The Restitution of Illicit Assets Act alias the *Lex Duvalier*

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Plan

I. The issue of “failing” states

II. The *Duvalier* case

III. The Swiss Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means

IV. Conclusion
I. 1/4 – The return of kleptocrats’ assets in figures

Switzerland has returned over CHF 1.7 billion over the past 15 years (FDFA, 2011).

<table>
<thead>
<tr>
<th>Year</th>
<th>Country</th>
<th>Case</th>
<th>Amount returned</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>Peru</td>
<td>Montesinos</td>
<td>approx. USD 93 million</td>
</tr>
<tr>
<td>2003</td>
<td>The Philippines</td>
<td>Marcos</td>
<td>approx. USD 683 million</td>
</tr>
<tr>
<td>2005</td>
<td>Nigeria</td>
<td>Abacha</td>
<td>approx. USD 700 million</td>
</tr>
<tr>
<td>2005</td>
<td>Angola</td>
<td></td>
<td>approx. USD 21 million</td>
</tr>
<tr>
<td>2007</td>
<td>Kazakhstan</td>
<td></td>
<td>approx. USD 144 million</td>
</tr>
<tr>
<td>2008</td>
<td>Mexico</td>
<td>Salinas</td>
<td>approx. USD 74 million</td>
</tr>
<tr>
<td>2010</td>
<td>Taiwan</td>
<td>Chen Shui-bian</td>
<td>approx. CHF 20 million</td>
</tr>
</tbody>
</table>
I. 2/4 – Swiss system regarding illicit assets

- **PREVENTION**
  - **MLA**
  - **FREEZING**
  - **CONFISCATION**
  - **RETURN**
  - **DEFECTIVE MLA**
I. 3/4 – “Failure” of the requesting state

- State **unable** to satisfy the conditions set out by Swiss law for an MLA request
- “Failing” state
  - Lack of means – Affaire *Duvalier*
  - Lack of will – Affaire *Mobutu*
- Failure of the MLA leads to the lifting of the freezing on the assets, unless …

**POLITICAL FREEZING**

art. 184 para. 3 Swiss Cst.
I. 4/4 – Political Freezing

- Art. 184 para. 3 Cst. (art. 102 ch. 8 a Cst.)

Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.

- In Switzerland’s interest to have a clean financial centre
II. The *Duvalier* case

<table>
<thead>
<tr>
<th>YEAR</th>
<th>HAITI</th>
<th>SWITZERLAND</th>
<th>FREEZING</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>MLA</td>
<td>IMAC freezing (approx. USD 7.5 million?)</td>
<td>IMAC freezing</td>
</tr>
<tr>
<td>2002</td>
<td></td>
<td>Failure of the MLA procedure due to Haiti’s inability to satisfy the legal requirements</td>
<td>Political freezing</td>
</tr>
<tr>
<td>2005 – 2008</td>
<td></td>
<td></td>
<td>Renewals of the political freezing</td>
</tr>
<tr>
<td>2008</td>
<td>New MLA</td>
<td></td>
<td>MLA freezing</td>
</tr>
<tr>
<td>2009</td>
<td></td>
<td>FOJ’s decision to return the assets to Haiti</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td></td>
<td>Confirmation by the SFCC</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td></td>
<td>Annulment by the SSC Lifting of the freezing</td>
<td>Political freezing</td>
</tr>
<tr>
<td>2011</td>
<td></td>
<td>Entry into force of the <em>lex Duvalier</em></td>
<td></td>
</tr>
<tr>
<td>?</td>
<td></td>
<td>Decision of the SFAC</td>
<td>?</td>
</tr>
<tr>
<td>?</td>
<td></td>
<td>SCC / SFAC + SCC</td>
<td>?</td>
</tr>
</tbody>
</table>
III. 1/6 – The Restitution of Illicit Assets Act

- The Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means Restitution of Illicit Assets Act (RIAA)

- Art. 1 RIAA

The present Act governs the freezing, forfeiture and restitution of assets of politically exposed persons or their close associates in cases where a request for mutual assistance in criminal matters cannot produce an outcome owing to the failure of state structures in the requesting state in which the politically exposed person exercises or exercised office (country of origin).
III. 2/6 – Conditions for the freezing of assets

- At the discretion of the Swiss government (art. 2 RIAA)
  → Political freezing

- Conditions

1. MLA request
2. Assets belonging to a PEP or persons from his/her close associates
3. Failure of the state structures
4. Safeguarding of Swiss interests
III. 3/6 – Forfeiture procedure

- **At the discretion** of the Swiss government (art. 5 – 7 RIAA) → Forfeiture claim

- **Conditions**
  1. Assets belonging to a PEP or his/her close associates
  2. Obtained by unlawful means → **Presumption of unlawful origin**
     i. Extraordinary increase of assets
     ii. Level of corruption acknowledged as high
  3. Assets frozen by the Swiss government pursuant to the RIAA

- Criminal statute of limitations not applicable
III. 4/6 – Amicable settlement and third-party rights

- **At the discretion** of the Swiss government (art. 4 RIAA) → Mandate to the FDFA to seek an amicable settlement

- Rights of third-party **largely excluded** (art. 7 RIAA) except for:
  - Swiss authorities
  - People who have acquired rights *in rem* in good faith
III. 5/6 - Restitution

- **Agreement** between Switzerland and the country of origin

- Otherwise, the Swiss government shall determine the process of restitution (art. 8 – 10 RIAA)

- Objectives of the restitution
  - To improve the living conditions of the people of the country of origin
  - To strengthen the Rule of Law in the country of origin and to fight the impunity of criminals

- Restitution in the form of **financing for programmes of public interests**
III. 6/6 Application to the *Duvalier case*?

- **Art. 14 RIAA – Transitional provisions**

  1. Assets already frozen on the commencement of this Act on the basis of a Federal Council order issued pursuant to Article 184 paragraph 3 of the Federal Constitution, because a request for mutual legal assistance in criminal matters has proven unsuccessful, shall remain frozen until a decision on their forfeiture enters into force in accordance with this Act.

- **Application to the *Duvalier case***?
IV. Conclusion

- Switzerland is at the forefront of the fight against assets of illicit origin
- However, it remains an issue essentially political
- With no third-party rights such as NGO’s
- Impacts the security of law

THANK YOU
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