International Legal Assistance by Switzerland regarding Assets of Politically Exposed Persons

Aline Haerri
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BGer 1P.581/2000 of 8 December 2000
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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


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
<table>
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<tr>
<th>Abbreviation</th>
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<td>FINMA</td>
<td>Swiss Financial Market Supervisory Authority</td>
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<tr>
<td>FOJ</td>
<td>Federal Office of Justice</td>
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<td>FSC</td>
<td>Federal Supreme Court [Bundesgericht]</td>
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<td>Financial Times</td>
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<td>ICCPR</td>
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<td>IMAC</td>
<td>Federal Act on International Mutual Assistance in Criminal Matters [Internationale Rechtshilfe in Strafsachen, IRSG]</td>
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<td>MLA</td>
<td>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]</td>
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Abstract

The paper examines the issue of international legal assistance provided by Switzerland in connection with assets of Politically Exposed Persons (PEPs). Switzerland has been confronted with prominent cases involving PEPs since the 1980ies 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) in the context of PEP assets. 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). 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. 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) 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

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1 The acronym is mostly used in its plural form, i.e. PEPs, yet sometimes the singular is used, i.e. PEP.
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 assets\(^8\), 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 matters\(^11\) (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 assistance\(^13\). 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.\(^17\)

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\(^8\) 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.

\(^15\) BLANCHI/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.
Introduction

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} The act provides mechanisms for the freezing, forfeiture and restitution of PEP assets.\textsuperscript{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).\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{20} Dispatch RIAA, pp. 13-14.

\textsuperscript{21} FDFA, Illicit assets of PEPs.

\textsuperscript{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 recovery\(^{24}\), 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.

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23 E.g. ACHTELIK, 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/7145c5f-b-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. The SFBC’s annual report of 1987 already mentioned the necessity for banks to regulate such business relationships back at the time. 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. 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. 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.”

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. Since, it has developed the specific obligations in connection with PEPs. With the combination of the three previous Anti-Money Laundering Ordinances of the SFBC, the current definition of PEP with regard to due diligence obligations is laid down in the Ordinance of the FINMA on the Prevention of

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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”, hence justifying the necessity that the decision on whether a business relationship with “foreign heads of states” 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.
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“.
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)\(^\text{37}\), which will be discussed in section 1.2.1.1.\(^\text{38}\)

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 2001”\(^\text{39}\). The paper represents the basis for the handling of banking relationships with PEPs.\(^\text{40}\) Since then many different definitions of the PEP concept have been developed; however, it is often lamented that there is no universal worldwide PEP definition\(^\text{41}\), 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.\(^\text{42}\) The international benchmark definition is provided by the FATF\(^\text{43}\), which has been taken over by the International Monetary Fund (IMF) and the World Bank.\(^\text{44}\) 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 I 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. 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 of prominence is dealt with either by a deliberately open concept, by specifying that middle ranking or more junior officials shall not be considered, by describing prominence with the attraction of publicity beyond the borders of their origin, or by providing exhaustive lists of the relevant officials.

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.

### 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. The RIAA speaks about “(…) persons who are closely associated (…) for family, personal or business reasons (close associates)”. 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. 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.

### 1.1.2.3. The Criterion of the Origin of PEPs

For political reasons, the majority of definitions solely cover foreign persons. For the AMLO-FINMA, domestic PEPs have so far not been included because the abusive use of a
bank account of a domestic PEP is considered less probable and the inclusion would arguably require significant extra effort. 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. 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. 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. 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. 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.

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’. The proposition of an expansion to former PEPs was still rejected in the revision of the SFBC’s AML Ordinance in 2002, 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.

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.

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

HÉRITIER LACHAT, p. 71.

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

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 where 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.

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

laundering. Instead, a risk-based qualification in which the assessment is taken individually in each case is to be preferred. 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. In comparison, the EU-Directive 2005/60/EC and its implementing regulation 2006/70/EC 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.

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. 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.

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-Check or WorldCompliance.

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 connotation, 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;

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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.
76 As seen, the notion PEP is often being equated with dictators or potentates.
The Legal and Political Implications of Assets of PEPs Obtained by Unlawful Means

indeed, WorldCompliance contains 1,500,000 PEPs in their database. Hence, everyone from Northkorea’s Kim Jong-un, Sheikh Khalifa bin Zayed, president of the United Arab Emirates, Liechtenstein’s Prince Hans-Adam II von und zu Liechtenstein 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.” 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. 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.

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 a list. 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. In practice, PEPs are identified by using name-matching tools from external companies such as World-Check, WorldCompliance mentioned before. However, such lists of persons may raise concerns with regard to data protection or the completeness and accuracy of such lists. 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

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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.
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 ACHTELIK, pp. 290-291.
banking relationships. 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.

Another problem with those name lists lies in their accuracy. In the FINMA report on due diligence obligations in connection with PEPs, the supervisory authority has found that, in some cases, PEPs were not identified because their names were checked with “exact matches” only. On the contrary, phonetic searches are in order, especially where the person’s name in question is not written with the Latin alphabet. 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.

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. 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.”

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. 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.
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 criminality\(^{97}\), 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 intermediaries\(^{100}\) 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

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\(^{96}\) 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.\textsuperscript{103} Furthermore, assets must be frozen in connection with the duty to report.\textsuperscript{104}

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

\textit{1.2.1.1. 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 1998\textsuperscript{105}; however, they were hardened with the introduction of the Money Laundering Ordinance of the SFBC that entered into force on 1 June 2003.\textsuperscript{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

<table>
<thead>
<tr>
<th>Section</th>
<th>Article</th>
<th>Due Diligence Obligation / Wording of the Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1: Subject Matter and Definitions</td>
<td>Art. 2 para. 1 lit. a: Definitions</td>
<td>Please refer to section 1.1.</td>
</tr>
<tr>
<td>Section 5: Increased Duties of Due Diligence\textsuperscript{107}</td>
<td>Art. 12 para. 3 and 4: Business Relationships with Increased Risks</td>
<td>Business relationships with PEPs are deemed to be relationships with increased risk in all cases\textsuperscript{108}, and financial intermediaries need to identify and label the business relationships with PEPs.\textsuperscript{109}</td>
</tr>
<tr>
<td></td>
<td>Art. 14 para. 2 supara. g: Additional investigations in the case of increased risk</td>
<td>Additional investigations shall be carried out depending on the circumstances, namely whether the contracting party or the beneficial owner is a PEP.\textsuperscript{110}</td>
</tr>
<tr>
<td></td>
<td>Art. 18 para 1 subpara. a and para 2: Responsibilities of the Upper Management</td>
<td>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.\textsuperscript{111}</td>
</tr>
</tbody>
</table>
| 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.\textsuperscript{112} If assets that

\textsuperscript{103} Art. 9 MLA
\textsuperscript{104} Art. 10 MLA.
\textsuperscript{105} SFBC Circular 98/1 of 26/3/1998 replaced the Circular 91/3 of 18 December 1991.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{108} Art. 12 para. 3 AMLO-FINMA.
\textsuperscript{109} Art. 12 para. 4 AMLO-FINMA.
\textsuperscript{110} Art. 14 para. 2 subpara. g AMLO-FINMA.
\textsuperscript{111} Art. 18 para 1 subpara. a and para. 2 AMLO-FINMA
\textsuperscript{112} Art. 7 para. 1 AMLO-FINMA.
The Legal and Political Implications of Assets of PEPs Obtained by Unlawful Means

<table>
<thead>
<tr>
<th>Art. 8: Prohibited Business Relationships</th>
<th>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.</th>
</tr>
</thead>
</table>

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 request\textsuperscript{115}, 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.\textsuperscript{116} This necessary alignment is laid down in legal assistance with the requirement of double criminality\textsuperscript{117}, which will be discussed in more detail in section 2.2.2.

