

Master Thesis

Master in Legal Studies

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**International Legal
Assistance by
Switzerland
regarding Assets of
Politically Exposed
Persons**

Aline Haerri

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Bibliography

- ACEMOGLU DARON/ ROBINSON JAMES/ VERDIER THIERRY, Kleptocracy and Divide-and-Rule: A Model of Personal Rule, in: The Alfred Marshall Lecture, Journal of the European Economic Association Papers and Proceedings 2, April-May 2004, pp. 162-192.
- ACHTELIK OLAF, Politisch exponierte Personen in der Geldwäschereibekämpfung, Dissertation Universität Bremen, Shaker Verlag, Aachen 2009.
- ALTERMAN JON B., Egypt: Stable, but for How Long, in: The Washington Quarterly 23:4, Autumn 2000, pp. 107–118.
- BAKER STEPHEN/ SHORROCK ED, Gatekeepers, Corporate Structures and their Role in Money Laundering, in: Pieth Mark (ed.), Tracing stolen assets - A practitioner's handbook, International Centre for Asset Recovery, Basel Institute on Governance, Basel 2009.
- BERTOSSA BERNARD, Confiscation internationale et indépendance de la justice, in: Giroud Sandrine/ Borghi Alvaro (eds.), État de droit et confiscation internationale, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 19-37.
- BERTOSSA BERNARD, La restitution des valeurs issues de la corruption, in: Cassani Ursula/ Héritier Lachat Anne (eds.), Lutte contre la corruption internationale - The never ending story, Schulthess Verlag, Zürich 2011, pp. 135-138.
- BIAGGINI GIOVANNI, Kommentar BV, Bundesverfassung der Schweizerischen Eidgenossenschaft, Mit Auszügen aus der EMRK, den UNO-Pakten sowie dem BGG, Orell Füssli Verlag AG, Zürich 2007.
- BIANCHI FLAVIA/ HEIMGARTNER STEFAN, Die Rückerstattung von Potentatengeldern, in: Aktuelle Juristische Praxis (AJP/PJA), 3/2012, S. 353–370.
- BÖCKMANN ALEXANDER, Antikorruption - Wandel in Diskurs und Praxis, in: Achathaler Lukas/ Hofmann Domenica/ Pázmándy Matthias (eds.), Korruptionsbekämpfung als globale Herausforderung - Beiträge aus Praxis und Wissenschaft, VS Verlag für Sozialwissenschaften, Springer Fachmedien Wiesbaden GmbH, Wiesbaden 2011, pp. 149-163.
- BRADLEY JOHN R., After the Arab Spring - How Islamists Hijacked the Middle East Revolts, Palgrave Macmillan, New York 2012.
- BREITENMOSER STEPHAN, Neuere Rechtsentwicklungen in den Bereichen der internationalen Amts- und Rechtshilfe, in: Breitenmoser Stephan/ Ehrenzeller Bernhard (eds.), Aktuelle Fragen der internationalen Amts- und Rechtshilfe, Schriftenreihe des Institut für Rechtswissenschaft und Rechtspraxis, St. Gallen 2009.

- BRUN THEOBALD, Die Beschlagnahme von Bankdokumenten in der internationalen Rechtshilfe in Strafsachen, in: Band 39 Schweizer Schriften zum Bankrecht, Schulthess Polygraphischer Verlag AG, Zürich 1996.
- CAPUS NADJA, Strafrecht und Souveränität: Das Erfordernis der beidseitigen Strafbarkeit in der internationalen Rechtshilfe in Strafsachen, Stämpfli Verlag AG, Bern 2010.
- CASSANI URSULA, La lutte contre la corruption: Vouloir, c'est pouvoir?, in: Cassani Ursula/ Héritier Lachat Anne (eds.), Lutte contre la corruption internationale - The never ending story, Schulthess Verlag, Zürich 2011, pp. 33-61. (cit. CASSANI, La lutte contre la corruption).
- CASSANI URSULA, Les avoirs mal acquis, avant et après la chute du "potentat", Schweizerische Zeitschrift für internationales und europäisches Recht (SZIER) Issue 4 Vol. 20, 2010: 465-482. (cit. CASSANI, Les avoirs mal acquis).
- CELOZA ALBERT F., Ferdinand Marcos and the Philippines: The Political Economy of Authoritarianism, Praeger Publishers, Westport 1997.
- CHAIKIN DAVID/ SHARMAN J.C., Corruption and Money Laundering – A Symbiotic Relationship, Palgrave Macmillan, New York 2009.
- COPPA FRANK J., Mobutu, Sese Seko 1930-1997, in: Coppa Frank J. (ed.), Encyclopedia of Modern Dictators - From Napoleon to the Present, Peter Lang Publishing, New York 2006, pp. 188-189. (cit. COPPA, Mobutu).
- COPPA FRANK J., Mubarak, Muhammad Hosni 1928-, in: Coppa Frank J. (ed.), Encyclopedia of Modern Dictators - From Napoleon to the Present, Peter Lang Publishing, New York 2006, pp. 192-193. (cit. COPPA, Mubarak) ,
- CREMER GEORG, Corruption & Development Aid - Confronting the Challenges. Lynne Rienner Publisher Inc., Boulder 2008.
- DANNACHER MARNIE, Diktatorenengelder in der Schweiz - Einziehung und Herausgabe von unrechtmässig erworbenen Vermögenswerten politisch exponierter Personen, Helbing Lichtenhahn Verlag, Basel 2012.
- DE GORGE BARBARA, Qaddafi, Muammar al- 1942-, in: Coppa Frank J. (ed.), Encyclopedia of Modern Dictators - From Napoleon to the Present, Peter Lang Publishing, New York 2006, pp. 250-252. (cit. DE GORGE, Qaddafi)
- DE GORGE BARBARA, Assad, Bashar al- 1965-, in: Coppa Frank J. (ed.), Encyclopedia of Modern Dictators - From Napoleon to the Present, Peter Lang Publishing, New York 2006, pp. 16-18. (cit. DE GORGE, Assad)
- DE NÈVE DOROTHÉE, Korruption und Demokratie – Perspektiven der Politikwissenschaft, in: Achathaler Lukas/ Hofmann Domenica/ Pázmándy Matthias (eds.), Korruptionsbekämpfung als globale Herausforderung - Beiträge aus Praxis und

- Wissenschaft, VS Verlag für Sozialwissenschaften, Springer Fachmedien Wiesbaden GmbH, Wiesbaden 2011, pp. 129-147.
- DONATSCH ANDREAS/ HEIMGARTNER STEFAN/ SIMONEK MADELAINE, Internationale Rechtshilfe unter Einbezug der Amtshilfe im Steuerrecht, Schulthess Verlag, Zürich 2011.
- EYMANN STEPHANIE, Die strafprozessuale Kontosperrre, Helbling Lichtenhahn Verlag, Basel 2009.
- EZROW NATASHA/ FRANTZ ERICA, Dictators and Dictatorships - Understanding Authoritarian Regimes and Their Leaders, The Continuum International Publishing Group, New York 2011.
- FERGUSON JAMES, Papa Doc, Baby Doc, Haiti and the Duvaliers, Basil Blackwell Ltd, Oxford 1987.
- FUCHS RONNY/ SCHÄUBLE PETER, Name-Matching-Systeme: im Einsatz gegen Geldwäscherei und Terrorismusfinanzierung, Books on Demand GmbH, Norderstedt 2010.
- GEDDES BARBARA, What do we know about Democratization after 20 years?, in: Annual Review of Political Science Vol. 2, Palo Alto 1999, pp. 115-144.
- GEISS ROBIN, Failed States - Die normative Erfassung gescheiteter Staaten, Duncker & Humblot GmbH, Berlin 2005.
- GIROUD SANDRINE, État de droit et confiscation internationale: Quels enjeux pour l'État helvétique?, in: Giroud Sandrine/ Borghi Alvaro (eds.), État de droit et confiscation internationale, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 1-17.
- GRABER CHRISTOPH K./ OBERHOLZER DOMINIK, Das neue GwG. Geldwäschereigesetz, Gesetzesausgabe mit englischer Übersetzung, Ausführungserlassen und Anmerkungen, 3. überarbeitete und ergänzte Auflage, Schulthess Verlag, Zürich 2009.
- GRAFL LUCAS, Zum unterschiedlichen Verständnis von korrupten und strafwürdigen Handlungen - Eine empirische Untersuchung, in: Achathaler Lukas/ Hofmann Domenica/ Pázmándy Matthias (eds.), Korruptionsbekämpfung als globale Herausforderung - Beiträge aus Praxis und Wissenschaft, VS Verlag für Sozialwissenschaften, Springer Fachmedien Wiesbaden GmbH, Wiesbaden 2011, pp. 175-190.
- GRISEL ETIENNE, Vers une loi fédérale "sur la restitution des avoirs illicites", in: Giroud Sandrine/ Borghi Alvaro (eds.), État de droit et confiscation internationale, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 209-220.

- GROS JEAN-GERMAIN, *State Failure, Underdevelopment and Foreign Intervention in Haiti*, Routledge Taylor & Francis Group, New York and Abingdon 2012.
- GSTÖHL CAROLINE, *Geheimnisschutz im Verfahren der internationalen Rechtshilfe in Strafsachen*, Stämpfli Verlag AG, Bern 2008.
- GULLY-HART PAUL, *International asset recovery of corruption-related assets: Switzerland*, in: Pieth Mark (ed.), *Recovering Stolen Assets*. Peter Lang, Bern 2008, pp. 165-185. (cit. GULLY-HART, *Asset Recovery*).
- GULLY-HART PAUL, *The function of state and diplomatic privileges and immunities in international cooperation in criminal matters: the position of Switzerland*, *Fordham International Law Journal*, Issue 5, Article 3 Volume 23 1999: pp. 1334-1343. (cit. GULLY-HART, *Immunity*).
- HALLER DIETER/ SHORE CHRIS. *Corruption – Anthropological Perspectives*, Pluto Press, London 2005.
- HENZELIN MARC, *L’immunité pénale des chefs d’Etat en matière financière. Vers une exception pour les actes de pillage de ressources et de corruption?*, in: *Revue suisse de droit international et européen (RSDIE)* Vol. 12, 2002: pp. 179-212. (cit. HENZELIN, *L’immunité pénale*)
- HENZELIN MARC, *Le dédommagement des victimes étrangères dans le cadre de la procédure suisse d’entraide internationale en matière pénale v. la restitution des avoirs à l’étranger*, in: Giroud Sandrine/ Borghi Alvaro (eds.), *État de droit et confiscation internationale*, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 147-165. (cit. HENZELIN, *Victimes*)
- HÉRITIER LACHAT ANNE, *Intermédiaires financiers et corruption*, in: Cassani Ursula/ Héritier Lachat Anne (eds.), *Lutte contre la corruption internationale - The never ending story*, Schulthess Verlag, Zürich 2011, pp. 63-81.
- IKAMBANA PETA, *Mobutu's Totalitarian Political System: An Afrocentric Analysis*, Routledge Taylor & Francis Group, New York and Abingdon 2007.
- KEITH OLIVER, *‘Excellent!’ I cried. ‘Elementary!’ said he. Mutual legal assistance and the present challenges faced by the legal community in the never-ending quest for the recovery of stolen assets: the victim’s options*, in: Thelesklaf Daniel/ Gomes Pereira Pedro (eds.), *Non-State actors in Asset Recovery*, Basel Institute on Governance, Peter Lang, Bern 2011, pp. 161-182.
- KESSLER RICHARD J., *Marcos and the Americans*, in: *Foreign Policy* No. 63 (Summer 1986), *Washingtonpost Newsweek Interactive LLC* 1986, pp. 40-57.
- KLEY ANDREAS, *Die UBS-Rettung im historischen Kontext des Notrecht*, in: *Zeitschrift für Schweizerisches Recht* Vol. 130, Helbing Lichtenhahn Verlag, Basel 2011, pp. 123-138.

- LARSON ERIK N., The United Nations Convention against Corruption, in: Achathaler Lukas/ Hofmann Domenica/ Pázmány Matthias (eds.), Korruptionsbekämpfung als globale Herausforderung - Beiträge aus Praxis und Wissenschaft, VS Verlag für Sozialwissenschaften, Springer Fachmedien Wiesbaden GmbH, Wiesbaden 2011, pp. 11-18.
- LEVI MICHAEL/ LORD NICHOLAS, Links between corruption and organized crime and research gaps, in: Thelesklaf Daniel/ Gomes Pereira Pedro (eds.), Non-State actors in Asset Recovery, Basel Institute on Governance, Peter Lang, Bern 2011, pp. 38-61.
- MONFRINI ENRICO/ KLEIN YVES, L'Etat requérant lésé par l'organisation criminelle: L'exemple des cas Abacha et Duvalier, in: Giroud Sandrine/ Borghi Alvaro (eds.), État de droit et confiscation internationale, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 111-146.
- MONFRINI ENRICO, The Abacha case, in: Pieth Mark (ed.), Recovering Stolen Assets, Peter Lang, Bern 2008, pp. 41-61.
- MOREILLON LAURENT, Droit de l'entraide internationale en matière pénale. Commentaire romand, Helbing Lichtenhahn Verlag, Basel 2003.
- MOREILLON LAURENT/ MACALUSO ALAIN/ MAZOU MIRIAM, La remise internationale de fonds spoilés à l'épreuve des droit fondamentaux: Aspects de droit international et de droit régional, perspectives critiques en droit suisse, in: Giroud Sandrine/ Borghi Alvaro (eds.), État de droit et confiscation internationale, Genève, Lugano, Bruxelles: Editions interuniversitaires suisses 2010, pp. 39-88.
- PERDRIEL-VAISSIÈRE MAUD, How to turn Article 51 into reality?, in: Thelesklaf Daniel/ Gomes Pereira Pedro (eds.), Non-State actors in Asset Recovery, Basel Institute on Governance, Peter Lang, Bern 2011, pp. 17-37.
- PIETH MARK, Recovering Stolen Assets, Peter Lang, Bern 2008.
- PINI MATHIAS, Risk Based Approach – ein neues Paradigma in der Geldwäschereibekämpfung, Dike Verlag AG, Zürich/St. Gallen 2007.
- POPP PETER, Grundzüge der internationalen Rechtshilfe in Strafsachen, Helbing Lichtenhahn Verlag, Basel 2001.
- RICHTER DAGMAR, "Potentatengelder" in der Schweiz: Rechtshilfe im Spannungsfeld der Menschenrechte von Tätern und Opfern, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, ZaöRV 58, C. H. Beck, München 1998, pp. 541-609.
- SCHULZ MARKUS E., The role of financial institutions in anti-bribery and anti-corruption efforts, in: Thelesklaf Daniel/ Gomes Pereira Pedro (eds.), Non-State actors in Asset Recovery, Basel Institute on Governance, Peter Lang, Bern 2011, pp. 131-146.
- SCHUPP PIERRE-DOMINIQUE, La révision de la loi fédérale sur l'entraide internationale en matière pénale (EIMP), in: ZStrR Nummer 2 1997, pp. 180-195.

- SCHWEIZER RAINER J., Anforderungen der EGMR-Rechtsprechung an die internationale Amts- und Rechtshilfe im Kontext eines europäischen Paradigmenwechsels, in: Lorandi Franco/ Staehelin Daniel (eds.), *Innovatives Recht*, Dike Verlag AG, Zürich/St. Gallen 2011, pp. 985-1010.
- SNYDER RICHARD, Explaining Transitions from Neopatrimonial Dictatorships, in: *Comparative Politics* Vol. 24, Ph.D. Program in Political Science of the City University of New York, July 1992, pp. 379-399.
- STESSENS GUY, *Money Laundering: A New International Law Enforcement Model*, Cambridge University Press, Cambridge 2000.
- TERRY LAUREL S., An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance, in: *Journal of the Professional Lawyer - The Pennsylvania State University Legal Studies Research Paper* No. 39-2010, pp. 3-67.
- THELESKLAF DANIEL/ WYSS RAPHAEL/ ZOLLINGER DAVE/ VAN THIEL MARK, *GwG Geldwäschereigesetz - Kommentar zu GwG, StGB (Auszug), GwV-FINMA 1 und VSB 08 sowie die einschlägigen Verordnungen und Texte von UNO, Europarat, EU, FATF, Basler Ausschuss und Wolfsberg-Gruppe*, Orell Füssli Verlag AG, Zürich 2009.
- TOMES ROBERT, Marcos, Ferdinand, Edralin 1917-1989, in: Coppa Frank J. (ed.), *Encyclopedia of Modern Dictators - From Napoleon to the Present*, Peter Lang Publishing, New York 2006, pp. 178-181.
- WEDER ULRICH, Art. 260ter Kriminelle Organisation, in: Donatsch Andreas/ Flachsmann Stefan/ Hug Markus/ Maurer Hans/ Weder Ulrich (eds.), *StBG Kommentar*, Orell Füssli Verlag AG, Zürich 2006, pp. 320-321.
- WELCH KIMBERLY, Duvalier, François 1907-1971, in: Coppa Frank J. (ed.), *Encyclopedia of Modern Dictators - From Napoleon to the Present*, Peter Lang Publishing, New York 2006, pp. 83-87.
- WYSS RALPH, GwV-EBK, in: Thelesklaf Daniel/ Wyss Ralph/ Zollinger Dave (eds.), *Geldwäschereigesetz - Kommentar zu GwG, GwV-EBK, StGB (Auszug) sowie die einschlägigen Verordnungen und Texte von UNO, FATF, Basler Ausschuss und Wolfsberg-Gruppe*, Orell Füssli Verlag AG, Zürich 2003, pp. 151-251.
- ZIELNIEWICZ AGATA, Zur stärkeren Beteiligung der Bundesversammlung in ausserordentlichen Lagen, in: *Parlament, Parlement, Parlamento* Issue: 2 Volume: 13 2010, pp. 24-30.
- ZIMMERMANN ROBERT, *La coopération judiciaire internationale en matière pénale*, Stämpfli, Bern 2009.

Online Resources

(Arranged First in Groups of Similar Sources and then in Alphabetic Order)

International Center for Asset Recovery (ICAR):

ICAR, Chronology: Efforts to Recover Assets looted by Ferdinand Marcos of the Philippines, retrieved from <http://www.assetrecovery.org/kc/node/609c7c27-a33e-11dc-bf1b-335d0754ba85.html.html> (accessed on 19/02/2012). (cit. ICAR, Marcos Chronology)

ICAR, Chronology of the Duvalier case provided by the International Center of Asset Recovery (ICAR), retrieved from <http://www.assetrecovery.org/kc/node/3a54d197-11a4-11df-88c3-599b06b766bd.1> (accessed on 01/10/2011). (cit. ICAR, Duvalier Chronology)

ICAR, Ferdinand Marcos, retrieved from <http://www.assetrecovery.org/kc/node/5881e61f-a33e-11dc-bf1b-335d0754ba85.0;jsessionid=BAC233C24CE04AFC86156FD73F0D0764> (accessed on 19/02/2012). (cit. ICAR, Marcos Overview)

ICAR, Hosni Mubarak, Asset Recovery Knowledge Center, retrieved from <http://www.assetrecovery.org/kc/node/aa830c83-a324-11e0-aac0-351294c63a72.html> (accessed on 11/12/2012). (cit. ICAR, Mubarak Overview)

JIMU IGNASIO, Managing Proceeds of Asset Recovery: the Case of Nigeria, the Philippines, Peru and Kazakhstan, ICAR Working Paper Series No. 6 2008, retrieved from http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf (accessed on 02/04/2012). (cit. JIMU).

Schweizer Fernsehen (SF)

SF, Calmy-Rey: Gaddafi ist so gestorben, wie er regiert hat, Tagesschau 21/10/2011, retrieved from <http://www.tagesschau.sf.tv/Nachrichten/Archiv/2011/10/21/Schweiz/Calmy-Rey-Gaddafi-ist-so-gestorben-wie-er-regiert-hat> (accessed on 02/05/2012). (cit. SF, Calmy-Rey: «Gaddafi ist so gestorben, wie er regiert hat», 21/10/2011).

SF, Daniel Thelesklaf: Das Geldwäscherei-Gesetz hat zwei Lücken, Videoportal 21/02/2011, retrieved from http://www.videoportal.sf.tv/video?id=97934e43-0d23-4dd9-8f62-5ddeda915a0b;DCSext.zugang=videoportal_ahnlichevideos (accessed on 02/05/2012) (cit. SF, Interview with Daniel Thelesklaf of 21/2/2011).

SF, Interview mit Renate Schwob: Wir brauchen einen institutionalisierten Dialog, Videoportal 21/02/2011, retrieved from <http://www.videoportal.sf.tv/video?id=8c564081-861e-49b1-b287-6a02d9ec5ac1> (accessed on 02/05/2012). (cit. SF, Interview with Renate Schwob)

SF, Mubarak-Gelder in der Schweiz bleiben blockiert, 09/02/2012, retrieved from <http://www.tagesschau.sf.tv/Nachrichten/Archiv/2012/02/09/Schweiz/Mubarak-Gelder->

[in-der-Schweiz-bleiben-blockiert](#) (accessed on 02/05/2012). (cit. SF, Mubarak-Gelder, 9/2/2012)

SF, Schweiz beantragt bei UNO Freigabe blockierter libyscher Gelder, 01/09/2011, retrieved from <http://www.tagesschau.sf.tv/Nachrichten/Archiv/2011/09/01/Schweiz/Schweiz-beantragt-bei-UNO-Freigabe-blockierter-libyscher-Gelder> (accessed on 02/05/2012). (cit. SF, Schweiz beantragt bei UNO Freigabe blockierter libyscher Gelder, 1/9/2011)

SwissBanking

SWISSBANKING SWISS BANKERS ASSOCIATION, Aussichten, Politikbrief der Schweizerischen Bankiervereinigung, #03...Spurensuche...Ein sauberer Finanzplatz, Interview mit Renate Schwob, retrieved from http://www.swissbanking.org/3_aussichten_spurensuche_einsaubererfinanzplatz.pdf (accessed on 01/04/2012). (cit. SwissBanking, Aussichten, Interview mit Renate Schwob)

SWISSBANKING SWISS BANKERS ASSOCIATION, Dictators' Assets, retrieved from <http://www.swissbanking.org/en/home/dossiers-link/geldwaeschereibekaempfung/geldwaeschereibekaempfung-potentatengelder.htm> (accessed 24/02/2012). (cit. SwissBanking, Dictator's Assets)

WORLD BANK / Stolen Asset Recovery (StAR) Initiative:

GREENBERG THEODORE S./ GRAY LARISSA/ SCHANTZ DELPHINE/ LATHAM MICHAEL/ GARDNER CAROLINE, Stolen Asset Recovery - Politically Exposed Persons, A Policy Paper on Strengthening Preventive Measures For The Banking Sector, The World Bank, StAR, UNODC, Washington D.C. 2009, retrieved from http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/WB_PEPs_en.pdf (accessed on 18/2/2012). (cit. The World Bank, StAR, Politically Exposed Persons).

WORLD BANK, Stolen Asset Recovery (StAR) Initiative: Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action.: The World Bank, Washington D.C. 2011, retrieved from http://www1.worldbank.org/finance/star_site/documents/barriers/barriers_to_asset_recovery.pdf (accessed on 18/2/2012).

WORLD BANK, Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan, The International Bank for Reconstruction and Development/ The World Bank, Washington D.C. 2007, retrieved from <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> (accessed on 18/02/2012). (cit. World Bank, StAR, Challenges, Opportunities and Action Plan)

OTHER

- BAVIER JOHN, Congo's New Mobutu, Foreign Policy, 29/06/2010, retrieved from http://www.foreignpolicy.com/articles/2010/06/29/congo_s_new_mobutu?page=0,1 (accessed on 22/04/2012). (cit. Foreign Policy 29/06/2010, Congo's New Mobutu)
- BBC News, Haiti's history of misery, 13/01/2010, retrieved from <http://news.bbc.co.uk/2/hi/8456728.stm> (accessed on 11/10/2011). (cit. BBC, Haiti's history of misery, 13/1/2012).
- BEOBACHTER, Unschuldig auf der Terrorliste, Ausgabe 18/10, retrieved from <http://www.beobachter.ch/justiz-behoerde/buerger-verwaltung/artikel/uno-strafverfolgung-unschuldig-auf-der-terrorliste/> (accessed on 29/04/2012).
- BLOOMBERG, Freezing Mubarak Assets Shows How Switzerland Fights Image of Dirty Money 15/2/2011, retrieved from <http://www.bloomberg.com/news/2011-02-14/frozen-mubarak-assets-show-swiss-fighting-taint-of-dirty-money.html> (accessed on 1/2/2012). (cit. Bloomberg, Switzerland Fights Image of Dirty Money)
- CENTRAL INTELLIGENCE AGENCY (CIA), The World Factbook, Democratic Republic of the Congo, retrieved from <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (accessed on 22/4/2012). (cit. CIA World Factbook, DRC).
- CENTRAL INTELLIGENCE AGENCY (CIA), The World Factbook, Haiti, retrieved from <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (accessed on 22/4/2012). (cit. CIA World Factbook, Haiti).
- CENTRAL INTELLIGENCE AGENCY (CIA), The World Factbook, Swaziland, Economy, retrieved from <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (accessed on 30/3/2012). (cit. CIA World Factbook, Swaziland).
- FORBES MAGAZINE, The Top 15 Wealthiest Royals, 01/09/2008, retrieved from <http://www.forbes.com/global/2008/0901/038.html> (accessed on 30/03/2012). (cit. Forbes, Wealthiest Royals)
- FRANCE24, Freezing dictators' assets: is Switzerland setting a good example? 27/01/2011, retrieved from <http://www.france24.com/en/20110121-talking-points-freezing-dictators-assets-is-switzerland-setting-a-good-example> (accessed on 1/2/2012). (cit. France24, Is Switzerland setting a good example?)
- GAUTHIER AMÉLIE/ MOITA MADALENA, Vulnerability and causes of fragility in Haiti, FRIDE – A European Think Tank for Global Action March 2010, retrieved from <http://www.fride.org/publication/744/vulnerability-and-causes-of-fragility-in-haiti> (accessed on 01/05/2012).
- INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, An Introduction to the Responsibility to Protect, retrieved from <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (accessed on 2/5/2012) (cit. RtoP, Introduction)

- KELLER CHRISTOPH, Mobutus Bankgeheimnis, Das Magazin 19/06/2009, retrieved from http://www.aktionfinanzplatz.ch/pdf/news/DAS_MAGAZIN_Mobutus-Bankgeheimnis.pdf (accessed on 01/04/2012). (cit. KELLER, Das Magazin of 19/6/2009)
- PRICEWATERHOUSECOOPERS AG (PWC), Geldwäschereibekämpfung und Kundenidentifikation, Überblick und Regelungen, April 2003, retrieved from http://www.pwc.ch/user_content/editor/files/publ_bank/pwc_gwg_01-22_d.pdf (accessed on 2/12/2011). (cit. PWC, Geldwäschereibekämpfung 2003)
- SWISS EXPERTS IN ECONOMIC CRIME INVESTIGATION (SEECI), Interview with Jürg-Beat Ackermann in relation to the 6th Swiss Conference to Economic Criminal Law, retrieved from http://www.seeci.ch/DE/Interview_JBAckermann%20V.4.pdf (accessed on 30/04/2012). (cit. SEECI, Interview Ackermann)
- THE WOLFSBERG GROUP, Wolfsberg FAQ's on Politically Exposed Persons, retrieved from <http://www.wolfsberg-principles.com/faq-persons.html#1> (accessed on 5/1/2011). (cit. The Wolfsberg Group, Wolfsberg FAQ's on PEPs).
- TRANSPARENCY INTERNATIONAL, Frequently Asked Questions about Corruption, retrieved from http://www.transparency.org/news_room/faq/corruption_faq (accessed on 20/1/2012). (CIT. TI, FAQ about Corruption)
- TRANSPARENCY INTERNATIONAL, NGOs über FINMA-Bericht enttäuscht, 10 /11/2011, retrieved from: http://www.transparency.ch/de/aktuelles_schweiz/meldungen/2011_11_10_Finma.php?navanchor (accessed on 7 April 2012). (cit. TI, NGOs über FINMA-Bericht enttäuscht, 10 /11/2011)
- UN SECURITY COUNCIL DEPARTMENT OF PUBLIC INFORMATION, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, 17/3/2011, retrieved from <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> (accessed on 2/5/2012). (cit. UN Security Council Information, SC approves 'No-Fly-Zone', 17/3/2011)
- U.S. DEPARTMENT OF STATE, Diplomacy in Action, Background Note: Syria, retrieved from <http://www.state.gov/r/pa/ei/bgn/3580.htm#history> (accessed on 2/4/2012). (cit. U.S. DEPARTMENT OF STATE, Diplomacy in Action, Syria)
- U.S. DEPARTMENT OF STATE, Diplomacy in Action, Bureau of Near Eastern Affairs, Background Note: Egypt, 19 March 2012, retrieved from <http://www.state.gov/r/pa/ei/bgn/5309.htm> (accessed on 2/5/2012). (cit. U.S. DEPARTMENT OF STATE, Diplomacy in Action, Egypt)
- WORLD-CHECK, White Paper, Politically Exposed Persons – Refining the PEP Definition, Edition II. April, 2008, retrieved from http://www.world-check.com/media/d/content_whitepaper_reference/Refining_the_PEP_Definition_-_EditionII.pdf (accessed on 15/03/2012). (cit. WORLD-CHECK, PEPs)

WORLDCOMPLIANCE. Global PEP List – Politically Exposed Persons. Retrieved from <http://www.worldcompliance.com/en/content/global-pep-list.aspx> (accessed on 15/03/2012). (cit. WorldCompliance, Global PEP List)

Newspaper Articles

(Arranged First in Groups of Similar Sources and then in Alphabetic Order)

Financial Times (FT)

FT, Interactive map and timeline: Syria, FT 26/01/2012, retrieved from <http://www.ft.com/intl/cms/s/0/30c85d10-4814-11e1-b1b4-00144feabdc0.html#axzz1tj7vSvwN> (accessed on 02/04/2012). (cit. FT of 26/1/2012, Interactive map and timeline: Syria)

FT, Libya: Back to the bad old days, FT 16/02/2012, retrieved from <http://www.ft.com/intl/cms/s/0/55f01408-5885-11e1-9f28-00144feabdc0.html#axzz1tj7vSvwN> (accessed on 02/05/2012). (cit. FT of 16/2/2012, Libya: Back to the bad old days)

Neue Zürcher Zeitung (NZZ)

AP, Libyen hat 5,6 Milliarden Franken aus Schweiz abgezogen, NZZ 28/06/2009, retrieved from http://www.nzz.ch/nachrichten/wirtschaft/aktuell/libyen_hat_56_milliarden_franken_aus_schweiz_abgezogen_1.2836687.html?video=1.2023468 (accessed on 20/01/2012). (cit. NZZ 28/6/2009, Libyen hat 5,6 Milliarden Franken aus Schweiz abgezogen)

BOLLIGER MONIKA/ BAUMANN MERET, Wie weiter in Syrien?, NZZ 10/02/2012, retrieved from http://www.nzz.ch/nachrichten/politik/international/wie_weiter_in_syrien_1.14935072.html (accessed on 02/04/2012). (cit. NZZ 10/2/2012, Wie weiter in Syrien?)

DAPD, Haitis Justiz in der Kritik, NZZ 01/02/2012, retrieved from http://www.nzz.ch/nachrichten/politik/international/haitis_justiz_in_der_kritik_1.14724218.html on 1 March 2012 (accessed on 02/05/2012). (NZZ 1/2/2012, Haitis Justiz in der Kritik)

FREFEL ASTRID, Libyer bejubeln das Ende des Diktators, NZZ 20/10/2011, retrieved from http://www.nzz.ch/nachrichten/politik/international/ghadhafi_tod_libyen_frei_1.13065262.html (accessed on 02/05/2012). (cit. NZZ 20/10/2011, Libyer bejubeln das Ende des Diktators)

HÄUPTLI LUKAS, Die Crux mit den Potentatengeldern, NZZ 17/4/2011, retrieved from http://www.nzz.ch/nachrichten/politik/schweiz/die_crux_mit_den_potentatengeldern_1.

- [10282326.html](#) (accessed on 9/9/2011). (cit. NZZ 17/4/2011, Die Crux mit den Potentatengledern).
- HUS, Potentatengelder im Visier, NZZ 16/5/2011, retrieved from http://www.nzz.ch/nachrichten/wirtschaft/aktuell/potentatengelder_im_visier_1.10603089.html (accessed on 2/5/2012) (cit. NZZ 16/5/2011, Potentatengelder im Visier)
- IMHOF ISABELLA, Wenn der starke Mann plötzlich schwächelt, NZZ 27/07/2011, retrieved from: http://www.nzz.ch/nachrichten/politik/international/krankheit_machthaber_1.11655263.html (accessed on 19/10/2011). (cit. IMHOF, NZZ 27/7/2011, Wenn der starke Mann plötzlich schwächelt)
- SDA/ AFP/ DDP, Duvalier muss in Haiti bleiben, NZZ 21/01/2011, retrieved from http://www.nzz.ch/nachrichten/politik/international/duvalier_muss_in_haiti_bleiben_1.9168174.html (accessed on 01/10/2011). (cit. NZZ 21/1/2011, Duvalier muss in Haiti bleiben)
- SDA/ AFP, Urteil im Prozess gegen Mubarak am 2. Juni, NZZ 22/02/2012, retrieved from http://www.nzz.ch/nachrichten/politik/international/urteil_mubarak_1.15222730.html (accessed on 02/05/2012). (cit. NZZ 22/2/2012, Urteil im Prozess gegen Mubarak am 2. Juni)
- SDA, Bundesrat beschliesst Sanktionen gegen Syrien, NZZ 18/5/2012, retrieved from http://www.nzz.ch/nachrichten/politik/schweiz/bundesrat_beschliesst_sanktionen_gegen_syrien_1.10621855.html (accessed on 3/4/2012). (cit. NZZ 18/5/2012 Bundesrat beschliesst Sanktionen gegen Syrien)
- SDA/ DAPD/ REUTERS, EU verstärkt Sanktionen gegen Assad-Regime, NZZ 27/2/2012, retrieved from: http://www.nzz.ch/nachrichten/politik/international/eu_verstaerkt_sanktionen_gegen_ad-regime_1.15310110.html (accessed on 26/04/2012). (cit. NZZ 27/2/2012, EU verstärkt Sanktionen gegen Assad-Regime)
- SDA/ DPA/ AFP/ REUTERS/ DDP, Gemeinsam für ein neues Libyen, NZZ 01/09/2011 retrieved from http://www.nzz.ch/nachrichten/politik/international/gemeinsam_fuer_ein_neues_libyen_1.12281036.html (accessed on 26/04/2012). (cit. NZZ 1/9/2011, Gemeinsam für ein neues Libyen)
- SDA/DDP/AFP/REUTERS/DPA, “Baby Doc” kehrt nach Haiti zurück, NZZ 17/1/2011, retrieved from http://www.nzz.ch/nachrichten/politik/international/baby_doc_kehrt_nach_haiti_zurueck_1.9116977.html (accessed on 17/10/2011). (cit. NZZ 17/1/2011, “Baby Doc” kehrt nach Haiti zurück)
- SDA, Verfahren gegen Banken wegen Potentatengeldern, NZZ 10/11/2011, retrieved from http://www.nzz.ch/nachrichten/wirtschaft/aktuell/finma_verfahren_potentatengelder_1.

[13278946.html](#) (accessed on 12/04/2012). (NZZ 10/11/2012, Verfahren gegen Banken wegen Potentatengeldern)

SDA, Widmer-Schlumpf bestätigt Willen für Weissgeldstrategie, NZZ 22/02/2012, retrieved from http://www.nzz.ch/nachrichten/politik/schweiz/widmer-schlumpf_bestaetigt_willen_fuer_weissgeldstrategie.1.15218424.html (accessed on 02/05/2012). (cit. NZZ 22/2/2012, Widmer-Schlumpf bestätigt Willen für Weissgeldstrategie)

ZOLLINGER DAVID, Gestern noch „Regent“, heute ein „Potentat“, NZZ 03/04/2011, retrieved from http://www.nzz.ch/nachrichten/startseite/gestern_noch_regent_heute_ein_potentat.1.10115995.html on 19 October 2011 (accessed on 19/10/2011). (cit. ZOLLINGER, NZZ 3/4/2011, Gestern noch „Regent“, heute ein „Potentat“)

Other:

BRADLEY SIMON, Campaigners praise Mubarak asset freeze, Swissinfo.ch 15/02/2011 retrieved from http://www.swissinfo.ch/eng/specials/the_arab_spring/Campaigners_praise_Mubarak_asset_freeze.html?cid=29496466 (accessed on 13/01/2012). (cit. Swissinfo.ch of 15/2/2011, Campaigners praise Mubarak asset freeze)

BRADLEY SIMON, Return of Ben Ali funds remains a “paradox”, Swissinfo.ch 30/09/2011, retrieved from http://www.swissinfo.ch/eng/specials/the_arab_spring/Return_of_Ben_Ali_funds_remains_a_paradox_.html?cid=31247474 (accessed on 02/05/2012). (cit. Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a “paradox”)

CAPODICI VINCENZO, Syriens Kleptokraten, Tagesanzeiger 07/02/2012, retrieved from <http://www.tagesanzeiger.ch/ausland/naher-osten-und-afrika/Syriens-Kleptokraten/story/25863228> (accessed on 03/04/2012). (cit. Tagesanzeiger of 7/2/2012, Syriens Kleptokraten)

DENYER SIMON, Libya ponders when to investigate deep-rooted corruption, The Washington Post 18/09/2011, retrieved from http://www.washingtonpost.com/world/middle-east/libya-ponders-when-to-investigate-deep-rooted-corruption/2011/09/13/gIQA8bidaK_story.html (accessed on 02/05/2012). (cit. Washington Post, Libya ponders when to investigate deep-rooted corruption, 18/09/2011)

FRENCH HOWARD W., Anatomy of an Autocracy: Mobutu’s 32-Year Reign, The New York Times 17/05/1997, retrieved from <http://partners.nytimes.com/library/world/africa/051797zaire-mobutu.html> (accessed on 24/01/2012). (cit. FRENCH, The New York Times of 17/5/1997, Anatomy of an Autocracy: Mobutu’s 32-Year Reign)

- IL CORRIERE DELLA SERA, Gheddafi visita Roma, dopo le polemiche preclusa per lui l'aula del Senato, Il Corriera Della Sera 10/06/2009 retrieved from http://www.corriere.it/politica/09_giugno_10/gheddafi_visita_protesta_2d03e27e-559d-11de-8b38-00144f02aabc.shtml (accessed on 20/02/2012). (cit. Il Corriere Della Sera of 10/6/2009, Gheddafi visita Roma)
- KÜHNI OLIVIA, Ex-UBS-Chef Grübel: Weissgeldstrategie ist das Unwort des Jahres. Handelszeitung 29/02/2012, retrieved from: <http://www.handelszeitung.ch/unternehmen/ex-ubs-chef-gruebel-weissgeldstrategie-ist-das-unwort-des-jahres-0> (accessed on 02/05/2012). (cit. Handelszeitung 29/02/2012, Weissgeldstrategie ist das Unwort des Jahres).
- LA REPUBBLICA, Libia, la repressione fa più di 100 morti Berlusconi: "Non disturbo Gheddafi" 19/2/2011, retrieved from http://www.repubblica.it/esteri/2011/02/19/news/libia_hr-12640156/ (accessed on 12/4/2012). (La Repubblica, Non disturbo Gheddafi, 19/2/2011)
- NEW YORK TIMES, Shady Dealings Helped Qaddafi Build Fortune and Regime, 24/3/2011, retrieved from <http://www.nytimes.com/2011/03/24/world/africa/24qaddafi.html?pagewanted=all> (accessed on 2/5/2012). (cit. New York Times, Shady Dealings Helped Qaddafi Build Fortune and Regime, 24/3/2011)
- SDA, Schweiz gibt Millionen von Assads Cousin frei, Tagesanzeiger 10/02/2012, retrieved from <http://www.tagesanzeiger.ch/schweiz/standard/Schweiz-gibt-Millionen-von-Assads-Cousin-frei-/story/30226626> (accessed on 02/04/2012). (cit. Tagesanzeiger, Schweiz gibt Millionen von Assads Cousin frei, 10/2/2012)
- UNITED NATIONS NEWS CENTRE, Former Haitian leader must face charges for human rights abuses, says UN, UN News Centre 31/01/2012, retrieved from <http://www.un.org/apps/news/story.asp?NewsID=41082&Cr=haiti&Cr1=> (accessed on 02/05/2012). (UN News Centre 31/01/2012, , Former Haitian leader must face charges)
- UNITED NATIONS NEWS CENTRE, Haiti: UN human rights chief offers help to address crimes under Duvalier, UN News Centre 01/02/2011, retrieved from <http://www.un.org/apps/news/story.asp?NewsID=37432&Cr=Haiti&Cr1> (accessed on 02/05/2012). (cit. UN News Centre 01/02/2011, Haiti: UN human rights chief offers help to address crimes under Duvalier)
- UN NEWS CENTER, Security Council imposes sanctions on Libyan authorities in bid to stem violent repression, UN New Centre 26/2/2011, retrieved from <http://www.un.org/apps/news/story.asp?NewsID=37633> (accessed on 2/5/2012). (cit. UN News Centre, 26/2/2011 Security Council imposes sanctions on Libyan authorities)

Materials

1. Swiss Law, Dispatches, Parliamentary Acts and Official Online Sources

(Translated into English, Arranged First in Groups of Similar Sources and then in Alphabetic Order)

a. Legislation

Federal Act on International Mutual Assistance in Criminal Matters (Act on International Criminal Assistance, IMAC) of 20 March 1981, (Status as of 1 January 2012) (SR 351.1).

