

1988

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Recommended Citation

Hoets, Pieter J. and Zwart, Sara G. (1988) "SWISS BANK SECRECY AND THE MARCOS AFFAIR," *NYLS Journal of International and Comparative Law*. Vol. 9 : No. 1 , Article 4.

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SWISS BANK SECRECY AND THE MARCOS AFFAIR

PIETER J. HOETS* & SARA G. ZWART**

I. AN IDEAL HIDEAWAY

In the small communities deep in the valleys between the majestic, snow-capped Alps and Jura mountains, respect for an individual's privacy rights and a belief in individual freedom are firmly rooted and imbedded in the Swiss character. In fact, in Switzerland, as in other civil law countries, protection of a person's privacy is deemed legally fundamental.¹ Such personal privacy includes the right to protect one's bank accounts from foreign eyes; therefore, Swiss bank officers and employees must keep secret the amount and existence of their clients' bank accounts.² Since Switzerland is also known for its long-standing neutrality,³ stable currency, broad range of financial services, and su-

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The authors wish to thank Dr. S. Salvioni of Locarno, Switzerland, counsel to the Philippines in the Marcos case, for reading the manuscript.

1. See, e.g., Meyer, *Swiss Banking Secrecy and its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18, 20-21 (1978). Personality rights also include a person's physical and intellectual integrity, his liberty of action, his legal capacity and his own name. *Id.*; see also *Banks v. King Features Syndicate*, 30 F. Supp. 352, 353 (S.D.N.Y. 1939).

2. Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C.J. INT'L L. & COM. REG. 1, 1-2 (1983). " 'Banking secrecy' means that the banks must keep secret any information about their clients regarding privacy and property, which they receive by practicing their business. This discretion applies to the banks' officers, employees and any other persons with a direct relation to the bank." *Id.*

3. The historical roots of Swiss neutrality can be traced to Swiss internal policy in the early sixteenth century. W. MARTIN, *SWITZERLAND* (1971). Cantons were admitted into the confederacy only upon a pledge of strict neutrality in the event of disputes between confederate states. *Id.* Swiss policy of neutrality toward foreign states was an exercise in political pragmatism. In 1511, the Swiss opted to appease France and Austria by staying neutral in their disputes. *Id.* In 1815, a war-torn continent recognized Swiss neutrality as an integral part of European international law which was steadfastly adhered to during Italian and German unification and two world wars. *Id.* at 200. Strict neutrality has aided the Swiss in attracting foreign assets into comparatively safe banking institutions. T. FEHRENBACH, *THE SWISS BANKS* 155 (1966).

perb infrastructure,⁴ it is no wonder that Swiss lawyers, money managers and banks have been protecting flight capital for over 300 years.⁵

II. CAPITAL FLIGHT

In the seventeenth century, Protestant Huguenots, including a large group of French merchants, sought personal and financial safety in Switzerland in order to escape religious and political persecution and the confiscation of their property by the Catholic Kings of France.⁶ A century later it was the members of France's Royal House of Bourbon and their vassals, who, while fleeing from the French Revolution, the guillotine and the confiscation of their properties, sought a safe haven in Switzerland.⁷

These migrations of individuals and assets in the wake of war and revolution were often politically motivated.⁸ Yet, it would be naive to assume that no money derived from crime ever found its way into Switzerland via these political refugees. There is no way to prove that all the assets they brought into Switzerland were indeed theirs. A leather pouch filled with gold coins and carried by a French nobleman in the eighteenth century across the Jura passes to Geneva might indeed have contained that nobleman's own gold recovered from a vault in his abandoned chateau. The same gold may have also been stolen from a wealthy merchant in a village inn along the way.

Today, crime money of all sorts finds its way into Switzerland. Swiss banks receive money generated through political crime, war crime, individual crime (e.g., tax violations, insider trading, illegal laundering, and undisclosed corporate payments) and organized crime (e.g., narcotics, gambling and other racketeering).⁹

4. Bowen, *Nibbling Away at the Swiss Role*, Bus, Dec. 1986, at 117, 118.

5. Reasons for capital to flee include: political instability (especially in developing countries such as Mexico, Argentina, Venezuela and the Philippines), bribery and corruption, tax evasion, smuggling, violations of securities laws, and drug trafficking. See I. WALTER, *SECRET MONEY* 39-90 (1985).