\textsuperscript{113} Art. 7 para. 2 AMLO-FINMA.
\textsuperscript{114} Art. 8 para. 1 AMLO-FINMA.
\textsuperscript{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.
\textsuperscript{116} CAPUS, p. 331.
\textsuperscript{117} CAPUS, p. 335.
b) Art. 260\textsuperscript{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 criminality\textsuperscript{118}; however, in legal assistance in connection with PEP assets, art. 260\textsuperscript{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”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{ter} PC\textsuperscript{122}, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} FATF publishes annual reports containing mutual

\textsuperscript{118} E.g, money laundering under art. 305\textsuperscript{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.
\textsuperscript{119} Art. 260\textsuperscript{ter} PC.
\textsuperscript{120} FCC Decision RR.2009.94 of 12 August 2009, c. 3.2.1.
\textsuperscript{121} WEDER, p. 320.
\textsuperscript{122} BGE 131 II 169.
\textsuperscript{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 ACHTELIK, p. 29.
\textsuperscript{124} STESSENS, p. 17.
\textsuperscript{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. The FATF 40 have been revised in February 2012 and now require stricter regulation in connection with business relationships with PEPs as before. The FATF is increasingly dealing with the intrinsic link between corruption and AML.

1.2.2.2. International Law on Corruption and PEPs

The first globally binding anti-corruption treaty is the United Nations Convention against Corruption (UNCAC). One of the most important breakthroughs of the treaty is the field of asset recovery; UNCAC for the first time codifies the principle of the restitution of assets of PEPs obtained by unlawful means to the country of origin. 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. 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.

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. 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. 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. 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.

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. 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. 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.

PERDRIEL-VAISSÈRE, p. 20. 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 absolute\(^{140}\) 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 \textit{ratione personae}, to an immunity \textit{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 \textit{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: \url{http://www1.worldbank.org/finance/star_site/about-us.html}.

\(^{138}\) Basel Institute of Governanace, International center for Asset Recovery (ICAR), retrieved from \url{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 right\textsuperscript{147}; furthermore personal responsibility has grown in international law for universal crimes, such as human and humanitarian law violations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{150} With regard to compliance with FAFT recommendations, Switzerland is part of the 16\% that are either fully compliant or largely compliant.\textsuperscript{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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{147} GULLY-HART, Asset Recovery, p. 180.
\item \textsuperscript{148} GULLY-HART, Asset Recovery, pp. 180-181.
\item \textsuperscript{149} BERTOSSA, Confiscation internationale, p. 34, citing BGer of 8 December 2000 1P.581/2000; cf. HENZELIN, L’immunité pénale.
\item \textsuperscript{150} Dispatch UNCAC, p. 7411. Dannacher points out that it 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.
\item \textsuperscript{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.
\end{itemize}
\end{footnotesize}
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. 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. 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.” TI uses such a large definition of the term: “Corruption is operationally defined as the abuse of entrusted power for private gain.” 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. 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. However, even the least corrupt state is getting involved with the problem of corruption 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 disguised, 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

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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. 322ter through 322septies 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-VAISSÈRE, p. 18.
Switzerland involved dictatorial regime types. In cases of large scale corruption by PEPs, the term ‘kleptocracy’ is often used, which refers to governments that practice large-scale corruption at the expense of the general populations. 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”. Examples of such states are Mobutu’s Zaire, the Duvaliers’ Haiti, Marco’s Philippines and Gaddafi’s Libya. They found that “there are indications that personalist forms of dictatorships are prone to corruption yet the reasons underlying this trend warrant greater exploitation.”

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”. 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. 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”, 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. 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. He argues that while we discuss about human rights issues, it is really about realpolitik. Contrary to

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160 E.g. the cases of Abacha, Marcos, Mobutu or Duvalier, cf. section 2.4.
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.
169 Cf. SF, Interview with Daniel Thelesklaf of 21/2/2011.
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 involved\textsuperscript{172}, 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.\textsuperscript{173}, more than one quarter of the Swaziland’s adult population has been infected by HIV/AIDS, and 69% live below the poverty line.\textsuperscript{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.

\textsuperscript{172} Art. 5 OECD Convention on Bribery of 1997, SR 0.311.21.
\textsuperscript{173} Forbes estimated his wealth at 200 m. USD in 2008, see Forbes, Wealthiest Royals.
\textsuperscript{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 law\textsuperscript{175}, which is composed of the Federal Act on International Legal Assistance in Criminal Matters (IMAC) and the connected ordinance\textsuperscript{176}, as well as various bilateral and multilateral treaties in the matter.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 case.\textsuperscript{181}

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.\textsuperscript{182}

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{175}]
\item 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.
\item Ordinance on Legal Assistance in Criminal Matters of 24 February 1982 (status as of 5 December 2006), SR 351.11.
\item 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.
\item Dispatch RIAA, p. 8.
\item Dispatch RIAA, p. 8.
\item 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.
\item SCHWEIZER, p. 989; art. 12 para. 1 IMAC refers to criminal procedural law, cf. CAPUS, p. 328.
\item 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
\end{enumerate}
\end{footnotesize}
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 assistant 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 Freedoms (henceforth ECHR), or the International Covenant on Civil and Political Rights (henceforth ICCPR). The assessment whether the minimum guarantees are being granted is based on a value judgment concerning the internal institutional conditions of a foreign country. In some cases, this precondition leads to the imposition of certain human rights to non-signatory states of the ECHR. 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. However, this practice is criticized, mainly for the lack of a guarantee of the respect of human rights (cf. section 2.5.5).

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” or aggravate the situation of a discriminated person on the before mentioned grounds. Furthermore, the proceedings must not be “tainted with other grave

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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.
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defects’. 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.

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. Hence, in cases of abrogation or discontinuation of proceedings, the precondition of applicability of the IMAC is no longer given. Concerning the notion and scope of ‘criminal matter’, legal assistance is granted in order to repress criminal offences which are subject to imprisonment, while it will be denied in the case of offences with minor importance which do not justify the carrying out of the proceedings.

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.

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. 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.