Federal Act on the Combating of Money Laundering and the Financing of Terrorism within the Financial Sector 10/10/1997 (Status as of 1 January 2010) (SR 955.0).

Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA) of 22 March 2002 (Status on 27 July 2004) (SR. 946.231).

Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act, RIAA) of 1 October 2010 (Status as of 1 February 2011) (SR 196.1).

Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 1 January 2011) (SR 101).

Federal Supreme Court Act of 17 June 2005 (Status as of 1 April 2012) (SR. 173.110).

Swiss Criminal Code of 21 December 1937 (Status as of 1 January 2012) (SR 311.0).

Ordinances

Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Prevention of Money Laundering and the Financing of Terrorism of 8 December 2010 (Status as of 1 January 2011) (SR 955.033.0).

Ordinance on Legal Assistance in Criminal Matters 24/02/1982 (Status as of 5 December 2006) (SR 351.11).

Ordinances on Egypt, Libya and Syria

Ordinance on measures against certain persons from Egypt of 2 February 2011 (Status as of 16 February 2011) (SR. 946.231.132.1), retrieved from <http://www.admin.ch/ch/d/sr/9/946.231.132.1.de.pdf> (accessed on 2/5/2012).

Ordinance on measures against certain persons from Libya of 21 February 2011 (SR 946.231.149.82), retrieved from <http://www.admin.ch/dokumentation/gesetz/00068/index.html?lang=de> (accessed on 02/05/2012). (cit. Ordinance on Libya of 21/2/2011, SR 946.231.149.82)

Ordinance on measures against certain persons from Libya of 30 March 2012 (SR 946.231.149.82), retrieved from <http://www.admin.ch/dokumentation/gesetz/00068/index.html?lang=de> (accessed on 02/05/2012). (cit. Ordinance on Libya of 30/3/2011, SR. 946.231.149.82)

Ordinance on measures against certain Syria 18 May 2011 (SR 946.231.172.7), retrieved from <http://www.admin.ch/ch/d/sr/9/946.231.172.7.de.pdf> (accessed on 02/04/2012). (cit. Ordinance on Syria of 18/5/2011, SR 946.231.172.7)

b. Dispatches

Dispatch concerning the Convention against Corruption (UNCAC) 21/09/2007 (SR.07.078), retrieved from <http://www.admin.ch/ch/d/ff/2007/7349.pdf> (accessed on 01/04/2012). (Dispatch UNCAC)

Dispatch concerning the Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act, RIAA) 28/04/2010, (SR 10.039) (BBI 2010 3309 et. seq) English Version, retrieved from <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/finec/intcr.Par.0018.File.tmp/Message%20LRAI%20in%20English.pdf> (accessed on 01/06/2011). (cit. Dispatch RIAA)

Dispatch concerning the Treaty in Legal Assistance in Criminal Matters between Switzerland and Egypt 3/7/2001 (SR 01.042), retrieved from <http://www.admin.ch/ch/d/ff/2001/4901.pdf> (accessed on 2/5/2012). (cit. Dispatch Treaty Legal Assistance in Criminal Matters between Switzerland and Egypt, SR 01.042)

c. Parliamentary acts (Motions and Interpellations)

EINFACHE ANFRAGE 97.1030, Mobutu-Vermögen in der Schweiz, 20/3/1997, Gysin Remo retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=19971030 (accessed on 22 April 2012). (cit. Einfache Anfrage 97.1030)

INTERPELLATION 11.3175, Sperrung ausländischer Vermögenswerte. Berechenbarkeit der Schweizer Politik gegenüber ausländischen Staaten und Partnern der Schweizer Wirtschaft 17/03/2011, Frick Bruno, The Swiss Parliament, Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113175 (accessed on 02/01/2012). (cit. Interpellation 11.3175)

MOTION 07.3872, Boykott der Uno-Terrorliste 21/12/2007, Vischer Daniel, The Swiss Parliament, Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20073872 (accessed on 29/4/2012). (cit. Motion 07.3872)

- MOTION 11.3148, Bewilligungspflicht für die Erbringung von Finanzdienstleistungen an politisch exponierte Personen 16/03/2011, Leutenegger Oberholzer Susanne, , The Swiss Parliament, Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113148 (accessed on 03/04/2012). (cit. Motion 11.3148)
- MOTION 11.3151, Blockierung von Geldern gestürzter Potentaten 16/03/2011, Leutenegger Oberholzer Susanne, The Swiss Parliament. Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113151 (accessed on 04/01/2011). (cit. Motion 11.3151)
- PARLIAMENTARY QUESTION 97.1030, Mobutu-Vermögen in der Schweiz 20/03/1997, Gysin Remo, The Swiss Parliament, Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=19971030 (accessed on 22/04/2012). (cit. Parliamentary question, 97.1030)
- POSTULAT 07.3459, Mutual assistance in the case of "failing states" 21/06/2007, Gutzwiller Felix, The Swiss Parliament, Curia Vista – Geschäftsdatenbank, retrieved from http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch_id=20073459 (accessed on 22/10/2011). (cit. Postulate 07.3459, Gutzwiller Felix)

d. Online Resources from State Departments

Federal Department of Foreign Affairs (FDFA)

- FDFA, Chronology of the Mobutu Assets Frozen in Switzerland, retrieved from http://www.eda.admin.ch/etc/medialib/downloads/edactr/cod.Par.0024.File.tmp/CHRONOLOGY_OF_THE_MOBUTU_ASSETS_FROZEN_IN_SWITZERLAND.pdf (accessed on 22/04/2012). (cit. FDFA Chronology of the Mobutu Assets Frozen in Switzerland)
- FDFA, Directorate of Public International Law (DPIL), Switzerland's concrete commitment for North Africa, The return of illegally acquired funds, retrieved from http://www.deza.admin.ch/en/Home/Countries/North_Africa/Projekte_in_Nordafrika (accessed on 02/05/2012). (cit. FDFA, DPIL, The return of illegally acquired funds)
- FDFA, FAQ: New Act on the Restitution of Illicit Assets (RIAA), retrieved from <http://www.eda.admin.ch/eda/en/home/topics/finec/intcr/poexp/faqria.0006.html#faq0006> (accessed on 22/4/2012).
- FDFA, Illicit assets of politically exposed persons (PEPs), retrieved from <http://www.eda.admin.ch/eda/en/home/topics/finec/intcr/poexp.html> (accessed on 11/02/2012). (cit. FDFA, Illicit assets of PEPs)
- FDFA, Immunity of holders of political office and of states, retrieved from <http://www.eda.admin.ch/eda/en/home/topics/intorg/chres/indig.html> (accessed on 25/10/2011). (cit. FDFA, Immunity)

FDFA, Restitution of Illicit Assets Act (RIAA), 1/2/2011, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=37478> (accessed on 22/10/2011). (cit. FDFA, RIAA 1/2/2011)

FDFA MEDIA RELEASE 03/02/2010, The Duvalier accounts remain blocked while a draft law will be reviewed that could permit illicit assets to be confiscated, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=31463> (accessed on 01/10/2011). (cit. FDFA, Duvalier accounts remain blocked, 03/02/2010)

FDFA MEDIA RELEASE 13/06/2010, Max Göldi returns to Switzerland, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=33660> (accessed on 02/05/2012). (cit. FDFA, Media release, Max Göldi returns to Switzerland, 13/10/2011)

FDFA MEDIA RELEASE 11/2/2011, Federal Council orders freezing of any assets of Egypt's former President Hosni Mubarak in Switzerland, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=37632> (accessed on 9/9/2011). (cit. FDFA, FC orders freezing of any assets of Egypt's former President)

FDFA MEDIA RELEASE 24/02/2011, The Federal Council condemns the use of force against the Libyan people and has blocked any assets held by Moammar Gaddafi in Switzerland, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=37795> (accessed on 02/05/2012). (cit. FDFA, Media release, The Federal Council condemns the use of force against the Libyan people (...), 24/2/2011)

FDFA MEDIA RELEASE 11/05/2011, Swiss delegation of experts on blocked assets, in Cairo, retrieved from: http://www.eda.admin.ch/eda/en/home/rebs/afri/vegy/embkai.encoded-Show%3D1%26print%3D1.html#ContentPar_0018 (accessed on 09/09/2011). (cit. FDFA, Swiss delegation of experts on blocked assets in Cairo)

FDFA MEDIA RELEASE 18/08/2011, The FDFA recalls the Swiss Ambassador in Syria to Berne for consultations, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=40641> (accessed on 03/04/2012). (cit. FDFA, The FDFA recalls the Swiss Ambassador in Syria to Berne for consultations, 18/8/2011)

FDFA MEDIA RELEASE 24/01/2012, Restitution of illicit assets in the context of the Arab Spring: meeting of experts in Lausanne, retrieved from <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=43127> (accessed on 02/05/2012). (cit. FDFA, Arab Spring)

Swiss Federal Banking Commission (SFBC):

SFBC, Annual Report 1987, retrieved from <http://www.finma.ch/archiv/ebk/d/publik/bericht/pdf/jb87.pdf> (accessed on 23/03/2012). (cit. SFBC Annual Report of 1987)

SFBC, Annual Report 1997, retrieved from <http://www.finma.ch/archiv/ebk/d/publik/bericht/pdf/jb97.pdf>. (accessed on 01/04/2012).

- SFBC, EBK-Geldwäschereibericht März 2003, retrieved from <http://www.finma.ch/archiv/ebk/d/archiv/2003/pdf/m032703-01d.pdf>, (accessed on 01/05/2012). (SFBC Geldwäschereibericht 2003)
- SFBC, Frequently Asked Questions regarding the SFBC Ordinance on Money Laundering, 2003, retrieved from <http://www.finma.ch/archiv/ebk/e/faq/faq9.html> (accessed on 11/01/2012). (cit. SFBC Q&A 2003)
- SFBC, SFBC Circular 98/1 26/03/1998, p. 5, paragraph 15, retrieved from <http://www.finma.ch/archiv/ebk/d/publik/mitteil/1998/m3-98-2.pdf> (accessed on 11/01/2012). (cit. SFBC Circular 98/1 of 26/3/1998)
- SFBC, Sorgfaltspflichten von Banken und Effektenhändlern bei Geldwäscherei, Terrorismusfinanzierung und Beziehungen zu politisch exponierten Personen, Bericht einer durch die Eidgenössische Bankenkommission eingesetzten Arbeitsgruppe zum Entwurf einer Verordnung der Eidgenössischen Bankenkommission, Juni 2002, retrieved from <http://www.finma.ch/archiv/ebk/d/archiv/2002/pdf/neu090702-02d.pdf> (accessed on 07/05/2012). (cit. SFBC, Arbeitsgruppe KYC, June 2002)

Swiss Federal Market Supervisory Authority (FINMA)

- FINMA, Due diligence obligations of Swiss banks when handling assets of “politically exposed persons” 11/03/2011, retrieved from <http://www.finma.ch/e/finma/publikationen/Documents/br-pep-20110311-e.pdf> (accessed on 02/05/2012). (cit. FINMA, Due Diligence Report of 11 March 2011)
- FINMA, Due diligence obligations of Swiss banks when handling assets of “politically exposes persons” 10/11/2011, retrieved from http://www.finma.ch/e/aktuell/Documents/bericht_pep-abkl%C3%A4rung_20111110_e.pdf (accessed on 02/05/2012). (cit. FINMA, Due Diligence Report of 10 November 2011)
- FINMA, Geldwäschereiverordnung-FINMA (GwV-FINMA), Erläuterungsbericht 08/06/2010, retrieved from <http://www.finma.ch/d/regulierung/anhoerungen/Documents/erlaeuterungsbericht-geldwaeschereiverordnung-finma-20100611-de.pdf> (accessed on 02/5/2012). (cit. FINMA, GwV-FINMA Erläuterungsbericht)

OTHER

- BUNDESAMT FÜR JUSTIZ, Die international Rechtshilfe in Strafsachen, Wegleitung, 9. Auflage, 2009, retrieved from <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0085.File.tmp/wegl-str-d-2009.pdf> on 26 January 2012 (accessed on 15/03/2012). (cit. Wegleitung)
- FEDERAL ADMINISTRATION, News, Verordnung über Massnahmen gegen Syrien, 18/5/2011, retrieved from

<http://www.news.admin.ch/message/index.html?lang=de&msg-id=39212> (accessed on 02/05/2012). (cit. Federal Administration, Verordnung über Massnahmen gegen Syrien, 18/5/2011)

FEDERAL DEPARTMENT OF JUSTICE AND POLICE, International Police Co-operation, Federal Office of Police, retrieved from http://www.ejpd.admin.ch/content/ejpd/en/home/themen/sicherheit/ref_polizeizusammenarbeit.html (accessed on 15/03/2012). (cit. FDJP, International Police Co-operation)

FEDERAL DEPARTMENT OF JUSTICE AND POLICE, Media Release 12/2/2009, Handover of Duvalier assets to Haiti ordered, retrieved from <http://www.bj.admin.ch/content/bj/en/home/dokumentation/medieninformationen/2009/2009-02-12.html> (accessed on 15/3/2012). (cit. FDJP, Handover of Duvalier assets, 12/2/2009).

SECO, Swiss Criminal Law on Corruption, retrieved from <http://www.seco.admin.ch/themen/00645/00657/00659/01395/index.html?lang=en> (accessed on 14/02/2012). (cit. SECO, Swiss Criminal Law on Corruption)

2. International Law, Treaties and Organizations

Bilateral treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters 25 May 1973 (RVUS) (SR 0.351.933.6).

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 8 November 1990 (Status as of 1 August 2009) (GwUe) (SR 0.311.53).

European Convention on Human Rights 4 June 1950 (Status as of 23 February 2012) (SR 0.101).

European Convention on Mutual Legal Aid in Criminal Matters 20 April 1959 (Status as of 1 April 2010) (SR 0.351.1).

European Union's first Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0308:EN:HTML> (accessed on 1/2/2012).

European Union COMMISSION DIRECTIVE 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, L214/29. (cit EU Commission Directive 2006/70/EC).

European Union Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of

money laundering and terrorist financing, Official Journal L 309 , 25/11/2005 P. 0015 – 003. (cit. EU Directive 2005/60/EC).

International Covenant on Civil and Political Rights of 16 December 1966, SR. 0.013.2.

OECD Convention of 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions (SR 0.311.21), retrieved from <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (accessed on 01/04/2012). (cit. OECD Convention on Bribery of 1997, SR 0.311.21)

The Council of Europe Recommendation Nr. R (80) 10 of 1980 and its Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, retrieved from <http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>; (accessed on 13/04/2012).

United Nations Convention against Corruption (UNCAC), retrieved from http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed on 01/04/2012).

UN Security Council Resolution 1970 of 26/2/2011, retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement> (accessed on 02/05/2012). (cit UN Security Council Resolution 1970 of 26/2/2011)

UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, retrieved from: http://www.unodc.org/pdf/convention_1988_en.pdf; (accessed on 13/04/2012).

Financial Action Task Force (FATF)

FATF, Laundering the Proceeds of Corruption July 2011, retrieved from <http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> (accessed on 13/04/2012). (cit. FATF Laundering the Proceeds of Corruption)

FATF, Regulations of 2012, retrieved from: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20approved%20February%202012%20reprint%20March%202012.pdf> (accessed on 13/04/2012). (cit. FATF Regulations of 2012)

FATF, Report on Money Laundering Typologies 2003-2004, retrieved from <http://www.oecd.org/dataoecd/19/11/33624379.PDF> (accessed on 10/03/2012). (cit. FATF Typologies Report 2003-2004)

Other

Declaration of principles adopted by the central bank governors of the G-7 states on the initiative of the Bank for International Settlements (BIS) in Basle, retrieved from <http://www.bis.org/publ/bcbcs137de.pdf>; (accessed on 13/04/2012).

3. Judicial Decisions

BGE 105 Ib 282

BGE 112 Ib 576

BGE 115 Ib 517

BGE 116 Ib 101

BGE 116 Ib 452

BGE 120 Ib 119

BGE 121 IV 43

BGE 123 II 276

BGE 123 II 595

BGE 126 II 462

BGE 129 II 268

BGE 131 II 169

BGE 136 IV 4

BGer 1P.581/2000 of 8 December 2000

BGer of 17 July 2007, 1C_138/2007

BGer of 12 January 2010, 1C_374/2009

FCC Decision of 12 August 2009 RR.2009.94

Abbreviations

AMLO-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Prevention of Money Laundering and the Financing of Terrorism of 8 December 2010 (status as of 1 January 2011), SR 955.033.0
art.	article
artt.	Articles
BGE	Leading Decision of the Federal Supreme Court [German: Bundesgerichtsentscheid (BGE)]
BGer	Decision of the Federal Supreme Court
BCBS	Basel Committee on Banking Supervision
c.	consideration (in connection with decisions of the Federal Supreme Court)
cf.	confer
cit.	cited as
CHF	Swiss Francs
Dispatch RIAA	Dispatch concerning the Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act, RIAA)
ECHR	European Convention on Human Rights and Fundamental Freedoms
Embargo Act	Federal Act on the Implementation of International Sanctions of 22 March 2002 (946.231, Embargogesetz, EmbG)
e.g.	for example (exempli gratia)
et seq.	and the following
FAC	Federal Administrative Court [Bundesverwaltungsgericht]
FATF	Financial Action Task Force
FCC	Federal Criminal Court [Bundesstrafgericht]
FCCA	Federal Criminal Court Act
FDF	Federal Department of Finance
FDFA	Federal Department of Foreign Affairs [EDA]
FDJP	Federal Department of Justice and Police
Fig.	Figure

FINMA	Swiss Financial Market Supervisory Authority
FOJ	Federal Office of Justice
FSC	Federal Supreme Court [Bundesgericht]
FT	Financial Times
ICCPR	International Covenant on Civil and Political Rights
i.e.	that is (id est)
IMAC	Federal Act on International Mutual Assistance in Criminal Matters [Internationale Rechtshilfe in Strafsachen, IRSG]
m.	million
MLA	Federal Act on the Combating of Money Laundering and the Financing of Terrorism within the Financial Sector of 10 October 1997 (status as of 1 January 2010), SR 955.0 [Geldwäschereigesetz, GwG]
N	Number
NZZ	Neue Zürcher Zeitung
p.	page
para.	paragraph
PC	Swiss Penal Code / Swiss Criminal Code [Strafgesetzbuch, StGB]
pp.	pages
RIAA	Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means [Bundesgesetz über die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen, RuVG]
SBA	Swiss Bankers Association, Swiss Banking
SC	Swiss Constitution [Bundesverfassung, BV]
SECO	State Secretariat for Economic Affairs
SFBC	Swiss Federal Banking Commission
StAR	Stolen Asset Recovery
subpara.	Subparagraph
TI	Transparency International
UNCAC	United Nations Convention against Corruption
US	United States of America
USD	US Dollars

Abstract

The paper examines the issue of international legal assistance provided by Switzerland in connection with assets of Politically Exposed Persons (PEPs)¹. Switzerland has been confronted with prominent cases involving PEPs since the 1980ies² and even today, Switzerland stands in front of important international legal assistance cases in connection with the Arab spring which have yet to be solved. This paper starts with presenting the general legal and political implications of assets of PEPs in their wider context. It will in the following examine the general legal framework as provided by the Act on International Criminal Assistance (IMAC)³ in the context of PEP assets⁴. Yet, on the basis of this solid act, some cases involving PEP assets obtained by unlawful means that stood in connection with failing states led to morally unsatisfying results. In response to this, a new subsidiary act has been designed specifically in order to solve such PEP asset related cases, the Restitution of Illicit Assets Act (RIAA)⁵. Furthermore, the paper is devoted to addressing open issues regarding the current legal assistance framework concerning PEP assets.

The analysis is confined to the legal field of international legal assistance and does not consider other procedural options to tackle the issue such as by means of penal law or civil law.⁶ In the field of international legal assistance, the study is limited to the legal basis of the IMAC and the RIAA.

Introduction

The issue of assets of Politically Exposed Persons (henceforth PEPs)⁷ has been the focus of attention in Switzerland for many years. It is all the more topical today in light of what has been going on at the beginning of 2011 with what has come to be referred to as “Arab spring”. Indeed, Switzerland’s fast response to the Arab uprising with regard to the freezing of PEP assets from the concerned states attracted attention worldwide. However, it was perceived in two ways: on the upside, it was recognized that Switzerland’s legal system is prepared to deal

¹ The acronym is mostly used in its plural form, i.e. PEPs, yet sometimes the singular is used, i.e. PEP.

² Dispatch concerning the Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means of 28 April 2010, (SR 10.039), English version (henceforth Dispatch RIAA), p. 2 and p. 6.

³ Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981, (Status as of 1 January 2012), SR 351.1 (henceforth IMAC).

⁴ What is meant with ‘PEP assets’ are assets in the power of disposal of a PEP. The terms potentate’s assets or dictators’ assets (German terms: Potentatengelder oder Diktatorengelder) is often used in the literature to designate the assets that belong to PEPs who qualify as potentates or dictators. Yet, as there is no clear legal concept for potentates or dictators in connection with their assets, this paper will use the term PEP assets as the term PEP is well embedded in most legal systems.

⁵ Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means of 1 October 2010 (Status as of 1 February 2011), SR 196.1 (henceforth RIAA).

⁶ For details on the means of penal and civil law to address the issue, see DANNACHER (cf. bibliography); cf. for civil law action in legal assistance KEITH.

⁷ The acronym is mostly used in its plural form, i.e. PEPs, yet sometimes the singular is used, i.e. PEP.

with the issue of PEP assets⁸, but on the downside, it was questioned whether Switzerland was still a haven for ill-gotten assets.⁹ Even before the uprisings, the topic has featured high on the political agenda in Switzerland due to the coming into force of the Federal Act on the Restitution of Illicit Assets (henceforth RIAA) on 1 February 2011.

The Swiss approach to the PEP assets issue is mainly based on two pillars: first, it is concerned with the prevention of corruption and anti-money laundering (henceforth AML) which is mainly dealt with by imposing due diligence obligations to its financial sector; second, it focuses on mutual legal assistance and the restitution of assets.¹⁰ Most of the legal set-up that is specifically designed for PEPs stems from the first pillar; however, with the introduction of the RIAA, there is now also a regulation aimed specifically at the PEP assets issue on the legal assistance side. The emphasis of this paper is clearly put on the second pillar and examines international mutual legal assistance in criminal matters (henceforth legal assistance) by Switzerland regarding assets of PEPs. The topic is examined against the backdrop of the introduction of the RIAA.

The title of this paper has to be specified in two ways. First, the examination of legal assistance is confined to assistance in criminal matters¹¹ (as opposed to civil or administrative matters). Hence, the foreign procedure that is being supported by legal assistance is of penal nature.¹² The paper will focus on acts relating to the assets of PEPs and will thus concentrate on legal assistance as provided by ancillary legal assistance¹³. Specifically, it will focus on the following acts of ancillary mutual assistance: the freezing, the forfeiture and the handing over for restitution of assets.¹⁴ Second, the notion of assets of PEPs is often equated with potentates' or dictators' assets or funds.¹⁵ When referring to PEP assets in this paper, the notion implies that the assets stand in connection with an unlawful origin.¹⁶ Furthermore, the notion of assets covers all belongings attributable to a PEP in Switzerland.¹⁷

⁸ As examples, France24, *Is Switzerland setting a good example?* or Bloomberg, *Switzerland Fights Image of Dirty Money*.

⁹ SwissBanking, *Dictators' Assets*.

¹⁰ FDFA, *Illicit assets of PEPs*.

¹¹ International legal assistance in criminal matters in its broad sense includes acts such as the extradition of persons, the delegation of the prosecution, and the enforcement of foreign criminal decisions; cf. ZIMMERMANN, p. 7.

¹² GSTÖHL, p. 93.

¹³ Ancillary mutual legal assistance is sometimes also called minor mutual legal assistance; cf. DONATSCH/HEIMGARTNER/SIMONEK, p. 185.

¹⁴ *Wegleitung* 2009, p. 5; for a more detailed overview of procedural measures included by ancillary mutual assistance, cf. CAPUS, p. 329; more on ancillary legal assistance will be discussed in chapter 0.

¹⁵ BIANCHI/HEIMGARTNER, p. 355; see also DANNACHER, title; FDFA, *Illicit assets of PEPs*.

¹⁶ In a similar vein, the PEP concept is often closely linked to the concept of potentates. The PEP definitions do not make this link (see section 1.1); yet when PEPs are connected to assets obtained by unlawful means the probability of the PEP in question being a potentate is high. Furthermore if PEPs stand in connection with legal assistance proceedings, the origin of the assets is questioned. Whether assets are of unlawful origin depends on how they have been acquired.

¹⁷ Cf. Dispatch RIAA, p. 20. Then term 'assets' may include bank accounts, real estate or any other sort of property held by a PEP in Switzerland.

Procedure and structure of the paper

This paper is divided into four parts. The first part aims at presenting the general legal and political implications of assets of PEPs in their wider context. It begins with a discussion of the definition of PEP and, as a second step, presents the concept against the backdrop of the Swiss and the international legal framework. Section 3 will distance itself from the legal perspective in that it will take a more holistic approach to the issue of PEPs by looking at the fundamental problems connected to PEP assets obtained by unlawful means, i.e. it will focus on the problem of corruption and will discuss the ambiguous international relationships to PEPs that can be qualified as dictators.

Part II of this paper outlines the general framework of legal assistance as stipulated in the Swiss law. Thereby the focus lies on the IMAC and its tools to react to assets of PEPs in Switzerland. Bilateral legal assistance agreements will not be covered in this paper.¹⁸ In addition to exploring the general legal framework, some of the prominent previous cases will be looked into. Furthermore, the current most seminal cases will be discussed. In studying these cases, the focus will lie on the legal assistance proceedings in Switzerland. A more detailed overview of the cases is presented in Annex 3.¹⁹ As a last step, the main problems of legal assistance based on the IMAC in connection with PEP assets will be addressed.

Part III is concerned with the newly introduced RIAA, which is subsidiary to the IMAC. The law has been customized for those PEP asset cases where in spite of the removal of the corrupt PEPs that have exploited a state, the succeeding government is unable or unwilling to realize the necessary legal conditions to conduct the appropriate proceedings for international legal assistance.²⁰ The act provides mechanisms for the freezing, forfeiture and restitution of PEP assets.²¹ The first section will look at its history and purpose. As a second step, its content will be discussed in detail. Third, the scope of its applicability will be discussed. Finally, the main problems of the RIAA will be summarized.

Part IV is devoted to addressing open issues regarding the current legal assistance framework concerning PEP assets. Specifically, it discusses the problem of the freezing under art. 184 para. 3 of the Swiss Constitution (henceforth SC)²². Furthermore, the importance of safeguarding fundamental rights will be addressed, since both the IMAC and the RIAA cause problems in this respect. Additionally this part of the paper will examine the question if further and more comprehensive legislation is needed in the matter and as to what the future

¹⁸ While bilateral agreements are of particular importance in legal assistance, it is assumed that the number of treaties Switzerland has entered into with states that are ruled by highly corrupt states is insignificant.

¹⁹ Tables 4 to 9 in Annex 3 give background information on the selected cases. The focus thereby is on the economic situation in the states concerned, its international affairs, as well the post fall situation in the country that is relevant with regard to the application of the RIAA.

²⁰ Dispatch RIAA, pp. 13-14.

²¹ FDFA, Illicit assets of PEPs.

²² Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 1 January 2011), SR 101; (henceforth SC).

of Swiss banking with respect to PEP assets may look like. Finally, the paper addresses the need for a global approach to tackle the issues of PEP assets obtained by unlawful means.

Evaluation of the existing literature

The problem area of PEP assets is being approached from various fields of study. For instance, substantial contributions come from the fields of study concerned with corruption and money laundering.²³ Further significant input comes from the initiatives related to asset recovery²⁴, e.g. the Stolen Asset Recovery Initiative (StAR)²⁵ or the International Center for Asset Recovery (ICAR) of the Basel Institute on Governance.²⁶

With regard to the confined field of legal assistance in connection with PEP assets, many of the prominent authors have added to the discussion.²⁷ An article by Richter of 1998 is very informative and links the issue to its human rights implications.²⁸ For the first time, the recently published dissertation by Dannacher examines the issue of PEP assets in Switzerland in connection with legal assistance under Swiss law, including a detailed examination of the RIAA.²⁹

Goals of the Paper

In a first step, this paper intends to present the PEP issue from an integrated approach in that it embeds the subject in its context of money laundering and corruption. It aims at examining the legal framework provided by international legal assistance in criminal matters under Swiss law. To be more specific, it deals with the acts of freezing, the forfeiture and the handing over for restitution of assets connected to PEPs as provided by the IMAC and the RIAA. Furthermore, it is devoted to addressing open issues regarding the current legal framework concerning PEPs, which include concerns for the respect of human rights.

²³ E.g. ACHELNIK, he has examined the PEP issue in his dissertation in the AML context; CHAIKIN/SHARMAN investigate on the relationship between corruption and money laundering.

²⁴ Cf. PIETH.

²⁵ StAR is an initiative that was jointly launched by the UNODC and the World Bank in order to support the international fight against the laundering of the proceeds of corruption, the initiative has published important papers and guides in the PEP matter, cf. their website http://www1.worldbank.org/finance/star_site/.

²⁶ Basel Institute of Governance, International Center for Asset Recovery (ICAR), cf. their website <http://www.assetrecovery.org/kc/node/7145c5fb-a33e-11dc-bf1b-335d0754ba85.3> (accessed on 1/4/2012); for example, ICAR assists developing countries in recovering stolen assets by helping to set up legal assistance requests and provides a knowledge center with essential chronologies of asset recovery cases and other important information.

²⁷ Important publications in the matter include, among others, Cassani's revealing article on the RIAA before its entry into force, see CASSANI, *Les avoirs mal acquis*; Bianchi and Heimgartner have recently published an article in AJP on the matter, see BIANCHI/HEIMGARTNER; furthermore, the problem has recently been approached from the angle of the rule of law in connection with international forfeiture, see GIROUD/BORGHI.

²⁸ RICHTER.

²⁹ DANNACHER.

1. The Legal and Political Implications of Assets of PEPs Obtained by Unlawful Means

1.1. The Concept of PEPs

1.1.1. History of the PEP concept in Switzerland

The Swiss Federal Banking Commission (henceforth SFBC) – the predecessor of today’s Financial Market Supervisory Authority (henceforth FINMA) – has preoccupied itself with PEPs since the 1980s, when it was faced with the Marcos, Duvalier and Abacha cases.³⁰ The SFBC’s annual report of 1987 already mentioned the necessity for banks to regulate such business relationships back at the time.³¹ Clearly, the need for the identification of PEPs is caused by an enhanced probability of corruption and money laundering and, as a result of this, PEPs entail an increased reputational risk for the Swiss banking sector.³² Hence, the concept has originated in connection with specific due diligence obligations of financial intermediaries. Back at the time the SFBC left it up to the banks to regulate the issue with appropriate directives.³³ In its annual report of 1997, the SFBC elaborated on the concept in further detail in that it pointed out that “a bank must not accept transfers to accounts if it knows or should know that the assets are coming from corruption or misuse of public funds”³⁴.

1.1.2. The PEP Definition

With the SFBC Circular 98/1, Switzerland was first in requiring financial intermediaries to introduce concrete business policies regarding persons in, or with, significant public functions and people known to be close to the said persons.³⁵ Since, it has developed the specific obligations in connection with PEPs. With the combination of the three previous Anti-Money Laundering Ordinances of the SFBC³⁶, the current definition of PEP with regard to due diligence obligations is laid down in the Ordinance of the FINMA on the Prevention of

³⁰ HÉRITIER LACHAT, p. 72.

³¹ HÉRITIER LACHAT, p. 72; RICHTER, p. 549; in this report, the SFBC points out that “Les cas Marcos et Duvalier démontrent à quel point il peut être délicat pour des banques d’accepter en grande quantité des avoirs de chefs d’Etats étrangers”³¹, hence justifying the necessity that the decision on whether a business relationship with “foreign heads of states”³¹ can be accepted or continued (after weighing all the circumstances) needs to be taken at management level and not by subordinate services of the bank, SFBC Annual Report of 1987, p. 156, free translation by the author.

³² FUCHS/ SCHÄUBLE, p. 16.

³³ SFBC Annual Report of 1987, p. 156.

³⁴ SFBC Annual Report of 1997, p. 22; free translation by the author from the German original: „Eine Bank darf keine Überweisungen auf bei ihr eröffnete Konti akzeptieren, wenn sie weiss oder wissen müsste, dass die Gelder aus Korruption oder dem Missbrauch öffentlicher Gelder stammen“.

³⁵ SFBC Circular 98/1 of 26/3/1998, p. 5, para. 15; cf. FINMA, Due Diligence Report of 11 March 2011, p. 5.

³⁶ FINMA Money Laundering Ordinances 1 (SR 955.022), 2 (SR 955.0232) and 3 (SR 955.033.0).

Money Laundering and the Financing of Terrorism (AMLO-FINMA)³⁷, which will be discussed in section 1.2.1.1.³⁸

The international fostering of the PEP concept came about with the Abacha affair and with it, the international conference of representatives of G-7 countries and Switzerland in 2001 out of which resulted the Supervisors' PEP working paper 2001³⁹. The paper represents the basis for the handling of banking relationships with PEPs.⁴⁰ Since then many different definitions of the PEP concept have been developed; however, it is often lamented that there is no universal worldwide PEP definition⁴¹, which makes the uniform implementation of measures more difficult. In Annex 1, some of the major supra-national, international as well as national PEP definitions are presented in Table 2 Selected Definitions of PEP. A comprehensive comparison of the PEP definitions among the standard setters has been elaborated by the World Bank.⁴² The international benchmark definition is provided by the FATF⁴³, which has been taken over by the International Monetary Fund (IMF) and the World Bank.⁴⁴ Although the presented definitions differ, the core characteristics composing the FATF definition can be found in most other definitions. These core characteristics are:

- (a) Characteristic of Prominence or Seniority: Person is holding or has held a prominent public function.
- (b) Characteristic of Family or Entourage: Family members or close associates of such persons are included in the definition.
- (c) Characteristic of being foreign: The function is held in a foreign country.

However, several elements of those core characteristics suffer from clarity and need further interpretation. The first issue arises with regard to who is a PEP, which mainly raises the following questions:

- (1) How much prominence or seniority is needed to qualify as a PEP?
- (2) What is meant by 'family' or 'entourage'?
- (3) Shall the definition include domestic PEPs?
- (4) Shall legal entities be included in addition to natural persons?

Furthermore, how long exactly a PEP shall be considered as such after the person in question has stepped down from the prominent position is largely a matter of interpretation. Annex 2

³⁷ Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on the Prevention of Money Laundering and the Financing of Terrorism of 8 December 2010 (Status as of 1 January 2011), SR 955.033.0 (henceforth AMLO-FINMA).

³⁸ FINMA, Due Diligence Report of 11 March 2011, the definition was in all three ordinances congruent and has been taken over unchanged by the AMLO-FINMA, cf. FINMA, GwV-FINMA Erläuterungsbericht, p. 24.

³⁹ SFBC, Arbeitsgruppe KYC, June 2002, p. 15.

⁴⁰ SFBC, Arbeitsgruppe KYC, June 2002, p. 15.

⁴¹ Dispatch RIAA, p 21; StAR, Politically Exposed Persons, A Policy Paper on Strengthening Preventive Measures, p. 25

⁴² The World Bank, StAR, Politically Exposed Persons, Appendix C, p. 79.

⁴³ Cf. Annex 1 for the content of the FATF definition.

⁴⁴ WORLD-CHECK, PEPs, p. 5.

Table 3 provides a comparison of the Swiss approach as laid down in the AMLO-FINMA to other definitions and outlines some open discussion points. For reasons of coherence, the RIAA PEP definition has been adopted from the existing definition of the AMLO-FINMA with minor changes.⁴⁵ The following attempts to provide a brief overview of the most debated characteristics as to the PEP definition.

1.1.2.1. The Criterion of Seniority or Prominence

The criterion of seniority or prominence is dealt with either by a deliberately open concept⁴⁶, by specifying that middle ranking or more junior officials shall not be considered⁴⁷, by describing prominence with the attraction of publicity beyond the borders of their origin⁴⁸, or by providing exhaustive lists of the relevant officials.⁴⁹

There are two important aspects that need to be mentioned: first, it is vital to include senior executives of state-owned businesses in this definition. Second, it is often criticized that subnational leaders, such as regional governors, senior figures in political parties or charities, members of supranational or religious organizations are not being included in most definitions.⁵⁰

1.1.2.2. The Criterion of Belonging to the Family or Entourage of PEPs

Family members or close associates often act on behalf of a PEP.⁵¹ The RIAA speaks about “(...) persons who are closely associated (...) for family, personal or business reasons (close associates⁵²)”.⁵³ In contrast, the AMLO-FINMA includes the circumscription “recognized as being associated with” and is thus smaller in scope, for the reason that contrary to the RIAA, the AMLO-FINMA includes specific due diligence obligations.⁵⁴ To decide whether or not someone is in the entourage of a PEP seems to be a difficult. The crucial point for Wyss is the known or expected probability of having influence on the PEP in his/ her financial matters.⁵⁵

1.1.2.3. The Criterion of the Origin of PEPs

For political reasons, the majority of definitions solely cover foreign persons.⁵⁶ For the AMLO-FINMA⁵⁷, domestic PEPs have so far not been included because the abusive use of a

⁴⁵ The IMAC, consistent with the act's purpose and nature, does not address the PEP issue as such.

⁴⁶ SFBC Geldwäschereibericht 2003, p. 30, e.g. AMLO-FINMA.

⁴⁷ EU Commission Directive 2006/70/EC; FATF Recommendation No. 6 (cf. Annex 1); however, they do not indicate what middle ranking or more junior means.

⁴⁸ The Wolfsberg Group, Wolfsberg FAQ's on PEPs.

⁴⁹ See Annex 1; cf. ACHTELIK, p. 48.

⁵⁰ The World Bank, StAR, Politically Exposed Persons, p. 29; CHAIKIN/ SHARMAN, p. 84.

⁵¹ The World Bank, StAR, Politically Exposed Persons, p. 28.

⁵² In German ,Umfeld', in French ,entourage' and in Italian 'cerchia'.

⁵³ Art. 2 para. b subpara 2 RIAA; as will be seen in the Duvalier case, the beneficial owner of the core part of the disputed assets was Simone Ovide Duvalier, cf. section 2.4.1.

⁵⁴ Dispatch RIAA, p. 21, footnote 38.

⁵⁵ WYSS, GwV-EBK, Art. 1, N 5a, p. 157.

⁵⁶ The World Bank, StAR, Politically Exposed Persons, p. 27; the exceptions to that trend are offered by the BCBS and UNCAC which both do not speak about a differentiation to this effect and the FATF – who clearly makes a differentiation by including only foreign PEPs in its definition but clarifies in its interpretative notes that

bank account of a domestic PEP is considered less probable and the inclusion would arguably require significant extra effort.⁵⁸ However, the World Bank advocates the abolishment of the distinction between foreign and domestic PEPs for three reasons: first, all PEPs are subject to similar pressures and perverse incentives; second, many banks argue that identifying domestic PEPs is easier than foreign PEPs and third, including domestic PEPs would increase a governments' commitment to fighting corruption and money laundering.⁵⁹ There is a fourth point that is worth considering; foreign PEPs who open a bank account in their country of origin with a foreign branch or a foreign subsidiary of a Swiss group are in principle not to be identified as higher risk relationships in their country.⁶⁰ This may eventually leave room for circumvention of the due diligence obligations. Nevertheless, as put forward by Héritier Lachat, it seems that in practice, domestic persons of equivalent rank are equally included in Switzerland.⁶¹ However, in contrast to business relationships with foreign PEPs, the qualification is not mandatory.

1.1.2.4. The Inclusion of Legal Persons

The definition of the AMLO-FINMA and the RIAA clearly do include companies.⁶² However, the majority of definitions simply speaks about natural persons. Yet, PEPs who dispose over illegal assets try to obscure the source of their assets as well as the link to their person e.g. by using trusts or companies.⁶³

1.1.3. Length of Qualification as a PEP

The wording of the AMLO-FINMA does not clearly indicate whether former PEPs shall be considered; it simply speaks of persons 'holding'⁶⁴ the considered positions. Whereas the proposition of an expansion to former PEPs was still rejected in the revision of the SFBC's AML Ordinance in 2002⁶⁵, in the explanatory report to the AMLO-FINMA, FINMA confirms the argument of the World Bank that the specification of a time limit is an artificial way of dealing with the problem and may lead to false assumptions concerning the risk of money

"countries are encouraged to extend the requirements of Recommendation 6 to individuals who hold prominent public functions in their own country", FATF 40 Recommendations, p. 22; cf. ACHTELIK, p. 47-48.

⁵⁷ In the context of the RIAA, the focus on foreign PEPs obviously makes sense, as its scope of application requires an international setting per se.

⁵⁸ SFBC Q&A 2003; cf. SFBC Geldwäschereibericht 2003, p. 30.

⁵⁹ The World Bank, StAR, Politically Exposed Persons, p. 27.

⁶⁰ SFBC Q&A 2003.

⁶¹ HÉRITIER LACHAT, p. 71.

⁶² Art. 2 para. a subpara 2 AMLO-FINMA

⁶³ Cf. BAKER/ SHORROK, p. 81 et. seq. for a study on the role of corporate structures in money laundering. As will be seen with the Duvalier case (cf. section 2.4.1.), the assets were held in a foundation under Liechtenstein law, cf. BGer of 12 January 2010, 1C_374/2009. Furthermore, in many cases, PEPs control whole national industries. In the case of the freezing of Libya in 2011, the FC extended the freeze from private individuals to banks, sovereign wealth funds and oil companies, cf. FINMA, Due Diligence Report of 10 November 2011, p. 5.