6. Note, *Secret Foreign Bank Accounts*, 6 TEX. INT'L L.F. 105, 115 (1970).

7. *Id.*

8. A significant number of individuals and their assets have migrated to Switzerland due to European political persecution, war and revolution. *Id.* For example, Louis XIV's expression of absolute power, [*l'etat c'est moi*, (I am the state)] and his personal disdain for French Protestants resulted in the exodus of many political opponents and non-Catholics alike. Richtler, *Despotism*, in 2 *DICTIONARY OF THE HISTORY OF IDEAS* 1, 4-15 (P. Wiener ed. 1973).

9. See J. ZIEGLER, *SWITZERLAND: THE AWFUL TRUTH* 39-65 (1979).

III. SILENT TREATMENT

In the nineteenth century, claims for and requests about flight capital that were made to Swiss banks by powerful countries and neighbors, such as France and the once mighty Austrian-Hungarian Habsburg Empire, received nothing but the silent treatment from Swiss banks. Demands for disclosure in our century have not, however, fared much better.¹⁰ Requests for the disclosure and surrender of Swiss bank records by Nazi Germany, Fascist Italy, Soviet Russia, and more recently from the United States, Latin and Central America and many new Asian and African countries caught up in war, revolution and turmoil, have all failed to penetrate the Swiss wall of silence. Both Switzerland's government and its banks, supported by Swiss law, have steadfastly and consistently refused to lift the veil of bank secrecy. Meanwhile, the protection and management of flight capital has become a cornerstone of the thriving Swiss banking industry and continues to attract increasing amounts of money.¹¹

IV. CHANGING TIMES

Times are changing, however, for it appears that the famous solid walls of Swiss bank secrecy are showing cracks and signs of stress. Modern technology and the mass media have disclosed sensational revelations in the last two decades about Swiss-bound flight capital, thereby putting the once secret transactions of Swiss banks in the limelight. For instance, a major fissure developed after the Chiasso scandal in 1977 when Credit Suisse, one of Switzerland's biggest banks, was found guilty of poor management and breach of fiduciary duty to its clients.¹² Another crack in the wall of Swiss secrecy resulted from

10. Unable to obtain disclosure from Switzerland, foreign states have resorted to other means in their attempts to stop tax evasion. For many years, the French government has attempted to reclaim money from tax evaders. See Bowen, *supra* note 4, at 119.

11. See I. WALTER, *supra* note 5, at 30-31.

12. Chiasso, a small town in the Italian region of Switzerland, was a prime destination for flight capital from Northern Italy. See generally N.Y. Times, Apr. 15, 1977, § 4, at 1, col. 4. Credit Suisse, one of the largest Swiss banks, lost more than \$1 billion by investing in the volatile Italian wine and food industry instead of investing in the more secure Euromarket. Although Credit Suisse absorbed the losses, the Swiss banking industry was called into question. The Chiasso affair caused an increase in the power of Berne's Federal Banking Commission, setting off a series of "gentleman's agreements" with the United States, and spawning a socialist attack on the banking industry. See Glynn, *Is Time Running Out for Swiss Bank Secrecy?*, INSTITUTIONAL INVESTOR, Nov. 1986, at 97; see also I. WALTER, *supra* note 5, at 98-99. Although the socialists lost a public referendum to break bank secrecy in 1984, a future attack is not unlikely. See U.S., *Switzerland Move Toward Rules on Swiss Banks' Disclosure of Hot Money*, 17

several United States insider trading cases, in particular the Dennis Levine insider trading scandal of 1986.¹³ In that case, computers spotted irregular trading and put United States authorities on the track to Switzerland. Further damage to the Swiss banking image was caused by the overthrow of President Duvalier of Haiti, when it became known that large blocks of Haitian money were stored in Swiss vaults. The greatest loss of respect to the Swiss image, however, occurred when the Marcoses' millions turned up in Swiss banks.¹⁴

Consequently, the Swiss government and banks have been trying to repair their image. Not only do they suggest that the veil of secrecy will be lifted to disclose money generated by criminal activities,¹⁵ but they are also adapting their laws. For example, Switzerland and the United States concluded a Memorandum of Understanding on Insider Trading (MOU) on August 21, 1982, to improve cooperation on the prosecution of insider trading.¹⁶

Privately, the Swiss Bankers Association (SBA) adopted a "Convention of Diligence" (also known as the "Know Your Customer Agree-

Sec. Reg. & L. Rep. (BNA) at 1559 (Sept. 13, 1985).

