



On February 20, 2011, the Tunisian Foreign Affairs Ministry reported that the Tunisian government has made an extradition request to Saudi Arabian authorities for ousted president Zine el-Abidine Ben Ali. The statement accuses Ben Ali of various crimes, including committing and inciting manslaughter.¹⁷

In the coming weeks and months many countries will be adjudicating international enforcement requests to arrest members of the Ben Ali family, extradite them, as well as seize and freeze any alleged illegal proceeds of crime that may allegedly belong to the family.

E. Swiss Government Freezing of Egyptian Assets: The Swiss Practice Regarding Assets of Politically Exposed People of Presumed Illicit Origin

by Sandrine Giroud¹

On February 11, 2011, upon former Egyptian President Hosni Mubarak's resignation, the Swiss government decided to freeze, with immediate effect, all of his assets in Switzerland, as well as assets of closely connected individuals, in order to avoid any misappropriation of Egyptian government assets.

Announced by the President of the Swiss Confederation only 30 minutes after Mubarak's resignation, the Swiss government's decision shows its willingness to act against assets of presumed illicit origin. The government's political decision, however, raises the question of what legal framework is applicable to the confiscation of assets of politically exposed persons ("PEPs").

1. The Governmental Prerogative to Issue Ordinances in the Interests of the Country

In the wake of allegations of misappropriation by the Mubarak family of amounts ranging from USD 40 to 80 billion, the Swiss government made use of its prerogative under article 184(3) of the Swiss Federal Constitution to issue ordinances and rulings required to safeguard the interests of the country.² The Swiss government has long considered that it is in Switzerland's fundamental interest to ensure that the assets of PEPs which were obtained by unlawful means are not held in Switzerland. It has also made a priority of identifying misappropriated assets and their return to their country of origin. Accordingly, it has considered that the protection of its reputation as a financial centre as well as the reputation of the country as a whole is in Switzerland's interests within the meaning of article 184(3) of the Swiss Federal Constitution. Accordingly, the government considers that it may take the measures it deems necessary in respect of assets alleged to be of illicit origin, such as freezing them.

It is not the first time that the Swiss government has resorted to this constitutional prerogative. Already in the Mobutu and Duvalier cases, the Swiss government invoked its constitutional powers to freeze the assets of the Congolese and Haitian dictators for several years. More recently, on January 19, 2011, the Swiss government also decided to freeze the Swiss assets of former Tunisian President Ben Ali, as well as those of Ivory Coast President Laurent Gbagbo.

¹⁷ *Tunisia formally seeks extradition of Ben Ali*, WASH. POST, Feb. 3, 2011, at A7, col. 4.

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² RS 101.



It is important to note that when resorting to article 184(3) of the Swiss Federal Constitution, the Swiss government carries out an “acte de gouvernement,” in other words a political act. Ordinances rendered on this basis cannot be appealed. This of course creates a complex legal situation for the targets of such ordinances, in particular as to the right to be heard and the right to access to justice.

2. Subsidiarity to Existing Legal Mechanisms for the Recovery of PEPs’ Assets

The government’s constitutional prerogative, although important in practice, only constitutes a subsidiary measure to domestic criminal proceedings and mutual legal assistance mechanisms under the Swiss Criminal Code of December 21, 1937 (SCC),³ the Federal Money Laundering Act of October 10, 1997 (MLA)⁴ and the Federal Act on International Mutual Assistance in Criminal Matters of March 20, 1981 (IMAC).⁵

Indeed, ordinances under article 184(3) of the Swiss Federal Constitution can only be temporary. Therefore, while assets can be frozen, confiscation of assets by means of an ordinance is not permitted. Accordingly, confiscation can only occur in the context of domestic criminal proceedings, mutual legal assistance proceedings, or, as of February 1, 2011, in the context of the new Act on the Restitution of Illicit Assets (RIAA).⁶

A first tool for the confiscation of assets of illicit origin held by PEPs is domestic criminal law, in particular article 70 of the SCC, which provides for the forfeiture of assets that have been acquired through the commission of an offense. Therefore, assets acquired in the context of money-laundering, which is an offense under article 305bis of the SCC, can be forfeited pursuant to article 70.