⁶⁴ Art. 2 para. a subpara. 1 AMLO-FINMA.

⁶⁵ SFBC Geldwäschereibericht 2003, p. 13; WYSS, GwV-EBK, Art. 1, N 3, p. 154.

laundering.⁶⁶ Instead, a risk-based qualification in which the assessment is taken individually in each case is to be preferred.⁶⁷ The RIAA includes formerly active PEPs which is important for two reasons: first the RIAA will almost exclusively deal with PEPs who are no longer in office; second, legal assistance procedures in the matter can take a long time.⁶⁸ In comparison, the EU-Directive 2005/60/EC⁶⁹ and its implementing regulation 2006/70/EC⁷⁰ set a time limit of one year. i.e. a person is no longer considered a PEP one year after s/he left the office.⁷¹

The inclusion of former PEPs is important; on the one hand, because they may still have influence on the national politics and persons affiliated and may still have access to resources, and on the other hand, assets of unlawful origin may be deposited in Switzerland only after the giving up of the position the person was holding.⁷² Furthermore, from a practical view point, banks use data information systems in order to identify PEPs; consequently, as the former PEP was already in the data system, the additional cost of keeping the person in those lists is assumed to be small.⁷³

1.1.4. Discussion of the Practicability of the PEP Definitions

There are mainly two problems with regard to the practicability of the proposed PEP definitions. On the one hand, there is the problem of an insufficient differentiation, i.e. the definitions include a too diverse spectrum of politicians in order to be efficient by its own. On the other hand, the PEP concept is difficult to implement because of the various different definitions. In practice, those obligated under PEP due diligence obligations must rely on commercial database providers such as World-Check⁷⁴ or WorldCompliance⁷⁵.

1.1.4.1. Insufficient differentiation within the PEP Group

The PEP concept is often understood in the same way as the concept of a potentate. However, a person defined as a PEP is obviously not corrupt per se or misusing a power position. In a nutshell, the identification of a person as a PEP points to the fact that the person may have access to state accounts and may have enough power to abuse it or, put in simple terms, with PEPs there is an enhanced risk for corrupt behavior. While the notion of PEP may have a negative connotation⁷⁶, virtually everyone who fulfills one of the core conditions enumerated before is considered a PEP. This broad definition results in a very wide spectrum of PEPs;

⁶⁶ The World Bank, StAR, Politically Exposed Persons, p. 31; cf. FINMA, GwV-FINMA Erläuterungsbericht, p. 24.

⁶⁷ FINMA, GwV-FINMA Erläuterungsbericht, p. 24.

⁶⁸ Cf. section 2.4.1.

⁶⁹ EU Directive 2005/60/EC.

⁷⁰ EU Commission Directive 2006/70/EC.

⁷¹ FINMA, GwV-FINMA Erläuterungsbericht, p. 12; Art. 2 2006/70/EC.

⁷² PINI, p. 119.

⁷³ PINI, p. 119.

⁷⁴ World-Check offers a comprehensive solution for assessing, managing and remediating financial, regulatory and reputational risks, cf. their website: <http://www.world-check.com/> (accessed on 23/2/2012).

⁷⁵ WorldCompliance is one of the leading providers of customer and third party screening solutions, cf. their website: <http://www.worldcompliance.com/en/default.aspx> (accessed on 23/2/2012).

⁷⁶ As seen, the notion PEP is often being equated with dictators or potentates.

indeed, WorldCompliance contains 1,500,000 PEPs in their database.⁷⁷ Hence, everyone from Northkorea's Kim Jong-un, Sheikh Khalifa bin Zayed, president of the United Arab Emirates⁷⁸, Liechtenstein's Prince Hans-Adam II von und zu Liechtenstein⁷⁹ to Switzerland's current president Eveline Widmer-Schlumpf is included in this database. The result is a huge variety of different politicians with very different institutional systems, power relationships and stands on human rights included in these lists.

One solution to this problem is the application of a risk based approach. According to the World Bank, "[f]or banks, a risk-based approach to AML means focusing resources on where the greatest risks lie"⁸⁰. Hence, following such an approach, the addressees of the due diligence obligations are more flexible in allocating their resources to where the PEP risk is considered as high.⁸¹ Indeed, it is proposed here that the PEP definition must include finer-grained distinctions in order to be practical. Also, there must be a qualification of a PEP varying from high risk profiles to low risk profiles of potential wrong doing, e.g. by the way of identifying high risk regions based on the grade of corruption or even based on a state's human rights records. It would certainly be reasonable if there was some kind of coordination between banks and between states with regard to their qualification.⁸²

1.1.4.2. Difficult implementation of the PEP Definition

The identification of a person as a PEP is part of the efforts to combat money laundering and corruption. To be more specific, the regulation of financial intermediaries and the imposition of specific due diligence obligations is one of the most important pillars in these efforts. However, one of the difficulties with regard to the practicability of the definition resides in the problem that there is no clear international consensus on the definition of a PEP let alone on a list.⁸³ Furthermore, the duty to identify a PEP as such is left entirely to the financial intermediaries, without any specifications as to how this identification should take place.⁸⁴ In practice, PEPs are identified by using name-matching tools from external companies such as World-Check, WorldCompliance mentioned before.⁸⁵ However, such lists of persons may raise concerns with regard to data protection or the completeness and accuracy of such lists.⁸⁶ Nevertheless, Pini argues that in order to comply with the minimum standards with regard to the risk-based approach, the acquiring of such lists is a must for banks in order to conduct

⁷⁷ WorldCompliance, Global PEP List.

⁷⁸ Forbes estimated his wealth at 23 billion USD in 2008, see Forbes, Wealthiest Royals.

⁷⁹ Forbes estimated his wealth at 5 billion USD in 2008, see Forbes, Wealthiest Royals.

⁸⁰ The World Bank, StAR, Politically Exposed Persons, p. 24.

⁸¹ The World Bank, StAR, Politically Exposed Persons, p. 24.

⁸² In this sense, cf. The Wolfsberg Group, Wolfsberg FAQ's on PEPs.

⁸³ Cf. SCHULZ, pp. 145-146.

⁸⁴ PINI, p. 120.

⁸⁵ PINI, p. 120.

⁸⁶ ACHELNIK, pp. 290-291.

banking relationships.⁸⁷ However, with regard to the completeness of those lists there is no guarantee for the banks; however, the responsibility to be sure lies on their side.⁸⁸

Another problem with those name lists lies in their accuracy. In the FINMA report on due diligence obligations in connection with PEPs⁸⁹, the supervisory authority has found that, in some cases, PEPs were not identified because their names were checked with “exact matches” only.⁹⁰ On the contrary, phonetic searches are in order, especially where the person’s name in question is not written with the Latin alphabet.⁹¹ Hence, in many cases, the use of such lists may not be enough and further effort is needed, such as a general internet research. A further possibility is the commissioning of a specialized external company to compile a comprehensive research on the person in question.⁹²

Pini criticizes the Swiss authorities in that they do not provide any support in this matter. In his view, the supervisory authority should itself compile a list with the global PEPs or approve an existing list.⁹³ In a similar vein, Chaikin and Sharman criticize that “[a]t present just how PEPs are to be identified is under-specified and largely delegated to private firms who will often not have sufficient expertise and resources to perform this task adequately (...) At the very last governments must be prepared to give more and more specific guidance to private firms on identifying PEPs, if not become directly involved in drawing up PEP lists.”⁹⁴

While this line of criticism is understandable, it is also obvious why state authorities have difficulties with issuing such a list. Besides the fact that it is a very difficult task to produce a comprehensive PEP list, name lists are a sensitive issue as has been seen for example in the extreme case of the UN terrorist list.⁹⁵ If FINMA would go as far as to publish such a PEP list it would probably be attacked for data protection reasons as well as for considerations of international relations, for the simple reason that no one likes to be on a list published by another’s state financial supervisory authority and, of course, the list would include each single one of the political leaders of the world. In contrast to Pini’s argument it could thus be proposed that the list should be published by the international community, for example in the context of the FATF, in order to avoid the above-mentioned dilemma. Finally, a compromise between the utility of such a list and the privacy considerations of the individuals on these lists needs to be found.

⁸⁷ PINI, p. 120.

⁸⁸ PINI, p. 121.

⁸⁹ FINMA, Due Diligence Report of 10 November 2011.

⁹⁰ FINMA, Due Diligence Report of 10 November 2011, p. 7.

⁹¹ FINMA, Due Diligence Report of 10 November 2011, p. 7.

⁹² FINMA, Due Diligence Report of 10 November 2011, p. 9.

⁹³ PINI, p. 121.

⁹⁴ CHAIKIN/ SHARMAN, p. 84; cf. SCHULZ, pp. 145-146.

⁹⁵ Cf. e.g. Motion 07.3872; or Beobachter, 1/9/2010, Unschuldig auf der Terrorliste.

1.2. Legal Framework of the PEP Concept

1.2.1. PEPs in Swiss National Law

As discussed above, the PEP concept stands in the larger context of combatting economic crime such as money laundering and corruption. In Switzerland, until the coming into force of the RIAA, the PEP issue has so far been taken up in a concrete way in legal terms only by the AMLO-FINMA. Albeit the focus of this paper lies on legal assistance in the matter and not on AML regulations, it is still worthwhile to look at how the PEP issue is regulated in the AML system in order to lay down the legal framework in which the PEP concept is embedded in.

In a much broader sense, the PEP issue in Switzerland is dealt with by criminalizing activities that have led to the acquisition of the assets in question as well as their laundering, such as, among others, the participation in criminal organizations, bribery, money laundering or misappropriation. Moreover, the Swiss Penal Code (henceforth PC)⁹⁶ and its ancillary laws stand in connection with legal assistance by the condition of double criminality⁹⁷, a requirement that will be discussed in section 2.2.2.

1.2.1.1. PEPs and Swiss Money Laundering Legislation

Today, the rules concerning due diligence obligations of financial intermediaries regarding assets of PEPs are laid down in the AMLO-FINMA, which is based on the Swiss Anti-Money Laundering Act (MLA)⁹⁸. The Swiss AML measures for preventing and combating money-laundering aim at implementing the FATF 40 recommendations, which will be discussed in section 1.2.2.1. In brief, the MLA establishes the general rules concerning due diligence obligations in relation with money laundering and the financing of terrorism and defines organizational measures for the implementation of the obligations.⁹⁹ In the context of PEPs, the following due diligence obligations are of particular interest: financial intermediaries¹⁰⁰ must identify all parties and determine the beneficial owner.¹⁰¹ The financial intermediary must clarify the economic background and the purpose of a transaction or of a business relation if it appears unusual or if there is an indication that assets proceed of a felony or are subject to the disposal of a criminal organization (art. 260^{ter} para. 1 PC) or to serve the financing of terrorism.¹⁰² Furthermore, they have a duty to report if they have grounds to suspect that among others, the assets are connected to a criminal organizations or money

⁹⁶ Swiss Criminal Code of 21 December 1937, (Status as of 1 January 2012) SR 311.0 (henceforth PC).

⁹⁷ Double criminality is sometimes also referred to as dual criminality.

⁹⁸ Federal Act on the Combating of Money Laundering and the Financing of Terrorism within the Financial Sector of 10 October 1997 (Status as of 1 January 2010), SR 955.0 (henceforth MLA).

⁹⁹ According to art. 1 MLA, the act regulates “the combating of money laundering within the sense of art. 305^{bis} PC, the combating of terrorist financing within the sense of art. 260^{quinquies} para. 1 PC and the guarantee of due diligence in the financial sector”.

¹⁰⁰ As defined in art. 2 MLA.

¹⁰¹ Artt. 3 and 4 MLA.

¹⁰² Art. 6 MLA

laundering or originate from a crime.¹⁰³ Furthermore, assets must be frozen in connection with the duty to report.¹⁰⁴

The due diligence obligations with regard to PEPs specifically are laid down in the AMLO-FINMA that will be discussed in the following.

1.2.1.1.1. Ordinance of 8 December 2010 of the Swiss Financial Market Supervisory Authority (FINMA) on the prevention of money laundering and Terrorist Financing (AMLO-FINMA)

The AMLO-FINMA is based on art. 17 and 18 para. 1 subpara. e of the MLA and specifies how the obligations under the MLA must be implemented. Rules concerning PEPs had already been laid down in the SFBC Circular of 1998¹⁰⁵; however, they were hardened with the introduction of the Money Laundering Ordinance of the SFBC that entered into force on 1 June 2003.¹⁰⁶ The articles that are of particular interest in connection with the issue of PEP assets are presented in table 1:

Table 1 AMLO-FINMA Provisions in Connection with PEPs

Section	Article	Due Diligence Obligation / Wording of the Law
Section 1: Subject Matter and Definitions	Art. 2 para. 1 lit. a: Definitions	Please refer to section 1.1.
Section 5: Increased Duties of Due Diligence ¹⁰⁷	Art. 12 para. 3 and 4: Business Relationships with Increased Risks	Business relationships with PEPs are deemed to be relationships with increased risk in all cases ¹⁰⁸ , and financial intermediaries need to identify and label the business relationships with PEPs. ¹⁰⁹
	Art. 14 para. 2 subpara. g: Additional investigations in the case of increased risk	Additional investigations shall be carried out depending on the circumstances, namely whether the contracting party or the beneficial owner is a PEP. ¹¹⁰
	Art. 18 para 1 subpara. a and para 2: Responsibilities of the Upper Management	Whether PEP relationships are accepted has to be decided by the senior executive body or at least one of its members. Furthermore they need to decide on the continuation of a PEP relationship on an annual basis. ¹¹¹
Section 3: Principles	Art. 7: Prohibited Assets	Financial intermediaries are not permitted to accept assets that they know, or are expected to know, are the proceeds of criminal activities, even if committed outside of Switzerland. ¹¹² If assets that

¹⁰³ Art. 9 MLA

¹⁰⁴ Art. 10 MLA.

¹⁰⁵ SFBC Circular 98/1 of 26/3/1998 replaced the Circular 91/3 of 18 December 1991.

¹⁰⁶ To be more specific, rules regarding increased risk relationships were introduced as well as the responsibility of the senior management to decide over PEP relationships, see PWC, *Gelwäschereibekämpfung* 2003, p. 13.

¹⁰⁷ The fifth section of the AMLO-FINMA is concerned with increased duties of due diligence. In principle, all articles of the section, i.e. art. 12 to art. 19 AMLO-FINMA are relevant, but only some of the provisions that address PEP relationships directly will here be briefly introduced.

¹⁰⁸ Art. 12 para. 3 AMLO-FINMA.

¹⁰⁹ Art. 12 para. 4 AMLO-FINMA.

¹¹⁰ Art. 14 para. 2 subpara. g AMLO-FINMA.

¹¹¹ Art. 18 para. 1 subpara. a and para. 2 AMLO-FINMA

¹¹² Art. 7 para. 1 AMLO-FINMA.

	derive from criminal activity are negligently accepted, the obligatory guarantee for proper business conduct of financial intermediaries may be called into question. ¹¹³
Art. 8: Prohibited Business Relationships	Financial intermediaries are not permitted to maintain business relationships with any individual or undertakings of which they know or must assume constitute a terrorist or a criminal organization, or which are affiliated to, or support or finance such an organization. ¹¹⁴

Table 1 AMLO-FINMA Provisions in Connection with PEPs

In a nutshell, the above-mentioned due diligence obligations require financial intermediaries to identify a PEP, to clarify the background of the assets, to get the approval by senior management if an account can be opened and if approved, to monitor the assets and to get an approval annually by senior management to continue with the business relationship. Moreover, assets that are known or expected to be known to be the proceeds of criminal activities are not permitted, and neither are business relationships with individuals that may be affiliated to, or support or finance a criminal organization permitted.

Section 4.3 is devoted to discussing problematic issues in connection with the Swiss AML legislation in connection with PEP assets.

1.2.1.2. PEPs and Swiss Criminal Law

a) Criminal Law in the Context of Legal Assistance

As discussed above, assets of PEPs are not illicit per se. Yet if the activities that led to obtaining the assets are punishable under Swiss criminal law, the assets are considered of unlawful origin. While it is in certain cases possible for Swiss authorities to conduct criminal proceedings against foreign PEPs being suspected of having committed crimes independent of a legal assistance request¹¹⁵, the focus of this paper lies on legal assistance; consequently, the Swiss criminal law will be looked at from this angle. Generally, procedural coercive measures based on legal assistance are only justified when the suspected crime is mirrored in the material criminal law of the requested state.¹¹⁶ This necessary alignment is laid down in legal assistance with the requirement of double criminality¹¹⁷, which will be discussed in more detail in section 2.2.2.

¹¹³ Art. 7 para. 2 AMLO-FINMA.

¹¹⁴ Art. 8 para. 1 AMLO-FINMA.

¹¹⁵ Moreover, Swiss authorities may conduct proper criminal proceedings against the corrupt PEP such as e.g. in the Abacha case, cf. MONFRINI/ KLEIN, pp. 111-146; cf. DANNACHER, p. 89, 173.

¹¹⁶ CAPUS, p. 331.

¹¹⁷ CAPUS, p. 335.

b) Art. 260^{ter} PC and Art. 72 PC in connection with Legal Assistance

Many offences outlined in the PC and its ancillary laws are relevant in the context of PEP assets with a view of double criminality¹¹⁸; however, in legal assistance in connection with PEP assets, art. 260^{ter} PC played the most important role. The provision criminalizes the participation in an “organization, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means”¹¹⁹ or the support of such an organization in its criminal activities. A criminal organization is characterized by four elements, that is, the number, the organization, the code of silence and the criminal purpose.¹²⁰ The condition of secrecy requires a systematic foreclosure of the organization; furthermore, the condition can be realized in the case the organization is being involved in legal endeavors in order to conceal the criminal activities.¹²¹ In the case of the Abacha assets, the FSC has for the first time classified a regime as a criminal organization under art. 260^{ter} PC¹²², which was repeated in the Duvalier case. However, this qualification is sometimes criticized in doctrine which will be discussed in section 2.3.2.3.

1.2.2. PEPs in International Law

Various international bodies are dealing with the issue of PEPs, mostly in the context of money laundering and corruption.

1.2.2.1. *International Law on Money Laundering and PEPs – Focus on the FATF*

Internationally, the matter of money laundering is dealt with by the means of binding treaties, soft law and various subject specific initiatives.¹²³ With regard to PEPs, the formation of the Financial Action Task Force on Money Laundering (FATF) by the G7-states in Paris in 1989 and its 40 recommendations (FATF 40) first published in 1990 are, while being soft law, of particular influence.¹²⁴ The FATF dealt with the PEP issue for the first time in 2001, in the following the FATF 40 of 2003 included Recommendation 6 which defines the PEP concept and clarifies the connecting obligations.¹²⁵ FATF publishes annual reports containing mutual

¹¹⁸ E.g, money laundering under art. 305^{bis} PC, bribery under art. 322 PC, misappropriation under art. 138 PC, abuse of public office under art. 312 PC and various others, cf. MONFRINI/ KLEIN, p. 131; cf. BIANCHI/ HEIMGARTNER, p. 358.

¹¹⁹ Art. 260^{ter} PC.

¹²⁰ FCC Decision RR.2009.94 of 12 August 2009, c. 3.2.1.

¹²¹ WEDER, p. 320.

¹²² BGE 131 II 169.

¹²³ The most important ones in this context being the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; the declaration of principles adopted by the central bank governors of the G-7 states on the initiative of the Bank for International Settlements (BIS); the Council of Europe Recommendation Nr. R (80) 10 of 1980 and its Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990; as well as the EU's first Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering; see ACHTELNIK, p. 29.

¹²⁴ STESENS, p. 17.

¹²⁵ CHAIKIN/ SHARMAN, p. 85; the FATF 2003-2004 Typologies report laid down the risks PEPs create with regards to AML: “the sources for the funds that a PEP may try to launder are not only bribes, illegal kickbacks

evaluations and is now of a world-wide influence in the field of AML.¹²⁶ The FATF 40 have been revised in February 2012 and now require stricter regulation in connection with business relationships with PEPs as before.¹²⁷ The FATF is increasingly dealing with the intrinsic link between corruption and AML.¹²⁸

1.2.2.2. *International Law on Corruption and PEPs*

The first¹²⁹ legally binding¹³⁰ global anti-corruption treaty is the United Nations Convention against Corruption (UNCAC).¹³¹ One of the most important breakthroughs of the treaty is the field of asset recovery¹³²; UNCAC for the first time codifies the principle of the restitution of assets of PEPs obtained by unlawful means to the country of origin.¹³³ PEPs are being addressed specifically in art. 52 UNCAC which, next to general client identification requirements, encourages states to conduct enhanced scrutiny of accounts linked to individuals with prominent public functions.¹³⁴ However, as pointed out by Perdriel-Vaissière, one of the difficulties with the UNCAC is that it is highly state-focused, i.e. it is made by states for states, what questions its effectiveness in case the state's own public officials are involved in corruption.¹³⁵

1.2.2.3. *Global Combined Anti-Corruption and AML Initiatives relating to PEPs*

Civil society organizations such as Transparency International (henceforth TI) or global initiatives by international organizations contribute to the advancement of the legislation. In the introduction, StAR and ICAR have been briefly mentioned. StAR was jointly launched by the UNODC and the World Bank.¹³⁶ Its mandate is to “support international efforts to end

and other directly corruption-related proceeds but also may be embezzlement or outright theft of State assets or funds from political parties and unions, as well as tax fraud. (...) PEPs that come from countries or regions where corruption is endemic, organised and systemic seem to present the greatest potential risk (...)”, FATF Typologies Report 2003-2004, p. 19; cf. CHAIKIN/ SHARMAN, p. 85.

¹²⁶ STESENS, p. 20.

¹²⁷ FATF Regulations of 2012; cf. SEECI, Interview Ackermann.

¹²⁸ FATF Laundering the Proceeds of Corruption.

¹²⁹ Previously, some of the first tangible policies against corruption were posted by the OECD's Recommendation on Bribery in International Business Transactions of 1994 and the following Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, SR. 0.311.21, which enumerates a list of functionaries that is very similar to the later definition of PEPs, see ACHELNIK, p. 28-29.

¹³⁰ As discussed by Dannacher, a disadvantage of the treaty is that there not many obligations that are binding – most of the articles are recommendations only, what according to her weakens the treaty's impact; see DANNACHER, p. 31. The differences between international hard law and soft law will not be touched upon in this paper.

¹³¹ United Nations Convention against Corruption (UNCAC), SR 0.311.56 (henceforth UNCAC); it includes the four main anti-corruption tasks of prevention, criminalization and law enforcement, international cooperation and asset recovery, cf. LARSON, p. 11; The convention has currently 140 signatories.

¹³² LARSON, p. 14.

¹³³ Dispatch to the UN Convention on Corruption, SR 07.078 (henceforth Dispatch UNCAC), p. 7356; DANNACHER, p. 31.

¹³⁴ To be more specific, the article aims at accounts that are “sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates”, Art. 52 UNCAC.

¹³⁵ PERDRIEL-VAISSÈRE, p. 20.

¹³⁶ LARSON, p. 15.

safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets”¹³⁷. Basle-based ICAR provides detailed chronologies of PEP assets in Switzerland and provides assistance in setting up international legal assistance requests.¹³⁸ Indeed, soft law plays an important role in the development of AML and anti-corruption initiatives.

1.2.2.4. PEPs and Immunity

When international PEPs, for example heads of state, are in connection with legal proceedings, there is always the question of immunity. In a few words, heads of states cannot be prosecuted in Switzerland due to immunity.¹³⁹ The question of immunity is a complex and debated one. The following will give a brief overview of what immunity may imply in connection with PEPs.

The Federal Department of Foreign Affairs (henceforth FDFA) states that the principle of immunity of heads of states stems from customary international law and specifies that “while abroad, serving heads of state enjoy absolute¹⁴⁰ immunity against criminal proceedings”.¹⁴¹ However, there are limits to absolute immunity. In connection with PEP assets, the question arises as to whether a PEP who is no longer in office is still protected by immunity and if so, if it can be waived. Once left office, a former head of state can still benefit from immunity, but only for acts “undertaken in the exercise of official functions”¹⁴². Therefore, as discussed by Gully-Hart, when no longer in office, immunity of a head of state is altered from an immunity *ratione personae*, to an immunity *ratione materiae*.¹⁴³ With regard to criminal proceedings, as stated by the FDFA, the FSC has weakened absolute immunity if “a state expressly waves the immunity of its head of state”.¹⁴⁴ This circumstance has also been taken up in the Dispatch concerning the RIAA, where it is suggested that the immunity of a head of state is *de facto* waived by that state when the PEP is linked to a legal assistance request.¹⁴⁵ Gully-Hart finds that “[...] in all the cases considered by the Swiss courts, immunity has been waived by foreign states seeking to gain control of assets allegedly misappropriated.”¹⁴⁶

¹³⁷ WorldBank, StAR, introduction website: http://www1.worldbank.org/finance/star_site/about-us.html.

¹³⁸ Basel Institute of Governance, International center for Asset Recovery (ICAR), retrieved from <http://www.assetrecovery.org/kc/node/7145c5fb-a33e-11dc-bf1b-335d0754ba85.3> (accessed on 1/4/2012).

¹³⁹ CASSANI, *Les avoirs mal acquis*, p. 471.

¹⁴⁰ Absolute immunity stands opposed to relative immunity. Relative immunity calls for differentiation in attributing immunity according to the nature of the act, i.e. if it qualifies as an exercise of state authority or not, cf. FDFA, Immunity.

¹⁴¹ FDFA, Immunity; the focus on criminal proceedings is important as absolute immunity in civil proceedings is a disputed matter in legal doctrine, cf. FDFA Immunity.

¹⁴² FDFA, Immunity.

¹⁴³ GULLY-HART, Immunity, p. 1339.

¹⁴⁴ FDFA, Immunity.

¹⁴⁵ Dispatch RIAA, p. 22

¹⁴⁶ GULLY-HART, Immunity, p. 1342.

Hence, immunity is not a personal right¹⁴⁷; furthermore personal responsibility has grown in international law for universal crimes, such as human and humanitarian law violations.¹⁴⁸

In the context of former PEPs who have been thrown down from their position, immunity lost its value for the PEP, since it may be waived according to the liking of the current rulers. However, immunity may still be an impediment to the criminal jurisdiction of PEPs who are currently in power and abuse it. As long as the acts of the PEP connected to the acquisition do not qualify as universal crimes, the PEP cannot be held responsible. Yet, as pointed out by Bertossa, immunity of heads of states does not impede forfeiture proceedings linked to assets which have not been assigned to duties of authority.¹⁴⁹

1.2.3. Discussion of the PEP Concept in Swiss and International law

Switzerland is equipped with concrete AML due diligence rules, which comply with the FATF 40 recommendations and can rely on a functioning penal system that criminalizes behavior linked to corruption. Switzerland did not feel the need to adjust its legislation with regard to the ratification of the UNCAC.¹⁵⁰ With regard to compliance with FAFT recommendations, Switzerland is part of the 16% that are either fully compliant or largely compliant.¹⁵¹ However, while belonging to the most compliant countries worldwide, it will be questioned in section 4.3 if the current AML legislation is effective enough.

International law focuses on issues of corruption and money laundering in that it obliges states to comply with certain requirements that are mostly related to due diligence obligations of financial intermediaries. However, in terms of legal assistance in connection with PEP assets, there is no coordination so far. This problem will be discussed in section 4.5.

1.3. Fundamental Problems with Potentate Funds Obtained by Unlawful Means

To broaden the perspective of the PEP subject and to better understand the fundamental problems behind the issue, this section will focus on the following two aspects: first, the phenomenon of corruption in connection with PEPs; second, the crucial influence of international relations, since it can be argued that the question as to whether assets of PEPs

¹⁴⁷ GULLY-HART, *Asset Recovery*, p. 180.

¹⁴⁸ GULLY-HART, *Asset Recovery*, pp. 180-181.

¹⁴⁹ BERTOSSA, *Confiscation internationale*, p. 34, citing BGer of 8 December 2000 1P.581/2000; cf. HENZELIN, *L'immunité pénale*.

¹⁵⁰ Dispatch UNCAC, p. 7411. Dannacher points out that art. 20 UNCAC has not been implemented in Swiss law. The article recommends the adoption of a criminal offence that criminalizes "illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income", Art. 20 UNCAC. Yet, according to Dannacher, this concept, that was previously unknown in Swiss law, can now be found with regard to forfeiture under RIAA; see DANNACHER, p. 31.

¹⁵¹ The World Bank, *StAR, Politically Exposed Persons*, p. 7, Figure 1.1. FATF Recommendation 6: Compliance of 124 Jurisdictions; FINMA, *Due Diligence Report of 11 March 2011*, p. 5.

are legitimized or not or from what point in time their legitimacy is questioned largely depends on the politics in the international arena.

1.3.1. Corruption

1.3.1.1. Definition of Corruption

There is an abundance of various definitions on what corruption is.¹⁵² However, one can usually differentiate between the broad definitions of corruption and those that focus on specific legal provisions that deal with the problem of corruption. In Switzerland for example the criminal law against corruption penalizes the active and passive bribery as well as the giving or accepting of advantages.¹⁵³ With regard to the broad definition, Cassani points out that “[t]he notion of corruption is sometimes used in a broader sense. When speaking of a ‘corrupt regime’ or criminality of ‘potentates’, one refers to all forms of abusive exploitation of a position of power in order to enrich oneself: breach of trust, misconduct in public office or theft, involving the assets of a state or state owned companies, fraud to the detriment of the state or development aid organisms, extortion at the expense of citizens, etc.”¹⁵⁴ TI uses such a large definition of the term: “Corruption is operationally defined as the abuse of entrusted power for private gain.”¹⁵⁵ However, the broad definition of TI has been criticized in recent years for not distinguishing between other forms of crimes such as, e.g., theft.¹⁵⁶ However, for the purpose of this paper a broad conception of corruption is useful for the reason that the illicit enrichment by PEPs is done in many different ways.

1.3.1.2. Corruption, regime type and stage of economic development

Corruption is a worldwide problem. However, despite its wide spread, developing countries generally suffer more acutely from it than developed countries.¹⁵⁷ However, even the least corrupt state is getting involved with the problem of corruption¹⁵⁸ when accepting money that originates out of corruption. In today’s globalized world, corrupt assets can easily be transferred to the other end of the world and be successfully disguised¹⁵⁹, which reflects the global nature of the problem.

Along those lines, it is interesting to investigate the relationship between regime type and corruption, The majority of international legal assistance cases concerning PEP assets in

¹⁵² It is probably hard to grasp the phenomenon of corruption in its entire scope; e.g. from an anthropological perspective, the here mentioned definitions might not be universally satisfying, cf. HALLER/ SHORE. Furthermore, if a certain behavior is considered as being corrupt depends largely on the social conventions and moral values, cf. GRAFL for an essay for a study on the different understandings of corrupt and criminal acts.

¹⁵³ According to artt. 322^{ter} through 322^{septies} PC; cf. SECO, Swiss Criminal Law on Corruption.

¹⁵⁴ CASSANI, *La Lutte contre la corruption*, p. 33, free translation by the author.

¹⁵⁵ TI, FAQ about Corruption.

¹⁵⁶ DE NÈVE, p. 131.

¹⁵⁷ PERDRIEL-VAISSÈRE, p. 19.

¹⁵⁸ Cf. DE NÈVE, she examines corruption in democratic states.

¹⁵⁹ PERDRIEL-VAISSIÈRE, p. 18.

Switzerland involved dictatorial regime types.¹⁶⁰ In cases of large scale corruption by PEPs, the term ‘kleptocracy’¹⁶¹ is often used, which refers to governments that practice large-scale corruption at the expense of the general populations.¹⁶² Ezrow and Frantz analyzed corruption in predatory states, which are states where “a single ruler has near total control over state resources, which the leader uses to maximize personal wealth”.¹⁶³ Examples of such states are Mobutu’s Zaire, the Duvaliers’ Haiti, Marco’s Philippines and Gaddafi’s Libya.¹⁶⁴ They found that “there are indications that personalist forms of dictatorships are prone to corruption yet the reasons underlying this trend warrant greater exploitation.”¹⁶⁵

1.3.2. International Politics - Friend or Foe?

After the death of Muammar Gaddafi in October 2011, former FC Calmy Rey commented that “his dictatorship was a bloody one” and that “he died the way he reigned”.¹⁶⁶ To Switzerland, Gaddafi’s regime has thus been unacceptable from a human rights point of view. However, he was a welcomed client of Swiss banks. Gaddafi had large amounts of assets lying on Swiss bank accounts – a fact that became popular during the Switzerland-Libya crisis in 2009 when Gaddafi transferred CHF 5.6 billion to other European banks.¹⁶⁷ Similarly, transferring the assets to other banks worldwide did not pose any problem either - yet, considering that at that time the former Italian Prime Minister Silvio Berlusconi called the relationship with Gaddafi a “true and deep friendship”¹⁶⁸, and the rather tight business links with European governments, it is not that surprising that European banks did not refuse his assets.

The issue is ambivalent. While state sovereignty generally calls for non-interference in internal matters of each state, the question as to whether Swiss companies can do business is linked to reputational risks. In other words, there is a conceptual difference between what a state can do and what companies can do. Arguably, a state must maintain diplomatic relations even with dictatorships in order e.g. to protect its own interests.¹⁶⁹ In an article in NZZ, Zollinger argues that our relationship with potentates is contradictory; while we have no sympathy for the political system, we still maintain contact with those dictators.¹⁷⁰ He argues that while we discuss about human rights issues, it is really about realpolitik.¹⁷¹ Contrary to

¹⁶⁰ E.g. the cases of Abacha, Marcos, Mobutu or Duvalier, cf. section 2.4.

¹⁶¹ EZROW/FRANTZ, p. 137; cf. ACEMOGLU; cf. CHAIKIN/SHARMAN, pp. 153-186.

¹⁶² PERDRIEL-VAISSÈRE, p. 18.

¹⁶³ EZROW/FRANTZ, p. 135.

¹⁶⁴ EZROW/FRANTZ, pp. 135 – 138, p. 216.

¹⁶⁵ EZROW/FRANTZ, p. 139.

¹⁶⁶ SF, Calmy-Rey: «Gaddafi ist so gestorben, wie er regiert hat», 21/10/2011.

¹⁶⁷ NZZ 28/6/2009, Libyen hat 5,6 Milliarden Franken aus Schweiz abgezogen.

¹⁶⁸ Il Corriere Della Sera of 10/6/2009, Gheddafi visita Roma.

¹⁶⁹ Cf. SF, Interview with Daniel Thelesklaf of 21/2/2011.

¹⁷⁰ ZOLLINGER, NZZ 3/4/2011, Gestern noch „Regent“, heute ein „Potentat“, free translation by the author.

¹⁷¹ ZOLLINGER, NZZ 3/4/2011, Gestern noch „Regent“, heute ein „Potentat“, Zollinger creates the word “realtourism” in order to describe people’s attitude on holiday destinations, i.e. many Swiss have chosen to travel to Egypt or Tunisia under Mubarak or Ben Ali without much consideration of human rights records.

art. 5 of the OECD Anti-Bribery Convention, which lays down that investigation and prosecution of the bribery of a foreign PEP shall not be influenced by considerations of economic interest, the potential effect of international relations or the identity of the persons involved¹⁷², considerations of international politics and economics do play a key role. Many governments in the recent cases were for a long time internationally legitimized governments whose legitimacy was questioned within days. It was clear to everyone that Gaddafi had control over the natural resources and the whole state finances. Hence, the answer to the question from what point in time the origin of PEP assets is being examined seems to be largely a political one.

Yet, what businesses can do is a matter of reputational risk. For illustrational purposes, while the wealth of King Mswati III is estimated around USD 200 m.¹⁷³, more than one quarter of the Swaziland's adult population has been infected by HIV/AIDS, and 69% live below the poverty line.¹⁷⁴ King Mswati III is clearly considered a PEP, yet can his assets be questioned from a legal perspective? In essence, he inherited the assets and his power from his father. However, while it would be hard to qualify the assets as obtained by unlawful means, the question if Swiss companies want to do business with the King is subject to reputational risks.

In Annex 3 Tables 4 to 9 several PEP cases are presented where the nature of the international relations is investigated in order to support the claims made here with practical examples.

¹⁷² Art. 5 OECD Convention on Bribery of 1997, SR 0.311.21.

¹⁷³ Forbes estimated his wealth at 200 m. USD in 2008, see Forbes, Wealthiest Royals.

¹⁷⁴ CIA World Factbook, Swaziland.

2. General Legal Framework and Legal Practice Concerning Legal Assistance in connection with Assets of PEPs as provided by the Act on International Legal Assistance in Criminal Matters (IMAC)

This part of the paper examines the general framework of legal assistance in criminal matters as laid down in Swiss law¹⁷⁵, which is composed of the Federal Act on International Legal Assistance in Criminal Matters (IMAC) and the connected ordinance¹⁷⁶, as well as various bilateral and multilateral treaties in the matter.¹⁷⁷ However, it was the IMAC that has stood in the center of most of the previous legal assistance cases involving assets of PEPs. The act has even been revised as a response to some shortcomings, as they occurred, for example, such as in the Marcos affair (cf. section 2.4.1).¹⁷⁸ The revised act entered into force on 1 February 1997 and was improved in terms of length of the process as well as by establishing clear rules for the handover of assets.¹⁷⁹ With the IMAC, Switzerland is equipped with an autonomous legal basis for legal assistance procedures which allows providing legal assistance even in the absence of bilateral treaties.¹⁸⁰ From a procedural point of view, if the IMAC has no specific procedural rules, various other procedural acts are applicable depending on the executive authority in a certain case¹⁸¹.

A detailed examination of the general legal assistance provisions provided by the IMAC would go beyond the scope of this paper. Hence, a limited number of subject matters were selected on the basis of their relevance for the subject of PEP assets of unlawful origin. For the purpose of this study the focus lies on the following aspects: as a first step, the general conditions that have to be met in order to grant ancillary legal assistance will be charted, while a selection has been made according to the topicality in connection with PEP assets.¹⁸²

¹⁷⁵ Legal assistance in criminal matters has to be distinguished from both police cooperation and administrative assistance. The subject matter of administrative assistance is an administrative issue and is conducted between administrative authorities, cf. GSTÖHL, p. 93-96. Police cooperation comprises the exchange of police information in criminal matters, which are obtained without procedural coercion; it is based on global, multilateral co-operation via Interpol, bilateral police co-operation agreements with individual states and European multilateral co-operation via Europol, see FDJP, International Police Co-operation.

¹⁷⁶ Ordinance on Legal Assistance in Criminal Matters of 24 February 1982 (status as of 5 December 2006), SR 351.11.

¹⁷⁷ For the purpose of an overview, three acts can be mentioned in the context of ancillary mutual legal assistance: first, the European Convention on Mutual Legal Aid in Criminal Matters of 20 April 1959 (Status as of 1 April 2010), SR 0.351.1; second, the bilateral treaty between the US and the Swiss Confederation on Mutual Assistance in Criminal Matters of 25 May 1973, RVUS, SR 0.351.933.6; and third, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (Status as of 1 August 2009), SR 0.311.53.

¹⁷⁸ Dispatch RIAA, p. 8.

¹⁷⁹ Dispatch RIAA, p. 8.

¹⁸⁰ Wegleitung, p. 13, in case of the existence of a treaty, the treaty prevails. However, the principle of most favorable condition (in German: *Günstigkeitsprinzip*) requires that in each particular case the norm which is in terms of conditions to mutual assistance the most favorable one shall be applied, cf. Wegleitung, p. 13, SCHWEIZER, p. 990; GSTÖHL, p. 92.

¹⁸¹ SCHWEIZER, p. 989; art. 12 para. 1 IMAC refers to criminal procedural law, cf. CAPUS, p. 328.

¹⁸² Some important conditions will not be treated, such as, among others, the principle of specialty according to art. 67 IMAC, cf. Wegleitung p. 33ff, DANNACHER, p. 64ff; the principle of reciprocity according to art. 8

Second, I will look at the three procedural steps of ancillary legal assistance that stand in connection with PEP assets and which have been adopted by the RIAA, i.e. the freezing of bank accounts, and the handing over of assets for forfeiture and restitution.¹⁸³ Furthermore, selected previous and current cases involving assets of PEPs will be looked at in order to outline the development in dealing with such assets.

As previously mentioned, bilateral treaties will not be covered in this paper, since it is assumed that the number of treaties Switzerland has entered into with states that show a high level of corruption is insignificant.¹⁸⁴

2.1. Part Three of the Act on International Legal Assistance in Criminal Matters concerning Ancillary Legal Assistance

First it is important to bear in mind that the subject matter of this paper is concerned with the assets of PEPs and not with the person as such. The focus on assets leads to part three of the IMAC which deals with ancillary legal assistance. The main purpose of ancillary legal assistance lies in the act of supporting a foreign state to enforce its criminal claim.¹⁸⁵ Hence, procedural acts, including coercive measures are conducted in the requested state based on legal assistance without having a proper internal criminal claim.¹⁸⁶ According to Capus, “the state providing assistance hence intervenes within its proper legal system with the aim to enable the establishment of legal certainty in a society external from its own.”¹⁸⁷

With regard to the content of ancillary legal assistance, art. 63 para. 2 IMAC enumerates some of the relevant acts.¹⁸⁸ In connection with PEP assets, the most relevant forms of ancillary legal assistance are the procedural act of the freezing of bank accounts as well as the handing over of seized assets for the purpose of forfeiture or return.¹⁸⁹ The term ‘freezing’ is used in connection with bank accounts in criminal procedural and mutual assistance law and refers to the seizure of accounts.¹⁹⁰ In connection with the freezing of bank accounts, section

IMAC, cf. Wegleitug p. 27; the principle of ne bis in idem according to art. 66 IMAC, cf. DANNACHER, pp. 63-64.