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

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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. DANNCHER, p. 51.
proceedings were to happen in Switzerland.\textsuperscript{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.\textsuperscript{210} The executing authority, in processing a request, relies mainly on the facts
described therein\textsuperscript{211}; hence, the description of the facts shall be as detailed as possible.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{217} However, the principle is increasingly becoming less important mostly due to
the harmonization of criminal law.\textsuperscript{218} Furthermore, since the European Convention on Mutual
Legal Aid in Criminal Matters\textsuperscript{219} does not require double criminality, it is debatable if the

\begin{thebibliography}{99}
\item POPP, recital 255, p. 171; cf. DANNACHER, p. 46.
\item Wegleitung, p. 38.
\item Wegleitung, p. 41.
\item Wegleitung, p. 41.
\item NZZ 16/5/2011, Potentatengelder im Visier.
\item For details on the requirements to the form and the content of requests, see Wegleitung, pp. 38-43;
EYMANN, pp. 111-114; DANNCHER, pp. 56-58.
\item ZIMMERMANN, recital 575, p. 530.
\item ZIMMERMANN, 2009, recital 576, p. 531.
\item DONATSCH/ HEIMGARTNER/ SIMONEK, p.65.
\item CAPUS, p. 387; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 65.
\item European Convention on Mutual Legal Aid in Criminal Matters of 20 April 1959, SR 0.351.1.
\end{thebibliography}
principle still counts to the general principle of legal assistance independent of a designated provision in a treaty.\textsuperscript{220}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{224} The question of consistency of the legal qualification of the offences or equivalent terms of penalties is irrelevant.\textsuperscript{225} Furthermore, if more than one offence is named in the request, only one of the described offences must be punishable under Swiss law.\textsuperscript{226}

For ancillary legal assistance, according to art. 64 para. 1 IMAC, the condition of double criminality is only relevant to compulsory measures.\textsuperscript{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.\textsuperscript{228} However, following a FSC decision of 1986\textsuperscript{229} and according to prevalent doctrine, both the objective and subjective elements must be examined\textsuperscript{230}, which increases the protection of the concerned person.\textsuperscript{231}

\textbf{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.\textsuperscript{232} The question thus arises if such

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item ZIMMERMANN, 2009, recital 582-584, pp. 535-537.
\item DONATSCH/ HEIMGARTNER/ SIMONEK, p. 71.
\item ZIMMERMANN, p. 533, recital 580; DONATSCH/ HEIMGARTNER/ SIMONEK, p. 69.
\item ZIMMERMANN, p. 533, recital 580.
\item 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.
\item Wegleitung, p. 28; DONATSCH/ HEIMGARTNER/ SIMONEK, p.68, citing BGer of 17 July 2007, 1C_138/2007, c. 2.3.2.
\item Art. 64 para. 1 IMAC; CAPUS, p. 347; Wegleitung, pp. 17-28; art. 64 para. 1 IMAC.
\item Art. 64 para. 1 IMAC.
\item BGE 112 Ib 576 c. 4 b.
\item CAPUS, p. 348, ZIMMERMANN, p. 537, recital 584.
\item DANNACHER, p. 60.
\item DANNACHER, pp. 59-63. Dannacher exemplifies this issue with the Mobutu case, where looting was legalized by decree (DANNACHER, p. 61).
\end{enumerate}
\end{footnotesize}
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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.
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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 freezing\(^{239}\) 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 FC\(^{241}\), 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 preventive\(^{244}\) 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 accounts\(^{246}\), which, in practical terms, represents the most common provisional act\(^{247}\) and hinders a PEP of emptying bank accounts, or the provisional seizure\(^{248}\) e.g. of documents\(^{249}\) or land register barriers\(^{250}\) 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/SIMONNEK, 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.
\(^{244}\) 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 state and second, by order of the Federal Office of Justice (henceforth FOJ). 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. A further condition is that the request does not appear obviously inadmissible or inappropriate according to the last sentence of para. 1.

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. 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. 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. The second condition is that the prevailing situation is characterized by the fact that any delay would jeopardize the proceedings. However, the measures will be lifted if the foreign state does not deliver the announced request within a set deadline. 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. 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. The FSC limits the examination whether provisional measures are valid to the question if the principles of double criminality and proportionality are being respected.

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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.
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 decree\(^ {266}\); 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 assets\(^ {268}\); 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 regulation\(^{282}\) in the matter was considered as too vague\(^{283}\) 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 assets\(^{286}\) that were subject to a precautionary seizure to the requesting state after conclusion of the legal assistance proceeding.\(^{287}\)

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\(^{275}\) Wegleitung 2009, p. 61, footnote 461.

\(^{276}\) Cf. Dispatch RIAA, p. 19.

\(^{277}\) EYMMANN, 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. DONATSCHE/ 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 compromise\(^{292}\) 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.


\(^{293}\) 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; anderseits 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 Ausnahmefähigkeit 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. However, as pointed out by Bianchi and Heimgartner, “in the area of restitution of potentate assets, the exception has become the rule.”

Anticipatory restitution should be applied with precaution as it is a definitive measure. 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.

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. Without this evidence the forfeiture and restitution of the assets has not been possible. In the case of the Abacha assets, the FSC has for the first time classified a regime as a criminal organization under art. 260ter PC. The FSC further decided that if the requested funds are linked to a criminal organization, the special forfeiture provisions of art. 72 PC comprising the reversal of the burden of proof is applicable to the handing over according to art. 74a para. 3 IMAC. It followed from this that the onus of proving the lawful origin of the assets concerned was now on the Abacha family.

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. 260ter PC. Similarly, a debate is going on as to the point of time in which the statute of limitations of art. 260ter 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.

Furthermore, the analogical application of art. 72 PC mentioned above is problematic in terms of the content of

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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 CAPUS, p. 232.
301 SCHUPP, p. 192; cf. MOREILLON/ MCALUSO/ MAZOU, p. 69.
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 BGE 131 II 169 c. 9.
308 Art. 260ter 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.\textsuperscript{310} A further appeal to the FSC is again possible in particularly significant cases.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{310}Art. 80e para. 1 IMAC.
\textsuperscript{311}Art. 84 para. 1 Federal Supreme Court Act of 17 June 2005 (Status as of 1 April 2012) (SR. 173.110).
\textsuperscript{312}Dispatch RIAA, p. 2, 6.
\textsuperscript{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 billions of dollars of assets stolen from the Philippines. 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. 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.”

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 into force in 1983. 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. Therefore, it was the Marcos cases that paved the way for the Duvalier and Mobutu cases.

In Switzerland, the case was opened by the provisional freezing of the Marcos assets by the FC based on art. 102 para. 8 previous SC, 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. The formal request for legal assistance from the Philippines was submitted in April 1986 which led to the freezing of the bank account by the competent examining magistrates who partially authorized the restitution of the assets. In the aftermath of the appeal of Imelda Marcos and several foundations and companies the FSC passed two consistent rulings in which it established several principles on how to handle such cases. 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 upheld; second, the confiscated assets may only be restituted when a legally binding decision in the matter has been taken by a competent Philippine court; third, the Philippines had to initiate

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315 Estimations expect USD 10 billion of stolen assets, cf. CHAIKIN/SHARMAN, p. 152.
316 TOMES, p. 180; CELOZA, p. 133.
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.
327 RICHTER, p. 559.
328 RICHER, 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 proceedings \(^{330}\) 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

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\(^{330}\) 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. 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. Again, Switzerland was the first country to freeze the assets. From 1997 to 2003, several attempts by Swiss authorities were made in order to receive clarification on the Congolese legal assistance request; however, due to the continuous influence of the Mobutu clan, neither the legal assistance proceedings nor penal proceedings in the DRC developed any further. 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. The order was prolonged for another two years in 2006 despite the absence of any progress in the matter. 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. 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. 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. 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 Democrates Mobutistes, a party that is dedicated to a “véritable Nation démocratique”.

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. 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

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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.
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.\textsuperscript{354} The FOJ posits that a sum of approx. CHF 7 m. thereof lies in Swiss bank accounts.\textsuperscript{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.\textsuperscript{356}

In Annex 4 (Figure 1 Timeline of the Duvalier Case), a detailed timeline informs about the stages in the Duvalier case\textsuperscript{357}, which will therefore only shortly be summarized to the most important points. The FSC judgment of 12 January 2010\textsuperscript{358} 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.\textsuperscript{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,\textsuperscript{360} which will be discussed in section 2.5.2.