13. In the Dennis Levine case, a Panamanian subsidiary of Bank Leu (Switzerland's sixth largest bank) supplied information about Levine's account to the Securities and Exchange Commission (SEC) following persistent prodding. See Lascelles, *A Hole in the Secret Heart*, Fin. Times, Feb. 3, 1987, at 22; see also *Trading Pattern Enabled SEC to Break Levine Insider Trading Case, Lynch Tells Panel*, 18 Sec. Reg. & L. Rep. (BNA) at 889 (June 20, 1986). Levine, charged with making \$12 million in illegal insider trading, was convicted and sentenced to two years in prison on February 20, 1987. See *Levine Gets Two Year Jail Term*, N.Y. Times, Feb. 1, 1987, at 33, col. 6. The first case where the SEC broke Swiss bank secrecy was SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981), where an American, through a Swiss bank, made a \$2 million profit based on inside information of an upcoming merger. The Swiss bank obtained a waiver of confidentiality from the client when threatened with a \$50,000 per day fine and a ban from trading in the United States. *Id.* at 113.

14. See *Buried Treasure: Much Marcos Wealth Still Carefully Hidden, Eludes Investigators*, Wall St. J., Feb. 11, 1987, at 1, 18.

15. See Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Aug. 31, 1982, United States-Switzerland, reprinted in 22 I.L.M. 1 (1983) [hereinafter Memorandum of Understanding].

16. *Id.*; Note, *International Agreements: United States-Switzerland Investigation of Insider Trading Through Swiss Banks*, 23 HARV. INT'L. L. J. 437 (1983) [hereinafter *International Agreements*]; Note, *Banking Secrecy and Insider Trading*, 23 VA. J. INT'L. L. 605 (1983) [hereinafter *Banking Secrecy*]. The Swiss Parliament is considering legislation that would make insider trading illegal. See *Bill Clears Swiss Lower Chamber*, Wall St. J., Oct. 8, 1987, at 44, col. 3. The Swiss government has announced plans to make "laundering" of money a criminal offense. See *Switzerland to Make Money Laundering a Crime and Curb Use of Bank Secrecy Form*, 177 Doing Business in Europe (CCH) § 1 (Mar. 19, 1987).

ment") in 1977.¹⁷ This code is based on Article 3 of the Federal Banking Law, which requires irreproachable conduct by bankers towards their clients.¹⁸ Under this convention, which is supervised by the Federal Banking Commission, Swiss banks promise not to help foreigners speculate against the Swiss franc or contravene the exchange controls of their own countries and, consequently, to exercise "due diligence" in identifying the true beneficiaries of their accounts. The banks have thus accepted a good faith duty to identify the real deposit owners and establish their legitimacy.

Being a democratic country, Switzerland speaks through its citizens, who dislike being called the robber barons of the world. By giving up what amounts to a limited part of Swiss bank secrecy in Switzerland, the banks are appeasing the Swiss people. At the same time the Swiss banks are making a showing of accepting the international rules of the game in order to gain the trust necessary to capture their share of the huge institutional investors' money markets that are housed in the United States and elsewhere.¹⁹ An analysis of the history, the facts and the legal issues of the Marcos case demonstrates just how far, in fact, Switzerland has shifted its banking policies in an effort to aid foreign governments seeking the recovery of illegally-gained funds.

V. FERDINAND EDRALIN MARCOS, PRESIDENT OF THE PHILIPPINES (1965-1986), AND HIS SWISS BANK ACCOUNTS

On March 24, 1986, at a state dinner for the Finnish President Mauno Koivisto, the Swiss Council of Ministers (Bundesrat), the country's seven member executive cabinet, convened for an impromptu emergency meeting. Huddled in a corner of the ballroom, the Bundesrat announced a decision which stunned Swiss bankers and for-

17. Agreement of the Signatory Banks and the Swiss Bankers Association with the Swiss National Bank on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy of July 1, 1977 (English translation on file in the Office of the N.Y.L. Sch. J. Int'l & Comp. L.) [hereinafter Agreement or Know Your Customer Agreement]. The Agreement, which has five-year terms, was renewed on July 1, 1982 (and signed on Oct. 1, 1982) and on July 1, 1987 (eff. Oct. 1, 1987). See Hawes, Lee & Roberts, *Insider Trading Law Developments: An International Analysis*, 14 LAW & POL'Y BUS. 335 (1982); see also Honegger, *supra* note 2, at 7.