¹⁸³ Some important aspects will not be examined such as e.g. the spontaneous transmittal of information and evidence according to art. 67a IMAC.

¹⁸⁴ This, however, does not hold true for Egypt.

¹⁸⁵ CAPUS, p. 235.

¹⁸⁶ CAPUS, p. 328.

¹⁸⁷ CAPUS, p. 236, free translation by the author from the German original: “Der Rechtshilfe leistende Staat interveniert also innerhalb seiner Rechtsordnung, um die Herstellung eines gesellschaftsexternen Rechtsfriedens zu ermöglichen.“ In connection with PEP assets, the argument could be extended in that legal assistance is not only granted in the interest of another states legal certainty, but it is equally in the requested states proper interest (if not a global interest) to grant legal assistance, e.g. for reasons of integrity of its financial center or global reputation.

¹⁸⁸ Cf. DONATSCH/ HEIMGARTNER/ SIMONEK, p. 34.

¹⁸⁹ DONATSCH/ HEIMGARTNER/ SIMONEK, p. 37; art.74a IMAC.

¹⁹⁰ DONATSCH/ HEIMGARTNER/ SIMONEK, p. 37; the German term is ‘Kontosperre’, cf. BIANCHI/ HEIMGARTNER, p. 355; cf. for more details on the freezing of accounts in connection with legal assistance EYMANN, p. 107 et seq. As the notion freezing is often used in connection with PEP assets, the paper will use this term instead of seizure; mainly it refers to the assets on the accounts.

2.3.1 will focus on provisional measures as a means to freeze bank accounts in a preliminary stage of the legal assistance procedure.

2.2. Analysis of Selected General Rules and Conditions of Legal Assistance as provided by IMAC in connection with Assets of PEPs

2.2.1. Demands on the Judicial Proceeding and of the Infraction

In order to grant legal assistance in criminal matters, certain demands regarding the offense and the criminal proceeding in the requesting state have to be met.

2.2.1.1. Demands on the Criminal Proceeding in the Requesting State

The requirements to the foreign criminal proceedings are laid down in art. 2 IMAC: first, the proceedings must meet the procedural requirements of the European Convention on Human Rights and Fundamental Freedoms¹⁹¹ (henceforth ECHR), or the International Covenant on Civil and Political Rights¹⁹² (henceforth ICCPR).¹⁹³ The assessment whether the minimum guarantees are being granted is based on a value judgment concerning the internal institutional conditions of a foreign country.¹⁹⁴ In some cases, this precondition leads to the imposition of certain human rights to non-signatory states of the ECHR.¹⁹⁵ In the context of PEP assets obtained by unlawful means, the procedural exigencies may create problems due to the fact that in many cases the requesting state is not equipped with a functioning judicial system able to meet the minimal guarantees. In such cases, legal assistance has been subjected to conditions according to art. 80p IMAC with regard to the fulfillment of the minimal standards.¹⁹⁶ However, this practice is criticized, mainly for the lack of a guarantee of the respect of human rights (cf. section 2.5.5).¹⁹⁷

A second precondition is that the context of the proceedings must not be discriminatory. To be more specific, it must not be “carried out so as to prosecute or punish a person on account of his political opinions, his belonging to a certain social group, his race, religion, or nationality”¹⁹⁸ or aggravate the situation of a discriminated person on the before mentioned grounds.¹⁹⁹ Furthermore, the proceedings must not be “tainted with other grave

¹⁹¹ European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, SR. 0.101.

¹⁹² International Covenant on Civil and Political Rights of 16 December 1966, SR. 0.013.2.

¹⁹³ Art. 2 para. a IMAC; see DANNACHER, pp. 40-42 for more detail on the content of the minimal guarantees.

¹⁹⁴ Wegleitung, p. 16, citing BGE 129 II 268 c. 6 and cited jurisdiction.

¹⁹⁵ GSTÖHL, p. 105, footnote 614. Conversely, however, the formal procedural guarantees according to art. 6 ECHR are not applicable to passive mutual assistance procedures since the FSC qualifies them as administrative procedures, cf. GSTÖHL, p. 105, she is referring to several BGE and specifies that in BGE 120 Ib 119 c. 4 “it is left open if certain compulsory measures in the mutual assistance procedure may be qualified as being of penal or civil nature”, footnote 611, free translation by the author (CAPUS, pp. 296–298); cf. section 4.2.

¹⁹⁶ Wegleitung, p. 16; e.g. BGE 123 II 595 cf. RICHTER, p. 582-585 for more information on the conditions in the Marcos case; this practice is disputed, against it is POPP, recital 381, p. 254.

¹⁹⁷ POPP, recital 381-383, pp. 254-256; DANNACHER, p. 42.

¹⁹⁸ Art. 2 para. b IMAC

¹⁹⁹ Art. 2 para. c IMAC.

defects”²⁰⁰. The question arises as to whether PEPs may fall into the group of protected persons. However, the aim of the foreign proceedings concerning PEP assets generally aim at repatriating stolen assets. Hence the proceedings focus on economic crimes and in some cases even crimes against the population rather than on the PEP’s political opinions or belonging to a certain social group.²⁰¹

2.2.1.2. Demands on the Criminal Matter, the Statute of Limitations and the Exclusion of Acts that have a Predominantly Political Character

a) Demands on the Criminal Matter

Regarding the requirements concerning the penal proceeding, the IMAC is only applicable for judicial proceedings in criminal matters in which an appeal to a judge can be made according to the law of the requesting state.²⁰² Hence, in cases of abrogation or discontinuation of proceedings, the precondition of applicability of the IMAC is no longer given.²⁰³ Concerning the notion and scope of ‘criminal matter’, legal assistance is granted in order to repress criminal offences which are subject to imprisonment²⁰⁴, while it will be denied in the case of offences with minor importance which do not justify the carrying out of the proceedings.²⁰⁵ The term needs to be understood in its broad sense in order to include all sorts of foreign proceedings that are repressive in their nature.²⁰⁶

b) Statute of Limitations

If the offence subject to investigation in the requesting state would be barred by the statute of limitation if committed in Switzerland, legal assistance comprising coercive measures will be denied.²⁰⁷ In PEP asset cases, this apparently simple preclusion causes problems, as will be exemplified in the descriptions of the Duvalier and the Mobutu cases (cf. 2.4.1). The examination whether the act is barred by the statute of limitation is done at the time of the issuance of the decree to enter into the case according to art. 80a IMAC.²⁰⁸ In dealing with states with weak institutional structures, such limitations impede legal assistance seriously. The aim of the article is in the end to protect the concerned individual in that s/he should not be at a greater disadvantage when granting legal assistance than s/he would be if the same

²⁰⁰ Art. 2 para. d IMAC, this condition represents a fallback clause for all other grave defects that obstruct a fair trial within the Swiss legal sense, see GSTÖHL, p. 101.

²⁰¹ In a similar vein, in the context of PEPs the question arises as to what is meant by the preclusion of acts that are of a predominantly political nature according to art. 3 para. 1 IMAC. However, the exclusion of political acts has a humanitarian background, i.e. it aims at protecting resistance against certain, maybe repressive government, see ZIMMERMANN, pp. 566-567, recital 613. Hence, the article cannot intend to preclude legal assistance cases that aim at repatriating stolen assets.

²⁰² Art. 1 para. 3 IMAC; the judicial instance must not deal with the criminal matter in every stage of the proceeding but it must be competent to judge over it, cf. CAPUS, p. 232.

²⁰³ GSTÖHL, p. 101; POPP, recital 130, p. 91; ZIMMERMANN, recital 332.

²⁰⁴ ZIMMERMANN, recital 554, p. 505.

²⁰⁵ Art. 4 IMAC.

²⁰⁶ Wegleitung pp. 16-17.

²⁰⁷ Wegleitung, p. 22; art. 5 para. 3 IMAC.

²⁰⁸ BGE 136 IV 4, c. 6.2.; cf. DANNER, p. 51.

proceedings were to happen in Switzerland.²⁰⁹ However, arguably, if procedures in PEP asset would be instigated in Switzerland, it could be proposed that the statute of limitations would most probably not come into play due to the efficiency of the legal system, this is however without taking into account problems relating to the gathering of evidence related to such cases.

2.2.2. Demands to the Content and Form of the Legal Assistance Request

Several requirements need to be met as to the form and content of a legal assistance request. However, defective requests are usually not being denied but instead are sent back to be revised.²¹⁰ The executing authority, in processing a request, relies mainly on the facts described therein²¹¹; hence, the description of the facts shall be as detailed as possible.²¹² As will be seen in the Mubarak case, Egypt's' request for legal assistance was insufficient in its first edition whereupon a Swiss delegation travelled to Cairo to assist with formulating the request.²¹³ I propose that such assistance is to be welcomed and may yield a fruitful cooperation from the outset of the proceedings. If this practice can establish itself in PEP asset cases, which is desired, the requirements concerning form and content will pose fewer problems and thus will not be discussed in detail here.²¹⁴

2.2.3. Principle of Double Criminality

2.2.3.1. Purpose of the Principle of Double Criminality

The condition of double criminality requires that the infraction prosecuted in the requesting state is punishable according to the law of both the requesting state and that of the requested state.²¹⁵ The condition emanates from considerations of the 'ordre public' or the sense of justice in that cooperation will not be accorded if in the requested state the act in question does not constitute, in its sense of justice, a punishable incrimination.²¹⁶ The principle is based on the premise that cooperation needs to be based on a consensus as to what is considered a criminal act.²¹⁷ However, the principle is increasingly becoming less important mostly due to the harmonization of criminal law.²¹⁸ Furthermore, since the European Convention on Mutual Legal Aid in Criminal Matters²¹⁹ does not require double criminality, it is debatable if the

²⁰⁹ POPP, recital 255, p. 171; cf. DANNACHER, p. 46.

²¹⁰ Wegleitung, p. 38.

²¹¹ Wegleitung, p. 41.

²¹² Wegleitung, p. 41.

²¹³ NZZ 16/5/2011, Potentatengelder im Visier.

²¹⁴ For details on the requirements to the form and the content of requests, see Wegleitung, pp. 38-43; EYMANN, pp. 111-114; DANNACHER, pp. 56-58.

²¹⁵ ZIMMERMANN, recital 575, p. 530.

²¹⁶ ZIMMERMANN, 2009, recital 576, p. 531.

²¹⁷ DONATSCH/ HEIMGARTNER/ SIMONEK, p.65.

²¹⁸ CAPUS, p. 387; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 65.

²¹⁹ European Convention on Mutual Legal Aid in Criminal Matters of 20 April 1959, SR 0.351.1.

principle still counts to the general principle of legal assistance independent of a designated provision in a treaty.²²⁰

2.2.3.2. Examination of the Condition of Double Criminality

For the examination of double criminality, Swiss authorities rely on the facts laid down in the legal assistance request and confine themselves to the question whether the facts are punishable under Swiss law, as long as there is no obvious misuse.²²¹ In other words, the decisive factor is whether the statement of the facts in the request may be subsumed under a certain *corpus delicti* of Swiss law.²²² With regard to the applicable legislation, the examination is conducted towards the law that exists at the point of time the decision is taken about whether legal assistance is granted.²²³ Hence, it is not relevant if the law in question has already existed at the time the act for which legal assistance was requested has been committed.²²⁴ The question of consistency of the legal qualification of the offences or equivalent terms of penalties is irrelevant.²²⁵ Furthermore, if more than one offence is named in the request, only one of the described offences must be punishable under Swiss law.²²⁶

For ancillary legal assistance, according to art. 64 para. 1 IMAC, the condition of double criminality is only relevant to compulsory measures.²²⁷ The provision further specifies that in this area only the objective requirements must be met and hence subjective elements, such as intent or negligence, are being neglected.²²⁸ However, following a FSC decision of 1986²²⁹ and according to prevalent doctrine, both the objective and subjective elements must be examined²³⁰, which increases the protection of the concerned person.²³¹

2.2.3.3. Double Criminality in PEP Asset Cases

In most PEP asset cases that Switzerland has been confronted with, corruption in the requesting state is the *modus operandi* and PEPs used government funds more or less officially for their private purposes (cf. section 2.4). Corruption in the respective state is endemic and often even legalized by the PEP himself.²³² The question thus arises if such

²²⁰ One author in favor of the independent requirement for double criminality is e.g. ZIMMERMANN, p. 531, recital 576, citing BGE 105 Ib 282 c. 2a; against it DONATSCH/ HEIMGARTNER/ SIMONEK, p. 65.

²²¹ ZIMMERMANN, 2009, recital 582 -584, pp. 535-537.

²²² DONATSCH/ HEIMGARTNER/ SIMONEK, p. 71.

²²³ ZIMMERMANN, p. 533, recital 580; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 69.

²²⁴ ZIMMERMANN, p. 533, recital 580.

²²⁵ Wegleitung, p. 28; Dannacher exemplifies this with the Duvalier case in which the facts qualified as participation in a criminal organization under art. 260ter PC, yet Haiti used not one single norm to qualify the acts but several norms, DANNACHER, p. 60.

²²⁶ Wegleitung, p. 28; DONATSCH/ HEIMGARTNER/ SIMONEK, p.68, citing BGer of 17 July 2007, 1C_138/2007, c. 2.3.2.

²²⁷ Art. 64 para. 1 IMAC; CAPUS, p. 347; Wegleitung, pp. 17- 28; art. 64 para. 1 IMAC.

²²⁸ Art. 64 para. 1 IMAC.

²²⁹ BGE 112 Ib 576 c. 4 b.

²³⁰ CAPUS, p. 348, ZIMMERMANN, p. 537, recital 584.

²³¹ DANNACHER, p. 60.

²³² DANNACHER, pp. 59-63. Dannacher exemplifies this issue with the Mobutu case, where looting was legalized by decree (DANNACHER, p. 61).

legitimization opposes the condition of double criminality. Dannacher argues against the interference of such legitimization based on the fact that only in cases of obvious misuse the requested state investigates if the facts of the request represent criminal offences in the requesting state.²³³ Authorities are generally bound to the facts in the legal assistance request.²³⁴

Another point in connection with double criminality and PEP asset cases is that with requests relating to criminal organizations or money laundering, the exigencies to the exposition of the facts in the legal assistance request are lower than what would be requested for a subsumtion under the PC.²³⁵

2.2.4. The Ordre Public Preclusion

Art. 1a IMAC introduces the ordre public preclusion, i.e., if the requested state fears that the execution of the legal assistance request would go against its sovereignty, its security interests, its ordre public or other essential interests, the request will not be granted.²³⁶ In the Marcos case, the FSC has interpreted the norm by means of an argumentum e contrario: while constructed as a basis to refuse international legal assistance, it was used as a norm that favors cooperation if the omission of assistance would go against essential interests of Switzerland.²³⁷

2.3. Analysis of the General Rules of Legal Assistance concerning the Freezing, the Forfeiture and the Restitution of Assets of PEPs as provided by IMAC

This section tackles the freezing, and the handing over of assets for the purpose of forfeiture or restitution based on IMAC. With regards to the freezing of accounts, the focus is on freezings as a provisional measure according to art. 18 IMAC. The subsequent step, after the request for legal assistance has been received, would be governed by artt. 63 and 64 IMAC concerning coercive measures.²³⁸ However, as the measures overlap largely with those taken in the provisional measures in PEP asset cases this step will not be addressed separately.

²³³ DANNACHER, p. 61, citing the Decision of the II. Divisional Court of the FSC of 31 January 2011 (RR.2010.185) c. 3.4; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 70, they point out however that the requesting state must in its request attach the relevant legislation, cf. p. 70.

²³⁴ DANNACHER, p. 61, citing BGE 136 IV 4 ff.; Dannacher further explains that the legalization of corruption is the exceptional case and most states are equipped with similar criminal offences. Furthermore, she argues that such acts drastically oppose the sense of justice which can generally be based on the collectivity of the internal legal framework of the state in question, DANNACHER, pp. 59-63.

²³⁵ CAPUS, p. 387; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 71; with regard to the criminal organization cf. ZIMMERMANN, p. 544, recital 590.

²³⁶ ZIMMERMANN, 2009, recital 709, p. 662.

²³⁷ ZIMMERMANN, 2009, recital 712, p. 666; BGE 123 II 595 c. 5a; yet it is suggested in this paper that assistance should not only be granted for the preservation of the reputation of the Swiss financial center but also with a concrete view to the good of the people of the requesting state and hence assistance should be linked to conditions according to art. 80p IMAC.

²³⁸ EYMANN, p. 128.

Concerning the handing over of PEP assets for forfeiture or restitution, art. 74a IMAC will be looked at in detail.

2.3.1. The Freezing of Assets under IMAC

In most legal assistance cases concerning PEPs, the first measure taken by Swiss authorities is usually the provisional freezing²³⁹ of assets belonging to PEPs. Generally, the freezing of assets is done in view of a later restitution or seizure in the requesting state.²⁴⁰ In several cases involving PEPs, the provisional measures taken to freeze the assets were not based on the IMAC but on the constitutional competency of the FC²⁴¹, which will be discussed in section 4.1. However, the IMAC provides for the possibility of a provisional asset freeze, which will be analyzed in the following.

2.3.1.1. The Purpose of Provisional Measures

The purpose of provisional measures is, according to art. 18 para. 1 IMAC, “to preserve the existing situation, to safeguard threatened legal interests or to protect jeopardized evidence”.²⁴² Hence, the aim is to make sure that in the time until the definitive execution of measures of international legal assistance can be ordered, the prevailing state of affairs remains unchanged.²⁴³ Hence, provisional measures are preventive²⁴⁴ in nature.²⁴⁵

2.3.1.2. The Content of Provisional Measures

It is not specified in art. 18 IMAC what sort of measures are included; however, in the context of assets of PEPs, they include relevant measures in order to secure the existing situation such as the provisional freezing of bank accounts²⁴⁶, which, in practical terms, represents the most common provisional act²⁴⁷ and hinders a PEP of emptying bank accounts, or the provisional seizure²⁴⁸ e.g. of documents²⁴⁹ or land register barriers²⁵⁰ which would prevent the sale of property.

²³⁹ Newspapers usually use the terms “freezing” or “blocking” interchangeably, as an example, cf. Swissinfo.ch of 15/2/2011, Campaigners praise Mubarak asset freeze.

²⁴⁰ DONATSCH/ HEIMGARTNER/ SIMONEK, p.37.

²⁴¹ Cf. Motion 11.3151; the first asset freezing of the Mobutu assets in 1986 was done by the FC on its foreign affairs competencies and was not based on the IMAC, cf. RICHTER, p. 543.

²⁴² Art. 18 para 1 IMAC.

²⁴³ POPP, p. 334, recital 491, cf. ZIMMERMANN, p. 347, recital 376.

²⁴⁴ MOREILLON, p. 218, No. 2.

²⁴⁵ *Wegleitung* 2009, p. 60.

²⁴⁶ POPP, p. 335 recital 494; ZIMMERMANN, p. 348, recital 376; MOREILLON, Art. 18, N 5, p. 216.

²⁴⁷ GSTÖHL, p. 309.

²⁴⁸ POPP, p. 335, recital 494, Popp cites BGE 123 II 276 f c. 4b/dd; 112 Ib 576 c. 6b; Popp criticizes this practice by the FSC and proposes a more restrictive application; in line with him is EYMANN, p. 130.

²⁴⁹ MOREILLON, p. 216, N 5.

²⁵⁰ Cf. e.g. Mobutu case, section 2.4.1; RICHTER, pp. 563-564; Parliamentary question, 97.1030.

2.3.1.3. *The Preconditions for Provisional Measures*

Provisional measures may be initiated in two ways: first, upon explicit request by another state²⁵¹ and second, by order of the Federal Office of Justice (henceforth FOJ).²⁵² The two options define different preconditions in order to grant measures.

a) **Provisional Measures upon Explicit Request**

First, if provisional measures are requested by another state, the request must be explicit, i.e. it must specify what measures are being requested as well as the scope of the request.²⁵³ A further condition is that the request does not appear obviously inadmissible or inappropriate according to the last sentence of para. 1.²⁵⁴

b) **In Case the Prevailing situation is as such that any Delay Would Jeopardize the Proceedings**

Second, if provisional measures are ordered by the FOJ, the first condition is that a request is being announced.²⁵⁵ The announcement however has not to relate to the provisional measures as such but a general announcement of a request of legal assistance is considered to be sufficient.²⁵⁶ Hence, the connection between the request and the provisional measures by the FOJ that are actually taken appears rather weak: as long as the provisional measures do not contradict the explicit will of the foreign state, the FOJ is free to designate the extent and content of the provisional measures.²⁵⁷ The second condition is that the prevailing situation is characterized by the fact that any delay would jeopardize the proceedings.²⁵⁸ However, the measures will be lifted if the foreign state does not deliver the announced request within a set deadline.²⁵⁹ With regard to the applicability of the general preconditions of legal assistance, in principle, the granting of provisional measures is only permissible if the general conditions of legal assistance are prima facie fulfilled.²⁶⁰ According to Moreillon and Zimmermann, in this state of the affairs not all conditions need to be met and provisional measures are in principle only refused if clearly ill-founded.²⁶¹ The FSC limits the examination whether provisional measures are valid to the question if the principles of double criminality and proportionality are being respected.²⁶²

²⁵¹ Art. 18 para. 1 IMAC.

²⁵² Art. 18 para. 2 IMAC.

²⁵³ POPP, p. 334, recital 492.

²⁵⁴ *Wegleitung* 2009, p. 60.

²⁵⁵ Art. 18 para. 2 IMAC.

²⁵⁶ POPP, p. 336, recital 496, Popp cites BGE 121 IV 43 f.

²⁵⁷ POPP, p. 336, recital 496, Popp cites BGE 116 Ib 101 f. *Erw. b.*

²⁵⁸ The German term is “Gefahr im Verzug”.

²⁵⁹ ZIMMERMANN, p. 348, recital 376.

²⁶⁰ DONATSCH/ HEIMGARTNER/ SIMONEK, p. 95; cf. POPP, p. 335, recital 493.

²⁶¹ ZIMMERMANN, p. 347, recital 376; MOREILLON, p. 216, No. 3; POPP, recital 493, p. 335.

²⁶² MOREILLON, p. 216 No. 6.

2.3.1.4. *Duration of provisional measures*

Provisional measures may remain in force until the conclusion of the legal assistance procedures.²⁶³ Assets that are only being handed over based on a final and executable order of the requesting state remain frozen until presented.²⁶⁴ However, if provisional measures last for several years they may lead to a disproportionate restriction on the right to property of the person in question.²⁶⁵

2.3.1.5. *Appeal Entitlements*

The order for provisional measures qualifies as an incidental decree²⁶⁶; hence, independent appeal to the FCC can only be taken if the conditions of art. 80e para. 2 IMAC are met.²⁶⁷ This implies that the freezing must cause immediate and irreparable disadvantage. In PEP cases the condition could e.g. be fulfilled if the PEP is denied access to any liquid assets²⁶⁸; however, the condition of immediate and irreparable disadvantage is in the case of asset freezes rarely fulfilled.²⁶⁹ A further appeal to the FSC is possible in particularly significant cases.²⁷⁰

Banking secrecy cannot be opposed to international legal assistance.²⁷¹ With regard to the banking secrecy and provisional measures however, it must be noted that provisional coercive measures may be problematic in the sense that they involve the same incisions in the banking secrecy as with the execution of ordinary measures; as pointed out by Gstöhl, however, the problems are exacerbated by the risk that secrets will be divulged to the requesting state before it is known whether the request fulfills all preconditions of legal assistance.²⁷²

2.3.1.6. *Problems of Provisional Measures in connection with PEP asset cases*

As seen above, if provisional measures are ordered by the FOJ according to art. 18 para. 2 IMAC, the first condition is that a request is announced. In the case of the sudden fall of long time dictatorial regimes, already the announcement may pose problems if state structures are too weak to act. However, in order not to jeopardize that asset are accessed by the PEP in question, immediate action is required. Furthermore, even if the announcement is made, the measures will be lifted if the foreign state does not deliver the announced request within a set deadline.²⁷³ The deadline is rather short: Popp considers a deadline of 18 days sufficient.²⁷⁴

²⁶³ Wegleitung, p. 61.

²⁶⁴ Wegleitung, p. 61; art. 33 a IMAC Ordinance.

²⁶⁵ Wegleitung, p. 61; BGE 126 II 462 c. 5.

²⁶⁶ GSTÖHL, p. 146.

²⁶⁷ GSTÖHL, p. 146.

²⁶⁸ BIANCHI/ HEIMGARTNER, p. 363.

²⁶⁹ DONATSCH/ HEIMGARTNER/ SIMONEK, p. 110.

²⁷⁰ Art. 84 para. 1 Federal Supreme Court Act of 17 June 2005 (Status as of 1 April 2012) (SR. 173.110).

²⁷¹ MOREILLON, p. 149, No. 748.

²⁷² GSTÖHL, p. 310.

²⁷³ ZIMMERMANN, p. 348, recital 376.

²⁷⁴ POPP, p. 337, footnote 41; he refers to the time limit as outlined in art. 50 para. 1 IMAC relating to the lifting of detention.

The FOJ sets out a maximum time limit of three months which can be extended at a later stage.²⁷⁵ In connection with PEPs coming from failed states even the deadline of three months may be too short for such a malfunctioning legal system to prepare a request that would impede the lifting of the provisional measures.²⁷⁶ So far the part of the freezing has been taken on by the FC which will be discussed in section 4.1.

Provisional measures are generally followed by ordinary legal assistance measures after a request has been received. The general preconditions of mutual assistance have been discussed in section 2.2. In the context of PEP assets, measures according to artt. 63 and 64 IMAC are of particular importance. Art. 63 para. 2 lit. b IMAC does not explicitly enumerate the freezing of accounts, yet they are clearly included.²⁷⁷

2.3.2. The Handing Over for the Purpose of Forfeiture or Restitution according to Art. 74a IMAC

2.3.2.1. Purpose and Object of Art. 74a IMAC

Historically, international cooperation in criminal matters with regard to the handing over of objects or property focused on evidential purposes.²⁷⁸ Hence, in connection with economic crimes, the only way to recover assets was with civil law.²⁷⁹ A clear differentiation between the handing over for evidential purposes (art. 74 IMAC)²⁸⁰ and the handing over for the purposes of forfeiture or restitution (art. 74a IMAC) was laid down with the revision of the IMAC of 1996.²⁸¹ The previous regulation²⁸² in the matter was considered as too vague²⁸³ particularly when dealing with PEP asset cases.²⁸⁴ Specifications by the FSC to art. 74 IMAC were incorporated in the establishment of art. 74a IMAC to a great extent.²⁸⁵

With art. 74a para. 1 IMAC, upon request, the requested state may hand over assets²⁸⁶ that were subject to a precautionary seizure to the requesting state after conclusion of the legal assistance proceeding.²⁸⁷

²⁷⁵ Wegleitung 2009, p. 61, footnote 461.

²⁷⁶ Cf. Dispatch RIAA, p. 19.

²⁷⁷ EYMANN, pp. 133-134.

²⁷⁸ Wegleitung, p. 64.

²⁷⁹ Wegleitung, p. 64.

²⁸⁰ The handing over of evidence according to art. 74 IMAC is concerned with objects, documents or assets that have been seized as evidence.

²⁸¹ Wegleitung, p. 65; the handing over of assets was already introduced in the IMAC of 1983 in article 74 previous IMAC (para. 2 and 3), However, the provisions were considered too vague and needed specifications by the FSC which introduced clearer guidelines in the two cases PEMEX BGE 115 Ib 517 and Marcos BGE 116 Ib 452, cf. Wegleitung, p. 66.

²⁸² Art. 74 previous IMAC.

²⁸³ Wegleitung, p. 66.

²⁸⁴ RICHTER, p. 545.

²⁸⁵ Wegleitung, p. 66.

²⁸⁶ What is meant with 'objects and assets' is specified in art. 74a para. 2 subpara. a to c; the question whether replacement claims (German term: Ersatzforderungen) may be seized and restituted has not yet been closed by doctrine and law, cf. DONATSCH/ HEIMGARTNER/ SIMONEK, pp. 37-38; DANNACHER, pp. 74-76. The issue will not be further discussed in this paper.

2.3.2.2. *The ‘As a Rule’ Conception of Art. 74a IMAC*

According to para. 3, the handing over “may intervene at any stage of the foreign proceeding, as a rule based on a final and executable order of the requesting State”.²⁸⁸ In principle, the illegality of the PEP assets in question may only be determined with clarity with the final and executable order of the requesting state.²⁸⁹ This paragraph was heavily discussed in the legislative process. There were mainly two points that were disputed; first an argument in favor of a handing over without a final and executable order of the requesting state was that the extradition of a person does itself not require such an order.²⁹⁰ Second, it was argued that in undisputed cases, the awaiting of a final and executable order would be unnecessary, which is a reasoning that Popp qualifies as a “spurious argument” since if the situation is undisputed, a swift decision by the foreign courts should not pose a problem.²⁹¹ Hence, the clause “as a rule” resulted from a compromise²⁹² on the one hand with the aim “to maintain the precondition of a final and enforceable decision of the requesting State and on the other hand to create an exception clause for situations where it is not possible or necessary to wait for a final and enforceable order or where for other reasons it would be necessary to act on account of the ‘ordre public’”²⁹³.

Popp deems the compromise unsatisfactory, arguing that early handovers should only be allowed in cases of irreversible damage to the assets in case they are kept in Switzerland.²⁹⁴ Zimmermann on the other hand considers the mitigation “as a rule” a welcomed solution on the grounds that it may prevent deadlocks.²⁹⁵ In the Marcos case, in which the FSC first had the opportunity to examine the “as a rule” conception, stated that “the legislation leaves it thus to the authorities that apply the law to waive the requirement [of a final and executable order of the requesting state] whereas the early handover must remain the exception and must not become the rule”.²⁹⁶ The FSC elaborated on the following condition for the forgoing of a final and executable order is not requested: with regard to the criminal origin there must be

²⁸⁷ Art. 74 para. 1 IMAC.

²⁸⁸ Art. 74 para. 3 IMAC.

²⁸⁹ MOREILLON/ MACALUSO/ MAZOU, pp. 67-68.

²⁹⁰ POPP, p. 282, recital 417; RICHTER, p. 548.

²⁹¹ POPP, p. 283, recital 417, free translation by the author.

²⁹² POPP, p. 282, recital 417; RICHTER, p. 548; ZIMMERMANN, p. 315, recital 340.

²⁹³ BGE 123 II 595, c. 4d, free translation by author from the German original: “Damit werde einerseits die Schranke des rechtskräftigen und vollstreckbaren Entscheids des ersuchenden Staates beibehalten; andererseits solle in bestimmten Fällen - wo dies nicht möglich oder auch nicht erforderlich sei oder wo es aus anderen Gründen wegen des ordre public geboten sei zu handeln - eine Ausnahmemöglichkeit bestehen.”

²⁹⁴ POPP, p. 284, recital 419.

²⁹⁵ ZIMMERMANN, p. 315, recital 340.

²⁹⁶ BGE 123 II 595 c. 4, free translation by the author from the German original “Das Gesetz überlässt es somit der rechtsanwendenden Behörde, in gewissen Fällen von diesem Erfordernis abzusehen, wobei die vorzeitige Herausgabe die Ausnahme bleiben muss und nicht zur Regel werden darf”.

absolutely no need for clarification.²⁹⁷ However, as pointed out by Bianchi and Heimgartner, “in the area of restitution of potentate assets, the exception has become the rule.”²⁹⁸

Anticipatory restitution should be applied with precaution as it is a definitive measure.²⁹⁹ The application of art. 74a IMAC requires that the requesting state has at least opened an internal procedure with regard to the forfeiture or the restitutions of the assets in question.³⁰⁰

2.3.2.3. Art. 74a IMAC in connection with Assets of Criminal Organizations according to Art. 260ter PC and Art. 72 PC

In legal assistance cases relating to PEP assets, the weakness of the requesting state’s institutional structures has hindered its ability to provide evidence that the assets have been acquired by unlawful means.³⁰¹ Without this evidence the forfeiture and restitution of the assets has not been possible.³⁰² In the case of the Abacha assets, the FSC has for the first time classified a regime as a criminal organization under art. 260^{ter} PC.³⁰³ The FSC further decided that if the requested funds are linked to a criminal organization, the special forfeiture provisions of art. 72 PC³⁰⁴ comprising the reversal of the burden of proof is applicable to the handing over according to art. 74a para. 3 IMAC.³⁰⁵ It followed from this that the onus of proving the lawful origin of the assets concerned was now on the Abacha family.³⁰⁶ This practice was repeated in the event of Duvalier.³⁰⁷

However, the qualification of regimes as criminal organizations is heavily discussed in the doctrine mainly due to the requirement of secrecy laid down in art. 260^{ter} PC.³⁰⁸ Similarly, a debate is going on as to the point of time in which the statute of limitations of art. 260^{ter} PC begins to run in connection with PEPs. According the FSC, this is at the end of the term of office of the PEP as it is assumed that the organization falls apart.³⁰⁹ Furthermore, the analogical application of art. 72 PC mentioned above is problematic in terms of the content of

²⁹⁷ BGE 123 II 595 c. 4 f.

²⁹⁸ BIANCHI/ HEIMGARTNER, p. 358, free translation by the author from the German original: “Im Bereich der Rückerstattung von Potentatengelder ist der Ausnahmefall zur Regel geworden“. They point out that so far potentate assets have never been restitution based on a final and enforceable decision, p. 358, footnote 44. Furthermore, they see in the anticipatory redemption a potential disproportionate infringement of fundamental rights if the public interest does not require a speedy execution since it is at the point of the handing over of the property not certain if the assets will be forfeited or restituted (BIANCHI/ HEIMGARTNER, p. 358).

²⁹⁹ MOREILLON, Art. 74a IMAC, N 12, p. 348; cf. MOREILLON/ MCALUSO/ MAZOU, p. 69.

³⁰⁰ SCHUPP, p. 192; cf. MOREILLON/ MCALUSO/ MAZOU, p. 69.

³⁰¹ CAPUS, p. 232.

³⁰² CAPUS, p. 232.

³⁰³ BGE 131 II 169.

³⁰⁴ Art. 72 PC states that “(...) it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.” (Art. 72 PC).

³⁰⁵ BGE 131 II 169 c. 9.

³⁰⁶ CAPUS, p. 232.

³⁰⁷ Cf. CAPUS, p. 233; cf. MOREILLON/ MACALUSO/ MAZOU, pp. 69-88.

³⁰⁸ Art. 260^{ter} PC; one part of the doctrine criticizes the lack of secrecy in PEP asset cases (cf. DANNACHER p. 109; others argue that the qualification of a criminal organization does not target the government in its entirety but only a limited circle of persons, cf. MONFRINI/ KLEIN, p. 124; cf. section 2.5.3.

³⁰⁹ BGer of 12 January 2010, 1C_374/2009 c. 6.5.; cf. BIANCHI/ HEIMGARTNER, p. 359; cf. section 2.5.3.

the reversal of the burden of proof. The problems connected to all these points will be discussed in section 2.5.3.

2.3.2.4. *Appeal*

The decree on the conclusion of the mutual assistance proceedings can be challenged by an appeal to the FCC.³¹⁰ A further appeal to the FSC is again possible in particularly significant cases.³¹¹

2.4. Selected Cases

Switzerland has been confronted with prominent PEP cases since the 1980ies and has taken up a leading role in terms of expertise due to its proactive answer in connection with the restitution of PEP assets.³¹² Richter has examined several past cases in which assets were claimed from a foreign country and has shown the evolution of approach of the Swiss practice towards such cases.³¹³ Albeit legal assistance helped to solve most of these cases, some lead to unsatisfactory results.

The previous cases that will be looked at in the following are those of Marcos, Mobutu and the Duvaliers; the Marcos case having set the cornerstone for the subsequent cases. The cases of Mobutu and Duvalier have particularly shown the limits of the legal assistance system when dealing with states that are not capable of meeting the conditions of a legal assistance procedure.³¹⁴ The Duvalier case is of particular importance in connection with the RIAA, which is often referred to as “Lex Duvalier”. Of the current cases, the following were selected for further discussion here: the Mubarak case, being the largest asset freeze, the Gaddafi case, being the first case in which the FC based on art. 184 para. 3 SC froze the assets of a head of state who was still in power, and the case of Assad, where assets are frozen based on the Embargo Act in accordance with EU sanctions and where the outcome of the civil war is still unknown.

However, the case studies are in no way exhaustive and simply intend to highlight the most important cornerstones. In the following, the focus lies on the legal assistance proceedings. In Annex 3 Tables 4 to 9, a much more detailed overview informs about further relevant details of the cases.

³¹⁰ Art. 80e para. 1 IMAC.

³¹¹ Art. 84 para. 1 Federal Supreme Court Act of 17 June 2005 (Status as of 1 April 2012) (SR. 173.110).

³¹² Dispatch RIAA, p. 2, 6.

³¹³ RICHTER, p. 555 et seq. Richter shed light on the following cases: Haile Selassie (1974), Pahlevi (1979), Ceaucesu (1989), Traoré (1991-1997), Layne (1996), Bhutto (1997), Karadzic (1997), Suharto (1998) and both Marcos cases (1986 and 1997). Later cases include the Abacha case, the Montesinos case, the Salinas case, and others. The Abacha case has been examined in detail by, among others, MONFRINI, p. 41 et. seq.

³¹⁴ Dispatch RIAA, p. 2.

2.4.1. Selected Previous Cases: Marcos, Mobutu and Duvalier

2.4.1.1. *Marcos case, the Philippines*

The Aquino government, which followed Marcos, engaged in several lawsuits in the attempt to recover what is estimated were billions³¹⁵ of dollars of assets stolen from the Philippines.³¹⁶ The Philippines filed requests for legal assistance in the US, Switzerland, Liechtenstein, Germany, Hong Kong and Australia and filed civil claims in the US and Singapore.³¹⁷ According to Chaikin and Sharman “the efforts (...) to recover the Marcoses’ illicit wealth through international cooperation have been disappointing, with the largest recovery being the USD 356 million frozen in Switzerland in 1986.”³¹⁸

The case is particularly interesting from the point of view of Swiss law in that Swiss lawyers were asked for the first time to apply the newly introduced IMAC that came in to force in 1983.³¹⁹ There had been no precedent cases in connection with the IMAC yet; hence, the Marcos case led to the first ever freezing of the funds of a former foreign head of state.³²⁰ Therefore, it was the Marcos cases that paved the way for the Duvalier and Mobutu cases.³²¹

In Switzerland, the case was opened by the provisional freezing of the Marcos assets by the FC based on art. 102 para. 8 previous SC³²², whereas the FC used this foreign policy instrument in this context for the first time and did not require the Philippines to previously meet the regular preconditions of legal assistance.³²³ The formal request for legal assistance from the Philippines was submitted in April 1986³²⁴ which led to the freezing of the bank account by the competent examining magistrates who partially authorized the restitution of the assets.³²⁵ In the aftermath of the appeal of Imelda Marcos and several foundations and companies the FSC passed two consistent rulings³²⁶ in which it established several principles on how to handle such cases.³²⁷ Three are of particular importance here; first, it is stipulated that banking documents can only be transferred if the due process of law has been upheld³²⁸; second, the confiscated assets may only be restituted when a legally binding decision in the matter has been taken by a competent Philippine court³²⁹; third, the Philippines had to initiate

³¹⁵ Estimations expect USD 10 billion of stolen assets, cf. CHAIKIN/ SHARMAN, p. 152.

³¹⁶ TOMES, p. 180; CELOZA, p. 133.

³¹⁷ CHAIKIN/ SHARMAN, p. 174.

³¹⁸ CHAIKIN/ SHARMAN, pp. 174-175.

³¹⁹ ICAR, Marcos Overview.

³²⁰ ICAR, Marcos Overview; however, for previous cases to the Marcos case, cf. RICHTER.

³²¹ Dispatch RIAA, p. 4.

³²² Art. 102 para. 8 previous SC; in the current SC this article is represented by art. 184 para. 3 SC.

³²³ RICHTER, p. 558; cf. EYMANN, pp. 10-12.

³²⁴ RICHTER, p. 559.

³²⁵ RICHTER, p. 559.

³²⁶ BGE 116 Ib 452, cf. RICHTER, p. 559.

³²⁷ RICHTER, p. 559.

³²⁸ RICHTER, p. 559; ICAR, Marcos Chronology, p. 6; proceedings must comply with the SC and the ECHR, cf. BGE 116 Ib 452.

³²⁹ RICHTER, pp. 559-560; ICAR, Marcos Chronology, p. 6; proceedings must comply with the SC and the ECHR, cf. BGE 116 Ib 452.

legal proceedings³³⁰ within one year after the FSC's decision, upon violations of these conditions the assets would be released from seizure in favor of the concerned persons.³³¹ The Philippines initiated proceedings against Imelda Marcos in due time; however, the final decree of the legal assistance proceedings could not be issued due to the lack of a final Philippine decision.³³² The assets hence remained in Switzerland for the time being.³³³

In 1995, the Philippines filed an additional request for legal assistance in which it asked for an anticipatory restitution pursuant to the exception under the newly introduced art. 74a IMAC regarding the handing over for the purpose of forfeiture or return.³³⁴ The competent district prosecution authorized an anticipatory restitution of the assets against which Imelda Marcos and others appealed to the FSC.³³⁵ In 1997, the FSC ruled that there could be an anticipatory restitution prior to a final and enforceable decision of the Philippine courts.³³⁶ By doing so, it specified several open aspects, such as the "as a rule" provision of art. 74a IMAC described above, procedural guarantees according to art. 2 IMAC and reversed the limitation of cooperation condition of art. 1a IMAC in a positive obligation provided it is in Switzerland's interests to grant legal assistance.³³⁷

The assets were transferred to an escrow account in the Philippine National Bank. With regard to restitution, the funds were intended to be spent on agrarian reform programs, yet, as pointed out by the Worldbank, in 2006, the Commission on Audit found that "a significant portion of the recovered assets were used to finance excessive, unnecessary expenses unlikely to benefit the agrarian reform beneficiaries."³³⁸ Furthermore, Switzerland required that one third of the restituted assets go to the victims of human rights violations under the Marcos regime.³³⁹ However, this requirement was not fulfilled by the Philippine authorities.³⁴⁰ The issue of restitution will be taken up again in section 2.5.5.