Following the FSC judgment of 12 January 2010\textsuperscript{361} with which the legal assistance ended, the FC, bearing in mind the Haitian earthquakes\textsuperscript{362} 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.”\textsuperscript{363} The freezing continued until the entry into force of the RIAA, after which the Duvalier assets have been frozen under article 14 RIAA.\textsuperscript{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.”\textsuperscript{365}

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

\textbf{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

\textsuperscript{355} FDJP, Handover of Duvalier assets, 12/2/2009.
\textsuperscript{356} FSC Decision 1C_374/2009, Facts A.
\textsuperscript{357} The timeline is based on the Chronology provided by ICAR, ICAR, Duvalier Chronology.
\textsuperscript{358} BGer of 12 January 2010, 1C_374/2009.
\textsuperscript{359} BGer of 12 January 2010, 1C_374/2009; cf. DANNACHER, p. 46-56 for a detailed examination of the statute of limitations.
\textsuperscript{360} BGer of 12 January 2010, 1C_374/2009, c. 6.7.
\textsuperscript{361} BGer of 12 January 2010, 1C_374/2009.
\textsuperscript{362} Cf. DANNACHER, p. 25.
\textsuperscript{363} FDFA, Duvalier accounts remain blocked, 03/02/2010.
\textsuperscript{364} FDFA, Illicit assets of PEPs.
\textsuperscript{365} FDFA, Illicit assets of PEPs.
economic situation, international affairs and the post-fall situation in the concerned countries, see Annex 3).

<table>
<thead>
<tr>
<th>Political situation</th>
<th>Marcos</th>
<th>Mobutu</th>
<th>Duvalier</th>
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<tbody>
<tr>
<td>Kleptocrat regime, personalist dictatorship</td>
<td>Kleptocrat regime personalist dictatorship</td>
<td>Kleptocrat regime personalist dictatorship</td>
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<tr>
<th>Economic situation</th>
<th>Widespread corruption; kleptocracy</th>
<th>Widespread corruption; kleptocracy</th>
<th>Widespread corruption; kleptocracy</th>
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<tbody>
<tr>
<td>Long time support by the U.S. for security reasons</td>
<td>Support by most Western countries, declining with the end of the cold war</td>
<td>Long time support by the U.S.</td>
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<tr>
<th>International situation</th>
<th>Continuous influential political support for the Marcos family, yet step to democratization under Corazon Aquino</th>
<th>Bloody war with African neighbors; strong influence by the Mobutu clan continues</th>
<th>Short hope for democratization, yet weak institutions and slipping back into confusion and violence</th>
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</thead>
<tbody>
<tr>
<td>Highlight of the legal assistance case</td>
<td>First time freezing by the FC based on art. 102 para. 8 SC without any previous request for legal assistance</td>
<td>The freezing order of the FC was prolonged several times and lasted at the end form 1997 to 2009.</td>
<td>Condition for procedural minimal guarantees according to the ECHR and the UNO Pact II could not be satisfied.</td>
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<td></td>
<td>Reversal of the limitation of cooperation article 1a IMAC in the sense that Swiss interests may speak for the granting of legal assistance</td>
<td>Failure of the legal assistance case due to the still continuous influence of the Mobutu clan</td>
<td>Qualification of the Duvalier clan as a criminal organization has been confirmed yet the crimes were already barred by the statute of limitations.</td>
</tr>
<tr>
<td></td>
<td>Interpretation of art. 74a IMAC</td>
<td>No Swiss criminal proceedings against Mobutu for money laundering or the participation in a criminal organization</td>
<td>Several freezing orders of the FC</td>
</tr>
<tr>
<td></td>
<td>Procedural guarantees according to art. 2 IMAC</td>
<td>Criminal organization was assumed to end with the fall of the head of state</td>
<td>First time application of the RIAA yet problem with retroactive application</td>
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<td></td>
<td>Problems with regard to use of the restituted assets</td>
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2.4.2. Selected Current Cases\(^{366}\): 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 him\(^{368}\) “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.”\(^{371}\)

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\(^{366}\) 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](http://www.assetrecovery.org/kc/node/135af2bb-9fd2-11df-a544-87078432a829.html) (accessed on 1/4/2012).

\(^{367}\) ICAR, Mubarak Overview.


\(^{369}\) 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). Swiss experts were sent to Cairo in order to assist Egyptian judicial authorities in establishing legal assistance procedures in May 2011.

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. A second request for legal assistance was sent in December 2011. Both requests are currently being processed. Furthermore, the federal prosecutor opened criminal investigations against members of Mubarak’s entourage after reports were sent to the Money Laundering Reporting Office (MROS). In September 2011, the investigations were extended to the criminal offense of organized crime. 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.

2.4.2.2. Gaddafi case, Libya

As previously mentioned, the FC has issued an ordinance 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. According to the Directorate of Public International Law (DPIL), Libya has not yet submitted a request for legal assistance. Unlike the freezings in the cases of Tunisia and Egypt, the freezing of the Libyan assets have additionally been set forth by UN sanctions, 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. The above mentioned ordinance included 29 natural persons from Libya, among them all the persons listed by the UN SC resolution 1970, and while therefore there was no urgent need for Switzerland to

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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. 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.
issue a special embargo ordinance, the ordinance was only amended based on the Embargo Act\textsuperscript{385} on 30 March 2011.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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”.\textsuperscript{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.\textsuperscript{391}

\textbf{2.4.2.3. \textit{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.\textsuperscript{392} Switzerland’s FC adopted an ordinance against Syria\textsuperscript{393} 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.\textsuperscript{394} Assets of Assad and his entourage have been frozen in Switzerland amounting to approximately CHF 50 million.\textsuperscript{395} The
measures include the freezing of assets of individuals attributable to the Syrian regime, however, they did so far not include Assad himself.\textsuperscript{396} The sanctions have been expanded several times since.\textsuperscript{397} Other states such as the US and the Arab League have imposed similar sanctions.\textsuperscript{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.\textsuperscript{399} Another factor hindering a solution is that the civilian Syrian opposition lacks unity and until now a credible vision for a new Syria.\textsuperscript{400}

\subsection*{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).

<table>
<thead>
<tr>
<th></th>
<th>Mubarak</th>
<th>Gaddafi</th>
<th>Assad</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Political situation</strong></td>
<td>Corrupt undemocratic regime</td>
<td>Corrupt undemocratic regime</td>
<td>Corrupt undemocratic regime</td>
</tr>
<tr>
<td><strong>Economic Situation</strong></td>
<td>High level of corruption</td>
<td>High level of corruption</td>
<td>High level of corruption</td>
</tr>
<tr>
<td><strong>Embargo</strong></td>
<td>No</td>
<td>Yes, UN Embargo</td>
<td>Yes, various embargos by EU, US, Arab League but no UN Embargo</td>
</tr>
<tr>
<td><strong>Post-fall Situation</strong></td>
<td>Functioning legal system, Mubarak case in court</td>
<td>Weak state structures, high corruption continues</td>
<td>Assad still head of state, civil war ongoing</td>
</tr>
<tr>
<td><strong>Highlights of the case</strong></td>
<td>• Bilateral legal assistance treaty between Egypt and Switzerland • Swiss delegation helps drafting legal assistance request</td>
<td>• 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</td>
<td>• Outcome of the political unrest yet unclear • Assets of cousin have been released</td>
</tr>
</tbody>
</table>