18. Bundesgesetz über die Banken und Sparkassen, SYSTEMATISCHE SAMMLUNG DES BUNDESRECHTS [SR] 952.0 amended SAMMLUNG DER EIDGENÖSSISCHEN GESETZE [AS] 808; La loi fédérale du 8 Novembre, 1934, RECUEIL SYSTEMATIQUE DU DROIT FÉDÉRAL [RS] 325, est modifiée RS 952.0 (Federal Law Relating to Banks & Savings Institutions of Nov. 8, 1934, as amended by Federal Law of Mar. 11, 1971) [hereinafter Banking Law].

19. Glynn, *supra* note 12, at 100. Over the past years, most Swiss banks (more than 583 branches) have been very profitable. With abundant assets, Swiss banks are moving to other centers abroad. *Id.*

eign clients around the globe. The Swiss finance ministry had been alerted by officers of Credit Suisse in Zurich, when the State dinner was about to begin,²⁰ that agents of recently deposed²¹ President Ferdinand Marcos were attempting to transfer hundreds of millions of dollars out of Switzerland. Appreciating the urgency of the matter and the need for immediate action,²² the Federal Council, under Article 102.8 of the Swiss Constitution,²³ ordered an emergency freeze on all assets held in Switzerland by Ferdinand Edralin Marcos, his family, and by persons or organizations close to him.²⁴ An official request by the Philippine government to continue the freeze followed on April 7, 1986.

Before analyzing the subsequent events, it is best to first study Ferdinand E. Marcos himself, and to understand how he became President of the Philippines and amassed his tremendous wealth. Always ambitious and militant (as a law student Marcos had been accused, convicted and subsequently acquitted of killing his father's political opponent),²⁵ Marcos, like others of his generation, gained prominence during World War II. His role in the Filipino resistance against the Japanese Occupation Forces helped him to realize his political ambitions when the Philippines later gained their independence.

Starting as a candidate of the Liberal Party, Marcos later switched to the Nationalist Party under whose banner he was elected President of the Philippines on November 8, 1965. His political opponents claim that even this first Presidential election was tainted by fraud, extortion, bribery and ballot-box tampering. Meanwhile, Marcos and his former beauty queen wife Imelda Romualdez²⁶ had gained the respect

20. *Id.* at 97.

21. *Id.* A Filipino businessman attempted to withdraw \$213 million in cash upon presentation of a power of attorney signed by Ferdinand and Imelda Marcos. See *Frontline: In Search of the Marcos Millions*, at 5 (PBS television broadcast, May 26, 1987) (transcript on file in the Office of the N.Y.L. Sch. J. Int'l & Comp. Law) [hereinafter *Frontline*].

22. The Bank was prepared to dispose of the funds the next morning, unless the Federal Banking Commission instructed them otherwise. See *Frontline*, *supra* note 21, at 6.

23. Article 102.8 of the Swiss Constitution states: "[The Federal Council] shall watch over the external interests of the Confederation particularly its international relations, and it shall be in charge of external affairs generally." Bundesverfassung [BV] art. 102.8, Costituzione federale [Cst] art. 102.8, Costituzione federale [COST. FED.] art. 102.8 (Switz.).

24. Glynn, *supra* note 12, at 97.

25. See C. PEDROSA, *IMELDA MARCOS 73-74* (1987) [hereinafter *IMELDA*].

26. Ferdinand and Imelda Marcos married exactly eleven days after they first met. Marcos was attracted to Imelda due to her highly respected family name, Romualdez (although she came from the poor branch), and her beauty. Marcos thought these two assets would be of good use in the political career he had ambitiously planned for him-

of several American presidents, who invariably praised them for being true allies in the Pacific—allies whose anti-communism was unquestionable.²⁷

However, many Filipinos thought differently. President Marcos was re-elected in 1969 for a second term,²⁸ but, by law, he had to look to 1973 as his last year in office.²⁹ During this second term, his opposition, especially the Liberal Party, became more vocal. They accused Marcos, the leader of the Nationalist Party, and his associates, of corruption, fraud, theft and extortion. On August 21, 1971, at a Liberal Party rally at the Plaza Miranda in the heart of Manila, fragmentation bombs were hurled from the crowd toward the speaker's platform. Many were killed and wounded.³⁰ That same night, President Marcos addressed the nation and accused the communists of this mysterious attack, a fact which forced him, he said, to suspend *habeas corpus* and to arrest political opponents as enemies of the state. A year later, in 1972, the Philippine Constitution itself was suspended. From that point on, Marcos continued his dictatorial reign under martial law (he issued his own constitution in 1973)³¹ until his ouster and flight to Ha-

self. *Id.* at 74-80.