2.4.1.2. Mobutu case, Democratic Republic of Congo/DRC

In the Mobutu case, in contrast to the Marcos case, the assets were not frozen by the FC, with the justification that at the time when the issue came up, Mobutu was still the head of state of Zaire and the single-handed freezing by Switzerland was not considered reasonable.³⁴¹ The legal assistance request was received on 13 May 1997, following to which provisional measures according to art. 18 IMAC were taken in order to implement a temporal land

³³⁰ The proceedings must comply with minimum standards of the SC and the ECHR, cf. RICHTER, p. 560.

³³¹ RICHTER, p. 560; ICAR, Marcos Chronology, p. 6.

³³² RICHTER, p. 560.

³³³ RICHTER, p. 560.

³³⁴ RICHTER, p. 574.

³³⁵ RICHTER, p. 574.

³³⁶ CHAIKIN/ SHARMAN, p. 176; for a detailed study on BGE 123 II 595 see RICHTER, p. 573 et seq.

³³⁷ RICHTER, p. 573 et seq.

³³⁸ World Bank, StAR, Challenges, Opportunities and Action Plan, p. 25.

³³⁹ JIMU, p. 13.

³⁴⁰ JIMU, p. 13.

³⁴¹ RICHTER, p. 563.

register barrier on his villa in Savigny.³⁴² On 17 May 1997, after the change of power in Kinshasa, the FC issued an ordinance on the basis of art. 102 para. 8 previous SC according to which all assets of Mobutu, his family or connected companies, which were located in or being managed from Switzerland have to be frozen.³⁴³ Again, Switzerland was the first country to freeze the assets.³⁴⁴ From 1997 to 2003, several attempts by Swiss authorities were made in order to receive clarification on the Congolese legal assistance request³⁴⁵; however, due to the continuous influence of the Mobutu clan, neither the legal assistance proceedings nor penal proceedings in the DRC developed any further.³⁴⁶ In order to avoid the result of having to return the assets to Mobutu's heirs, the FC in December 2003 again issued an order to freeze the assets for a period of three years and mandated the FDFA to reach a satisfactory solution with all parties involved.³⁴⁷ The order was prolonged for another two years in 2006 despite the absence of any progress in the matter.³⁴⁸ For two years, Switzerland continuously tried to find a diplomatic agreement when the order was yet again prolonged, first until the 28 February 2009, then until the 30 April 2009. In that time, the DRC aimed at initiating criminal proceedings against Mobutu in Switzerland for economic crimes such as money laundering and the participation or support of a criminal organization.³⁴⁹ However, the Office of the Attorney General of Switzerland rejected the claim on the grounds of the offences being barred by the statute of limitations.³⁵⁰ The DRC did not take recourse against this decision, furthermore, a complaint lodged by a Swiss citizen with the FSC was, fault of being a victim in the affair, rejected.³⁵¹ Hence, the assets have to be returned to the Mobutu heirs, one of which is Mobutu's son Nzanga Mobutu, who initiated the political party Union des Democratres Mobutistes, a party that is dedicated to a "véritable Nation démocratique".³⁵²

Dannacher questions the decision of the Office of the Attorney General of Switzerland to reject criminal proceedings based on the argument that the criminal organization formed by the Mobutu clan still exists.³⁵³ The issue will be taken up in section 2.5.3.

2.4.1.3. *Duvalier case, Haiti*

According to the facts provided in the Federal Criminal Court (henceforth FCC) decision of 12 August 2009, a commission of inquiry was established in Haiti after the fall of the Duvalier regime in 1986 which estimated that during the Duvalier era, a sum of USD 900

³⁴² RICHTER, pp. 563-564; Einfache Anfrage 97.1030.

³⁴³ RICHTER, p. 564-565; cf. EYMANN, pp. 34-25.

³⁴⁴ Einfache Anfrage 97.1030.

³⁴⁵ FDFA Chronology of the Mobutu Assets Frozen in Switzerland.

³⁴⁶ DANNACHER, p. 20.

³⁴⁷ FDFA, Chronology of the Mobutu Assets Frozen in Switzerland.

³⁴⁸ FDFA Chronology of the Mobutu Assets Frozen in Switzerland.

³⁴⁹ DANNACHER, p. 21.

³⁵⁰ FDFA Chronology of the Mobutu Assets Frozen in Switzerland.

³⁵¹ FDFA Chronology of the Mobutu Assets Frozen in Switzerland; cf. DANNACHER, p. 21.

³⁵² Cf. their website: <http://www.udemo.org/Udemo%20-%20Udemo.htm> (accessed on 22/4/2012).

³⁵³ DANNACHER, p. 22; she argues that the assumption that criminal organizations exist only until the fall of the head of state should be questioned, p. 22; cf. section 2.5.3.

million were diverted in favor of the former dictator and his relatives.³⁵⁴ The FOJ posits that a sum of approx. CHF 7 m. thereof lies in Swiss bank accounts.³⁵⁵ Approx. CHF 4.6 m. thereof are associated with the Foundation Brouilly, which is a foundation under Liechtenstein law of which the beneficial owner was Simone Duvalier (until her death in 1997), the wife of François Duvalier and mother of Jean-Claude Duvalier and which was constituted in December 1977.³⁵⁶

In Annex 4 (Figure 1 Timeline of the Duvalier Case), a detailed timeline informs about the stages in the Duvalier case³⁵⁷, which will therefore only shortly be summarized to the most important points. The FSC judgment of 12 January 2010³⁵⁸ denied legal assistance based on the fact that if the acts in question had been committed in Switzerland, they would have already been barred by the statute of limitations.³⁵⁹ The act considered was the participation in a criminal organization. Even though the request enumerated several other offences, for instance, crimes against humanity, the FSC did not acknowledge a direct link between the assets and those crimes,³⁶⁰ which will be discussed in section 2.5.2.

Following the FSC judgment of 12 January 2010³⁶¹ with which the legal assistance ended, the FC, bearing in mind the Haitian earthquakes³⁶² as well as the draft law governing the confiscation of illicit asset, the RIAA, continued the freeze on the Duvalier asset in order “to avoid allowing the assets to return to the Duvalier family who acquired them by illicit means.”³⁶³ The freezing continued until the entry into force of the RIAA, after which the Duvalier assets have been frozen under article 14 RIAA.³⁶⁴ The EDA states that “[o]nce confiscated, the assets will be returned to Haiti in order to improve the living conditions of the Haitian people.”³⁶⁵

The problem of the retroactive application of the RIAA to the Duvalier case will be discussed in section 4.2.2.3.

2.4.1.4. Overview of previous cases

For ease of overview, some cornerstones of the cases are outlined in a summarized form in the following, yet without any claim to comprehensiveness (for more details on the history, the

³⁵⁴ FCC Decision RR.2009.94 of 12 August 2009, Facts B., pp. 2-3. The FSC decision BGer of 12 January 2010, 1C_374/2009 repeats these facts but speaks of a sum of 400 to 900 million (Facts C.).

³⁵⁵ FDJP, Handover of Duvalier assets, 12/2/2009.

³⁵⁶ FSC Decision 1C_374/2009, Facts A.

³⁵⁷ The timeline is based on the Chronology provided by ICAR, ICAR, Duvalier Chronology.

³⁵⁸ BGer of 12 January 2010, 1C_374/2009.

³⁵⁹ BGer of 12 January 2010, 1C_374/2009; cf. DANNACHER, p. 46-56 for a detailed examination of the statute of limitations.

³⁶⁰ BGer of 12 January 2010, 1C_374/2009, c. 6.7.

³⁶¹ BGer of 12 January 2010, 1C_374/2009.

³⁶² Cf. DANNACHER, p. 25.

³⁶³ FDFA, Duvalier accounts remain blocked, 03/02/2010.

³⁶⁴ FDFA, Illicit assets of PEPs.

³⁶⁵ FDFA, Illicit assets of PEPs.

economic situation, international affairs and the post-fall situation in the concerned countries, see Annex 3).

	Marcos	Mobutu	Duvalier
Political situation	Kleptocrat regime, personalist dictatorship	Kleptocrat regime personalist dictatorship	Kleptocrat regime personalist dictatorship
Economic Situation	Widespread corruption; kleptocracy	Widespread corruption; kleptocracy	Widespread corruption; kleptocracy
International situation	Long time support by the U.S. for security reasons	Support by most Western countries, declining with the end of the cold war	Long time support by the U.S.
Embargo	None	None	None
Post-fall Situation	Continuous influential political support for the Marcos family, yet step to democratization under Corazon Aquino	Bloody war with African neighbors; strong influence by the Mobutu clan continues	Short hope for democratization, yet weak institutions and slipping back into confusion and violence
Highlights of the legal assistance case	<ul style="list-style-type: none"> ▪ First time freezing by the FC based on art. 102 para. 8 SC without any previous request for legal assistance ▪ Reversal of the limitation of cooperation article 1a IMAC in the sense that Swiss interests may speak for the granting of legal assistance ▪ Interpretation of art. 74a IMAC ▪ Procedural guarantee s according to art. 2 IMAC ▪ Problems with regard to use of the restituted assets 	<ul style="list-style-type: none"> ▪ The freezing order of the FC was prolonged several times and lasted at the end from 1997 to 2009. ▪ Failure of the legal assistance case due to the still continuous influence of the Mobutu clan ▪ No Swiss criminal proceedings against Mobutu for money laundering or the participation in a criminal organization ▪ Criminal organization was assumed to end with the fall of the head of state 	<ul style="list-style-type: none"> ▪ Condition for procedural minimal guarantees according to the ECHR and the UNO Pact II could not be satisfied. ▪ Qualification of the Duvalier clan as a criminal organization has been confirmed yet the crimes were already barred by the statute of limitations. ▪ Several freezing orders of the FC ▪ First time application of the RIAA yet problem with retroactive application

2.4.2. Selected Current Cases³⁶⁶: Mubarak, Gaddafi, Assad

2.4.2.1. Mubarak case, Egypt

Mubarak resigned on 11 February 2011 after mass protests and violence in the streets escalated.³⁶⁷ Switzerland's FC, based on art. 184 para. 3 SC, immediately ordered the freeze of all assets of Mubarak and parties close to him³⁶⁸ "in order to avoid any misappropriation of Egyptian government assets."³⁶⁹ In May 2011, Switzerland announces the freezing of CHF 410 million owned by PEP of the Mubarak regime.³⁷⁰ The media release states that "[i]f evidence shows that these frozen assets stem from illegal sources, the Swiss government hopes to quickly return them to Egypt within an international legal assistance framework."³⁷¹

³⁶⁶ The case of Zine El Abidine Ben Ali of Tunisia will not be discussed here, for information on the case see the overview and chronology provided by the ICAR Asset Recovery Knowledge Center that can be retrieved from <http://www.assetrecovery.org/kc/node/135af2bb-9fd2-11df-a544-87078432a829.html> (accessed on 1/4/2012).

³⁶⁷ ICAR, Mubarak Overview.

³⁶⁸ Cf. Verordnung über Massnahmen gegen gewissen Personen aus der Arabischen Republik Ägypten, SR. 946.231.132.1, retrieved from <http://www.admin.ch/ch/d/sr/9/946.231.132.1.de.pdf> (accessed on 2/5/2012).

³⁶⁹ FDFA, FC orders freezing of any assets of Egypt's former President.

³⁷⁰ FDFA, Swiss delegation of experts on blocked assets in Cairo.

³⁷¹ FDFA, Swiss delegation of experts on blocked assets in Cairo.

The first legal assistance request from Egypt shortly after the fall of Mubarak was rejected for being insufficiently detailed, i.e. a compelling presentation of the facts of the case was missing as well as evidence that the funds were acquired by unlawful means (e.g. through corruption).³⁷² Swiss experts were sent to Cairo in order to assist Egyptian judicial authorities in establishing legal assistance procedures in May 2011.³⁷³

So far, the Attorney General received a first request for legal assistance in August 2011, which aims at the restitution of assets connected to several people in the entourage of Mubarak.³⁷⁴ A second request for legal assistance was sent in December 2011. Both requests are currently being processed.³⁷⁵ Furthermore, the federal prosecutor opened criminal investigations against members of Mubarak's entourage after reports were sent to the Money Laundering Reporting Office (MROS).³⁷⁶ In September 2011, the investigations were extended to the criminal offense of organized crime.³⁷⁷ Mubarak now stands trial on charges of corruption, abuse of power and even murder during the mass protests for which the prosecutor demands the death penalty.³⁷⁸

2.4.2.2. *Gaddafi case, Libya*

As previously mentioned, the FC has issued an ordinance³⁷⁹ based on art. 184 para. 3 SC to freeze any assets held by Gaddafi and his entourage in Switzerland on 24 February 2011, which was the first time that the FC froze assets of a head of state while still in office.³⁸⁰ According to the Directorate of Public International Law (DPIL), Libya has not yet submitted a request for legal assistance.³⁸¹ Unlike the freezings in the cases of Tunisia and Egypt, the freezing of the Libyan assets have additionally been set forth by UN sanctions³⁸², which implies that the decisions on what happens with the Gaddafi assets frozen in connection with the sanctions is primarily taken by the international community.³⁸³ The above mentioned ordinance included 29 natural persons from Libya, among them all the persons listed by the UN SC resolution 1970³⁸⁴, and while therefore there was no urgent need for Switzerland to

³⁷² NZZ 17/4/2011, Die Crux mit den Potentatengeldern.

³⁷³ FDFA, Swiss delegation of experts on blocked assets in Cairo.

³⁷⁴ SF, Mubarak-Gelder, 9/2/2012.

³⁷⁵ SF, Mubarak-Gelder, 9/2/2012.

³⁷⁶ SF, Mubarak-Gelder, 9/2/2012.

³⁷⁷ SF, Mubarak-Gelder, 9/2/2012.

³⁷⁸ NZZ 22/2/2012, Urteil im Prozess gegen Mubarak am 2. Juni.

³⁷⁹ Ordinance on Libya of 21/2/2011, SR. 946.231.149.82.

³⁸⁰ FDFA, Media release, The Federal Council condemns the use of force against the Libyan people (...), 24/2/2011; in her article on returning dictators' assets from Switzerland of 1998, Richter set out the various historical cases concerning PEP assets in Switzerland and has shown the legal development from the refusal to freeze assets in the first place to the successful application of 74a IMAC.³⁸⁰ We can now even draw this legal development further in what we are now facing an asset freeze even before the fall of a head of state. Richter, in 1998, pointed out that "the Swiss Government uses its power carefully and restrictively. It has never frozen and probably will never freeze any assets before a dictator is definitely overthrown", RICHTER, p. 606.

³⁸¹ FDFA, DPIL, The return of illegally acquired funds.

³⁸² Cf. EYMANN, pp. 37-49 for details on freezings based on the Embargo law.

³⁸³ FDFA, DPIL, The return of illegally acquired funds.

³⁸⁴ UN Security Council Resolution 1970 of 26/2/2011.

issue a special embargo ordinance, the ordinance was only amended based on the Embargo Act³⁸⁵ on 30 March 2011.³⁸⁶ Former president of the FC, Calmy-Rey, requested the UN Sanctions Committee to release CHF 350 m. of the frozen assets for the benefit of the Libyan people, to which the UN SC has given green light.³⁸⁷ Yet such anticipatory restitution may cause problems with regard to the continuous corruption in Libya. Furthermore, concerning the protection of fundamental guarantees as discussed in section 4.5.2, these authorizations are questionable.³⁸⁸

According to Pieth, Libya is in a better situation in terms of legal assistance compared to other states connected to the Arab spring since it is “much closer to being a failed state so it will get much more help”³⁸⁹, adding that “[t]he new law for the return of dictator assets, used for Haiti, should apply to them, and if money belonging to Gaddafi and his relatives is found here they will get three months to explain why they own it legitimately”.³⁹⁰ Additionally, the DPIL states that investigations being carried out into parallel criminal proceedings on the grounds of suspicion of money laundering in connection with Libya.³⁹¹

2.4.2.3. *Al-Assad, Syria*

Political unrest in Syria started mid-March 2011 in the context of the Arab Spring which is ongoing despite suppressions from President Bashar al-Assad’s regime.³⁹² Switzerland’s FC adopted an ordinance against Syria³⁹³ on 18 May 2011 based on the Embargo Act in correspondence to the EU sanctions an ordinance with measures against Syria that correspond with the sanctions adopted by the EU on 9 May 2011.³⁹⁴ Assets of Assad and his entourage have been frozen in Switzerland amounting to approximately CHF 50 million.³⁹⁵ The

³⁸⁵ Federal Act on the Implementation of International Sanctions of 22 March 2002 (Status on 27 July 2004), SR. 946.231 (henceforth (Embargo Act)).

³⁸⁶ Ordinance on Libya of 30/3/2011, SR. 946.231.149.82, the ordinance has been amended six times since; cf. SECO, Massnahmen gegenüber Libyen, 30 March 2011, retrieved from <http://www.seco.admin.ch/themen/00513/00620/00622/04634/index.html?lang=de> (accessed on 2/5/2012).

³⁸⁷ NZZ 1/9/2011, Gemeinsam für ein neues Libyen; Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a “paradox”.

³⁸⁸ Bianchi and Heimgartner point out that in view of the existing legal basis, such formless restitutions cause concern, BIANCHI/ HEIMGARTNER, p. 354.

³⁸⁹ Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a “paradox”.

³⁹⁰ Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a “paradox”.

³⁹¹ FDFA, DPIL, The return of illegally acquired funds.

³⁹² FT of 26/1/2012, Interactive map and timeline: Syria.

³⁹³ Ordinance on Syria of 18/5/2011, SR 946.231.172.7; the ordinance has been amended nine times since, cf. SECO, <http://www.seco.admin.ch/themen/00513/00620/00622/04669/index.html?lang=de> (accessed on 3/4/2012).

³⁹⁴ FDFA, The FDFA recalls the Swiss Ambassador in Syria to Berne for consultations, 18/8/2011. This is the second time that assets of a foreign head of state have been frozen while he/she is still in power. However, in the Assad case the freezing of the assets is based on the Embargo Act and not on the FC’s competency based on the constitution as with Gaddafi.

³⁹⁵ Tagesanzeiger, Schweiz gibt Millionen von Assads Cousin frei, 10/2/2012; in the meantime, in a decision of the FCC of 11 January 2012, the court released CHF 3.6 million belonging to Assad cousin Hafez Makhlof. SECO unfroze these assets on 14 September 2011, yet this decision has been countered with the opening of criminal investigations by the Attorney General on the grounds of suspicion of money laundering. However, the FCC had to deny the freeze due to insufficient evidence for money laundering activities. From a point of view of

measures include the freezing of assets of individuals attributable to the Syrian regime, however, they did so far not include Assad himself.³⁹⁶ The sanctions have been expanded several times since.³⁹⁷ Other states such as the US and the Arab League have imposed similar sanctions.³⁹⁸ Yet, the adoption of effective collective international measures, such as an arms embargo, failed because of Russia's and China's veto in the UN SC.³⁹⁹ Another factor hindering a solution is that the civilian Syrian opposition lacks unity and until now a credible vision for a new Syria.⁴⁰⁰

2.4.2.4. Overview of current cases

For ease of overview, some cornerstones of the cases are outlined in a summarized form in the following, yet without any claim to comprehensiveness (for more details on the history, the economic situation, international affairs and the post-fall situation in the concerned countries, see Annex 3).

	Mubarak	Gaddafi	Assad
Political situation	Corrupt undemocratic regime	Corrupt undemocratic regime	Corrupt undemocratic regime
Economic Situation	High level of corruption	High level of corruption	High level of corruption
Embargo	No	Yes, UN Embargo	Yes, various embargos by EU, US, Arab League but no UN Embargo
Post-fall Situation	Functioning legal system, Mubarak case in court	Weak state structures, high corruption continues	Assad still head of state, civil war ongoing
Highlights of the case	<ul style="list-style-type: none"> ▪ Bilateral legal assistance treaty between Egypt and Switzerland ▪ Swiss delegation helps drafting legal assistance request 	<ul style="list-style-type: none"> ▪ First time asset freeze of a head of state while still in power ▪ Embargo by the UN internationalizes asset freeze ▪ Unfreezing of parts of the assets to the benefit of the Libyan people 	<ul style="list-style-type: none"> ▪ Outcome of the political unrest yet unclear ▪ Assets of cousin have been released

gathering evidence, it may be questionable to what extent criminal investigations into money laundering are effective as long as the suspect is still in political power, Tagesanzeiger, Schweiz gibt Millionen von Assads Cousin frei, 10/2/2012.

³⁹⁶ Federal Administration, Verordnung über Massnahmen gegen Syrien, 18/5/2011; NZZ 18/5/2012 Bundesrat beschliesst Sanktionen gegen Syrien.

³⁹⁷ NZZ 27/2/2012, EU verstärkt Sanktionen gegen Assad-Regime; however, with protracted sanctions there is always the question of whether they are effective and do not ultimately hurt most to those that are already the poorest, cf. NZZ 10/2/2012, Wie weiter in Syrien?

³⁹⁸ NZZ 10/2/2012, Wie weiter in Syrien?

³⁹⁹ NZZ 10/2/2012, Wie weiter in Syrien?

⁴⁰⁰ NZZ 10/2/2012, Wie weiter in Syrien?

2.5. Main Problems of Legal Assistance in Criminal Matters based on IMAC in connection with PEP assets

While the IMAC has already been revised in order to facilitate the dealing with PEP asset cases, difficulties in the application of IMAC provisions to PEP asset cases are numerous and manifold.

2.5.1. Dealing with Failing States

The most obvious problem is that when dealing with failing states, request for legal assistance cannot be granted due to the reliance of the IMAC on cooperative action, mainly with regard to evidence. First, with regard to the request for legal assistance, failing states may have problems with formulating an adequate request. Second, with regard to the guarantee of procedural minimal standards, in connection with weak judicial systems, the condition poses problems.⁴⁰¹ Third, with regard to the statute of limitations, the longevity of certain dictatorships leads to the situation that crimes which happened during the time of rule are subject to being barred by the statute of limitations.

2.5.2. The Direct Link between the Offence and the Assets

In the Duvalier case mentioned in section 2.4.1.3, the FSC specified that between the offence and the assets there must be the causal link that is direct and immediate, i.e. the assets must be a direct result of the offence.⁴⁰² The FSC did not acknowledge a direct link between the assets and various crimes against humanity of which Duvalier was accused⁴⁰³; crimes that would not have been barred by the statute of limitation according to art. 101 PC. In connection with corruption in violent dictatorships, the strict requirement of the direct and immediate causal link between offence and profits may be too stringent. One could argue that while there is no obvious link between crime and assets, the crimes committed by a dictator may be the motor that fuels his power base and allows him to exploit the state. In other words, the way of rule in its entirety allows the PEP to obtain the assets in question, and if the way of rule included crimes against humanity, this is indicative for a direct link between crime and profits.⁴⁰⁴ One possibility of addressing the problem would be to revise the IMAC with a view to weaken the condition of a direct and immediate causal link in cases of corrupt regimes⁴⁰⁵ in which human rights violations have been used as a tool to enlarge the power base of a PEP. However, any such revisions must be done in order to ensure legal certainty and to clearly determine in which cases such alleviation shall be applied.

⁴⁰¹ DANNACHER, p. 88.

⁴⁰² BGer of 12 January 2010 1C_374/2009, c. 6.6.; cf. BIANCHI/HEIMGARTNER, p. 358.

⁴⁰³ BGer of 12 January 2010, 1C_374/2009, c. 6.7.

⁴⁰⁴ Cf. DANNACHER, p. 54, Dannacher adopts a very similar line of argument, additionally pointing out that the facts of such cases have been acknowledged by the Statute of Rome in that it can authorize forfeitures while not judging on economic crimes, DANNACHER, p. 54.

⁴⁰⁵ Cf. DANNACHER, p. 172.

2.5.3. The Qualification as a Criminal Organization according to Art. 260ter and its Falling Apart with the Fall of the PEP

As mentioned above, the qualification of a regime as a criminal organization is much debated in doctrine, the main problem being the condition of secrecy. Monfrini and Klein argue in connection with the Abacha case that the structure of the organization was not the state or the government but an inner circle which was secret with regard to its constitution.⁴⁰⁶ Dannacher senses a the problem with the condition of secrecy which is not always fulfilled since most of the persons that are part of the organization are known to be in the circle; furthermore, the chain of command is often not secret either.⁴⁰⁷ The qualification of a regime as a criminal organization should thus not occur automatically but rather by considering the individual facts in a case.⁴⁰⁸

The second issue discussed is the general practice of the FSC to assume that criminal organizations split up upon the fall of the PEP. The practice is being criticized for not taking into account that the criminal organization may still be active long after the fall of the PEP.⁴⁰⁹ Indeed, as seen in the previous and present cases, corruption is usually a persistent phenomenon and the influence of the former PEP may still be far-reaching.⁴¹⁰

2.5.4. The Analogical Application of Art. 72 PC to Legal Assistance

As seen above, the FSC decided that if assets are linked to criminal organizations, the special forfeiture provisions of art. 72 PC comprising the reversal of the burden of proof is applicable to the handing over of assets according to art. 74a para. 3 IMAC.⁴¹¹ This does not constitute a direct application of a provision of the PC to legal assistance, but it is an application by analogy to the legal assistance case.⁴¹² Contrary to art. 72 PC, art. 74a IMAC requires the assets to be products or profits of an offence.⁴¹³ Furthermore, while art. 72 PC presumes that the assets are subject to the disposal of the criminal organization and hence counter-evidence needs to prove that the assets does not belong to the criminal organization, in the legal assistance cases the counter-evidence requested was directed at proving the legal origin of the assets.⁴¹⁴

⁴⁰⁶ MONFRINI/ KLEIN, p. 124.

⁴⁰⁷ DANNACHER, p. 109, Dannacher proposes an adjustment of art. 260^{ter} PC (DANNACHER, p. 181 et. seq.).

⁴⁰⁸ Cf. DANNACHER, p. 109.

⁴⁰⁹ Criticizing DANNACHER, pp. 54-56.

⁴¹⁰ Cf. KELLER, *Das Magazin* of 19/6/2009, cf. his article for more information on the still active and influential Mobutu clan; cf. section 2.4.

⁴¹¹ BGE 131 II 169 c. 9.

⁴¹² MOREILLON/ MACALUSO/ MAZOU, p. 72.

⁴¹³ DANNACHER, p. 77 et seq.

⁴¹⁴ MOREILLON/ MACALUSO/ MAZOU, p. 74 et. seq., cf. their article for more information on the issue; cf. DANNACHER, p. 76 et seq. for more information on the application of art. 72 PC to legal assistance.

2.5.5. Legal Basis for Monitoring

An important shortcoming of the IMAC is that it does not provide a proper monitoring system for the restitution of the assets which may lead to the unsatisfying result that the assets disappear in the hands of yet another corrupt regime. If legal assistance is not based on a treaty, which is normally the case when confronted with PEP assets, the handing over may be subjected to conditions according to art. 80p IMAC, especially if there is the danger involved that minimal human rights are not respected.⁴¹⁵ However, this practice is criticized; first, because art. 2 IMAC is not of optional nature; second, because there is no guarantee that the conditions are fulfilled.⁴¹⁶

Furthermore, art. 80e IMAC does not provide a clear legal basis for the aim and direction such conditions on the restitution should take. One of the main advantages of the RIAA is precisely that it specifies principles of the restitution of the assets.⁴¹⁷

2.5.6. Freezing of Assets under the Constitution

Another issue is that the freezing of assets are based on emergency law of the FC and are not based on IMAC provisions. The freezing based on the constitution will be discussed in section 4.1.

3. Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act, RIAA)

3.1. The Need for Specific Legislation on Potentate Funds, History and Purpose of the RIAA

3.1.1. History

In the Duvalier case, the FSC stated that “(...) les conditions posées par l'EIMP apparaissent trop strictes pour ce genre d'affaires. La longueur des procédures, les difficultés de preuve peuvent constituer – comme en l'espèce – des obstacles insurmontables. C'est dès lors au législateur qu'il appartient d'apporter les corrections et allègements nécessaires pour tenir compte des particularités de ces procédures.”⁴¹⁸ In 2007, following the extension of the freezing of the Duvalier assets, three interpellations and a postulate were submitted regarding the issue which were all accepted.⁴¹⁹ Specifically, the postulate of Gutzwiller requested an explanation of how to proceed in legal assistance cases in which the requesting state cannot

⁴¹⁵ POPP, recital 381, p. 254; BIANCHI/ HEIMGARTNER, p. 359.

⁴¹⁶ POPP, recital 381-383; DANNACHER, p. 42.

⁴¹⁷ Art. 8 RIAA; see section 3.3.3.

⁴¹⁸ BGer of 12 January 2010, 1C_374/2009, c. 7.

⁴¹⁹ Dispatch RIAA, p. 17, the interpellations and the postulate are mentioned in the Dispatch RIAA.

guarantee to proceed in line with constitutional principles and human rights standards⁴²⁰, whereupon the FC proposed to draw up a legal foundation in the matter. In early 2010, the FC submitted a preliminary draft of the RIAA for consultation.⁴²¹ The RIAA came into force on 1 February 2011.⁴²²

3.1.2. Purpose and Object

The Dispatch to the RIAA explains that the purpose of the RIAA is to fill a gap in the existing body of law.⁴²³ Its aim is “(...) to resolve cases of assets that have been frozen on the orders of the Federal Council (...) and which theoretically could still be outstanding when the new law comes into force, which will probably be the case with the Duvalier assets.”⁴²⁴ The RIAA is hence often referred to as *Lex Duvalier*⁴²⁵; Grisel for example sees the only real purpose of the RIAA in its application to the Duvalier case.⁴²⁶

3.2. The Subject Matter of the RIAA

Art. 1 RIAA specifies the subject matter of the RIAA and enumerates the following delimitations:

- (1) the act is designed for cases involving PEP assets
- (2) the cases have not produced an outcome in a previous legal assistance proceeding
- (3) the failure of the previous proceedings was due to the failure of state structures in the requesting state

With regard to (1), section 1.1. has already presented the PEP definition of the RIAA. The delimitation is repeated in Art. 2 para. b RIAA and Art. 5 para. 2 subpara. a RIAA and will be discussed in more detail in sections 3.3.1.2 and 3.3.2.

Delimitation (2) interrelates with the condition for a requested previous provisional securing under Art. 2 para. a RIAA. A previous request is to be qualified unsuccessful (or not having produced an outcome) if, for some reasons connected to the failure of state structures, it could not be granted. Success is thus equated with the granting of mutual assistance and vice versa, failure with the denial of legal assistance.⁴²⁷

⁴²⁰ Postulate 07.3459, Gutzwiller Felix.

⁴²¹ Dispatch RIAA, p. 17.

⁴²² FDFA, RIAA 1/2/2011.

⁴²³ Dispatch RIAA, p. 13; yet it could be questioned if there is really a gap in the existing law since the inability of another State to bring about a procedure of mutual assistance does not normally lead to the conclusion that there is a gap in the laws of the own legal framework.

⁴²⁴ Dispatch RIAA, p. 2.

⁴²⁵ For example, reporting on news around Duvalier and his assets in Switzerland, it was mentioned that the “new regulations on potentates’ assets, the so called *Lex Duvalier*, which has been pushed through last summer by the parliament and the FC, should enable the restitution of the Duvalier assets this year”, NZZ 17/1/2011, “Baby Doc” kehrt nach Haiti zurück, free translation by the author.

⁴²⁶ GRISEL, pp. 210-211.

⁴²⁷ DANNACHER, p. 139.

Concerning point (3), the application of the RIAA is reserved for cases in which a previous legal assistance case, as seen in (2), has failed owing to the failure of state structures. The delimitation is repeated in Art. 2 para. c RIAA and will be discussed in more detail in section 3.3.1.3.

3.3. Analysis of the Freezing, Forfeiture and Restitution of Assets

The RIAA lays down three measures with regard to PEP assets: their freezing, forfeiture and restitution.

3.3.1. Freezing of Assets

As pointed out by Bianchi and Heimgartner, the notion of freezing in the RIAA is terminologically broader than the freezing defined by IMAC in that it includes all sorts of economic resources that belong to a PEP while the freezings of the IMAC are limited to bank accounts and land property.⁴²⁸ The freezing under the RIAA is the first act that replaces the freezings under the IMAC.⁴²⁹

The FC decides at its own discretion whether it is politically opportune to order freezings with a view to instigate forfeiture proceedings.⁴³⁰ The Dispatch states that the FC “(...) will, as it does today, weigh up the various interests concerned, including considerations of bilateral relations, the possibility of restoring the rule of law in the requesting country, as well as the attendant economic issues and security aspects.”⁴³¹ Furthermore, four cumulative conditions have to be met which are largely reconciled with the limitation as to the subject matter of the act laid down in art. 1 RIAA. They will be discussed in the following.

3.3.1.1. *The Condition of the Existing Legal Assistance Request and the Previous Provisional Securing of the Assets*

Art. 2 para. a RIAA requires that the assets need to “have been secured provisionally in the context of a process of legal assistance in criminal matters instigated at the request of the country of origin.”⁴³² The condition of a request by the country of origin is considered necessary “to ensure that the authorities of the state in question have the genuine political will to request the return of the assets.”⁴³³ The Dispatch considers the condition to be proportional based on the fact that in most legal assistance cases even with weak states, a request was submitted.⁴³⁴ However, as seen in the Gaddafi case (cf. 2.4.2.2), Libya has not yet been able to present a legal assistance request. In recent cases however, Switzerland has actively

⁴²⁸ BIANCHI/ HEIMGARTNER, p. 355.

⁴²⁹ BIANCHI/ HEIMGARTNER, p. 355; Dispatch p. 19; hence, they resemble the freezings under art. 63 para. 2 subpara. b IMAC.

⁴³⁰ Dispatch RIAA, p. 14.

⁴³¹ Dispatch RIAA, p. 14.

⁴³² Art. 2 para a) RIAA.

⁴³³ Dispatch RIAA, p. 20.

⁴³⁴ Dispatch RIAA, p. 20; in the consultation and in the literature it was proposed to abstain from the condition, BIANCHI/ HEIMGARTNER, p. 363.

supported the drafting of the requests and hence the requirement may not pose essential obstacles to legal assistance. Nevertheless, the question of what happens if there will not be a request at all remains open. Bertossa finds the requirement contradictory to the condition that state structures are failing.⁴³⁵ However, the requirement of a previous request is the only collaborative action needed from the requesting state in the application of the RIAA. It could thus be seen as some minimal form of action of trespass from the requesting state, with which it claims the assets back.⁴³⁶ On the other hand, while the request by the state of origin has been done in a view of receiving legal assistance, it did not cooperate properly in order to lead the procedures to a satisfying outcome. Grisel points out that after the request for legal assistance has been submitted, the failing state loses the control over the procedures with the RIAA.⁴³⁷ It could thus be possible that the procedures are being pressed ahead with even though the requesting state is not interested anymore in advancing them.⁴³⁸

3.3.1.2. *The PEPs' Powers of Disposal over the Assets*

The second condition is that the powers of disposal over the assets must lie with the PEP.⁴³⁹ The PEP definition in the RIAA interrelates with the definition of assets and what is understood of powers of disposal over these assets. In a nutshell, assets should be understood broadly including all tangible or intangible, moveable or immovable property in Switzerland.⁴⁴⁰ The notion of powers of disposal is based on art. 72 PC and basically intends to cover all possible links between a person and connected assets.⁴⁴¹

3.3.1.3. *The Failure of State Structures Condition*

c) *Qualification as a Failing State*

The third condition is fulfilled if the country of origin presents the characteristics of a failing state.⁴⁴² To be more specific, the state in question cannot meet the conditions of legal assistance proceedings due to the “total or substantial collapse, or the unavailability, of its national judicial system.”⁴⁴³ As seen in previous cases, it has often been the weakness of state structures which led to the denial of legal assistance. However, “[i]t is morally reprehensible that, in such cases, it is precisely the PEPs who benefit from the poor state of the country's judicial system, having themselves contributed to or even orchestrated its decay.”⁴⁴⁴

⁴³⁵ BERTOSSA, *La restitution des valeurs*, p. 137.

⁴³⁶ Cf. Dispatch RIAA, p. 20.

⁴³⁷ GRISEL, p. 215.

⁴³⁸ GRISEL, p. 215; yet, with a view toward the wellbeing of a population, the lack of will to continue procedures may be overridden by the restitution of the assets for a good cause.

⁴³⁹ Art. 2 para b) RIAA.

⁴⁴⁰ Dispatch RIAA, p. 20, the Dispatch provides an extensive definition of the term.

⁴⁴¹ Dispatch RIAA, p. 20, the Dispatch provides an extensive definition of the term.

⁴⁴² Art. 2 para c) RIAA.

⁴⁴³ Art. 2 para. c RIAA.

⁴⁴⁴ Dispatch RIAA, p.4.

The notion of failed state has increasingly become a buzz word in international law.⁴⁴⁵ It is a complex concept what is illustrated by the various adjectives that are used to describe it, such as *failing*, *failed*, *collapsed*, *weak*, among many more.⁴⁴⁶ The content of the failure of state structures condition in the RIAA draws on art. 17 para. 3 of the Rome Statute of the International Criminal Court (ICC).⁴⁴⁷ In the context of the RIAA, the concept of the failing state is individually applied to the each, to be more specific; the qualification whether state structures are failing is done in light of the probability of success of the legal assistance proceedings according to the IMAC and is based on a case by case analysis.⁴⁴⁸ The assessment will integrate relevant documents issued by international organizations such as the UN and the World Bank.⁴⁴⁹

d) The Inability To Satisfy the Requirements of Legal Assistance Proceedings Due to the Failure of State Structures

The condition includes cases where in the state of origin judicial proceedings against the former PEP have failed or appear politically inopportune, or where the system is paralyzed by the continuous struggles for power or ongoing influence of the former regime.⁴⁵⁰ In other words, it comprises cases in which the incapacity or the unwillingness of the state to provide the necessary cooperation, e.g. by opening and conducting criminal proceedings against the former PEP, lead to the denial of legal assistance.⁴⁵¹ Additionally, the reason for failure may lie in the fact that the requesting state may in its proceedings not comply with the minimal standards according to the ECHR or the ICCPR as laid down in art. 2 para. a IMAC.⁴⁵² However, the dismissal of a request due to lack of double criminality may not lead to the application of the RIAA⁴⁵³, as it does not concern the capability of the state to provide the necessary cooperation.

Cassani points out that previous mutual assistance procedures may have other reasons for their failure, such as the statute of limitations or that some of the preconditions described in section 2.2 could not be fulfilled; however, if the requesting state does not qualify as a failing state, the RIAA will not be applied.⁴⁵⁴ Bertossa regrets the different treatment of failing states and of states capable of meeting the condition of legal assistance, since the latter could in some cases also benefit from the reversal of the burden of proof.⁴⁵⁵ Indeed, the differentiation

⁴⁴⁵ GEISS, Vorwort.

⁴⁴⁶ GROS, p. 18.

⁴⁴⁷ Dispatch RIAA, p. 19, 22.

⁴⁴⁸ Dispatch RIAA, p. 19.

⁴⁴⁹ Dispatch RIAA, p. 23.

⁴⁵⁰ CASSANI, Les avoirs mal acquis, p. 477.

⁴⁵¹ Cf. Dispatch RIAA, p. 4, 22.

⁴⁵² Dispatch RIAA, p. 22; the impact on the protection of human rights of this setting will be discussed in section 4.2.2.

⁴⁵³ BIANCHI/HEIMGARTNER, p. 365.

⁴⁵⁴ CASSANI, Les avoirs mal acquis, p. 477.

⁴⁵⁵ BERTOSSA, La restitution des valeurs, p. 137.

appears somehow artificial in a view of the Arab spring - while for Egypt it is expected to be capable to meet the conditions of legal assistance, the prospect for Libya are more pessimistic and the application of the RIAA more probable⁴⁵⁶. Yet such unequal treatment of states in such a similar situation may be considered unfair.

3.3.1.4. The Safeguarding of Swiss Interests

Fourth, the freezing requires that “the safeguarding of Swiss interests demand that the assets be frozen.”⁴⁵⁷ The FC’s foreign policy authority according to art. 184 SC is herewith preserved.⁴⁵⁸ This provision provides the FC with the free judgment whether the freezing is opportune or not – a decision cannot be contested.⁴⁵⁹ The provision is often criticized for its purely political nature.⁴⁶⁰

3.3.1.5. Maximum Length of Freezing

In the consultation to the RIAA, the maximum length of freezing was subject to debate.⁴⁶¹ The final decision was to set it at 10 years – i.e. if no forfeiture proceedings are instigated within ten years, the freeze shall be lifted.⁴⁶²

3.3.1.6. Amicable Settlement

Art. 4 RIAA leaves the door open for a negotiate solution in which the assets are divided between the PEP and the country of origin on a case by case basis.⁴⁶³ The possibility was criticized in the consultation by some for not allowing the entirety of the assets to be restituted to the country of origin but was welcomed by others for reasons of efficiency.⁴⁶⁴

3.3.2. Forfeiture

3.3.2.1. The Detachment from the Criminal Procedure and the Legal Nature of Forfeiture under RIAA

The Dispatch to the RIAA posits that the procedures under the RIAA are detached from any criminal proceedings.⁴⁶⁵ Accordingly, forfeiture is not connected to the act that led to the acquirement of the assets and the respective criminal conviction.⁴⁶⁶ The forfeiture procedure is presented as an administrative one. In order to forfeit assets, the FC instructs the FDF to take legal action before the FAC, independent of any criminal proceedings.⁴⁶⁷ The approach is

⁴⁵⁶ Cf. Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a “paradox”.