\textsuperscript{396} Federal Administration, Verordnung über Massnahmen gegen Syrien, 18/5/2011; NZZ 18/5/2012 Bundesrat beschliesst Sanktionen gegen Syrien.
\textsuperscript{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?
\textsuperscript{398} NZZ 10/2/2012, Wie weiter in Syrien?
\textsuperscript{399} NZZ 10/2/2012, Wie weiter in Syrien?
\textsuperscript{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. 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 offense. The FSC did not acknowledge a direct link between the assets and various crimes against humanity of which Duvalier was accused; 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. 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 regimes 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{412} Contrary to art. 72 PC, art. 74a IMAC requires the assets to be products or profits of an offence.\textsuperscript{413} Furthermore, while art. 72 PC presupposes 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.\textsuperscript{414}

\textsuperscript{406} MONFRINI/ KLEIN, p. 124.
\textsuperscript{407} DANNCHER, p. 109, Dannacher proposes an adjustment of art. 260\textsuperscript{ter} PC (DANNACHER, p. 181 et. seq.).
\textsuperscript{408} Cf. DANNACHER, p. 109.
\textsuperscript{409} Criticizing DANNACHER, pp. 54-56.
\textsuperscript{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.
\textsuperscript{411} BGE 131 II 169 c. 9.
\textsuperscript{412} MOREILLON/ MACALUSO/ MAZOU, p. 72.
\textsuperscript{413} DANNACHER, p. 77 et seq.
\textsuperscript{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

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\(^{415}\) 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 standards, 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. The RIAA came into force on 1 February 2011.

### 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. 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.” The RIAA is hence often referred to as Lex Duvalier; Grisel for example sees the only real purpose of the RIAA in its application to the Duvalier case.

### 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 it thus equated with the granting of mutual assistance and vice versa, failure with the denial of legal assistance.

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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 GRISSEL, 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

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\(^{428}\) 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.\footnote{BERTOSSA, La restitution des valeurs, p. 137.} 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.\footnote{Cf. Dispatch RIAA, p. 20.} 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.\footnote{GRISEL, p. 215.} 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.\footnote{GRISEL, p. 215; yet, with a view toward the well-being of a population, the lack of will to continue procedures may be overridden by the restitution of the assets for a good cause.}

### 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.\footnote{Art. 2 para b) RIAA.} 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.\footnote{Distatch RIAA, p. 20, the Dispatch provides an extensive definition of the term.} 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.\footnote{Distatch RIAA, p. 20, the Dispatch provides an extensive definition of the term.}

### 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.\footnote{Art. 2 para c) RIAA.} 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.”\footnote{Art. 2 para. c RIAA.} 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.”\footnote{Dispatch RIAA, p.4.}

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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 Distatch RIAA, p. 20, the Dispatch provides an extensive definition of the term.
441 Distatch 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.\textsuperscript{445} It is a complex concept what is illustrated by the various adjectives that are used to describe it, such as \textit{failing}, \textit{failed}, \textit{collapsed}, \textit{weak}, among many more.\textsuperscript{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).\textsuperscript{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.\textsuperscript{448} The assessment will integrate relevant documents issued by international organizations such as the UN and the World Bank.\textsuperscript{449}

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{452} However, the dismissal of a request due to lack of double criminality may not lead to the application of the RIAA\textsuperscript{453}, 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.\textsuperscript{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.\textsuperscript{455} Indeed, the differentiation

\begin{itemize}
\item \textsuperscript{445} GEISS, Vorwort.
\item \textsuperscript{446} GROS, p. 18.
\item \textsuperscript{447} Dispatch RIAA, p.19, 22.
\item \textsuperscript{448} Dispatch RIAA, p. 19.
\item \textsuperscript{449} Dispatch RIAA, p. 23.
\item \textsuperscript{450} CASSANI, Les avoirs mal acquis, p. 477.
\item \textsuperscript{451} Cf. Dispatch RIAA, p. 4, 22.
\item \textsuperscript{452} Dispatch RIAA, p. 22; the impact on the protection of human rights of this setting will be discussed in section 4,2,2.
\item \textsuperscript{453} BIANCHI/ HEIMGARTNER, p. 365.
\item \textsuperscript{454} CASSANI, Les avoirs mal acquis, p. 477.
\item \textsuperscript{455} BERTOSSA, La restitution des valeurs, p. 137.
\end{itemize}
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 probable 456. 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 GRISSEL, p. 214.
460 BERTOSSA, La restitution des valeurs, p. 138.
461 Dispatch RIAA, p. 18.
462 Art. 3 para. 2 RIAA.
464 Dispatch 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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\subsection*{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.\textsuperscript{474} Three conditions must be met:

\begin{enumerate}
\item The power of disposal is held with a PEP or his/her close associates;
\item The assets have been obtained by unlawful means;
\item The assets have been frozen by the FC pursuant to this act.\textsuperscript{475}
\end{enumerate}

Condition (2) will be discussed in the following.

\textsuperscript{468} Dispatch RIAA, p.13.
\textsuperscript{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.
\textsuperscript{470} Cf. DANNACHER, p. 154.
\textsuperscript{471} SCHMID, 69/19, p. 12.
\textsuperscript{472} BIANCHI/ HEIMGARTNER, p. 365; CASSANI. Les avoir mal acquis, p. 749 ; DANNACHER, p. 146.
\textsuperscript{473} BIANCHI/ HEIMGARTNER, pp. 365-366; cf. GRISEL, p. 216.
\textsuperscript{474} Dispatch RIAA, p. 24.
\textsuperscript{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 proof 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.\textsuperscript{482}

Hence, instead of basing the assumption on criminal behavior\textsuperscript{483}, 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.\textsuperscript{484} The extraordinary increase must be examined by the court on a case by case basis while concrete evidence must be delivered.\textsuperscript{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.\textsuperscript{486}

Both criteria can be criticized for not providing enough evidence that the assets have been obtained by unlawful means.\textsuperscript{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”\textsuperscript{488} in order for the presumption to cease to apply.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{491}

\textsuperscript{482} Art. 6 para 1 subpara a and b RIAA.

\textsuperscript{483} Such as in art. 72 PC, DANNACHER, p. 148.

\textsuperscript{484} Dispatch RIAA, p. 26; this concept has existed already before in art. 20 UNCAC, cf. DANNCHER, p. 149.

\textsuperscript{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.

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

\textsuperscript{487} DANNACHER, pp. 148-150.

\textsuperscript{488} Dispatch RIAA, p. 16.

\textsuperscript{489} Dispatch RIAA, p. 16.

\textsuperscript{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.

\textsuperscript{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. For the first time, the RIAA creates a specific legal basis and proper formal guidelines for the restitution of the assets. 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.). 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. 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.

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. 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.

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. The objective of the article is not obvious, since a criminal prosecution is not per se necessary; instead, it refers to the condition

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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 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.
498 GRISIEL, 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 nature\textsuperscript{500} and that even in administrative law, the
statute of limitation is a valid general principle of law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{506}

\textsuperscript{500} GRISEL, p. 216.
\textsuperscript{501} Cf. BIANCHI/ HEIMGARTNER, p. 368.
\textsuperscript{502} BIANCHI/ HEIMGARTNER, p. 368.
\textsuperscript{503} DANNACHER, pp. 156-157.
\textsuperscript{504} Art. 80d para. 2 IMAC.
\textsuperscript{505} Dispatch RIAA, p. 9, 12.
\textsuperscript{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. 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.”