27. As a former United States colony, as well as an important naval base in the Pacific, the Philippines occupied a special place with Americans, who were eager to maintain good relations. On the other hand, many Filipinos sought to sever ties, definitely and completely, from their former colonialists. See McManus, *Huge Stakes Led U.S. to Take Role in Key Asian Ally's Election*, L.A. Times, Feb. 7, 1986, at 28, col. 1.; see also Leahy, *Writing a New Chapter for the Philippines*, Christian Sci. Monitor, Jan. 20, 1986, at 1, col. 3.

28. See IMELDA, *supra* note 25, at 125. Although he was already embroiled in scandal by 1969, Marcos won the election by portraying himself as a nationalist and identifying his opponent with the unpopular cause of giving too much deference to the prior colonialist, the United States. Marcos was the first president of the Philippines to serve a second term. *Id.*

29. At that time, the Philippine Constitution limited presidents to two four-year terms. PHIL. CONST. of 1935, art. VII, § 5. The constitution of 1973, however, provided for a six-year term. PHIL. CONST. of 1973, art. VII, § 5. The present constitution limits presidents to one six-year term with no opportunity for re-election. PHIL. CONST. of 1986, art. VII, § 4.

30. *Returning Opposition Figure Hopes to Avoid Aquino's Fate*, L.A. Times, Jan. 6, 1985, at 4, col. 1. One of the speakers, Liberal Senator Jovito Salonga, miraculously survived. Suffering from over 100 shrapnel wounds, the loss of an eye, and the loss of hearing in one ear, Salonga paid a high price for his political courage. *Id.*

31. Marcos had long been playing with the idea of instituting martial law, which he saw as the only way to continue his presidency. Earlier he had tried to amend the constitution to open up the possibility of a third presidential term. He also had attempted, unsuccessfully, to promote Imelda for the presidency. See IMELDA, *supra* note 25, at 128. During martial law, many heads fell. Political opponents such as Senators Aquino and Salonga were first jailed, then exiled. Upon returning to Manila on Aug. 21, 1983, Aquino was gunned down while disembarking from the plane at the Manila airport. *Id.* at 135-

waii on February 25, 1986, following the election of Corazon Aquino as President by the People's Power.

During his years in office Marcos probably orchestrated one of the greatest thefts in history.³² Documents found in his bedroom safe in the abandoned Malacanang Palace and in his confiscated luggage upon arrival in the United States irrefutably established that the Marcoses smuggled vast amounts of money and other assets into Switzerland.³³ The first accounts (for which the Marcoses used pseudonyms)³⁴ were probably those they established with Credit Suisse in Zurich on March 20, 1968, less than thirty months after Marcos assumed the Presidency.³⁵ Subsequent accounts were opened with Swiss banks in the cantons of Zurich, Geneva, Fribourg, Lucerne and Lausanne. In addition, several Liechtenstein foundations³⁶ were created.³⁷

As President, Ferdinand Marcos created government monopolies for practically every commercial activity in the Philippines. There was the sugar monopoly, the coconut monopoly, the energy monopoly, the banana monopoly and many others. Trusted associates were put in

36, 196. This murder marked the beginning of the end of the Marcos regime.

32. In 1965, when former President Ferdinand Marcos took office, the Philippines led the ASEAN region in per capita income. Now, the Philippines have the lowest per capita income of any ASEAN nation. See *ASEAN Growth Slowed, But Region Offers Investment Opportunities, Speakers Say*, 3 Int'l Trade Rep. (BNA) 755 (June 4, 1986).

33. See *Azurin v. United States*, 632 F. Supp. 30 (Ct. Int'l Trade 1986). The Court of International Trade denied an attempt by Marcos's agents to release confiscated property at an Hawaiian airport. *Id.*

34. See *Progress Reported on Marcos's Swiss Money*, N.Y. Times, Oct. 12, 1986, at 6, col. 1. Mr. Marcos chose the pseudonym William Saunders and Mrs. Marcos chose the name Jane Ryan. The accounts were for \$950,000. *Frontline*, *supra* note 21, at 7.