⁴⁵⁷ Art. 2 para d) RIAA.

⁴⁵⁸ Dispatch RIAA, p. 23.

⁴⁵⁹ GRISEL, p. 214.

⁴⁶⁰ BERTOSSA, La restitution des valeurs, p. 138.

⁴⁶¹ Dispatch RIAA, p. 18.

⁴⁶² Art. 3 para. 2 RIAA.

⁴⁶³ Dispatch RIAA, pp. 23-24.

⁴⁶⁴ Disptach RIAA, p. 18.

⁴⁶⁵ Dispatch RIAA, p. 16.

⁴⁶⁶ Dispatch RIAA, p. 17.

⁴⁶⁷ Art. 5 para. 1 RIAA.

indeed a convenient one that allows for a much faster procedure, that is, by detaching the criminal assets from the prosecution of the owner of the assets, the need for a conviction out of a Swiss perspective is no longer given. The RIAA points out that “[i]t is primarily up to the judicial authorities of the state of origin of the assets to conduct a criminal procedure against the PEP and, if necessary, to convict him or her.”⁴⁶⁸ However, the conviction of former dictators in their state of origin proves to be difficult, be it because of illness or exile of the PEP or the unwillingness or incapacity of the authorities in place.⁴⁶⁹ Furthermore, since assets may be forfeited without any proceedings against the PEP affected, in some cases there will never be a judicial decision on whether the assets are or are not of illegal origin. This increases the risk of the ill-founded forfeitures which lead to unjustifiable limitations of the guarantee of ownership.⁴⁷⁰ This matter will be discussed in section 4.2.2.1.

The detachment from any criminal proceeding needs to be elaborated on further in the sense that the nature of forfeiture must be clarified. Many federal laws that qualify as administrative law contain confiscation measures.⁴⁷¹ However, with the RIAA, forfeiture is not a consequence of a violation of administrative provisions but is linked to penal provision and hence, in its substance, it is of penal nature.⁴⁷² Bianchi and Heimgartner qualify the nature of the RIAA forfeiture in terms of a systematic and procedural qualification as administrative, but in terms of a substantive qualification as penal in nature.⁴⁷³ This line of argumentation is supported in this paper especially in the context of the guarantees of human rights. The submission of the RIAA forfeiture under art. 6 para. 2 ECHR will be discussed in section 4.2 which is devoted to discuss the safeguarding of human rights in connection with PEP assets.

3.3.2.2. *The Conditions of Forfeiture*

With forfeiture, the ownership rights to the assets are conveyed to the Swiss Confederation for the purpose of restitution to the requesting state.⁴⁷⁴ Three conditions must be met:

- (1) The power of disposal is held with a PEP or his/her close associates;
- (2) The assets have been obtained by unlawful means;
- (3) The assets have been frozen by the FC pursuant to this act.⁴⁷⁵

Condition (2) will be discussed in the following.

⁴⁶⁸ Dispatch RIAA, p.13.

⁴⁶⁹ E.g., an NZZ article discussed how former dictators suddenly are plagued by serious illnesses in order to delay or prevent criminal proceedings against them, IMHOF, NZZ 27/7/2011, Wenn der starke Mann plötzlich schwächelt; in a similar vein, if there is a criminal proceeding it sometimes only covers the lighter offences, e.g. Duvalier may simply be charged of corruption, neglecting the crimes against humanity, NZZ 1/2/2012, Haitis Justiz in der Kritik.

⁴⁷⁰ Cf. DANNACHER, p. 154.

⁴⁷¹ SCHMID, 69/19, p. 12.

⁴⁷² BIANCHI/HEIMGARTNER, p. 365; CASSANI. Les avoir mal acquis, p. 749 ; DANNACHER, p. 146.

⁴⁷³ BIANCHI/HEIMGARTNER, pp. 365-366; cf. GRISEL, p. 216.

⁴⁷⁴ Dispatch RIAA, p. 24.

⁴⁷⁵ Art. 5 para. 2 subpara. a-c.

3.3.2.3. *The Reversal of the Burden of Proof*

(a) Generalities

The reversal of the burden of proof is a very sensitive issue since it goes against the fundamental presumption of innocence.⁴⁷⁶ Proving whether or not assets have been obtained by unlawful means is a particularly difficult task if they have been acquired in states with very different political and legal systems. It may even be argued that it lies in the nature of PEP assets that their origin is difficult to determine with certainty.⁴⁷⁷ Nonetheless, as Richter states, with a view of the amounts deposited in Switzerland by different PEPs, it seems highly likely that the assets were acquired by unlawful means, and this is even more so probable if the PEP exercises control over the majority of the state institutions.⁴⁷⁸ Moreover, the act of proving is further complicated in that there is usually not one victim, but a population as a whole.⁴⁷⁹ In the PEP context, the reversal of the burden of proof implies a general presumption of the unlawful origin of the assets.⁴⁸⁰ Hence, as long as the PEP is not able, in all probability, to prove the opposite, assets can be forfeited.

The Dispatch to the RIAA supports the reversal by several arguments, e.g. it states that “the fact that the assets have already been frozen in the course of mutual assistance proceedings suggests that the responsible authorities have sufficient indication that they may be connected with the criminal acts being investigated abroad (...).” However, this is not necessarily the case; as pointed out before, the RIAA finds application to cases that have been denied due to the fact that the foreign state may not guarantee the procedural requirements of the ECHR or the ICCPR.⁴⁸¹ Hence, it is not even guaranteed if there is any fair proceeding in the requesting state. However, with the RIAA, even if there is no sufficient indication for a connection to criminal acts, if the assets fulfill the two conditions discussed below, their unlawful origin is presumed.

(b) Conditions for the Reversal of the Burden of Proof

According to art. 5 para. 2 subpara. c RIAA the assets must have been obtained by unlawful means; hence in principle, Swiss authorities must be able to prove the illicit enrichment. Yet, if the following two conditions are met, the proving is taken over by a reversal of the burden of proof:

- (1) The wealth of the PEP has been subject to an extraordinary increase that is connected to his exercise of a public office;

⁴⁷⁶ Cf. STESENS, p. 29.

⁴⁷⁷ RICHTER, p. 596.

⁴⁷⁸ RICHTER, p. 596.

⁴⁷⁹ Cf. STESENS, p. 67.

⁴⁸⁰ Dispatch RIAA, p.15.

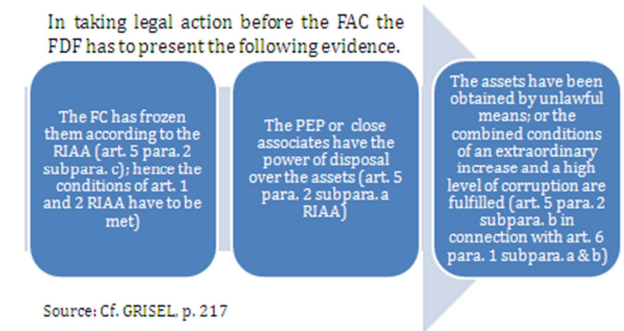
⁴⁸¹ Art. 2 para. a IMAC, cf. Dispatch RIAA, p. 22.

(2) The level of corruption in the country of origin or surrounding the PEP during the term of office is or was acknowledged to be high.⁴⁸²

Hence, instead of basing the assumption on criminal behavior⁴⁸³, the reversal of the burden of proof relies on two objective criteria. Regarding the first criterion, an extraordinary increase means that the assets stand in a disproportionate way to the income from the public office and this discrepancy cannot be explained in a plausible manner.⁴⁸⁴ The extraordinary increase must be examined by the court on a case by case basis while concrete evidence must be delivered.⁴⁸⁵

The determination of the high level of corruption (2) is based on reports and research from national and international organizations such as the World Bank or TI.⁴⁸⁶

Both criteria can be criticized for not providing enough evidence that the assets have been obtained by unlawful means.⁴⁸⁷



(c) Counter-Evidence that Demonstrates that in All Probability the Assets Have Been Acquired by Lawful Means

The PEP needs to present a “convincing case for their lawful enrichment”⁴⁸⁸ in order for the presumption to cease to apply.⁴⁸⁹ The Dispatch qualifies the reversal of the burden of proof as a “pragmatic solution that is based on the postulate that if banks are required to know their customer (...), owners must know the origin of their assets (...), and therefore that they must be in a position to provide evidence of their origin.”⁴⁹⁰ However, the PEP may not have access to documents in the state of origin anymore. Hence, the demands to the counter-evidence should be kept low.⁴⁹¹

⁴⁸² Art. 6 para 1 subpara a and b RIAA.

⁴⁸³ Such as in art. 72 PC, DANNACHER, p. 148.

⁴⁸⁴ Dispatch RIAA, p. 26; this concept has existed already before in art. 20 UNCAC, cf. DANNACHER, p. 149.

⁴⁸⁵ Dispatch RIAA, p. 26; while evidence must be delivered, it must not stand in connection with a criminal act, cf. for more information, DANNACHER p. 149.

⁴⁸⁶ Dispatch RIAA, pp. 26-27; corruption has to be understood in its broad meaning, cf. section 1.3.1.

⁴⁸⁷ DANNACHER, pp. 148-150.

⁴⁸⁸ Dispatch RIAA, p. 16.

⁴⁸⁹ Dispatch RIAA, p. 16.

⁴⁹⁰ Dispatch RIAA, p. 25; however, it is proposed here that the argument is not convincing enough to support the reversal of the burden of the proof. Banks have an obligation to clarify the economic background of the assets, yet for example a PEP can sell a villa that belongs to him for USD 1 million and transfer this money to his bank account. However, he could transfer USD 1 million to several different bank accounts with the same proof of the origin of assets.

⁴⁹¹ CASSANI, p. 478; DANNACHER

(d) Safeguarding the Human Right of the Presumption of Innocence

The reversal of the burden of proof is a very severe incision into constitutional and human rights; with its imposition, the RIAA overturns the presumption of innocence. This issue will be addressed in section 4.2.2.2.

3.3.3. Restitution

Only forfeited assets may be restituted, hence, the conditions for restitution are in the end those of forfeiture discussed above.⁴⁹² For the first time, the RIAA creates a specific legal basis and proper formal guidelines for the restitution of the assets.⁴⁹³ In the previous cases, the monitoring of restitution was solved by imposing ad-hoc solutions that were not always successful and are disputed (cf. section 2.5.5.).⁴⁹⁴ It is clearly in the interest of Switzerland and its reputation that the restituted assets fall into the right hands.

Art. 8 RIAA sets the objectives of the restitution; they may either aim at improving the living condition of the people of the country of origin or strengthening the rule of law in the country of origin and fighting the impunity of criminals.⁴⁹⁵ Art. 9 RIAA outlines the procedure of the restitution: either, the details are governed by an agreement or, if no agreement with the country of origin can be found, the FC determines the process.⁴⁹⁶

Grisel points out that what is called restitution under the RIAA is actually an allocation for the benefice of persons that have indirectly suffered from the PEP.⁴⁹⁷ Individual claims from direct victims are not considered. Giroud, Henzelin as well as Bianchi and Heimgartner sense a problem with the fact that the exclusion of victims contradicts the aim of international conventions Switzerland is party to.⁴⁹⁸

3.4. Other Important Aspects

3.4.1. Statute of Limitations

The statute of limitation has been an impediment to several legal assistance cases. According to art. 5 para. 3 RIAA no statute of limitations may be invoked with respect to criminal prosecution or penalties. Grisel sees a contradiction in the ignorance of the statute of limitations to the general fundamental principle of law.⁴⁹⁹ The objective of the article is not obvious, since a criminal prosecution is not per se necessary; instead, it refers to the condition

⁴⁹² Cf. BIANCHI/HEIMGARTNER, p. 361.

⁴⁹³ Dispatch RIAA, p. 13.

⁴⁹⁴ Dispatch RIAA, p. 13; cf. section 2.4.1.1.

⁴⁹⁵ Art. 8 RIAA.

⁴⁹⁶ Art. 9 RIAA.

⁴⁹⁷ GRISEL, p. 218.

⁴⁹⁸ GIROUD, p. 13; HENZELIN, *Victimes*, pp. 154-165; BIANCHI/HEIMGARTNER, pp. 368-369. However, the restitution provisions of the RIAA aim at improving the living conditions of the people, and while there are clearly individual victims, in the end a whole population suffers from the oppression of a certain regime. Hence it may be argued that the wellbeing of the population prevails over individual claims in such cases.

⁴⁹⁹ GRISEL, p. 220.

that assets need to have been obtained by unlawful means. The Dispatch to the RIAA justifies the undermining of the statute of limitations with the fact that the statute of limitation under criminal law is not an impediment to administrative measures; however, it neglects the fact that the measures taken are of criminal nature⁵⁰⁰ and that even in administrative law, the statute of limitation is a valid general principle of law.⁵⁰¹ Bianchi and Heimgartner consider the provision as obsolete, on the one hand because if the facts of the case stand in connection with a criminal organization, the statute of limitation only begins to run after the fall of the PEP; on the other hand, the RIAA aims at solving the problem of the long duration of procedures.⁵⁰² Dannacher points to two problems: first, the provision only addresses a certain circle of people what contradicts the principle of equality before the law according to art. 8 SC. Second, if the provision relates to the statute of limitations in the requesting state and is being ignored, this is problematic in terms of the respect of sovereignty.⁵⁰³

3.4.2. Appeal

With regard to the freezing, art. 11 RIAA lays the ground for an appeal to the FAC. In contrast to the appeal against freezings under IMAC, it does not request an immediate and irreparable prejudice.⁵⁰⁴

3.4.3. The Turning Away from the Principle of Cooperation and the Parties to the Proceedings

A basic principle of mutual assistance as provided for by IMAC is its reliance on partnership.⁵⁰⁵ However, with the RIAA, this is no longer the case. The only act coming from the state of origin is the request for mutual assistance in the previous proceedings. We can thus witness a dogmatic shift from cooperative assistance to unilateral assistance. However, as with this shift the condition of a fair criminal proceeding according to human rights standards is being ignored, its value is questionable.

With regard to third party rights, according to art. 7 RIAA, assets may not be seized if there is a claim by a Swiss authority or if a person who is not close to a PEP has acquired them in good faith either in Switzerland or abroad if being object of a judicial decision which can be recognized in Switzerland.⁵⁰⁶

⁵⁰⁰ GRISEL, p. 216.

⁵⁰¹ Cf. BIANCHI/ HEIMGARTNER, p. 368.

⁵⁰² BIANCHI/ HEIMGARTNER, p. 368.

⁵⁰³ DANNACHER, pp. 156-157.

⁵⁰⁴ Art. 80d para. 2 IMAC.

⁵⁰⁵ Dispatch RIAA, p. 9, 12.

⁵⁰⁶ Art. 7 RIAA; for more information cf. Dispatch RIAA, pp. 27-29; BIANCHI/ HEIMGARTNER, pp. 361-362; DANNACHER, pp. 160-161.

3.5. Subsidiarity of the RIAA

As pointed out by Cassani, the value of the RIAA is largely symbolic.⁵⁰⁷ The Dispatch to the RIAA states that “given the efficiency of the existing system, it is likely that there will be a very limited number of cases to which this law can be applied.”⁵⁰⁸ Subsidiarity of the RIAA to the IMAC does not mean that it is applicable if the IMAC is not but it is only applicable if under the IMAC, legal assistance request was not granted due reasons exemplified above.

Content-wise, the RIAA is a *lex specialis* in comparison to the IMAC which is the more general law. However, due to its subsidiarity, the principle of *lex specialis derogat legi generali* does not apply. The narrow field of application was also regretted by some in the consultation to the draft RIAA, especially in connection with the condition of a mutual assistance request discussed above.⁵⁰⁹

3.6. Main Problems of Legal Assistance based on the RIAA

The RIAA presents several regrettable problems. First and foremost, three aspects are from a human rights perspective questionable: the reversal of the burden of proof, the retroactive application and the forgoing of a due process. Section 4.2. is devoted to addressing human rights considerations in the context and these issues will be discussed there.

Further problems arise from its limited scope of application, the lack of consideration of claims from direct victims as well as the condition of state failure that is difficult to delimit and results in an unequal treatment of failing and functioning states. These issues have been discussed above.

4. Specific Questions and Problems with Legal Assistance relating to PEPs

This part of the paper is devoted to addressing open issues regarding the current legal assistance framework concerning PEPs. Specifically, it discusses the remaining problem of the freezing under art. 184 para. 3 SC and proposes that a proper legal basis is needed. Furthermore, section 4.2. is devoted to addressing concerns as to the protection of human rights and fundamental rights. Additionally this part of the paper will examine the question of what the future of Swiss banking will look like with respect to PEP assets. As a last issue, the paper addresses the need for a more comprehensive solution and a global approach to tackle the issues of PEP assets obtained by unlawful means.

⁵⁰⁷ CASSANI, *Les avoirs mal acquis*, p. 477; cf. BERTOSSA, *La restitution des valeurs*, p. 137.

⁵⁰⁸ Dispatch RIAA, p. 13.

⁵⁰⁹ Dispatch RIAA, pp. 17-18.

4.1. The Freezing of Assets and the Safeguarding of the Interests of the Country according to Art. 184 para. 3 SC

4.1.1. The Nature and Content of Art. 184 para. 3 SC

What is generally referred to as emergency law⁵¹⁰ appears in various forms.⁵¹¹ For the purpose of this paper, the focus lies on the power of the FC to enact foreign policy ordinances and rulings according to art. 184 para. 3 SC. The article determines that “[w]here safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.”⁵¹² The FC was already given such a competence under the previous constitution, which was laid down in art. 102 para. 8 previous SC⁵¹³ and under which it froze the Marcos assets in 1986 and the Mobutu assets in 1997.⁵¹⁴

With the Constitution of 1999 it was decided that ordinances – but not rulings – must be of limited duration.⁵¹⁵ As stated by Zielniewicz, the reason for the necessity of limiting the duration mainly lies in the lack of democratic legitimacy of the FC as opposed to the federal assembly.⁵¹⁶ There is however no guidance in the law with regard to a maximum duration.⁵¹⁷ The purpose of the article is not the averting of danger, as it is usually the case with emergency law, but rather the safeguarding of foreign policy interests.⁵¹⁸ When issuing such ordinances and rulings, the FC is bound to the constitution and the law. With regard to the limitation of fundamental rights, such as in the context of PEP assets the constitutional guarantee of ownership according to art. 26 SC, such ordinances represent a sufficient legal basis for the limitation as long as they follow the public interest and are proportional.⁵¹⁹

4.1.2. The Application of Art. 184 para. 3 SC to PEP Asset Cases

Since the Marcos case⁵²⁰, the freezing of PEP assets with a view of legal assistance following a political turnaround appears like an ordinary application of art. 184 para. 3 SC.⁵²¹ Moreillon

⁵¹⁰ The German term is ‘Notrecht’. Rulings under art. 184 para. 3 are sometimes referred to as ‘rulings to safeguard interests’, the German term being ‘Interessenwahrungsverfügungen’, because the urgency or emergency is not always given with art. 184 para. 3, BIANCHI/HEIMGARTNER, p. 356, cf. BIAGGINI, art. 184, N 13, p. 815.

⁵¹¹ KLEY, p. 124; whereas a basic distinction is made as to whether it is constitutional or extra-constitutional, ZIELNIEWICZ, pp. 25-26.

⁵¹² Art. 184 para. 3 SC

⁵¹³ THÜRER, art. 184, N 1, p. 1834; previous Constitution of 29 May 1884.

⁵¹⁴ Motion 11.3151.

⁵¹⁵ BIAGGINI, art. 184, N 11, p. 815.

⁵¹⁶ ZIELNIEWICZ, p.26, according to her, the entity is from a democratic view objectionable and hence it shall be limited to the minimum necessary (ZIELNIEWICZ, p. 26).

⁵¹⁷ BIAGGINI, art. 184, N 11, p. 815.

⁵¹⁸ BIAGGINI, art. 184, N 12, p. 815; THÜRER, art. 184, N 18, p. 1840.

⁵¹⁹ BIAGGINI, art. 184, N 13, p. 815, furthermore, urgency must be present in cases where limiting fundamental rights. There is generally no appeal against such rulings to the FSC, see GIROUD, p. 7; MOREILLON, Art. 18, N 2, p. 216; they are however subject to recourse in international law as the right to access a judge is given by art. 6 para. 1 ECHR. Yet due to their essentially politic nature the judge has to restrain his/her competence in the matter, see GIROUD, p. 7.

⁵²⁰ Cf. EBK-Jahresbericht of 1986, p. 25, the freezing order was a ruling of the FC.

argues that these measures are closely related to the international politics of Switzerland.⁵²² He specifies that while they are not of judicial nature they allow the requesting state to take the necessary time to prepare a legal assistance request.⁵²³ The freezings generally have two main purposes: first, they aim at buying time in the period before the legal assistance request have arrived and hence prevent the assets from being withdrawn.⁵²⁴ Second, in cases of failure of legal assistance proceedings, they intend to avoid the manifestation of unsatisfactory results or damage in terms of reputation.⁵²⁵

4.1.3. The Problems of the Application of Art. 184 para. 3 SC to PEP Asset Cases

The main problem of the use of emergency law lies in the safeguarding of the principle of legal certainty and the predictability and transparency of legal decisions.⁵²⁶ First, it appears paradoxical to use emergency law, which is designed to serve as a resort in extraordinary foreign policy situation, as a regular tool in recurring situations. Second, when freezings do not only aim at buying time in the period previous to legal assistance request but intend to avoid the manifestation of unsatisfactory results of legal assistance cases ruled upon by the FSC, it may be argued that such an application contradicts the principle of the rule of law if unsatisfactory results in legal assistance proceedings are prevented by the use of emergency law.⁵²⁷

Furthermore, there is no set of criteria established that clearly determine the required procedure. It can thus be criticized that the current situation is of arbitrary nature and that in extremis, such arbitrary action may have a negative impact on the Swiss financial center.⁵²⁸

4.1.4. Freezings under the RIAA

The RIAA has taken up the issue and provides a legal basis for the FC to freeze the assets under its art. 2 RIAA, adding several criteria to the discretion of the FC.⁵²⁹ However, as discussed in section 3.5, due to its subsidiarity, the RIAA will be applied only in exceptional cases; hence, the issue of the freezings by the FC based on art. 184 para. 3 will remain.

4.1.5. The Establishment of a Proper Legal Basis

On 16 March 2011 National Councilor Leutenegger Oberholzer tabled a motion demanding the FC to create a legal basis as part of a proper federal act for the freezing of assets of

⁵²¹ RICHTER, p. 542-543; for example, it used this tool inter alia in the following cases: Duvalier, Mobutu, Ben Ali, Mubarak, Gaddafi, cf. section 2.4).

⁵²² MOREILLON, Art. 18, N 2, p. 216.

⁵²³ MOREILLON, Art. 18, N 2, p. 216.

⁵²⁴ Dispatch RIAA, p. 15; the first time the FC used the tool before a request was sent was in the Marcos case in 1986, cf. section 2.4.1.1.

⁵²⁵ For example, in the Duvalier case in 2002.

⁵²⁶ Cf. BIANCHI/HEIMGARTNER, p. 357.

⁵²⁷ For example, in the Duvalier case in 2002.

⁵²⁸ Interpellation 11.3175.

⁵²⁹ Art. 2 RIAA, Dispatch RIAA, p.13, the Dispatch elaborates that “(...) the regular application of Art.184 para. 3 Const. in the past justifies the enactment of a formal legal foundation on which to codify practice with regard to the temporary freezing of assets”, Dispatch RIAA, p. 19.

overthrown potentates, mainly on the grounds of safeguarding legal certainty.⁵³⁰ She requested that the following point shall in particular be regulated: the conditions for an asset freeze, the criteria for the definition of overthrown PEPs, the point of time of the freeze, the authority to trigger asset freezes as well as the procedure.⁵³¹ Similarly, State Councilor Frick submitted an interpellation criticizing mainly the unpredictability of the action of the FC with regard to PEP assets as well as the lack of international coordination in the matter – which may result in a competitive disadvantage in economic terms compared to other states.⁵³²

In response the FC has commissioned the FDFA on 11 May 2011 to work on a formal legal basis upon which the FC can provisionally freeze the assets of PEPs and which specifies the criteria and modalities of such a freeze.⁵³³

While such a legal basis is welcomed, this paper advocates in a more general manner that a more comprehensive legal set up with regard to PEP assets is needed, as will be proposed in section 4.4.

4.2. Protection of Fundamental Rights and Human Rights and Rule of Law Principle

Capus states that over the past few decades there has been a transition of legal assistance in criminal matters towards much stronger emphasis on the respect of human rights, which means that individual rights must be protected in each stage of a procedure.⁵³⁴ Schweizer points out that relationship between fundamental rights, human rights and international legal assistance has not always been an obvious one and that until the 1970s and 1980s it was dominated by interests of national sovereignty.⁵³⁵ According to Breitenmoser basically all acts of legal assistance linked to individuals trench on the constitutional rights of the concerned persons.⁵³⁶ There are several important human rights and fundamental rights infringements in legal assistance cases regarding PEPs in general as well as with the RIAA specifically which will be discussed in the following.

4.2.1. The Guarantee of Ownership according to Art. 26 SC

When assets are being seized, forfeited and restituted, the most obvious question is whether the guarantee of ownership according to art. 26 SC is being infringed upon by forfeiture under the IMAC and the RIAA. The constitutional guarantee of ownership protects an individual's property from state intervention.⁵³⁷ Restrictions on fundamental rights must fulfill the conditions of art. 36 SC, which are in a nutshell the legal basis, a vast public interest and the

⁵³⁰ Motion 11.3151.

⁵³¹ Motion 11.3151.

⁵³² Interpellation 11.3175.

⁵³³ Answer of the Federal Council to Motion 11.3151 and Interpellation 11.3175 of 25 May 2011.

⁵³⁴ CAPUS, p. 481.

⁵³⁵ SCHWEIZER, p. 997.

⁵³⁶ BREITENMOSER, p. 34.

⁵³⁷ VALLENDER, Art. 26 N 27, p. 337; BIAGGINI, Art. 26 N 6, p. 182.

proportionality of the restriction;⁵³⁸ which implies that forfeiture must be a suitable and necessary measure. The legal basis for the handing over of property under IMAC lies in art. 74a para. 3 IMAC⁵³⁹ and under RIAA, the relevant articles are artt. 5 and 6 RIAA.⁵⁴⁰ The public interest in restituting assets of PEPs that have been acquired by unlawful means can be assumed, albeit only for assets that do have an unlawful origin.⁵⁴¹ Hence, in PEP asset cases, as long as the principle of proportionality is upheld, the guarantee of ownership may be restricted.

4.2.2. Concerns with regard to the Protection of Human Rights and Constitutional Rights in connection with the RIAA

With regard to the RIAA, several provisions pose problems with regard to the protection of human rights.

4.2.2.1. *The Forgoing of a Due Process*

As shown, the RIAA is applicable in cases where if the requesting state's request was not granted due to the incapacity of the state to comply with the minimal standards according to the ECHR or the ICCPR as laid down in art. 2 para. a IMAC.⁵⁴² This leads to the questionable result that Switzerland, based on the RIAA, provides unilateral legal assistance to states that do not respect basic human rights.⁵⁴³ Moreover, with the RIAA, forfeiture and restitution may happen without any kind of due process, be it in Switzerland or the requesting state.⁵⁴⁴ However, the forfeiture of assets without any link to an offence contradicts both Swiss law and international law.⁵⁴⁵

It may be argued that it is expected that with the fall of a corrupt PEP the doors stand open for a change towards democracy and a greater respect of human rights and that in this view, legal assistance according to the RIAA is granted to support this transition.⁵⁴⁶ However, Geddes identifies the probability of a transition from personalist dictatorships to democracy as being small.⁵⁴⁷ A hopeful attitude cannot justify legal assistance to countries where basic human rights are not respected.

⁵³⁸ Art. 36 SC.

⁵³⁹ Cf. Section 3.3 for more detail on art. 74 para. 3 IMAC.

⁵⁴⁰ DANNACHER, p. 154.

⁵⁴¹ Cf. DANNACHER, p. 154.

⁵⁴² Dispatch RIAA, p. 22.

⁵⁴³ Cf. DANNACHER, p. 139, Dannacher argues that the legal assistance based on the RIAA shall not be granted in cases where the minimal guarantees according to the ECHR and the ICCPR are not fulfilled, DANNACHER, p. 177

⁵⁴⁴ Dispatch RIAA, pp.16-17; DANNACHER, p. 175.

⁵⁴⁵ DANNACHER, p. 175.

⁵⁴⁶ Cf. RICHTER, p. 595.

⁵⁴⁷ GEDDES, p. 136. In her study, only 16% of personalist regimes that fell since 1945 became democracies. Even with the Arab spring, pessimist observers argue that the power vacuum will be filled by Islamists who do not have much sympathy for the rights of the region's women, freethinking intellectuals or moderate Muslims, see BRADLEY, p. 205

4.2.2.2. *Reversal of the Burden of Proof in Connection with Art. 6 para. 2 ECHR*

a) **Nature of Forfeiture under RIAA**

As seen in section 3.3.2.1 forfeiture with the RIAA is not considered to constitute a sanction under criminal law.⁵⁴⁸ As discussed, generally, in legal assistance cases the requested state does not have a proper criminal claim on its own but helps the requesting state in enforcing its criminal claim.⁵⁴⁹ The foreign claim that is supported by Swiss legal assistance in PEP asset cases is of criminal nature. With the RIAA, the assets are being forfeited with a view to direct restitution and aims at correcting the situation if not at penalizing⁵⁵⁰ the PEP. The qualification of forfeiture measures as an administrative act appears in this sense like a circumvention of the minimal guarantees provided in criminal forfeitures.⁵⁵¹ Cassani elaborates that “(...) the legislator was careful to develop an administrative judicial setting for the issuing of a forfeiture order, for the invalidation of the statute of limitations, and to simply rely on the probability with regard to the evidence of the licit origin of the assets. This however does not detract from the fact that the ultimate justification of this measure is the commission of an offense and that the forfeiture must be classified as a ‘punishment.’”⁵⁵² Indeed, as pointed out by Bianchi and Heimgartner, the forfeiture characteristics of the RIAA strongly resemble those in cases of criminal organizations; yet, without the actual need to fulfill the elements of the crime according to art. 260ter PC.⁵⁵³ With regard to the qualification as a criminal act, the Dispatch to the RIAA concludes that “it cannot be entirely ruled out that the forfeiture of assets (...) will be regarded as being criminal legislation in the sense of Art. 6 ECHR, such that Art. 6 para. 2 would be applicable.”⁵⁵⁴

a) **Qualification as a Charge regarding a Criminal Offence according to art. 6 para. 2 ECHR**

The ECHR lays down certain criteria in order to decide whether or not a sanction is in fact of penal nature in the sense of art. 6 ECHR: “its classification under domestic law, the nature of the offence and the nature, severity and objective of the sanction”.⁵⁵⁵ Applying these criteria to forfeiture under RIAA, we find that from its classification under domestic law, the RIAA is

⁵⁴⁸ Dispatch RIAA, p. 17.

⁵⁴⁹ CAPUS, p. 328.

⁵⁵⁰ Cf. Dispatch RIAA, „The public interest lies in the punishment of the unlawful acquisition of assets by PEPs and their associates”, p. 35.

⁵⁵¹ Cf. BIANCHI/HEIMGARTNER, p. 369 ; cf. GRISEL, p. 216.

⁵⁵² CASSANI, Les avoirs mal acquis, p. 479, free translation by the author from the French original: “Il est vrai que le législateur a pris le soin d'aménager une voie judiciaire administrative pour le prononcé de la confiscation, de déclarer sans effet la prescription de l'infraction en amont et de se contenter de la probabilité pour ce qui est de la preuve de la provenance licite des avoirs. Cela n'enlève rien au fait que la justification ultime de cette mesure est la commission d'une infraction et que la confiscation doit être qualifiée de ‘peine’”; furthermore Dannacher points out that art. 6 para. 2 ECHR is considered in the context of forfeiture if it has a penal aim or if it assumes the criminal liability of the concerned person without having determined the culpability in criminal proceedings, DANNACHER, p. 151. This seems fulfilled in the context of art. 6 RIAA.

⁵⁵³ BIANCHI/HEIMGARTNER, p. 365.

⁵⁵⁴ Dispatch RIAA, p. 36.

⁵⁵⁵ Dispatch RIAA, p. 36, citing Judgement in Engel vs. Netherlands of 8 June 1976m Series A, No. 22, §80ff.

considered an administrative act.⁵⁵⁶ With regard to the nature of the offence, the primary focus of the RIAA with regards to the offence lies on the unlawful acquisition of assets⁵⁵⁷ whereas the qualification of unlawfulness stands most probably in connection with the penal code.⁵⁵⁸ Concerning the nature, severity and objective of the sanction, forfeiture under the RIAA leads to the transferal of ownership right to the Confederation for the purpose of restitution⁵⁵⁹; hence the sanction is rather severe.⁵⁶⁰ As to the nature of the sanction, it is of repressive nature.⁵⁶¹ It follows from the above that forfeiture under RIAA qualifies as a charge under criminal law according to art. 6 para. 2 ECHR.⁵⁶²

b) Compatibility of the Reversal of the Burden of Proof with the Presumption of Innocence according to art. 6 para. 2 ECHR.

Assuming that the ECHR will qualify the act as of criminal nature, the question is if it will approve of the reversal of the burden of proof according to art. 6 RIAA with a view to the presumption of innocence as laid down in Art. 6 para. 2 ECHR.

First, while the ECHR is not inherently against a reversal of the burden of proof, in order to be compatible however, the presumption must permit the concerned person to exercise his/her rights of defense, i.e. s/he must be able to prove his/her innocence.⁵⁶³ Cassani points out that the reversal of the burden of proof does not pose problems as far as art. 6 para. 2 ECHR is concerned, as long as the submission of counter-evidence is not too burdensome.⁵⁶⁴ She concludes that the demonstration of the lawful acquirement of the assets in all probability does not seem to be too difficult.⁵⁶⁵

Second, Dannacher points out that according to the ECHR, the reversal of the burden of proof can only be the basis for a sanction if supported by circumstantial evidence that clearly indicates criminal behavior, and refers to the ECHR judgment *Pham Hoang v. France* in which the reversal was accepted because it was not automatic but weighted against the evidence.⁵⁶⁶ She argues that the conditions of art. 6 para. 1 subpara. a and b RIAA by themselves do not provide clear evidence of the criminal behaviors of the concerned person. Instead, for the reversal of the burden of proof to be compatible with the ECHR, Dannacher reasons that the only option is that in ordering forfeiture, the judge must examine further

⁵⁵⁶ Dispatch RIAA, p. 9.

⁵⁵⁷ Cf. Dispatch RIAA, p. 29.

⁵⁵⁸ Cf. BIANCHI/HEIMGARTNER, p. 366.

⁵⁵⁹ Dispatch RIAA, p. 24.

⁵⁶⁰ BIANCHI/HEIMGARTNER, p. 366.

⁵⁶¹ BIANCHI/HEIMGARTNER, p. 367.

⁵⁶² BIANCHI/HEIMGARTNER, p. 366;

⁵⁶³ STESENS, p. 69, citing ECHR judgement of 7/10/1988, *Salabiaku v. France*, ECHR, Series A, No. 141, paras. 29-30 and ECHR in *Phoam Hang v. France*, judgment of 25 September 1992, Publ. ECHR Series A, No. 243, para. 34; cf. DANNACHER, p. 152.

⁵⁶⁴ CASSANI, *Les avoirs mal acquis*, p. 478.

⁵⁶⁵ CASSANI, *Les avoirs mal acquis*, p. 478.

⁵⁶⁶ DANNACHER, p. 163, citing the ECHR in *Phoam Hang v. France*, judgment of 25 September 1992, Publ. ECHR Series A, No. 243, c. 36.

circumstantial evidence supporting the criminal liability of the concerned person in each individual case.⁵⁶⁷ Bianchi and Heimgartner point out that the reversal of the burden of proof is not compatible if the condition is not met that authorities prove that the offence which underlies the forfeiture has been committed; however, with the RIAA no such offence is necessary for forfeiture.⁵⁶⁸ In line with Dannacher, they consider the reversal as incompatible if it is not combined with substantiated indications on the unlawfulness of the way of acquisition of the assets.⁵⁶⁹

4.2.2.3. Retroactive effect of the RIAA on the Duvalier case in view of the Principle of Non Retroactivity of art. 7 para. 1 ECHR

With the Duvalier case, the RIAA, based on its art. 14 RIAA⁵⁷⁰, finds application to a case which has already been ruled upon by the FSC. Yet retroactivity, i.e. the application of a new law to facts that have been concluded, is interdicted.⁵⁷¹ The retroactive effect creates problems with a view to art. 7 para. 1 ECHR.⁵⁷² Cassani points out that the retroactive application will hardly be compatible with art. 7 ECHR as the forfeiture of assets qualifies as a punishment and can thus not be applied retroactively. Both Cassani and Dannacher agree that the RIAA provisions may not be rightfully applied to the Duvalier case.⁵⁷³

4.3. The Future of Potentate Assets in Swiss Banking Institutions

4.3.1. The Current AML System and Increasing Reputational Risks

Numbered accounts seem to belong to Switzerland as much as Rolex, but just how big is the discrepancy between reality and image? Capital flight has not always been recognized as a danger to reputation; indeed, in the 1970s financial centers have still actively promoted the flight of capital.⁵⁷⁴ In the Marcos case, the FSC in 1997 laid down that “[i]t is first and foremost the duty of the legislator and regulation authority, as well as the duty of the banks and their professional organizations to ensure that head of states of dictatorial regimes deposit millions in Swiss bank accounts that are of obvious unlawful origin – as it happened in the

⁵⁶⁷ DANNACHER, p. 153.

⁵⁶⁸ BIANCHI/HEIMGARTNER, p. 367.

⁵⁶⁹ BIANCHI/HEIMGARTNER, p. 367.

⁵⁷⁰ The Dispatch to the RIAA lays down that “[a]rt. 14 thus provides that the new Act will also apply to assets that have already been frozen by the Federal Council at the time the Act enters into effect”, Dispatch RIAA, p. 33.

⁵⁷¹ GRISEL, p. 211; Grisel also points out that in the Duvalier case, art. 2 para. a RIAA is not fulfilled as the renewed freezing by the FC after the FSC decision does not stand in the context of the previous legal assistance request, GRISEL, p. 211-212.

⁵⁷² Cf. DANNACHER, pp. 157-160; art. 7 para. 1 ECHR demands that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed (...)”.

⁵⁷³ CASSANI, *Les avoirs mal acquis*, p. 479. DANNACHER, p. 158, she further explores the compatibility of art. 14 RIAA to the principle of non retroactivity in administrative law, pp. 158-160.

⁵⁷⁴ PIETH, p. 4

present case⁵⁷⁵. During the last decades, due diligence obligations have been hardened with growing international pressure, increasing media attention, and with that rising reputational risks for banks and for the Swiss financial center when brought in connection with corrupt assets.⁵⁷⁶ The FDFA states that “Swiss banks are regarded as pioneers in keeping out illegal funds; already in 1977 they drew up their own strict due diligence rules.”⁵⁷⁷ As far as handling PEPs are concerned, Switzerland’s AML framework fulfills, if not exceeds, the requirements posed by the FATF.⁵⁷⁸

4.3.2. AML Due Diligence and the Current Cases in connection with the Arab Spring

In its recent report on the PEP issue in connection to the freezing of assets from Tunisia, Egypt and Libya, the FINMA concludes that most banks have well endorsed their obligations and have acted according to the law.⁵⁷⁹ Consequently, in practical terms, this means that the assets of PEPs that lie in Swiss bank accounts are being monitored by the financial institutions. At the same time, however, this implies that the banks are not required to actively report such assets. Furthermore, such funds do not qualify as assets that they know, or are expected to know, are the proceeds of criminal activities according to art. 7 AMLO-FINMA. Nor do PEPs in question qualify as persons of whom financial intermediaries know or must assume they constitute a terrorist or a criminal organization according to art. 8 AMLO-FINMA. Nevertheless, looking at the way of ruling of dictators, such as, for instance, Gaddafi in Libya, the question arises as to whether his assets are not obviously corrupt. Furthermore, the fact that the Abacha and Duvalier clans both have been classified as criminal organizations under art. 260^{ter} PC by the FSC leads to the question if, for example, Gaddafi does not qualify as a person who is known or assumed to be affiliated with a criminal organization. According to the FINMA report, with regard to the establishment of the origin of the assets “clarifications were almost always carried out, but in some cases not in the necessary depth”.⁵⁸⁰ Based on the generally satisfactory results of the report, FINMA does not see any need for action with regard to the AML legislation when dealing with PEPs.⁵⁸¹ TI harshly criticizes this result and the effectiveness of the AML legislations as such, stating that if the AML rules relating to PEP would be effective in keeping out corrupt or stolen money, banks would have had to report and freeze the assets long before the FC told them to do so.⁵⁸²

⁵⁷⁵ BGE 123 II 595 c. 5a; freely translated from the German original: “Es ist in erster Linie Aufgabe des Gesetz- und Verordnungsgebers sowie der Banken und ihrer Standesorganisationen, dafür zu sorgen, dass nicht - wie im vorliegenden Fall geschehen - Staatschefs diktatorischer Regime Millionenbeträge offensichtlich unlauterer Herkunft auf schweizerische Bankkonten deponieren können.“

⁵⁷⁶ PWC, Geldwäschebekämpfung 2003, p. 13.