Swiss legislation also requires banks to take steps to prevent money-laundering. Indeed, the strict provisions of the MLA oblige Swiss banks and all other providers of financial services not only to identify any party with whom or with which they do business, but also to determine who is the economic beneficiary (“Know Your Customer”). In particular, the MLA makes provision for a special duty of clarification with regard to PEPs. Moreover, the MLA requires banks and other financial intermediaries to report any suspicious transaction to the Money Laundering Reporting Office (MROS) and, if justified, to immediately block an account. It must be noted that Swiss banking secrecy is not a shield to criminal prosecution either within Switzerland or in respect of international legal assistance.

Another legal tool which is available for the recovery of misappropriated assets is mutual legal assistance at the request of a despoiled State. Switzerland provides assistance to a requesting State through mutual legal assistance in criminal matters either on a treaty or a non-treaty basis. Swiss treaty-based mutual legal assistance is governed by the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, including its Additional Protocols I and II, and, as of 24 October 2009, also by the United Nations Convention against Corruption. In addition, Switzerland has entered into bilateral agreements on mutual legal assistance in criminal matters with a number of foreign jurisdictions, including Algeria, Australia, Ecuador, Egypt, and the USA. Non-treaty based mutual legal assistance is provided in accordance with the IMAC, allowing competent Swiss authorities to seize and forfeit the proceeds of criminal acts such as corruption, money-laundering, and other forms of organized crime. Swiss legislation also allows for the initiation of a domestic criminal investigation in response to a foreign mutual legal

³ RS 311.0.

⁴ RS 955.0.

⁵ RS 351.1.

⁶ RS 196.1.



assistance request. For example, Swiss authorities can open a criminal investigation relating to the laundering in Switzerland of the proceeds of criminal conduct on foreign soil.

Finally, the entry into force of the RIAA has brought with it a new administrative law tool for the recovery of PEPs' assets of illicit origin, which is a subsidiary tool to the IMAC. It applies where a request for international mutual legal assistance in a criminal matter cannot succeed due to the failure of the requesting State's judicial system or governmental structure, which is technically referred to as a "failing State." The RIAA makes it possible to freeze and confiscate assets which are potentially of illicit origin without the need for a criminal conviction of the PEP in his country of origin.

3. In conclusion

The recent decisions of the Swiss government to issue ordinances freezing the assets of Mubarak along with those of Ben Ali and Laurent Gbagbo, as well as the assets of individuals or entities closely connected to them, is in line with its past practice in relation to PEPs' assets of presumed illicit origin. In taking these decisions, the Swiss government aims to protect the reputation, of Switzerland's financial sector, as well as the international reputation of the country as a whole.

Such decisions are a political reaction to allegations that PEPs' assets located in Switzerland are of illicit origin. Their aim is to prevent the disappearance of the assets before prosecuting authorities, in Switzerland or in the State of origin of the assets, can take legal action. They are temporary and are of a preventive nature.

Given their political nature, they cannot be appealed before the courts. This situation raises important questions as to the right of access to justice. It remains to be seen how Swiss courts will deal with the challenges that will undoubtedly be brought before them.

X. INTERNATIONAL CRIMINAL COURTS

A. French Transfer Rwandan Suspect to ICC

by Bruce Zagaris

On January 25, 2011, the French government transferred to the International Criminal Court (ICC) Callixte Mbarushimana, marking the first time that France has transferred a suspect to the Court.¹

According to the statement by ICC Prosecutor Luis Moreno-Ocampo, Callixte Mbarushimana was a top leader of the Rwandan armed group FDLR, which is responsible for the 1994 genocide in Rwanda and whose activities in the DRC triggered the Congo wars.

The suspect lived in Paris, contributing to the group's work, while FDLR troops continued to commit terror in Eastern DRC, murdering, torturing and raping on a massive scale.²

¹ Peggy Hollinger and Stanely Pignal, *French hand Rwandan rebel to Hague court*, FIN. TIMES, Jan. 26, 2011, at 7, col. 1.

² *Statement by ICC Prosecutor on transfer of Callixte Mbarushimana to the Hague*, ICC Press Release, Jan. 25, 2011.



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