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.

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.

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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 law appears in various forms. 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.” The FC was already given such a competence under the previous constitution, which was laid down in art. 102 para. 8 previous SC and under which it froze the Marcos assets in 1986 and the Mobutu assets in 1997.

With the Constitution of 1999 it was decided that ordinances – but not rulings – must be of limited duration. 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. There is however no guidance in the law with regard to a maximum duration. 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. 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.

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

Since the Marcos case, 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.

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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 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.
Specific Questions and Problems with Legal Assistance relating to PEPs

argues that these measures are closely related to the international politics of Switzerland.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).
\textsuperscript{522} MOREILLON, Art. 18, N 2, p. 216.
\textsuperscript{523} MOREILLON, Art. 18, N 2, p. 216.
\textsuperscript{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.
\textsuperscript{525} For example, in the Duvalier case in 2002.
\textsuperscript{526} Cf. BIANCHI/ HEIMGARTNER, p. 357.
\textsuperscript{527} For example, in the Duvalier case in 2002.
\textsuperscript{528} Interpellation 11.3175.
\textsuperscript{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.


\(^{534}\) 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;\textsuperscript{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 IMAC\textsuperscript{539} and under RIAA, the relevant articles are artt. 5 and 6 RIAA.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{543} Moreover, with the RIAA, forfeiture and restitution may happen without any kind of due process, be it in Switzerland or the requesting state.\textsuperscript{544} However, the forfeiture of assets without any link to an offence contradicts both Swiss law and international law.\textsuperscript{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.\textsuperscript{546} However, Geddes identifies the probability of a transition from personalist dictatorships to democracy as being small.\textsuperscript{547} A hopeful attitude cannot justify legal assistance to countries where basic human rights are not respected.

\textsuperscript{538} Art. 36 SC.
\textsuperscript{539} Cf. Section 3.3 for more detail on art. 74 para. 3 IMAC.
\textsuperscript{540} DANNACHER, p. 154.
\textsuperscript{541} Cf. DANNACHER, p. 154.
\textsuperscript{542} Dispatch RIAA, p. 22.
\textsuperscript{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
\textsuperscript{544} Dispatch RIAA, pp.16-17; DANNACHER, p. 175.
\textsuperscript{545} DANNACHER, p. 175.
\textsuperscript{546} Cf. RICHTER, p. 595.
\textsuperscript{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
Specific Questions and Problems with Legal Assistance relating to PEPs

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.\textsuperscript{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.\textsuperscript{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 penalizing\textsuperscript{550} 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.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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”.\textsuperscript{555} Applying these criteria to forfeiture under RIAA, we find that from its classification under domestic law, the RIAA is

\textsuperscript{548} Dispatch RIAA, p. 17.
\textsuperscript{549} CAPUS, p. 328.
\textsuperscript{550} Cf. Dispatch RIAA, „The public interest lies in the punishment of the unlawful acquisition of assets by PEPs and their associates”, p. 35.
\textsuperscript{551} Cf. BIANCHI/ HEIMGARTNER, p. 369 ; cf. GRISIEL, p. 216.
\textsuperscript{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.
\textsuperscript{553} BIANCHI/ HEIMGARTNER, p. 365.
\textsuperscript{554} Dispatch RIAA, p. 36.
\textsuperscript{555} Dispatch RIAA, p. 36, citing Judgement in Engel vs. Netherlands of 8 June 1976m Series A, No. 22, §80ff.
considered an administrative act. 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 assets whereas the qualification of unlawfulness stands most probably in connection with the penal code. 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 restitution; hence the sanction is rather severe. As to the nature of the sanction, it is of repressive nature. It follows from the above that forfeiture under RIAA qualifies as a charge under criminal law according to art. 6 para. 2 ECHR.

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. 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. She concludes that the demonstration of the lawful acquirement of the assets in all probability does not seem to be too difficult.

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. 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.
563 CASSANI, Les avoirs mal acquis, p. 478.
564 CASSANI, Les avoirs mal acquis, p. 478.
circumstantial evidence supporting the criminal liability of the concerned person in each individual case.\textsuperscript{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 proof that the offence which underlies the forfeiture has been committed; however, with the RIAA no such offence is necessary for forfeiture.\textsuperscript{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.\textsuperscript{569}

4.2.2.3. \textit{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 RIAA\textsuperscript{570}, 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.\textsuperscript{571} The retroactive effect creates problems with a view to art. 7 para. 1 ECHR.\textsuperscript{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.\textsuperscript{573}

4.3. \textbf{The Future of Potentate Assets in Swiss Banking Institutions}

4.3.1. \textit{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{567} DANNACHER, p. 153.
\item \textsuperscript{568} BIANCHI/ HEIMGARTNER, p. 367.
\item \textsuperscript{569} BIANCHI/ HEIMGARTNER, p. 367.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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 (…)”.
\item \textsuperscript{573} CASSANI, Les avoirs mal acquis, p. 479. DANNCHER, p. 158, she further explores the compatibility of art. 14 RIAA to the principle of non retroactivity in administrative law, pp. 158-160.
\item \textsuperscript{574} PIETH, p. 4
\end{itemize}
Specific Questions and Problems with Legal Assistance relating to PEPs present case“. 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. 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.” As far as handling PEPs are concerned, Switzerland’s AML framework fulfills, if not exceeds, the requirements posed by the FATF.

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. 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. 260ter 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”. 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. 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.

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.”
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).
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.
Specific Questions and Problems with Legal Assistance relating to PEPs

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

\(^{590}\) However, most of the changes have already been implemented in the Swiss AML legislation.

\(^{591}\) In a parliamentary motion it was proposed to make PEP relationships subject to approval by state authorities.

\(^{592}\) Motion 11.3148.

\(^{593}\) Motion 11.3148.

\(^{594}\) Motion 11.3148.

\(^{595}\) 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
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

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\(^{596}\) 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.
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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.\textsuperscript{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.

\textbf{4.5. The Need for Global Approaches}

\textbf{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

\textsuperscript{602} CASSANI, Les avoirs 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 level\(^\text{603}\), as illustrated in table 1:

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

<table>
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<tr>
<th></th>
<th>Switzerland</th>
<th>Europe</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tunisia</td>
<td>19.1.2011</td>
<td>4.2.2011</td>
<td>-</td>
</tr>
<tr>
<td>Egypt</td>
<td>11.2.2011</td>
<td>21.3.2011</td>
<td>-</td>
</tr>
<tr>
<td>Libya</td>
<td>24.2.2011</td>
<td>2.3.2011</td>
<td>25.2.2011</td>
</tr>
</tbody>
</table>

Source: FINMA Report of 10 November 2011\(^\text{604}\)

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.\(^\text{605}\) 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.\(^\text{606}\) 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.\(^\text{607}\) She states that such a cacophony as in these cases cannot be accepted.\(^\text{608}\)

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.\(^\text{609}\) 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 1970\(^\text{610}\) which obligated all members to freeze Gaddafi related funds\(^\text{611}\), as discussed in section 2.4.2. Resolution 1973 was considered as a breakthrough for the so-called responsibility to protect

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\(^{603}\) 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.  
\(^{611}\) UN News Centre, 26/2/2011 Security Council imposes sanctions on Libyan authorities.
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(RtoP), i.e. a relatively new concept of international law which postulates that a state’s primary responsibility is the protection of its population. 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. However, in the case of Syria, the intervention at an UN level are rather poor, which demonstrates the limits of the new concept.