⁵⁷⁷ FDFA, Illicit assets of PEPs.

⁵⁷⁸ FINMA, Due Diligence Report of 11 March 2011, p. 5; Switzerland is part of the 16% that are either fully compliant or largely compliant with the FATF regulation (The World Bank, StAR, Politically Exposed Persons p. 7, Figure 1.1. FATF Recommendation 6: Compliance of 124 Jurisdictions).

⁵⁷⁹ FINMA, Due Diligence Report of 10 November 2011, p. 3.

⁵⁸⁰ FINMA, Due Diligence Report of 10 November 2011, pp. 8-9.

⁵⁸¹ NZZ 10/11/2012, Verfahren gegen Banken wegen Potentatengeldern.

⁵⁸² TI, NGOs über FINMA-Bericht enttäuscht, 10/11/2011.

4.3.3. The International Acceptance of Dictatorial Regimes in Connection with Swiss Banking Institutions

While there is an immense reputational risk for banks when dealing with PEPs from countries with a high degree of corruption, democratic states tend to interrelate with dictatorial regimes without much of a reputational risk. As discussed in section 1.3.2, a good example of this is the friendship between Berlusconi and Gaddafi. On 19 February 2011 Berlusconi still felt no need for intervention and was quoted saying “[n]on disturbo Gheddafi”⁵⁸³. Thelesklaf feels that a clear distinction between how a state may act and how its financial institutions may act must be drawn: a state must maintain diplomatic relations even with dictatorships in order for example to protect its own interests.⁵⁸⁴ Hence, a bank cannot justify its banking relationship with a dictator in that Switzerland has diplomatic relations to the PEP but it must consider the risk for the reputation of the Swiss financial center.⁵⁸⁵

Another question of interest here is as to whether huge amounts of assets of dictators that are generally known or suspected to be of questionable origin still be transferred to Switzerland. Wyss estimates that in the current environment, no financial intermediary will dare to take on assets of which they know are the proceeds of a crime.⁵⁸⁶ When taking on money from any person and especially in the cases of PEPs, the question that a financial intermediary has to ask itself is where the assets are coming from. However, as simple as the question may sound, finding a clear answer is not straightforward. In practice, as pointed out by Bianchi and Heimgartner, as long as a certain PEP is internationally accepted and the origin of the assets of the PEP can be clarified in a plausible way, the general AML legislation, subject to country specifications, applies to PEP assets, except for those over which an embargo has been imposed.⁵⁸⁷ With the current AML legislation and the high reputational risks for Swiss banks, new bank account openings of PEPs that belong to the sort of human rights violating corrupt dictators are nowadays hard to imagine. A bank has to look at each account opening individually; and where a corrupt background seems obvious, banks will already today renounce to open a bank account.⁵⁸⁸

According to Bianchi and Heimgartner, there are currently efforts being made in the area of soft law by FATF and the BCBS that intend to establish international standards with regard to the warding off of PEP assets.⁵⁸⁹ Furthermore, the FATF recommendations have been revised at the beginning of this year and require stricter regulation in connection with business

⁵⁸³ La Repubblica, Non disturbo Gheddafi, 19/2/2011.

⁵⁸⁴ SF, Interview with Daniel Thelesklaf of 21/2/2011.

⁵⁸⁵ SF, Interview with Daniel Thelesklaf of 21/2/2011.

⁵⁸⁶ WYSS, GwV-EBK, Art. 4, N 3, p. 170.

⁵⁸⁷ BIANCHI/HEIMGARTNER, p. 354.

⁵⁸⁸ ZOLLINGER, NZZ 3/4/2011, Gestern noch „Regent“, heute ein „Potentat“.

⁵⁸⁹ BIANCHI/HEIMGARTNER, p. 354, footnote 7.

relationships as before.⁵⁹⁰ However, most of the changes have already been implemented in the Swiss AML legislation.

4.3.4. The Advancement of AML Due Diligence Obligations

A lot of the AML and anti-corruption efforts aim at cleaning up financial centers from assets obtained by unlawful means. Yet, as recently seen in connection with the Arab spring, assets of PEPs that with a very high probability have been acquired by unlawful means lie in bank accounts around the world.

In what ways shall the AML legislation be advanced in order to prevent such situations from happening? With regard to the efficiency of the AML legislation Thelesklaf senses a problem with the threshold for the obligation to report being too high and feels a need to concretize the obligation.⁵⁹¹ In a parliamentary motion it was proposed to make PEP relationships subject to approval by state authorities.⁵⁹² However, the FC recommended the rejection of the motion based on the grounds that the PEP qualification is too diverse and the drawing up of a list would imply to point the finger at certain persons which would be counterproductive in political and economic terms.⁵⁹³ The FC further raises concerns with regard to the protection of privacy of the concerned individuals.⁵⁹⁴

One idea would be to review PEP bank accounts and to include criteria such as minimum standards in terms of corruption levels or even human rights records in the decision if the banking relationship with certain PEPs shall be continued. One could generally imagine to harden the requirement of the duty to clarify in the sense of a shifting of the burden of proof as to the legitimacy of the origin of PEP assets, i.e. banks would not be allowed to accept money coming from PEPs of states with high corruption level and low human rights if they cannot proof the legality of the assets with certainty.⁵⁹⁵ Indeed, both Credit Suisse and UBS participate in corporate social responsibility programs that aim at combatting corruption. In extremis the assets of a PEPs coming from dictatorial regimes could generally be refused on the grounds that the reputational risk is too big. Schwob, Member of the Executive Board of the SBA, was asked whether it would have been better if the banks did not accept the money in the first place and answered that “[s]uch a demand would, with regard to the economic

⁵⁹⁰ FATF Regulations of 2012; cf. SEECI, Interview Ackermann.

⁵⁹¹ SF, Interview with Daniel Thelesklaf of 21/2/2011.

⁵⁹² Motion 11.3148.

⁵⁹³ Motion 11.3148.

⁵⁹⁴ Motion 11.3148.

⁵⁹⁵ The current discussion about the FC's white-money-strategy (in German the term used is “Weissgeldstrategie) which aims at freezing Switzerland from undeclared assets goes in a similar direction. However, in a recent interview former UBS and Credit Suisse chief Oswald Grübel criticized the white-money-strategy, dismissing the term as the non-word of the year. Grübel argues that the administrative effort needed to guarantee that all the money entering Switzerland has been declared is huge, if not impossible. The burden of guaranteeing that all money is clean would probably mean that Switzerland would have to know all country-specific tax regulations and that indeed would hardly be feasible, see *Handelszeitung* 29/02/2012, *Weissgeldstrategie ist das Unwort des Jahres*.

interdependence, be naïve. Swiss companies are present in foreign states and foreign companies are doing business in Switzerland. On what grounds should a Swiss bank refuse a client coming from such a state? If it is clear that the assets have been legally acquired there is no reason to not accept the assets just because the foreign state does not maintain equally high democratic standards as Switzerland.⁵⁹⁶

However, with such ideas, another rather ambivalent question remains unsolved, i.e., where the assets will go and whether this is a better solution than having them in Switzerland. As Cassani points out, “a general ban by the global banking sector would be a crippling burden that might prove to be counterproductive for the economic development for the country.”⁵⁹⁷

Note, however, that all such considerations should be taken on an international level and not by Switzerland alone. This will be discussed in section 4.5.

4.3.5. The Increasing Responsibility of the Bank Employee

The financial intermediary as a legal entity is obliged to provide the guarantee of irreproachable business conduct.⁵⁹⁸ However, the acceptance of assets is done by the natural person of the bank employee. The bank employee is increasingly accountable for any assets or PEP relationships that are not being reported, e.g. in a recent decision, the FCC convicted a bank employee for money laundering (art. 305bis PC) and lack of due diligence in financial transactions (art. 305ter PC) on the grounds that s/he did not qualify the wife of a former federal judge a PEP.⁵⁹⁹ Appeal has been taken to the FSC, which came to the conclusion that the employee cannot be held responsible for lack of due diligence in financial transactions (art. 305ter PC) for not qualifying the client as a PEP for the time in which s/he did not know of the client’s family link to a judge; however, it confirmed the conviction for money laundering.⁶⁰⁰

4.4. The Need for more Comprehensive Legislation

Switzerland has done much in the context of PEP assets and with the RIAA, it has established a legal basis that aims at tackling the most difficult cases of international legal assistance cases. However, the introduction of the RIAA appears like an effort made too little too late. It is too little in the sense that the RIAA will hardly ever be applied and does not tackle the existing problems in a satisfactory manner. And it is too late in the sense that its design for the Duvalier case produces a retroactive application and is thus not compatible with human rights safeguards.⁶⁰¹ Cassani regrets that the legislator with regard to legal assistance introduced the

⁵⁹⁶ SwissBanking, Aussichten, Interview mit Renate Schwob, p.8, free translation by the author.

⁵⁹⁷ CASSANI, p. 474, free translation by the author.

⁵⁹⁸ WYSS, GwV-EBK, Art. 4, N 3, p. 170.

⁵⁹⁹ BGer 6B_729/2010.

⁶⁰⁰ BGer 6B_729/2010, c. 3.5.7.

⁶⁰¹ Cf. section 4.2.2.3.

reversal of the burden of proof concerning forfeiture in the RIAA, whose practical relevance will remain marginal, instead of amending art. 74a IMAC in this regard.⁶⁰²

The approach to the PEP issue currently appears like a patchwork and not as a comprehensive approach. In a nutshell, the current system of legal assistance in connection with PEPs is constituted of the following elements: first, assets are frozen provisionally by the FC under the Constitution. Such freezings will find an individual legal basis in the near future. Second, provisional measures are taken under the IMAC. Third, in case of admission of the request, provisional measures or freezings under art. 63 IMAC are followed by the handing over of assets based on art. 74a IMAC, which will most probably be linked to hardly controllable conditions according to art. 80e IMAC. Fourth, in the case of refusal of legal assistance linked to state failure, the RIAA will be applied, which is questionable in terms of human rights, as indicated above. Moreover, in case the freezings have been based on an additional UN Embargo, the procedure of restitution is agreed upon with the UN with no further legal guidelines of internal law.

It would have been conceivable to create a law as a *lex specialis* that is specially designed for PEP asset cases, which would have been applicable as soon as faced with PEP assets in legal assistance and not only in cases in which a previous request for legal assistance could not be granted. However, here again, considerations with regard to changes in legislation should be done with a view that it is a global problem that should be tackled with a global solution, what will be discussed in the following.

4.5. The Need for Global Approaches

4.5.1. The Need for Coordination

In this age of globalization and international connection in almost every aspect of life, in order to be effective, solutions need to be coordinated internationally, especially since PEP assets are distributed over all financial centers around the world. The issue of criminal PEP assets obtained by unlawful means is clearly an international one, but also one with no international solution so far.

When analyzing the PEP concept in international law in section 1.2.2, it has been shown that several international treaties and initiatives have been established concerning the issues of corruption and money laundering. However, when looking at legal assistance concerned with PEP assets that have been obtained by unlawful means, there is no internationally coordinated response, even though states with financial centers around the world are faced with the same

⁶⁰² CASSANI, *Les avoires mal acquis*, p. 480; cf. DANNACHER, pp. 180-181, Dannacher presents further proposals for solutions such as amending the penal provisions of art. 260ter PC and the connected art. 72 PC (DANNACHER, pp. 176-184).

problems. In the context of the recent asset freezes, FINMA published an overview of asset freezings at national and international level⁶⁰³, as illustrated in table 1:

Table 1. Asset Freezes in Switzerland, Europe and the US

	Switzerland	Europe	US
Tunisia	19.1.2011	4.2.2011	-
Egypt	11.2.2011	21.3.2011	-
Libya	24.2.2011	2.3.2011	25.2.2011

Source: FINMA Report of 10 November 2011⁶⁰⁴

Even though it is exemplary of Switzerland to act fast and single-handedly, it is questionable if this approach is efficient from a more global perspective. Furthermore from a purely economic perspective, very strict regulations may intervene on the competitiveness of a financial center in comparison to other states that do not institute the measures in a comparable way. In an interview on 21 February 2011, Schwob considers the fact that there is no institutionalized dialogue at the international level as being the most detrimental circumstance in the matter.⁶⁰⁵ She points out that while Switzerland has acted with an iron hand in the Mubarak case, Europe has not been able to decide on the issue due to its need for unanimity.⁶⁰⁶ France and Great Britain have openly communicated that they do not want to take measures; however, according to her, they will point fingers at Switzerland in the next convenient moment.⁶⁰⁷ She states that such a cacophony as in these cases cannot be accepted.⁶⁰⁸

The FDFA has recently organized a seminar which focused on the subject of the Arab spring in connection with asset recovery, bringing together 40 experts from 15 countries.⁶⁰⁹ Such international gatherings are in my opinion of outmost importance and hopefully advance the international setting up of appropriate legislation. However, there are so far no news on concrete implementation on international measures on the issue apart from more or less coordinated embargos.

4.5.2. UN Embargos as a Way of International Coordination

An international response to the issue has been given by UN SC resolution 1970⁶¹⁰ which obligated all members to freeze Gaddafi related funds⁶¹¹, as discussed in section 2.4.2. Resolution 1973 was considered as a breakthrough for the so-called responsibility to protect

⁶⁰³ FINMA, Due Diligence Report of 10 November 2011, p. 4.

⁶⁰⁴ FINMA, Due Diligence Report of 10 November 2011, p. 4.

⁶⁰⁵ SF, Interview with Renate Schwob of 21/2/2011., free translation by the author.

⁶⁰⁶ SF, Interview with Renate Schwob of 21/2/2011., free translation by the author.

⁶⁰⁷ SF, Interview with Renate Schwob of 21/2/2011., free translation by the author.

⁶⁰⁸ SF, Interview with Renate Schwob of 21/2/2011., free translation by the author.

⁶⁰⁹ FDFA, Arab Spring.

⁶¹⁰ UN Security Council Resolution 1970 of 26/2/2011.

⁶¹¹ UN News Centre, 26/2/2011 Security Council imposes sanctions on Libyan authorities.

(RtoP),⁶¹² i.e. a relatively new concept of international law which postulates that a state's primary responsibility is the protection of its population.⁶¹³ If the state fails to do so, or if it itself represents the perpetrator of crimes against its own population, the international community should use appropriate means, including the collective use of force.⁶¹⁴ However, in the case of Syria, the intervention at a UN level are rather poor, which demonstrates the limits of the new concept.⁶¹⁵

However, while from a perspective of coordination, the implementation of such embargos is favorable, they may pose problems with regard to the safeguarding of human rights. For example, as seen in the Gaddafi case⁶¹⁶, with regards to the concerned assets in Switzerland, former FC president Calmy-Rey, Switzerland has requested the UN sanctions Committee to release CHF 350 m. of the frozen assets.⁶¹⁷ The idea is to restitute assets to Libya in favor of the people.⁶¹⁸ However, such restitutions would apparently happen without any kind of international legal assistance procedure⁶¹⁹ or even without any investigations into the illegal acquisition of the assets.⁶²⁰ In the three separate ordinances of the FC on measures against certain persons from Libya, Egypt and Tunisia, art. 1 para. 2 clearly states that in exceptional cases, the FDFA's Directorate of International Law (DIL) may, in consultation with SECO and FDF authorize "payments or transfers from frozen accounts or the release of frozen economic resources in order to safeguard Swiss interests or to avoid cases of hardship".⁶²¹ In a view of the protection of fundamental guarantees as discussed in section 4.2. such authorizations are questionable.

4.5.3. Internationalization of Criminal Justice

One of the main obstacles to an international approach in legal assistance concerning PEP cases is that penal law highly focuses on state sovereignty; however, the concept of sovereignty has been and still is in dynamic development. With it, criminal justice must be open to international developments.⁶²² According to Zimmermann, the cooperation in the matters of extradition, legal assistance, the delegation of the prosecution and the execution of foreign decisions constitute a first step in the direction to the internationalization of penal

⁶¹² NZZ 10/2/2012, Wie weiter in Syrien?

⁶¹³ RtoP, Introduction.

⁶¹⁴ RtoP, Introduction; the document, signed by world leaders, is however not binding and the concept has led to controversies since it leads to a weakening of the concept of state sovereignty, see NZZ 10/2/2012, Wie weiter in Syrien?

⁶¹⁵ NZZ 10/2/2012, Wie weiter in Syrien?; cf. section 2.4.2.3.

⁶¹⁶ Cf. section 2.4.2.2.

⁶¹⁷ NZZ 1/9/2011, Gemeinsam für ein neues Libyen; Swissinfo.ch of 30/9/2011, Return of Ben Ali funds remains a "paradox".

⁶¹⁸ NZZ 1/9/2011, Gemeinsam für ein neues Libyen.

⁶¹⁹ BIANCHI/HEIMGARTNER, p. 354.

⁶²⁰ Bianchi and Heimgartner point out that in light of the existing legal basis, such formless restitutions cause concern (BIANCHI/HEIMGARTNER, p. 354).

⁶²¹ Art. 1 para. 2 Ordinance on Libya of 21/2/2011, SR. 946.231.149.82; BIANCHI/HEIMGARTNER, p. 354.

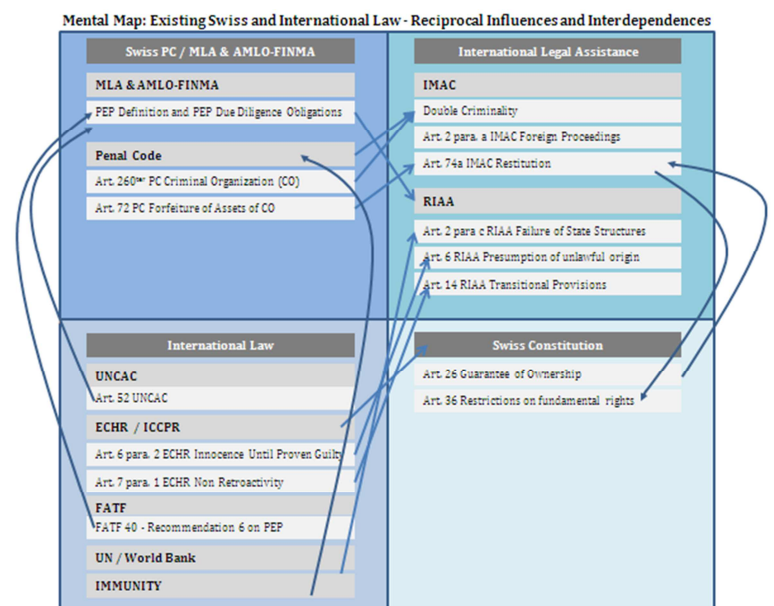
⁶²² CAPUS, p. 481.

law.⁶²³ One idea to tackle the issue on a global level could be a treaty between states with financial centers around the world, in which common standards of how to deal with PEP assets in connection with legal assistance in cases the legality of the origin of the assets is being questioned. In extremis, one could imagine setting up an international court that judges over the assets. However, this idea still appears utopian in the current situation.

Conclusion

Corruption is a persistent and continuous phenomenon and dictatorships do not belong to the past. International legal assistance by Switzerland concerning assets of PEPs has proven to be difficult in the past. Despite the intention behind solving such cases is noble⁶²⁴, some decisions taken in favor of legal assistance are questionable in terms of the rule of law and the respect for human rights.

The aim of the RIAA has been to improve the unsatisfying current situation when dealing with assets of PEP in connection with legal assistance cases. However, the situation remains unsatisfactory. The RIAA certainly represents a step in the right direction in that for the first time it addresses the issue specifically; however, next to the fact that it is hardly ever going to be applied, it goes in the wrong direction in that it does not respect the rule of law and human rights in many ways. The RIAA seems like a quick fix that was pushed through by the parliament⁶²⁵ in order to be applicable to the Duvalier case – which as it has been shown, is not compatible with fundamental rights and human rights. In fact, necessity knows no law. Similarly, the RIAA has been designed to produce the desired outcome of the restitution of assets to a population that suffered from tyranny. However, what was considered a necessity to counter a morally unsatisfactory result has resulted in a law that is not compatible with fundamental human rights in numerous ways. Furthermore, the RIAA makes a distinction between failing states and states capable of meeting the condition of



⁶²³ ZIMMERMANN, p. 3.

⁶²⁴ GIROUD, p. 16.

⁶²⁵ Cf. MOREILLON/ MACALUSO/ MAZOU, p. 85.

legal assistance; which, however, could in some cases also benefit from a reversal of the burden of proof.⁶²⁶

However, it is suggested in this paper that the main advantage of the RIAA lies in the restitution of assets; the law provides clear guidelines about how to proceed in favor of the people of the country. Even though it can be criticized for not accrediting specific claims from direct victims, the restituted assets will be allocated for the benefice of persons that have suffered from the rule of the PEP.⁶²⁷ A further advantage of the RIAA is that it provides for a concrete legal basis for the freezing of the assets by the FC.

The PEP problem is linked to the financial sectors around the world. It has been shown that financial intermediaries are subject to concrete domestic and international due diligence obligations concerning PEP relationships. Today, when Swiss banks accept assets of PEPs, an ounce of prevention is worth a pound of cure; a banks's reputation is so easily damaged that much of the decision to accept assets or not is not solely based on due diligence obligations but equally on concerns for their reputation.

Swiss authorities have acted fast and single-handedly concerning asset freezings in the recent cases linked to the Arab spring. However, it is questionable if this approach is efficient from a more global perspective and opportune for the Swiss financial sector. It has been shown that the issue should be coordinated on an international level. For this to happen, it would be worthwhile to investigate in a comprehensive way how financial centers around the world, especially in developed financial centers such as in the EU, the USA, the Bahamas, Singapore or Hong Kong International act in such situations in order to draw comparisons to the Swiss system and to propose a common solution. A rather utopic idea would be to devise a treaty that regulates how to react in such cases and bring the question of the legality of the assets to an international court. However, the currently existing international coordination, which is the use of embargos, is such a political issue that it results in the unequal treatment of similar situations. Hence, it could be argued that since in some cases there is no action on the international level, Switzerland should act on its own for the sake of justice. Clearly, with such an individual approach, questionable assets will soon exit Switzerland. Unfortunately, it appears that other states do not have such a thin skin with regard to questionable assets.

Most important, however, is the imperative to uphold human rights and fundamental rights, even in cases where our sense of justice requires a different outcome. The rule of law must predominate for the sake of a functioning democracy.

⁶²⁶ BERTOSSA, *La restitution des valeurs*, p. 137.

⁶²⁷ GRISEL, p. 218.

Annex

Annex 1: Table 2 Selected Definitions of PEP

The table includes the definitions of the

- USA Patriot Act (Uniting [and] Strengthening America [by] Providing Appropriate Tools Required [to] Intercept [and] Obstruct Terrorism Act of 2001),
- EU-Directive 2005/60/EC and its implementing regulation 2006/70/EC
- FATF,
- Wolfsberg Group,
- Basel Committee on Banking Supervision,
- UN Convention against Corruption,
- AMLO-FINMA and the RIAA

Legislation	Definition
USA Patriot Act Section 312⁶²⁸	<p>Senior Foreign Political Figure - Definition provided by the Financial Crimes Enforcement Network of the US Department of the Treasury:</p> <ul style="list-style-type: none"> ▪ a current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government, whether or not they are or were elected officials; ▪ a senior official of a major foreign political party; and a senior executive of a foreign government-owned commercial enterprise, including a corporation, business, or other entity formed by or for the benefit of such an individual. Senior executives are individuals with substantial authority over policy, operations, or the use of government-owned resources. ▪ also included in the definition of a senior foreign political figure are immediate family members of such individuals, and those who are widely and publicly known (or actually known) close associates of a senior foreign political figure.
EU-Directive 2005/60/EC Art. 3 Para. 8⁶²⁹	<p>PEP</p> <ul style="list-style-type: none"> ▪ natural persons who are or have been entrusted with prominent public functions ▪ and immediate family members, ▪ or persons known to be close associates, of such persons
EU-Commission Directive 2006/70/EC Art. 2⁶³⁰	<p>Politically exposed persons</p> <p>1. For the purposes of Article 3(8) of Directive 2005/60/EC, "natural persons who are or have been entrusted with prominent public functions" shall include the following:</p> <ul style="list-style-type: none"> (a) heads of State, heads of government, ministers and deputy or assistant ministers; (b) members of parliaments; (c) members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances; (d) members of courts of auditors or of the boards of central banks; (e) ambassadors, chargés d'affaires and high-ranking officers in the armed forces; (f) members of the administrative, management or supervisory bodies of State-owned enterprises. <p>None of the categories set out in points (a) to (f) of the first subparagraph shall be understood as covering middle ranking or more junior officials.</p> <p>The categories set out in points (a) to (e) of the first subparagraph shall, where applicable, include positions at Community and international level.</p> <p>2. For the purposes of Article 3(8) of Directive 2005/60/EC, "immediate family members" shall include the following:</p> <ul style="list-style-type: none"> (a) the spouse;

⁶²⁸ USA Patriot Act, Section 312, retrieved from the FINCEN Website: http://www.fincen.gov/news_room/rp/rulings/html/312factsheet.html (accessed on 20/12/2011).

⁶²⁹ EU-Directive 2005/60/EC Art. 3 Para. 8, retrieved from the EU-Lex Website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0060:EN:HTML> (accessed on 20/12/2011).

⁶³⁰ EU-Commission Directive 2006/70/EC Art. 2, retrieved from the EU-Lex Website: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:214:0029:0034:EN:PDF> (accessed on 20/12/2011).

	<p>(b) any partner considered by national law as equivalent to the spouse;</p> <p>(c) the children and their spouses or partners;</p> <p>(d) the parents.</p> <p>3. For the purposes of Article 3(8) of Directive 2005/60/EC, "persons known to be close associates" shall include the following:</p> <p>(a) any natural person who is known to have joint beneficial ownership of legal entities or legal arrangements, or any other close business relations, with a person referred to in paragraph 1;</p> <p>(b) any natural person who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit de facto of the person referred to in paragraph 1.</p> <p>4. Without prejudice to the application, on a risk-sensitive basis, of enhanced customer due diligence measures, where a person has ceased to be entrusted with a prominent public function within the meaning of paragraph 1 of this Article for a period of at least one year, institutions and persons referred to in Article 2(1) of Directive 2005/60/EC shall not be obliged to consider such a person as politically exposed.</p>
FATF ⁶³¹	<p>PEP</p> <ul style="list-style-type: none"> ▪ Individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. ▪ Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. ▪ The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories
United Nations Convention against Corruption (UNCAC), art. 52 ⁶³²	<ul style="list-style-type: none"> • <i>Article 52. Prevention and detection of transfers of proceeds of crime:</i> Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.
Basel Committee on Banking Supervision (BCBS) ⁶³³	<ul style="list-style-type: none"> • (...) politically exposed persons ("PEPs") are individuals who are or have been entrusted with prominent public functions, including heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of publicly owned corporations and important political party officials. There is always a possibility, especially in countries where corruption is widespread, that such persons abuse their public powers for their own illicit enrichment through the receipt of bribes, embezzlement, etc.
Wolfsberg Group ⁶³⁴	<ul style="list-style-type: none"> ▪ The term should be understood to include persons whose current or former („Rule of thumb“: 1 year after giving up any political function) position can attract publicity beyond the borders of the country concerned and whose financial circumstances may be the subject of additional public interest. In specific cases, local factors in the country concerned, such as the political and social environment, should be considered when deciding whether a person falls within the definition. ▪ The following examples are intended to serve as aids to interpretation: <ul style="list-style-type: none"> • Heads of state, government and cabinet ministers; • Influential functionaries in nationalized industries and government administration; • Senior judges; • Senior party functionaries; • Senior and/or influential officials, functionaries and military leaders and people

⁶³¹ FATF Definition, retrieved from the FATF Website: http://www.fatf-gafi.org/glossary/0,3414,en_32250379_32236920_34295666_1_1_1_1,00.html#34285860 (accessed on 20/12/2011).

⁶³² United Nations Convention against Corruption (UNCAC), art. 52, retrieved from http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed on 20/12/2011).

⁶³³ Basel Committee on Banking Supervision (BCBS), retrieved from www.bis.org/publ/bcbs85.pdf, p.10. (accessed on 20/12/2011).

⁶³⁴ Retrieved from the Website of the Wolfsberg Group: <http://www.wolfsberg-principles.com/faq-persons.html> (accessed on 20/12/2011).

	<ul style="list-style-type: none"> with similar functions in international or supranational organizations; • Members of ruling royal families; • Senior and/or influential representatives of religious organizations (if these functions are connected with political, judicial, military or administrative responsibilities) <ul style="list-style-type: none"> ▪ The term families should include close family members such as spouses, children, parents and siblings and may also include other blood relatives and relatives by marriage. ▪ The category of closely associated persons should include close business colleagues and personal advisors/consultants to the politically exposed person as well as persons who obviously benefit significantly from being close to such a person.
FINMA Anti-Money Laundering Ordinance Art. 2 para. 1 subpara a.	<ul style="list-style-type: none"> ▪ The following persons holding prominent public positions abroad: heads of state and government, high politicians at the national level, high functionaries in the administration, the judiciary, the military and political parties at national level, the highest organs of state enterprises of national importance, ▪ Companies and persons related to such persons for family, personal or business reasons evident near.
RIAA Art. 2 para. b subpara. 1 and 2	<ul style="list-style-type: none"> ▪ Individuals who exercise or have exercised a high public office abroad (politically exposed persons). This category includes specifically heads of state or government, high-ranking politicians, high-ranking members of the administration, judiciary, armed forces or national political parties, and senior executives of state-owned corporations of national importance, or ▪ Natural or legal persons who are closely associated with politically exposed persons for family, personal or business reasons (close associates).

Annex 2: Table 3 The Swiss PEP Definition in Comparison to Other Definitions

(1) Prominence /Seniority	
AMLO-FINMA / RIAA	<ul style="list-style-type: none"> ▪ The Swiss definition of the AMLO-FINMA does not present an exhaustive list, but instead uses a deliberately open concept with the idea that the meaning of a function may differ substantially across states and jurisdictions.⁶³⁵ ▪ The Dispatch to the RIAA concludes that “[a]ll in all, these are persons who operate in an environment of power politics and money.”⁶³⁶ ▪ Apart from the political prominence it is important to include senior executives of state-owned businesses of any sort in this definition. The AMLO-FINMA and the RIAA include “senior executives of state-owned corporations of national importance.”⁶³⁷
Comparison to other Definitions	<ul style="list-style-type: none"> ▪ In all definitions presented in Annex 1, the characteristic of seniority or prominence is required. ▪ The EU-Directive 2006/70/EC and the FATF do not include middle ranking or more junior officials; however, they do not specify what middle ranking or more junior means.⁶³⁸ ▪ The Wolfsberg Group uses a more descriptive approach, the definition shall “include persons whose (...) position can attract publicity beyond the borders of the country concerned and whose financial circumstances may be the subject of additional public interest.”⁶³⁹ ▪ Some definitions provide exhaustive lists of the relevant officials, in others, a list is omitted entirely.⁶⁴⁰ ▪ By specifying that only corporations of national importance shall be considered, the AMLO-FINMA / RIAA limit the scope as compared to the EU-Directive’s and the FATF which speak about state-owned enterprises in general.⁶⁴¹
Discussion	<ul style="list-style-type: none"> ▪ The seniority or prominence relates to the function the person holds or has been holding, i.e. the power and access to state owned funds the person is equipped with. ▪ An omission that is often being criticized it that subnational leaders, such as regional governors, senior figures in political parties or even charities, members of supranational or religious organizations are not being included in most definitions.⁶⁴²
(2) Family /Entourage	
AMLO-FINMA / RIAA	<ul style="list-style-type: none"> ▪ The RIAA speaks about “(...) persons who are closely associated with politically exposed persons for family, personal or business reasons (close associates⁶⁴³)”.⁶⁴⁴ ▪ In contrast, the AMLO-FINMA includes the term “recognized as being associated with” and is thus smaller in scope than the RIAA’s definition. ▪ However, as the Dispatch to the RIAA posits, because the RIAA does not include any due diligence obligations, the limitation would not have made sense.⁶⁴⁵
Comparison to other Definitions	<ul style="list-style-type: none"> ▪ Regarding the degree of family members, UNCAC and FATF do not limit the members while the EU Directive focuses on immediate family members.⁶⁴⁶
Discussion	<ul style="list-style-type: none"> ▪ As will be seen in the Duvalier case⁶⁴⁷, the beneficial owner of the core part of the disputed assets was Simone Ovide Duvalier, the wife of the late François Duvalier and mother of Jean-Claude Duvalier. ▪ The task to decide whether or not someone is in the entourage of a PEP seems to be a difficult one. The crucial point for Wyss is the probability of having influence of the PEP in his/ her financial matters.⁶⁴⁸

⁶³⁵ SFBC Geldwäschereibericht 2003, p. 30.

⁶³⁶ Dispatch RIAA, p. 21.

⁶³⁷ Art. 2 para. b subpara. 1 RIAA and art. 2 para. 1 subpara a. number 1 AMLO-FINMA.

⁶³⁸ EU Commission Directive 2006/70/EC; FATF Recommendation No. 6 (cf. Annex 1).

⁶³⁹ The Wolfsberg Group, Wolfsberg FAQ’s on PEPs.

⁶⁴⁰ See Annex 1; see also ACHTELIK, p. 48.

⁶⁴¹ EU-Directive 2006/70/EC Art. 2; FATF Definition uses the term ‘state owned corporations’.

⁶⁴² The World Bank, StAR, Politically Exposed Persons, p. 29; CHAIKIN/ SHARMAN, p. 84.

⁶⁴³ In German ,Umfeld‘, in French ,entourage‘ and in Italian ‘cerchia’.

⁶⁴⁴ Art. 2 para. b subpara 2 RIAA.

⁶⁴⁵ Dispatch RIAA, English translation, p. 21 footnote 38.

⁶⁴⁶ The World Bank, StAR, Politically Exposed Persons, p. 28.

⁶⁴⁷ Cf. section 2.4.1.3.

⁶⁴⁸ WYSS, GwV-EBK, Art. 1, p. 157.

(3) Inclusion of Domestic PEPs	
AMLO-FINMA / RIAA	<ul style="list-style-type: none"> ▪ In the context of the RIAA, the focus on foreign PEPs obviously makes sense, as its scope of application requires an international setting per se. ▪ For AMLO-FINMA it is conceivable that domestic persons with public functions may be included in the definition. ▪ In a dated Question and Answers section of the former SFBC, the question as to why national PEPs are not included was answered by the commission by pointing out that the abusive use of a bank account of a domestic PEP is less probable than that of a foreign PEP and that the inclusion would require significant extra effort.⁶⁴⁹ ▪ Nevertheless, as put forward by Héritier Lachat, it seems that in practice, domestic persons of equivalent rank are equally included in Switzerland.⁶⁵⁰ However, in contrast to business relationships with foreign PEPs, the qualification is not mandatory.
Comparison to other Definitions	<ul style="list-style-type: none"> ▪ The majority of definitions solely cover foreign persons, that is, domestic PEPs are not included ▪ The exceptions to that trend are offered by the Basel Committee on Banking Supervision (henceforth BCBS) and the UN Convention on Corruption⁶⁵¹ which both do not speak about a differentiation to this effect and the FATF – who clearly makes a differentiation by including only foreign PEPs in its definition but clarifies in its interpretative notes that “countries are encouraged to extend the requirements (...) to individuals who hold prominent public functions in their own country.”⁶⁵²
Discussion	<ul style="list-style-type: none"> ▪ The World Bank advocates the abolishment of the distinction between foreign and domestic PEPs for three reasons: first, all politicians are subject to similar pressures and perverse incentives; second, many banks argue that making the identification of domestic PEPs is anyways easier and third, including domestic PEPs would increase a governments’ commitment to fighting corruption and money laundering.⁶⁵³ ▪ There is a fourth point worth considering; according to the Q&A mentioned on the left, foreign PEPs who open a bank account in their country of origin with a foreign branch or a foreign subsidiary of a Swiss group are in principle not to be identified as higher risk relationships in their country.⁶⁵⁴ This may eventually leave room for circumvention of the due diligence obligations. ▪ Chaikin and Sherman go as far as to claim that “there is an expectation (if not an international legal obligation) that all those countries ratifying the UNCAC should broaden their PEP coverage to include domestic or national officials.”⁶⁵⁵
(4) Inclusion of Legal Entities	
AMLO-FINMA / RIAA	<ul style="list-style-type: none"> ▪ The definition of the AMLO-FINMA⁶⁵⁶ and the RIAA clearly do include companies.⁶⁵⁷
Comparison to other Definitions	<ul style="list-style-type: none"> ▪ The majority of definitions simply speaks about natural persons and does not address legal entities per se in the definition.
Discussion	<ul style="list-style-type: none"> ▪ World-Check⁶⁵⁸ sets out that PEPs that are corrupt or dispose over assets of an illegal origin usually try to conceal their identity and the source of their assets.⁶⁵⁹ World-Check sets out that “the most common forms of PEP concealment entails the use of a family member or associate through whom access to the banking system is gained, or alternatively, the formation of a company, trust, charity or similar financial or fiduciary vehicle to facilitate

⁶⁴⁹ SFBC Q&A 2003; cf. SFBC Geldwäschereibericht 2003, p. 30.

⁶⁵⁰ HÉRITIER LACHAT, p. 71.

⁶⁵¹ Art. 53 para. 1 UNCAC.

⁶⁵² FATF 40 Recommendations, p. 22; see also ACHTELIK, p. 47-48.

⁶⁵³ The World Bank, StAR, Politically Exposed Persons, p. 27.

⁶⁵⁴ SFBC Q&A 2003.

⁶⁵⁵ CHAIKIN/ SHARMAN, p. 84.

⁶⁵⁶ SR 955.033.0

⁶⁵⁷ Art. 2 para. a subpara 2 AMLO-FINMA

⁶⁵⁸ World-Check is part of the ThomsonReuters Group and offers a comprehensive solution for assessing, managing and remediating financial, regulatory and reputational risks, see: <http://www.world-check.com/>.

⁶⁵⁹ WORLD-CHECK, PEPs, p. 6.

legitimate transactions.”⁶⁶⁰ Indeed, as will be seen with the Duvalier assets⁶⁶¹, the assets where held in a foundation under Liechtenstein law.⁶⁶² Furthermore, in many cases, PEPs control whole national industries. In the case of the freezing of Libya in 2011, the FC extended the freeze from private individuals to banks, sovereign wealth funds and oil companies.⁶⁶³

(5) Length of Qualification

AMLO-FINMA / RIAA	<ul style="list-style-type: none"> • The wording of the AMLO-FINMA does not clearly indicate whether former PEPs shall be considered; it simply speaks of persons ‘holding’⁶⁶⁴ the considered positions. Whereas the proposition of an expansion of the PEP notion to former PEPs was still rejected in the revision of the SFBC’s Anti-Money Laundering Ordinance in 2002⁶⁶⁵, in the explanatory report to the AMLO-FINMA, FINMA confirms the argument of the World Bank.⁶⁶⁶ Instead, a risk-based qualification makes more sense in that the assessment is taken individually in each case.⁶⁶⁷ • The RIAA specifies that it includes “individuals who exercise or have exercised a high public office (...)”⁶⁶⁸ and hence includes formerly active PEPs. The clear inclusion of former PEPs in the RIAA is important as legal assistance cases concerning assets of PEPs generally concern PEPs that are not in office anymore. Furthermore, a time limit would not make sense as legal assistance procedures in those matters generally take a long time.
Comparison to other Definitions	<ul style="list-style-type: none"> ▪ In general, the definitions listed in Annex 1 state that former office holders shall be included; still, the question of duration is not answered by most. Looking at the EU-Directive 2005/60/EC⁶⁶⁹ and its implementing regulation 2006/70/EC⁶⁷⁰, there is a time limit of one year, i.e. a person is no longer considered a PEP one year after s/he left the office.⁶⁷¹
Discussion	<ul style="list-style-type: none"> • As argued by the World Bank, the specification of a time limit is an artificial way of dealing with the problem and may lead to false assumptions concerning the risk of money laundering.⁶⁷² ▪ The inclusion of former PEPs clearly makes sense, on the one hand, because they may still have influence on the national politics and persons affiliated and may still have access to resources, and on the other one, assets of unlawful origin may be deposited in Switzerland only after the giving up of the position the person was holding.⁶⁷³ Furthermore, from a practical view point, banks use data information systems in order to identify PEPs; consequently, as the former PEP was already in the data system, the additional cost of keeping the person in those lists would be small.⁶⁷⁴

⁶⁶⁰ WORLD-CHECK, PEPs, p. 5.

⁶⁶¹ Cf. section 2.4.1.

⁶⁶² BGer of 12 January 2010, 1C_374/2009.

⁶⁶³ FINMA, Due diligence obligations of Swiss banks when handling assets of “politically exposed persons” – An investigation by FINMA of 10 November 2011, p. 5.

⁶⁶⁴ Art. 2 para. a subpara. 1 AMLO-FINMA.

⁶⁶⁵ SFBC Geldwäschereibericht 2003, p. 13.

⁶⁶⁶ The World Bank, StAR, Politically Exposed Persons, p. 31; i.e. a specification of a time limit for the PEP status is not reasonable, Explanatory report to the AMLO-FINMA, p. 24

⁶⁶⁷ Explanatory report to the AMLO-FINMA, p. 24.

⁶⁶⁸ Art. 2 para. b subpara 1 RIAA.

⁶⁶⁹ EU Directive 2005/60/EC.

⁶⁷⁰ EU Commission Directive 2006/70/EC.

⁶⁷¹ FINMA, GwV-FINMA Erläuterungsbericht, p. 12; Art. 2 2006/70/EC.

