courts and return property when the requesting signatory 'reasonably establishes its prior ownership of … confiscated property to the requested state party; or when the requested state party recognises damage to the requesting state party as a basis for returning the confiscated property'.[19] This provision resembles existing procedures in Switzerland that enable the criminal courts to confer 'damaged' status on a civil party (including countries) and order confiscation of assets and repatriation to the 'damaged' country.[20]

Some of the provisions described above have undergone significant changes since they appeared in the earlier draft of the convention, and further changes may be adopted after this writing.

Regardless of these changes, however, the chapter on asset recovery clearly sets out to encourage countries to establish comprehensive regimes of mutual legal assistance that are designed to be as helpful as possible to requesting countries. It is only hoped that requested countries will take heed and observe the spirit as well as the letter of the aims of the chapter, making it increasingly difficult for rogue heads of state to pillage their citizens and get away with it.

Notes

1. Tim Daniel founded the public international law group at the law firm Kendall Freeman in London and has represented the government of Nigeria in major litigation for 25 years.
2. During the latter half of 2003, the precise formulation of the draft UN Convention against Corruption was debated in Vienna. At this writing, the final document was to be open for signature in Mexico in December 2003.
3. See Michela Wrong, *In the Footsteps of Mr. Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (New York: HarperCollins, 2002).
4. Article 74 of the EIMP.
5. Article 61.3 (a) and (b).
6. *Sunday Mail* (Australia), 6 August 2003. The article states that Imelda Marcos has appealed this decision, claiming that she and her three children were deprived of due process: this appeal does not appear to be delaying the handover of funds.
7. Article 67 *bis*, paragraph 2 (a).
8. This information is based on evidence presented to the International Development Committee, a British parliamentary select committee, which published its fourth report (on corruption) on 22 March 2001.
9. Articles of the chapter on asset recovery (chapter V) are discussed in the order in which they appear in the draft convention. The numbering is not sequential: 64, 65, 67, 67 *bis*, 60, 60 *bis*, 68, 61 and 66.
10. Article 65.
11. Article 67.
12. Article 67 *bis*.
13. Article 67 *bis*, paragraph 2 (a).
14. Article 67 *bis*, paragraph 2 (b).
15. Article 60.
16. Article 68.

17. See www1.oecd.org/fatf/Ctry-orgpages/org-egmont_en.htm
18. Article 66.
19. Article 61.
20. The use of this procedure was dramatically illustrated in August 2003 when the Geneva examining magistrate ordered assets confiscated from Benazir Bhutto and her husband Asif Zardari to be returned to Pakistan (see Box 6.6, 'The hunt for looted state assets: the case of Benazir Bhutto', page 102).