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 case, 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. The idea is to restitute assets to Libya in favor of the people. However, such restitutions would apparently happen without any kind of international legal assistance procedure or even without any investigations into the illegal acquisition of the assets.

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.” 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. 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

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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.
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 noble\textsuperscript{624}, 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 parliament\textsuperscript{625} 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

\textsuperscript{623} ZIMMERMANN, p. 3.

\textsuperscript{624} GIROUD, p. 16.

\textsuperscript{625} Cf. MOREILLO/ 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 upheld 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

- FATF,
- Wolfsberg Group,
- Basel Committee on Banking Supervision,
- UN Convention against Corruption,
- AMLO-FINMA and the RIAA

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Definition</th>
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<tbody>
<tr>
<td><strong>USA Patriot Act</strong></td>
<td>Senior Foreign Political Figure - Definition provided by the Financial Crimes Enforcement Network of the US Department of the Treasury:</td>
</tr>
<tr>
<td>Section 312</td>
<td>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;</td>
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<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td><strong>EU-Directive 2005/60/EC</strong></td>
<td>PEP</td>
</tr>
<tr>
<td>Art. 3 Para. 8</td>
<td>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</td>
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<tr>
<td><strong>EU-Commission Directive</strong></td>
<td>Politically exposed persons</td>
</tr>
<tr>
<td>2006/70/EC</td>
<td>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:</td>
</tr>
<tr>
<td>Art. 2</td>
<td>(a) heads of State, heads of government, ministers and deputy or assistant ministers;</td>
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<td></td>
<td>(b) members of parliaments;</td>
</tr>
<tr>
<td></td>
<td>(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;</td>
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<td></td>
<td>(d) members of courts of auditors or of the boards of central banks;</td>
</tr>
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<td></td>
<td>(e) ambassadors, chargés d'affaires and high-ranking officers in the armed forces;</td>
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<td></td>
<td>(f) members of the administrative, management or supervisory bodies of State-owned enterprises.</td>
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<tr>
<td></td>
<td>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.</td>
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<tr>
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<td>The categories set out in points (a) to (e) of the first subparagraph shall, where applicable, include positions at Community and international level.</td>
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<td>2. For the purposes of Article 3(8) of Directive 2005/60/EC, “immediate family members” shall include the following:</td>
</tr>
<tr>
<td></td>
<td>(a) the spouse;</td>
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shall include the following:

(b) any natural person who has sole beneficial ownership of a legal entity or legal arrangements, or any other close business relations, with a person referred to in paragraph 1;

(c) the children and their spouses or partners;

(d) the parents.

3. For the purposes of Article 3(8) of Directive 2005/60/EC, "persons known to be close associates" shall include the following:

(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;

(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.

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.

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**FATF**

- 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.

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**United Nations Convention against Corruption (UNCAC), art. 52**

- Article 52. Prevention and detection of transfers of proceeds of crime: 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.

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**Basel Committee on Banking Supervision (BCBS)**

- (...) 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.

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**Wolfsberg Group**

- 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:
  - 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

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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](http://www.fatf-gafi.org/glossary/0.3414.en_32250379_32236920_34295666_1_1_1_1.00.html#34285860) (accessed on 20/12/2011).


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)
  - 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. | 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 | 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** | **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.**<sup>635</sup>  
| | **The Dispatch to the RIAA concludes that “[a]ll in all, these are persons who operate in an environment of power politics and money.”**<sup>636</sup>  
| | **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.”**<sup>637</sup> |

### Comparison to other Definitions

| **AMLO-FINMA / RIAA** | **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.**<sup>638</sup>  
| | **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.”**<sup>639</sup>  
| | **Some definitions provide exhaustive lists of the relevant officials, in others, a list is omitted entirely.**<sup>640</sup>  
| | **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.**<sup>641</sup> |

### Discussion

| **AMLO-FINMA / RIAA** | **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.**<sup>642</sup> |

### (2) Family /Entourage

| **AMLO-FINMA / RIAA** | **The RIAA speaks about “(...) persons who are closely associated with politically exposed persons for family, personal or business reasons (close associates).”**<sup>643</sup>  
| | **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.**<sup>644</sup> |

### Comparison to other Definitions

| **AMLO-FINMA / RIAA** | **Regarding the degree of family members, UNCAC and FATF do not limit the members while the EU Directive focuses on immediate family members.**<sup>645</sup> |

### Discussion

| **AMLO-FINMA / RIAA** | **As will be seen in the Duvalier case<sup>647</sup>, 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.**<sup>648</sup> |

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636 Dispatch RIAA, p. 21.
637 Art. 2 para. b subpara. 1 RIAA and art. 2 para. 1 subpara a. number 1 AMLO-FINMA.
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.
### (3) Inclusion of Domestic PEPs

| **AMLO-FINMA / RIAA** | - 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.  
- Nevertheless, as put forward by Héritier Lachat, it seems that in practice, domestic persons of equivalent rank are equally included in Switzerland. However, in contrast to business relationships with foreign PEPs, the qualification is not mandatory. |
| Comparison to other Definitions | - 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 Corruption 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.”  
- Nevertheless, as put forward by Héritier Lachat, it seems that in practice, domestic persons of equivalent rank are equally included in Switzerland. However, in contrast to business relationships with foreign PEPs, the qualification is not mandatory. |
| **Discussion** | - 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.  
- 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. 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.”  

### (4) Inclusion of Legal Entities

| **AMLO-FINMA / RIAA** | - The definition of the AMLO-FINMA and the RIAA clearly do include companies.  
| Comparison to other Definitions | - The majority of definitions simply speaks about natural persons and does not address legal entities per se in the definition.  
| **Discussion** | - World-Check 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. 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 the abuse of their public influence.”  

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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/](http://www.world-check.com/).  
659 WORLD-CHECK, PEPs, p. 6.
legitimate transactions.” Indeed, as will be seen with the Duvalier assets, the assets where held in a foundation under Liechtenstein law. 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.

## (5) Length of Qualification

| AMLO-FINMA / RIAA | The wording of the AMLO-FINMA does not clearly indicate whether former PEPs shall be considered; it simply speaks of persons ‘holding’ 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 2002, in the explanatory report to the AMLO-FINMA, FINMA confirms the argument of the World Bank. Instead, a risk-based qualification makes more sense in that the assessment is taken individually in each case. The RIAA specifies that it includes “individuals who exercise or have exercised a high public office (…)” 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 | 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/EC and its implementing regulation 2006/70/EC, 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. |
| Discussion | 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. 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. Furthermore, from a practical viewpoint, 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. |

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660 WORLD-CHECK, PEPs, p. 5.
661 Cf. section 2.4.1.
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.
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
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.\footnote{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: \url{http://www.uvm.edu/~cbeer/geddes/APSA99.htm} (accessed on 15/4/2012).}

(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.\footnote{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.} Yet in cases of authoritarian regimes\footnote{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.} like the ones studies here, Geddes identifies the probability of a transition to democracy as being small.\footnote{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 vain, 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.} Second, it is investigated if the state of corruption outlives the previous corrupt dictator.\footnote{TOMES, p. 179; cf., to that effect, CELOZA, p. 23.}

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.\footnote{TOMES, p. 178; CELOZA, p. 46.} Shortly later, he imposed draft constitution\footnote{Cf. to that effect CELOZA, p. 48-57.} giving him dictatorial power.\footnote{TOMES, p. 178.} During his rule, Philippine politics became severely polarized and violent and increasingly autocratic.\footnote{TOMES, p. 178.} 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.\footnote{TOMES, p. 179; cf., to that effect, CELOZA, p. 23.}

\footnote{TOMES, p. 136. In her study, only 16\% of personalist regimes that fell since 1945 became democracies.}

\footnote{Geddes states 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.}
presidency by supporting the American role in Vietnam and by warding off communism. However, many problems grew such as the increasing communist insurgency, Muslim minorities demanding independency, the persisting poverty and conspicuous corruption. Opposition became more important and with it, the U.S. began to distance itself from Marcos. 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. He died in exile from a heart attack in 1989.