⁶⁷² The World Bank, StAR, Politically Exposed Persons, p. 31.

⁶⁷³ PINI, p. 119.

⁶⁷⁴ PINI, p. 119.

Annex 3: Details on Selected Cases

In the following the cases will be presented in more detail, focusing on specific investigations:

- (1) A brief historic overview will be given with a focus on economic situation in the country concerned.
- (2) The international relations of the country will be looked at in order to investigate to what extent the PEP was supported by the international arena. As seen in section 1.3.2, the qualification of a PEP as a dictator often did not pose a problem to other actors in the international scene, say democratic societies and their heads of states, on the contrary, some dictators were overtly supported. Yet, international support may terminate within days and in some cases foreign involvement may lead to the fall of a dictator.⁶⁷⁵
- (3) The post fall situation will be looked at. The investigation goes into two directions: First, speaking from an institutional perspective, it is about the strength of state structures.⁶⁷⁶ Yet in cases of authoritarian regimes⁶⁷⁷ like the ones studies here, Geddes identifies the probability of a transition to democracy as being small.⁶⁷⁸ Second, it is investigated if the state of corruption outlives the previous corrupt dictator.⁶⁷⁹

Annex 3.1. Table 4 Marcos Case

History	Ferdinand Edralin Marcos was elected president in 1965 and reelected in 1969 – however, coming closer to the end of his second and constitutionally last presidential term in 1972, he suspended the constitution and declared, based on the president’s emergency powers as commander in chief, martial law, for reason of several threats to national security. ⁶⁸⁰ Shortly later, he imposed draft constitution ⁶⁸¹ giving him dictatorial power. ⁶⁸² During his rule, Philippine politics became severely polarized and violent and increasingly autocratic. ⁶⁸³ Marcos’ experience during the Second World War enabled him to win American attention and he had many friends designated Philippine veterans in the resistance against Japan – which entitled them to enormous benefits from the U.S. and created a substantial power base that Marcos would eventually rely on. ⁶⁸⁴ He strengthened the ties to the U.S. during his legal
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⁶⁷⁵ Ezrow and Frantz discern four types of ways in which dictator’s fall: military coup, foreign intervention, negotiated settlement and revolution. The overthrow of Mobutu is an example of foreign intervention – in this case, “Laurent Kabila and his troops ousted Mobutu, but only with strong military support from Rwanda, Burundi, and Uganda, each of which had long wanted Mobutu out of power due to his treatment of ethnic Tutsis” EZROW/ FRANTZ, p. 61 -62; Geddes identifies several factors that caused foreign intervention: “being in the US sphere of influence; weakness combined with the territorial ambitions of neighbors; the economic crisis of the late eighties and early nineties, which gave international financial institutions unusual leverage”, GEDDES, p. 26 as cited in EZROW/ FRANTZ, p. 64. Geddes’ citation has been found here: <http://www.uvm.edu/~cbeer/geddes/APS99.htm> (accessed on 15/4/2012).

⁶⁷⁶ The reason for the incapacity of proceeding mutual legal assistance may in some cases be due to the fact that the fallen head of state still exercises influence of the country, Dispatch RIAA, p. 9.

⁶⁷⁷ Authoritarian regimes are being defined as regimes, where “access to office and the fruits of office depends much more on the discretion of an individual leader” GEDDES, p. 121.

⁶⁷⁸ GEDDES, p. 136. In her study, only 16% of personalist regimes that fell since 1945 became democracies.

⁶⁷⁹ Ezrow and Frantz argue that dictators are distinct from dictatorships in that the overthrow of the dictator often does not mean the end of the dictatorship: according to them, authoritarian regimes often last well beyond the fall of any particular ruler, EZROW/ FRANTZ, Introduction, xv. In the same vein, they say that “(...) when dictatorships collapse, this by no means is an indicator of an impending transition to democracy. Though some dictatorships do democratize upon dissolution, many are replaced shortly afterward with yet another dictatorship”, EZROW/ FRANTZ, p. 61. Furthermore, they point out in authoritarian regimes the dictator is likely to stick to power and violence in the transition is typical. They specify that violence is often exhibited by the way of “assassination coup, revolution or foreign intervention”, EZROW/ FRANTZ, p. 62.

⁶⁸⁰ TOMES, p. 178; CELOZA, p. 46.

⁶⁸¹ Cf. to that effect CELOZA, p. 48-57.

⁶⁸² TOMES, p. 178.

⁶⁸³ TOMES, p. 178.

⁶⁸⁴ TOMES, p. 179; cf., to that effect, CELOZA, p. 23.

	<p>presidency by supporting the American role in Vietnam and by warding off communism, which in turn paved the way to vast U.S. military and economic aid.⁶⁸⁵ However, many problems grew such as the increasing communist insurgency, Muslim minorities demanding independency, the persisting poverty and conspicuous corruption.⁶⁸⁶ Opposition became more important and with it, the U.S. began to distance itself from Marcos.⁶⁸⁷ Marcos fled after public mass protests began to make their way to the presidential palace in 1986, his departure being secured by the U.S.⁶⁸⁸ He died in exile from a heart attack in 1989.⁶⁸⁹</p>
Focus on Economic Situation	<p>In the Marcos regime, his way of rule led to great personal wealth for the family and entourage in that control over the whole state and its budget was entirely in Marcos' hands."⁶⁹⁰ Celozza points out that Marcos instituted business monopolies and made sure that he had control over all businesses and nationalized companies.⁶⁹¹ Chaikin and Sharman state that corruption was present in a variety of forms, including "diversion of foreign economic and military aid, embezzlement of government monies, roting of the pork barrel, theft of official gold stocks, institutionalized and private sector extortion securing of kickbacks from private businesses, illicit takeover of private firms, and creation of monopolies for the private benefit of the Marcos family, relatives, and cronies."⁶⁹² They furthermore stress that "(...) financial advisors (...) utilized numerous mechanisms of secrecy to conceal and launder his illicit wealth through financial institutions, investments, and multi-layered corporate shareholdings."⁶⁹³ After the departure of the Marcos family there were numerous revelations concerning the extent of government corruption, such as e.g. the wardrobe of Marcos' wife Imelda which contained thousands of shoes.⁶⁹⁴</p>
International Affairs	<p>Kessler points out that "[d]uring the 1970s the Philippine Left made the slogan 'The U.S.-Marcos Dictatorship' a rallying cry that, by the time Marcos departed, had become revealed truth in all social strata. U.S. support was believed to be the only reason Marcos remained in power."⁶⁹⁵ Celozza states that the U.S. security concerns – the U.S. maintained military bases in the Philippines – outranked their uncomfortable feeling towards the corruption and human rights violations of the Marcos government.⁶⁹⁶ Celozza points out that the "United States policy toward Marcos through five administrations from Johnson to Reagan had supported strategy toward Marcos. Their reasons varied, but all essentially revolved around the Philippine role in U.S. security."⁶⁹⁷ Kessler summarizes that "the United States did not begin to focus on the Philippine situation until Marcos had destroyed the fabric of Philippine society."⁶⁹⁸</p>
Post-fall situation	<p>Support for the Marcos family continued even after his fall, mainly from a Philippine elite who profited from the large corruption.⁶⁹⁹ The continued support went as far as electing Marcos' son Ferdinand Jr. Marcos and Marcos' wife Imelda to congress.⁷⁰⁰ According to Celozza, Corazon Aquino, who succeeded Marcos' presidency, had a difficult burden in the aftermath of his misrule.⁷⁰¹ However, with her in office, there was a return to a democratic constitution.⁷⁰² With regard to the criminal prosecution of the Marcos family with regard to the theft, bribery and human rights violations during their rule, not one member has been found guilty of any sort of crime.⁷⁰³ According to Chaikin and Sharman, proceedings in the Philippines against Imelda Marcos have all failed.⁷⁰⁴ The latest example of such proceedings was in 2008 when she was accused for criminal charges relating to her Swiss bank accounts but was discharged due to lack of proof.⁷⁰⁵</p>

⁶⁸⁵ TOMES, p. 179.

⁶⁸⁶ TOMES, p. 179.

⁶⁸⁷ TOMES, p. 180.

⁶⁸⁸ TOMES, p. 180.

⁶⁸⁹ TOMES, p. 180.

⁶⁹⁰ EZROW/FRANTZ, p. 137 -138

⁶⁹¹ CELOZA, p. 133.

⁶⁹² CHAIKIN/SHARMAN, p. 157.

⁶⁹³ CHAIKIN/SHARMAN, p. 153.

⁶⁹⁴ TOMES, p. 180.

⁶⁹⁵ KESSLER, p. 42.

⁶⁹⁶ CELOZA, p. 106; cf. Kessler, Richard J. p. 43.

⁶⁹⁷ CELOZA, p. 108.

⁶⁹⁸ KESSLER, p. 57.

⁶⁹⁹ ICAR, Marcos Overview.

⁷⁰⁰ ICAR, Marcos Overview.

⁷⁰¹ CELOZA, p. 133.

⁷⁰² CELOZA, p. 134.

⁷⁰³ CHAIKIN/SHARMAN, p. 179.

⁷⁰⁴ CHAIKIN/SHARMAN, p. 154.

⁷⁰⁵ CHAIKIN/SHARMAN, p. 154.

Annex 3.2. Table 5 Mobutu Case

History	Joseph Desire Mobutu, who later renamed himself Sese Seko, took advantage of the power struggles in the early days of independence of the Democratic Republic of Congo (henceforth DRC) and first seized control temporarily, returning it to the civilian authorities within six months. ⁷⁰⁶ In 1965 he seized power again with the help of the CIA of the United States. ⁷⁰⁷ Mobutu ruled in a dictatorial and oppressive way by assuming full control over the whole state ⁷⁰⁸ and consolidated power by publicly executing political opponents and other threats to his regime. ⁷⁰⁹ In his attempt to “Africanize” or “authentimize” the state, he changed its name to Zaire, called for the changing of geographical and personal names and commenced the expropriation and nationalization of the country’s resources. ⁷¹⁰ While he instituted a reign of violence and suppression, internal opposition remained - furthermore, faced with the probability of foreign invasion by Rwanda, internal civil war provoked by Kabila, as well as a growing internal discontent at the failed and corrupt policies, Mobutu was forced to flee in 1997. ⁷¹¹
Focus on Economic Situation	According to Ezrow and Frantz, Mobutu amassed “astonishing amounts of wealth, while simultaneously destroying Zaire’s economy. Mobutu was considered one of the richest people in the world, with a personal wealth said to be greater than \$5 billion. In the early 1990s, while civil servants went unpaid, Mobutu flew the Concorde to Paris to go on shopping sprees. [...] Mobutu accrued these riches by capitalizing on Zaire’s abundant natural resources, including minerals, diamonds, gold and some oil.” ⁷¹² Ikambana, who wrote on state crime in Mobutu’s political system, states that “[u]nder his system, corruption became the rule.” ⁷¹³
International Affairs	Mobutu’s position on international affairs was a calculated one; according to Ezrow and Frantz, “[h]e retained the support of key countries by cleverly emphasizing Zaire’s strategic importance to the West, both economically and politically. Mobutu diversified sources of external support in order to limit the amount of leverage that any single foreign power had over him”. ⁷¹⁴ As Snyder states “(...) Mobutu was able to squeeze resources out of his foreign acker with minimal reciprocal obligations by using Zaire’s strategic and economic importance and the threat of chaos if his regime were to collapse” ⁷¹⁵ . Mobutu’s strategy brought him continued development loans and other economic aid he needed to uphold his regime. ⁷¹⁶ According to French, “(...) Mobutu- through his canny courtship of Western support, destabilization of his neighbors, systematic corruption and grandiose economic schemes – left Zaire teetering on the brink of economic collapse.” ⁷¹⁷ Yet, as pointed out by French, Mobutu’s relevance to the West reduced greatly. ⁷¹⁸ With regard to his relationship with Switzerland, lawyer Enrico Monfrini who was representing the DRC in its case to recover the assets in Switzerland, put it that way: “Switzerland, just as many other countries, has rolled out the red carpet for the dictator from Kinshasa for too long”. ⁷¹⁹ Indeed, as pointed out by Keller, former FC Pierre Graber himself introduced Mobutu to a villa in Savigny. ⁷²⁰
Post-fall situation	After the fall of Mobutu that was forced by a rebellion fronted by Laurent Kabila, Kabila himself was challenged by another insurrection again backed by Rwanda and Uganda. ⁷²¹ Kabila’s regime was supported by Angola, Chad, Namibia, Sudan, and Zimbabwe ⁷²² which resulted in a vast and bloody war. ⁷²³

⁷⁰⁶ COPPA, Mobutu, p. 188.

⁷⁰⁷ COPPA, Mobutu, p. 188; cf. FRENCH, The New York Times of 17/5/1997, Anatomy of an Autocracy: Mobutu’s 32-Year Reign.

⁷⁰⁸ COPPA, Mobutu, p. 189.

⁷⁰⁹ EZROW/ FRANTZ, p. 229.

⁷¹⁰ COPPA, Mobutu, p. 189.

⁷¹¹ COPPA, Mobutu, p. 189.

⁷¹² EZROW/ FRANTZ, p. 137.

⁷¹³ IKAMBANA, p. 54; an interesting point is that Ikambana investigates on state crime which is, according to the author, often seen as problematic by criminologists because “it involves examining behaviors engaged in by agents and organizations that are socially and politically acceptable” (IKAMBANA, p. 53).

⁷¹⁴ EZROW/ FRANTZ, p. 231.

⁷¹⁵ SNYDER, p. 394.

⁷¹⁶ SNYDER, p. 394.

⁷¹⁷ FRENCH, The New York Times of 17/5/1997, Anatomy of an Autocracy: Mobutu’s 32-Year Reign.

⁷¹⁸ FRENCH, The New York Times of 17/5/1997, Anatomy of an Autocracy: Mobutu’s 32-Year Reign.

⁷¹⁹ KELLER, Das Magazin of 19/6/2009.

⁷²⁰ KELLER, Das Magazin of 19/6/2009; cf. RICHTER, p. 563.

⁷²¹ CIA World Factbook, DRC.

⁷²² CIA World Factbook, DRC.

⁷²³ Foreign Policy 29/06/2010, Congo’s New Mobutu.

With regard to the continuous influence of the Mobutu clan, Keller argues that the clan still has a strong influence in the DRC, for example, Mobutu's son Nzanga⁷²⁴ has been deputy prime minister until 2011.⁷²⁵

Annex 3.3. Table 6 Duvalier Case

History	According to the CIA World Factbook, "Haiti has been plagued by political violence for most of its history". ⁷²⁶ For more than three decades, i.e. from 1957 to 1986 Haiti was ruled by the Duvalier clan. François Duvalier, known as "Papa Doc", became the central opposition leader and was elected president in 1957 with the support of the army. ⁷²⁷ In his book "Papa Doc, Baby Doc: Haiti under the Duvaliers" ⁷²⁸ , Ferguson depicts Haiti as "particularly associated with a ruthless dynastic dictatorship" and argues that "Haiti under the Duvaliers [...] became a byword for underdevelopment, corruption and state terrorism". ⁷²⁹ He imposed an autocratic regime that effectively ended any form of democracy and civil liberties and declared himself "President-for-Life" in 1964. ⁷³⁰ Upon his death in 1971, his son Jean-Claude, his byname was "Baby Doc", took over the office of President for Life at the age of eighteen and ruled Haiti until his fall in 1986. ⁷³¹ The regime differs from general personlist dictatorial regimes in that it outlived the death of the founder of the regime, François Duvalier, by passing on power to his son – usually, personlist dictatorships are unable to survive beyond the tenor of the dictator. ⁷³²
Focus on Economic Situation	Gros notes that "[t]he private use of public resources on a most discretionary basis is the hallmark of the patrimonial state, which Haiti's, arguably, had always been." ⁷³³ Duvalier's mechanics of government finance included the raising money by the threat of violence or imprisonment, deductions on salaries of state employees or the collection of taxes duties and charges for all kinds of things. ⁷³⁴ Furthermore, loans and aids from the US and other states were diverted into private hands. ⁷³⁵ Ferguson thus argues that the principal recipient of foreign aid was Jean-Claude Duvalier. ⁷³⁶ He stresses that "Duvaliers predatory state (...) did not merely siphon off foreign aid, but also perpetuated the internal corruption which Papa Doc had practiced." ⁷³⁷ Furthermore, Ferguson cites an article of the Miami Herald of 1 February 1987 that states that "at least \$120 million were stolen from government funds by Baby Doc and his entourage". ⁷³⁸ He refers in the following to François Saint-Fleur, the successor in the Ministry of Justice, who claimed that "Duvalier also cashed a weekly cheque to the value of \$ 1.6 million, taken from the proceeds of the national lottery". ⁷³⁹ From the foregoing it clearly appears that Haiti had suffered in the days of the Duvalier under a corrupt system beyond all measure.

⁷²⁴ Nzanga Mobutu has his own website that can be retrieved from <http://www.nzanga.com/> (accessed 22/4/2012).

⁷²⁵ KELLER, Das Magazin of 19/6/2009, cf. his article for more information on the still active and influential Mobutu clan.

⁷²⁶ CIA World Factbook, Haiti.

⁷²⁷ WELCH, p. 83.

⁷²⁸ FERGUSON.

⁷²⁹ FERGUSON, Preface, vii.

⁷³⁰ WELCH, p. 83.

⁷³¹ "François Duvalier." *Encyclopædia Britannica. Encyclopædia Britannica Online*. Encyclopædia Britannica, 2011, retrieved from <http://www.britannica.com/EBchecked/topic/174718/Francois-Duvalier> (accessed on 18/10/2011).

⁷³² EZROW/FRANTZ, p. 220, p. 231.

⁷³³ GROS, p. 98.

⁷³⁴ According to Ferguson, a good example of Papa Doc's mechanics of government finance is the project of building Duvalierville, a planned city intended as a permanent memorial to Duvalier. Ferguson describes how public charges for building the new city were enforced: "The raising of money was straightforward; if businessmen refused or were reluctant to pay an unofficial sum towards the cause, their premises were destroyed and looted. Some were imprisoned; others were tortured and killed (...). Government employees, members of the military and even deputies found that contributions (...) had been deducted from their salaries. Roadblocks were set up to gather impromptu tolls, and telephone subscribers in Port-au-Prince – whose telephones had not worked for twenty years – were charged an extra levy." FERGUSON, p. 47; Gros states that "[t]he Duvalierist state did not provide social services to the masses instead, the masses were a major source of revenue for the regime" (GROS, p. 123).

⁷³⁵ FERGUSON, p. 63, also p. 50, for example those aids that have been sent in response to the famine in 1975.

⁷³⁶ FERGUSON, p. 70.

⁷³⁷ FERGUSON, p. 70.

⁷³⁸ FERGUSON, p. 150.

⁷³⁹ FERGUSON, p. 150.

International Affairs	Ferguson argues that “the success or failure of a Haitian government is always ultimately determined by relations with the US” and finds that “Duvalier’s regime was to experience the entire range of American reaction, from approval to extreme distaste (...)”. ⁷⁴⁰ Francois Duvalier, who had a pro-American stance, supported the US in most international disputes in the UN and his stance towards the US resulted in increased U.S. financial support for the corrupt regime. ⁷⁴¹ By the time of increasing domestic unrest in 1986, the Reagan administration insisted that baby Doc should step down from power and the US assisted him with the departure from Haiti. ⁷⁴²
Post-fall situation	With the fall of Baby Doc Duvalier in 1986, there was a hope for democratization with the rule of Jean-Bertrand Aristide. ⁷⁴³ Yet shortly after, army colonels took power which led to escape of thousands of people into the U.S. in 1994 which again influenced U.S. President Clinton to take action against the colonels. ⁷⁴⁴ Jean-Bertrand Aristide returned to office, and during his president ant that of his successor Rene Preval, living conditions improved supported by the UN, yet it did not take long until violence grew again. ⁷⁴⁵ According to Gothier and Moita, “(...) during the past two decades, struggles for power, turbulent and fraudulent elections, a military coup and the constant violence by armed political groups have prevented any significant progress in the construction of a functioning democracy. Haiti is a classic example of a fragile state (...)”. ⁷⁴⁶ Surprisingly, Jean-Claude Duvalier returned to Haiti from his 25-year exile in France on 16 January 2011. ⁷⁴⁷ Upon his arrival, Haitian authorities have initiated criminal investigations into corruption and embezzlement and four Haitians tried to initiate a lawsuit for crimes against humanity. Upon those investigations, a travel ban was imposed on him. ⁷⁴⁸ However, according to an article published by the Bureau des Avocats Internationaux and the Institute for Justice & Democracy in Haiti in Mai 2011, the judge in charge “demonstrates an apparent bias in favor of the accused and serves as a slap in the face of the victims who have come forth to seek justice through the law”. ⁷⁴⁹ Proceedings were however supported by the UN Office of the High Commissioner for Human Rights ⁷⁵⁰ , who, following reports that former Duvalier may not face charges relating to the serious human rights violations, voiced concerns. ⁷⁵¹

Annex 3.4. Table 7 Mubarak Case

History	Muhammad Hosni Mubarak was appointed vice president of the country, vice president of the ruling National Democratic Party and was the effective head of the military and hence the logical choice to succeed to the presidency following the assassination of Sadat in 1981 and has exercised almost absolute power in Egypt ⁷⁵² until his resignation on 11 February 2011. ⁷⁵³ He made efforts to restore Egypt to a leading position in the Arab world and intended harmonious relations with the U.S. from whom he needed military and economic aid. ⁷⁵⁴ However, with regard to political and economic modernization there was less advancement, although he was formally reelected by the National Democratic Party, he did not hold his promise made in 1993 not to run a fourth term. ⁷⁵⁵ In his rule, Mubarak has used several coercive strategies as a means of maintaining power including aggressive or repressive law enforcement, the cracking down of political opponents and independent organization that were linked to Islamist discontent. ⁷⁵⁶
Focus on Economic Situation	According to ICAR, the most important reason for Mubarak’s fall is corruption that reached heights with the privatization and the change to a market economy, when the government sold public sector companies for much less of their worth to people of the entourage or in return of commissions. ⁷⁵⁷

⁷⁴⁰ FERGUSON, p. 42.

⁷⁴¹ WELCH, p. 84.

⁷⁴² EZROW/ FRANTZ, p. 234.

⁷⁴³ BBC, Haiti’s history of misery, 13/1/2012.

⁷⁴⁴ BBC, Haiti’s history of misery, 13/1/2012.

⁷⁴⁵ BBC, Haiti’s history of misery, 13/1/2012.

⁷⁴⁶ Gauthier, Amélie and Moita, Madalena, p. 1.

⁷⁴⁷ NZZ 21/1/2011, Duvalier muss in Haiti bleiben.

⁷⁴⁸ NZZ 21/1/2011, Duvalier muss in Haiti bleiben.

⁷⁴⁹ Institute for Justice & Democracy in Haiti, retrieved from <http://ijdh.org/archives/18723> (accessed on 18/10/2011).

⁷⁵⁰ UN News Centre 01/02/2011, Haiti: UN human rights chief offers help to address crimes under Duvalier.

⁷⁵¹ UN News Centre 31/01/2012, , Former Haitian leader must face charges.

⁷⁵² COPPA, Mubarak, p. 192.

⁷⁵³ FDFA, FC orders freezing of any assets of Egypt’s former President.

⁷⁵⁴ COPPA, Mubarak, p. 192.

⁷⁵⁵ COPPA, Mubarak, p. 192.

⁷⁵⁶ ALTERMAN, p. 110 -111.

⁷⁵⁷ ICAR, Mubarak Overview

	Mubarak's and his entourage's wealth is estimated at UDS 40-70 billion that originates out of corruption and kickbacks but also out of legitimate business activities. ⁷⁵⁸
International Affairs	In the year 2000, Alterman, a specialist in questions relating to Egypt, anticipated that "In the near term, the present Egyptian regime appears remarkably stable. In the event of Mubarak's death or removal from office, it appears all but certain that the current internal and external alliances would hold." ⁷⁵⁹ With regard to US interests, Alterman suggested that "Short-term interests in stability appear to conflict with longer-term interests in economic and political liberalization that would promote long-term stability." ⁷⁶⁰ Switzerland has entered a bilateral treaty on legal assistance with which is the first ever bilateral legal assistance treaty entered to by Switzerland with an Arab state. ⁷⁶¹ Yet as Switzerland's biggest concern was the protection of human rights the treaty requires, next to the most important principals laid down in IMAC, the treaty includes a special human rights clause that requires the parties to apply the treaty in the light of existing human rights guarantees. ⁷⁶²
Post-fall situation	Mubarak resigned on 11 February 2011 after mass protests and violence in the streets escalated. ⁷⁶³ Mubarak now stands trial on charges of corruption, abuse of power and even murder during the mass protests for which the prosecutor demands the death penalty. ⁷⁶⁴ With regard to Egypt's judicial system, according to the U.S. Department of State's Bureau of Near Eastern Affairs, "Egypt's courts have demonstrated increasing independence, and the principles of due process and judicial review have gained greater respect since the revolution." ⁷⁶⁵

Annex 3.5. Table 8 Gaddafi Case

History	Muammar al-Gaddafi joined the Libyan armed forces in 1961 and organized a student military organization called the 'Free Officers Movement' – the organization that eventually staged a coup overthrowing King Idriss in 1969 and installed a revolutionary government of which Gaddafi finally gained total control at the age of 27. ⁷⁶⁶ In power, he established an ideology in this Green Book that intended to be an alternative to Western capitalism and Soviet totalitarian socialism, and instituted strict Islamic customs. ⁷⁶⁷ He installed a system that he called "state of the masses" ("Jamahiriya") which however represented a state exclusively run by Gaddafi's personal will – prohibiting freedom of speech, free media, or the right to assemble for any political reason. ⁷⁶⁸
Focus on Economic Situation	Gaddafi nationalized the Libyan oil industry with an annual return of approx. 8 billion USD and which allowed him at the one hand to enhance the social system and development standards of the country and on the other hand to pursue an aggressive and radical foreign policy. ⁷⁶⁹ The New York Times quotes a classified State Department cable said in 2009: "Libya is a kleptocracy in which the regime — either the al-Qadhafi family itself or its close political allies — has a direct stake in anything worth buying, selling or owning." ⁷⁷⁰
International Affairs	Due to his openly anti-Western stance, the UN leveled sanctions against Gaddafi's Libya in the mid 1980ties and again in 1992, which hurt the country's economy. ⁷⁷¹ With the turn of the century, Gaddafi finally renounced to terrorism, however, there was no improvement in terms of democratization. ⁷⁷² Relations between Switzerland and Gaddafi have been strained since following the temporary arrest of Hannibal Gaddafi in Geneva in 2008, two Swiss citizens were arrested in Libya, one of which was being detained for almost two years. ⁷⁷³ Riots against the Gaddafi regime started mid February 2011. On 24 February 2011, the FC orders the freezing ⁷⁷⁴ of any assets held by Gaddafi and his entourage in Switzerland in order to "avoid any

⁷⁵⁸ ICAR, Mubarak Overview, yet it is pointed out that there the figures cannot be verified.

⁷⁵⁹ ALTERMAN, p. 112.

⁷⁶⁰ ALTERMAN, p. 116.

⁷⁶¹ Dispatch Treaty Legal Assistance in Criminal Matters between Switzerland and Egypt, SR 01.042.

⁷⁶² Dispatch Treaty Legal Assistance in Criminal Matters between Switzerland and Egypt, SR 01.042(Art. 1 para. 3), p. 4905.

⁷⁶³ ICAR, Mubarak Overview.

⁷⁶⁴ NZZ 22/2/2012, Urteil im Prozess gegen Mubarak am 2. Juni.

⁷⁶⁵ U.S. DEPARTMENT OF STATE, Diplomacy in Action, Egypt.

⁷⁶⁶ DE GORGE, Qaddafi, pp. 250-251.

⁷⁶⁷ DE GORGE, Qaddafi, p. 251.

⁷⁶⁸ DE GORGE, Qaddafi, pp. 251 -251.

⁷⁶⁹ DE GORGE, Qaddafi, p. 251.

⁷⁷⁰ New York Times, Shady Dealings Helped Qaddafi Build Fortune and Regime, 24/3/ 2011.

⁷⁷¹ DE GORGE, Qaddafi, p. 252.

⁷⁷² DE GORGE, Qaddafi, p. 252.

⁷⁷³ FDFA, Media release, Max Göldi returns to Switzerland, 13/6/2010.

⁷⁷⁴ Ordinance on Libya of 21/2/2011, SR. 946.231.149.82

	misuse of state monies.” ⁷⁷⁵ Two days later, the UN Security Council (SC) in resolution 1970 ⁷⁷⁶ obligated all members to freeze all funds belonging to persons linked to Gaddafi and listed in the resolution. ⁷⁷⁷ On 17 March, the UN SC authorizes with resolution 1973 a no-fly zone over Libya. ⁷⁷⁸ While fighting goes on, a conference is held in Paris on 20 September over the future of Libya in which Switzerland requests the release of 334 million of the frozen Gaddafi assets to the benefit of the Libyan people. ⁷⁷⁹ Muammar Gaddafi is killed on 20 October 2011. ⁷⁸⁰
Post-fall situation	According to the Financial Times (FT), “Libya remains deeply unstable. It lacks a rigorous judicial system and a coherent police force, making the enforcement of justice and the rule of law all but impossible (...).” ⁷⁸¹ Furthermore, FT states that even though Libya got rid of Gaddafi, the culture of corruption remains and some argue that it is now worse than before. ⁷⁸² In an article of the Washington Post, an employee of a state-owned oil company is being quoted to have said with regards to the high level of corruption “[w]hat kind of revolution do we have? Just kicking out Gaddafi and that’s it? Keeping all the same people except Gaddafi?” ⁷⁸³

Annex 3.6. Table 9 Al-Assad Case

History	Bashar al-Assad succeeded his father Hafez al-Assad after his death in 2000 and like him he assumed dictatorial power, largely preserving the autocracy he inherited. ⁷⁸⁴ His father Hafez became the de facto ruler of Syria in 1967 after the disastrous war with Israel and prior to that he was one of the four founders of the military committee which led the 1963 revolution that brought the Ba’ath Socialist Party to power. ⁷⁸⁵ There was an attempt for an assassination on Hafez by the Muslim Brotherhood which tried to overthrow the Ba’ath Party in 1980 which was answered by Hafez with the killing of over 250 dissidents. ⁷⁸⁶ In 1982 there was another rise up of the Muslim Brotherhood in Hama where Assad had the city leveled to the ground, killing over ten thousand residents. ⁷⁸⁷ This act although condemned internationally, assured him complete control over Syria. ⁷⁸⁸ Hafez died in 2000, after 30 years in power and his son, Bashar al-Asad was elected President by referendum in which he ran unopposed. ⁷⁸⁹ While Syria officially is a democratic republic, it is in reality an authoritarian regime. ⁷⁹⁰ Political unrest in Syria started mid-March 2011 in the context of the Arab Spring which is ongoing despite suppressions from President Bashar al-Assad’s regime. ⁷⁹¹
Focus on Economic Situation	Syria’s economy is centrally planned and plagued by inefficiency and corruption. ⁷⁹² Estimations of the Assad’s accumulated wealth vary from USD 40 to 120 billion, which are believed to origin out of nepotism, corporate investments, licensing agreements and illegal activities. ⁷⁹³
International Affairs	Many countries have imposed sanctions against Damascus since the beginning of the crisis. Switzerland’s FC adopted an ordinance against Syria ⁷⁹⁴ on 18 May 2011 based on the Embargo Act in correspondence to the EU sanctions an ordinance with measures against Syria that correspond with the sanctions adopted by the EU on 9 May 2011. ⁷⁹⁵ The measures include the freezing of assets of

⁷⁷⁵ FDFA, Media release, The Federal Council condemns the use of force against the Libyan people (...), 24/2/2011.

⁷⁷⁶ UN Security Council Resolution 1970 of 26/2/2011.

⁷⁷⁷ UN News Centre, 26/2/2011 Security Council imposes sanctions on Libyan authorities.

⁷⁷⁸ UN Security Council Information, SC approves ‘No-Fly-Zone’, 17/3/2011.

⁷⁷⁹ SF, Schweiz beantragt bei UNO Freigabe blockierter lybischer Gelder, 1/9/2011.

⁷⁸⁰ NZZ 20/10/2011, Libyer bejubeln das Ende des Diktators.

⁷⁸¹ FT of 16/2/2012, Libya: Back to the bad old days.

⁷⁸² FT of 16/2/2012, Libya: Back to the bad old days.

⁷⁸³ Washington Post, Libya ponders when to investigate deep-rooted corruption, 18/09/2011.

⁷⁸⁴ DE GORGE, Assad, pp. 16 -17.

⁷⁸⁵ DE GORGE, Assad, pp. 18-19.

⁷⁸⁶ DE GORGE, Assad, p. 20.

⁷⁸⁷ DE GORGE, Assad, p. 20.

⁷⁸⁸ DE GORGE, Assad, p. 20.

⁷⁸⁹ U.S. DEPARTMENT OF STATE, Diplomacy in Action, Syria.

⁷⁹⁰ U.S. DEPARTMENT OF STATE, Diplomacy in Action, Syria.

⁷⁹¹ FT of 26/1/2012, Interactive map and timeline: Syria.

⁷⁹² U.S. DEPARTMENT OF STATE, Diplomacy in Action, Syria.

⁷⁹³ Tagesanzeiger of 7/2/2012, Syriens Kleptokraten.

⁷⁹⁴ Ordinance on Syria of 18/5/2011, SR 946.231.172.7; the ordinance has been amended nine times since, cf. SECO, <http://www.seco.admin.ch/themen/00513/00620/00622/04669/index.html?lang=de> (accessed on 3/4/2012).

⁷⁹⁵ FDFA, The FDFA recalls the Swiss Ambassador in Syria to Berne for consultations, 18/8/2011.

individuals attributable to the Syrian regime, however, they did so far not include Assad himself.⁷⁹⁶ The sanctions have been expanded several times since.⁷⁹⁷ Other states such as the US and the Arab League have imposed similar sanctions.⁷⁹⁸ Yet, the adoption of effective collective international measures, such as an arms embargo, failed because of Russia's and China's veto in the UN SC.⁷⁹⁹ Another factor hindering a solution is that the civilian Syrian opposition lacks unity and until now a credible vision for a new Syria.⁸⁰⁰

⁷⁹⁶ Federal Administration, Verordnung über Massnahmen gegen Syrien, 18/5/2011; NZZ 18/5/2012 Bundesrat beschliesst Sanktionen gegen Syrien.

⁷⁹⁷ NZZ 27/2/2012, EU verstärkt Sanktionen gegen Assad-Regime; however, with protracted sanctions there is always the question of whether they are effective and do not ultimately hurt most to those that are already the poorest, cf. NZZ 10/2/2012, Wie weiter in Syrien?

⁷⁹⁸ NZZ 10/2/2012, Wie weiter in Syrien?

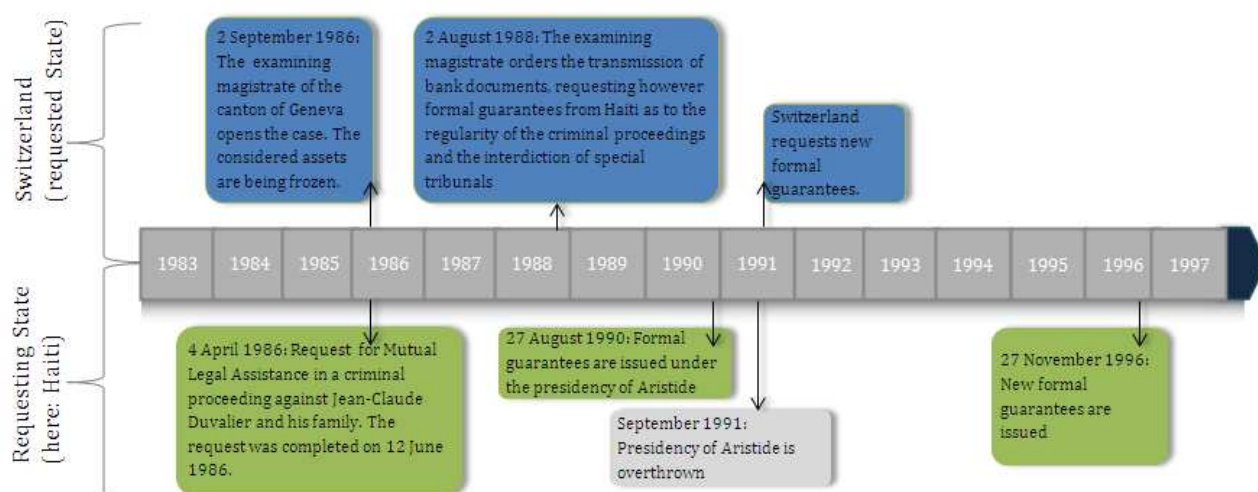
⁷⁹⁹ NZZ 10/2/2012, Wie weiter in Syrien?

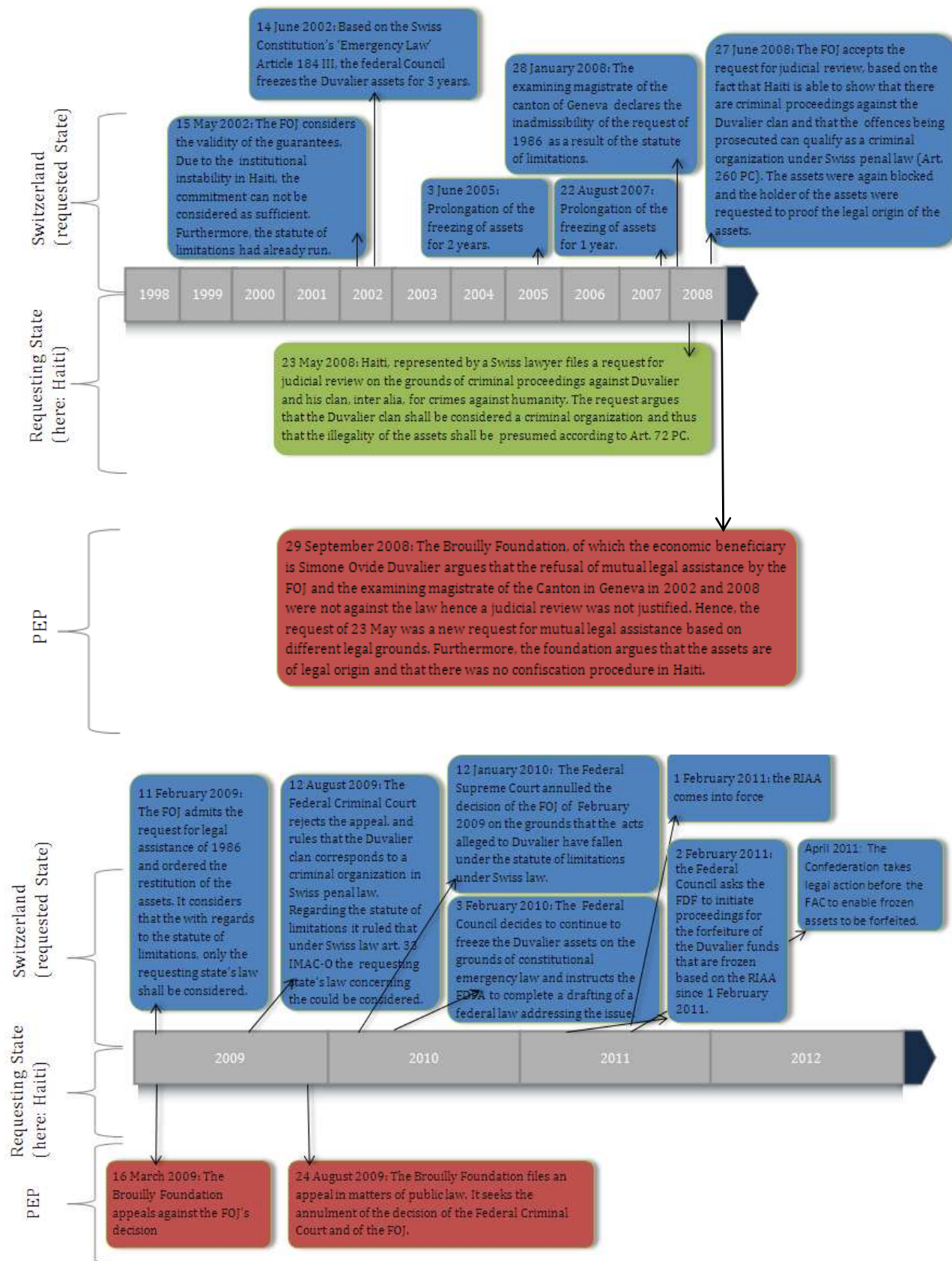
⁸⁰⁰ NZZ 10/2/2012, Wie weiter in Syrien?

Annex 4: Figure 1 Timeline in the Duvalier Case

Sources of the Timeline:

- Chronology of the Duvalier case provided by the International Center of Asset Recovery (ICAR), retrieved from <http://www.assetrecovery.org/kc/node/3a54d197-11a4-11df-88c3-599b06b766bd.1> (accessed on 1/10/2011).
- FSC Decision No. BGer of 12 January 2010, 1C_374/2009
- FDFA, Media Release, Duvalier accounts remain blocked, 03/02/2010
- FDFA, FAQ: New Act on the Restitution of Illicit Assets (RIAA), retrieved from <http://www.eda.admin.ch/eda/en/home/topics/finec/intcr/poexp/faqria.0006.html#faq0006> (accessed on 22/4/2012).





Declaration of authorship

I hereby declare

- that I have written this thesis without any help from others and without the use of documents and aids other than those stated above,
- that I have mentioned all used sources and that I have cited them correctly according to established academic citation rules.

Date and Signature

Zurich, 20 May 2012

Aline Haerri