### Focus on Economic Situation

In the Marcos regime, his way of rule lead to great personal wealth for the family and entourage in that control over the whole state and its budget was entirely in Marcos’ hands. Celoza points out that Marcos instituted business monopolies and made sure that he had control over all businesses and nationalized companies. 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, robbing of the pork barrel, theft of official gold stocks, institutionalized and private sector extortion securing of kickbacks from private businesses, illegitimate takeover of private firms, and creation of monopolies for the private benefit of the Marcos family, relatives, and cronies.” 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.” 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.

### Internatioonal Affairs

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.” Celoza 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.

### Post-fall situation

Support for the Marcos family continued even after his fall, mainly from a Philippine elite who profited from the large corruption. The continued support went as far as electing Marcos’ son Ferdinand Jr. Marcos and Marcos’ wife Imelda to congress. According to Celoza, Corazon Aquino, who succeeded Marcos’ presidency, had a difficult burden in the aftermath of his misrule.

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685 TOMES, p. 179.
686 TOMES, p. 179.
687 TOMES, p. 180.
689 TOMES, p. 180.
690 EZROW/FRANTZ, p. 137 -138
691 CELOZA, p. 133.
693 CHAIKIN/SHARMAN, p. 153.
694 TOMES, p. 180.
695 KESSLER, p. 42.
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. In 1965 he seized power again with the help of the CIA of the United States. Mobutu ruled in a dictatorial and oppressive way by assuming full control over the whole state and consolidated power by publicly executing political opponents and other threats to his regime. In his attempt to “Africanize” or “authenticize” 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. 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. |
| **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.” Ikambana, who wrote on state crime in Mobutu’s political system, states that “[u]nder his system, corruption became the rule.” |
| **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”. As Snyder states “(…) Mobutu was able to squeeze resources out of his foreign aker with minimal reciprocal obligations by using Zaire’s strategic and economic importance and the threat of chaos if his regime were to collapse”. Mobutu’s strategy brought him continued development loans and other economic aid he needed to uphold his regime. 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.” Yet, as pointed out by French, Mobutu’s relevance to the West reduced greatly. 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”. Indeed, as pointed out by Keller, former FC Pierre Graber himself introduced Mobutu to a villa in Savigny. |
| **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. Kabila’s regime was supported by Angola, Chad, Namibia, Sudan, and Zimbabwe which resulted in a vast and bloody war. |

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706 COPPA, Mobutu, p. 188.  
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.  
719 KELLER, Das Magazin of 19/6/2009.  
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 Nzanga has been deputy prime minister until 2011.

### 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.” 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. In his book “Papa Doc, Baby Doc: Haiti under the Duvaliers” 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”. He imposed an autocratic regime that effectively ended any form of democracy and civil liberties and declared himself “President-for-Life” in 1964. 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. 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.

#### 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.”

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. Furthermore, loans and aids from the US and other states were diverted into private hands. Ferguson thus argues that the principal recipient of foreign aid was Jean-Claude Duvalier. He stresses that “Duvaliers predatory state (…) did not merely siphon off foreign aid, but also perpetuated the internal corruption which Papa Doc had practiced.” 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”. 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.”

From the foregoing it clearly appears that Haiti had suffered in the days of the Duvalier under a corrupt system beyond all measure.

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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.
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.
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 (…)”. 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 (…)”. François 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. 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.

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With the fall of Baby Doc Duvalier in 1986, there was a hope for democratization with the rule of Jean-Bertrand Aristide. 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. Jean-Bertrand Aristide returned to office, and during his president and that of his successor Rene Preval, living conditions improved supported by the UN, yet it did not take long until violence grew again. According to Gauthier 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 (...)

Surprisingly, Jean-Claude Duvalier returned to Haiti from his 25-year exile in France on 16 January 2011. 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. However, according to an article published by the Bureau des Avocats Internationaux and the Institute for Justice & Democracy in Haiti in May 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.” Proceedings were however supported by the UN Office of the High Commissioner for Human Rights, who, following reports that former Duvalier may not face charges relating to the serious human rights violations, voiced concerns.

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 until his resignation on 11 February 2011. 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. 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. 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.

**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.
Mubarak’s and his entourage’s wealth is estimated at USD 40-70 billion that originates out of corruption and kickbacks but also out of legitimate business activities.

**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.” 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.”

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. 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.

**Post-fall situation**

Mubarak resigned on 11 February 2011 after mass protests and violence in the streets escalated. 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. 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.”

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**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. In power, he established and ideology in this Green Book that intended to be an alternative to Western capitalism and Soviet totalitarian socialism, and instituted strict Islamic customs. 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.

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. 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.”

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. Riots against the Gaddafi regime started mid February 2011. On 24 February 2011, the FC orders the freezing of any assets held by Gaddafi and his entourage in Switzerland in order to “avoid any

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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.
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.
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
Two days later, the UN Security Council (SC) in resolution 1970 obligated all members to freeze all funds belonging to persons linked to Gaddafi and listed in the resolution. On 17 March, the UN SC authorizes with resolution 1973 a no-fly zone over Libya. 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. Muammar Gaddafi is killed on 20 October 2011.

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 (…)”. 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.

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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. 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. 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. 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. This act although condemned internationally, assured him complete control over Syria. 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. While Syria officially is a democratic republic, it is in reality an authoritarian regime. 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. |
| Focus on Economic Situation | Syria’s economy is centrally planned and plagued by inefficiency and corruption. 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. |
| Internal Affairs | Many countries have imposed sanctions against Damascus since the beginning of the crisis. Switzerland’s FC adopted an ordinance against Syria 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. The measures include the freezing of assets of

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777 UN News Centre, 26/2/2011 Security Council imposes sanctions on Libyan authorities.
779 SF, Schweiz beantragt bei UNO Freigabe blockierter lybischer Gelder, 1/9/2011.
781 FT of 16/2/2011, 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.
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.
individuals attributable to the Syrian regime, however, they did so far not include Assad himself.\textsuperscript{796} The sanctions have been expanded several times since.\textsuperscript{797} Other states such as the US and the Arab League have imposed similar sanctions.\textsuperscript{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.\textsuperscript{799} Another factor hindering a solution is that the civilian Syrian opposition lacks unity and until now a credible vision for a new Syria.\textsuperscript{800}

\textsuperscript{796} Federal Administration, Verordnung über Massnahmen gegen Syrien, 18/5/2011; NZZ 18/5/2012 Bundesrat beschliesst Sanktionen gegen Syrien.
\textsuperscript{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?
\textsuperscript{798} NZZ 10/2/2012, Wie weiter in Syrien?
\textsuperscript{799} NZZ 10/2/2012, Wie weiter in Syrien?
\textsuperscript{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
**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