35. Switzerland maintains named accounts and numbered accounts, both covered by banking secrecy laws. In a named account, cashiers and other bank employees have access to the agreement establishing the account and the signature card of the owner. In a numbered account, the identity of the owner is revealed to very few people. Although bank employees may know the existence of the account, all but one or two senior executives are ignorant of the owner's name. Fictitious names or dummy corporations can be used to obtain even greater secrecy. The purpose of numbered accounts is to guarantee owners a higher degree of secrecy, by shielding their identity from most of the bank's own employees. See I. WALTER, *supra* note 5, at 30-31. See also Meyer, *supra* note 1, at 28.

36. A Liechtenstein foundation provides almost absolute secrecy. The name of the beneficial owner (which may be an individual or a foreign corporation) appears only in the fiduciary agreement with a Liechtenstein lawyer, who protects the secrecy of his clients with his professional privilege. The foundation becomes a legal entity upon depositing the articles of foundation, which are not open to the public. The foundation is also exempt from publishing financial statements. See LIECHTENSTEIN: PERSONEN-UND GESELLSCHAFTRECHT [PGR] art. 552-570; see also I. WALTER *supra* note 5, at 33.

37. Such foundations can be created on a banker's desk in Switzerland. See generally I. WALTER, *supra* note 5; see also *supra* note 36.

charge, and in return they paid commissions to President Marcos.³⁸ No sugar, coconuts, bananas or other products could be bought or sold without the trustees' permission.³⁹ The same system was used for the granting of import, export and construction licenses.⁴⁰ Furthermore, evidence found in Palace Malacanang shows that similar arrangements were made in connection with the huge Japanese war reparations.⁴¹

There are also instances of direct transfers from the Philippine treasury of money earmarked for official purposes, such as the Intelligence Fund, to Marcos's personal secret bank accounts in Switzerland.⁴² There were even gold transports made directly from the Philippines to Switzerland. Some of these may even have continued after the Marcoses' downfall, causing the Swiss Banking Commission to be especially cautious of unusual transactions.⁴³ Finally, there were other ways the Marcoses enlarged their secret accounts.⁴⁴ Questions still remain,

38. *Frontline*, *supra* note 21, at 11. "The presidential papers itemize some of the 'donations.' In just three weeks, one business donated over a hundred thousand dollars." *Id.*

39. *Id.* at 10-11. For instance, the sugar monopoly was in the hands of Bobby Benedicto, a law school classmate of Marcos, who had helped Marcos arrange his affairs in Switzerland and Liechtenstein. *Id.*

40. In the North-South highway scam, for instance, President Marcos took a 15% cut. According to a study sponsored in 1968 by the Asia Society (which included ten American members), the monopolization of major industries and commodity production by friends of Marcos put the country behind other Asian countries that developed vibrant export sectors. See *Market Access More Important Than Aid to Philippines Economy, Study Group Reports*, 3 Int'l Trade Rep. (BNA) 549 (Apr. 23, 1986).

41. See *Frontline*, *supra* note 21, at 13. Japanese companies, funded by the Japanese government, undertook to rebuild roads, bridges and harbor installations that were destroyed during World War II. Part of the moneys earmarked for reconstruction was discreetly and continuously transferred by Japanese companies to secret, numbered bank accounts in Switzerland. In just one five-month period, kickbacks amounted to \$2.7 million. *Id.*

42. See *id.* at 12. As martial ruler, Mr. Marcos controlled the treasury single-handedly. Philippine banks, like the Development Bank, operated completely under his control. According to Eduardo Olaguer, Governor of the Development Bank, his bank had easily paid out \$3.5 million to Marcos groups for phony projects. *Id.*

43. *Marcos Bid to Stash Gold in Australia, Newspapers Report*, Associated Press, Mar. 5, 1986. It was reported that Qantas Airlines was asked by Philippine government officials, two days before the election that resulted in the end of the Marcos regime, to ship 10 tons of gold bullion to Sydney, Australia. *Id.*

44. For example, the Marcoses acquired several New York and California properties, the right to ownership of which is presently before the United States courts. Compare *Republic of the Phil. v. Marcos*, 806 F.2d 344 (2d Cir. 1986) with *Republic of the Phil. v. Marcos*, 818 F.2d 1473 (9th Cir. 1986). On essentially the same facts, the Second Circuit granted a preliminary injunction to freeze the New York properties subject to further litigation, while the Ninth Circuit denied such injunction concerning the California properties. The Ninth Circuit seemed concerned that it would be forced to litigate the

however, as to how much money was transferred and deposited by Marcos and his associates in Swiss banks, how much has since been taken out and to where, and how much money is still there. Although many have guessed—for example Philippine authorities have estimated a total illegal transfer of billions of dollars—definitive answers in the Marcos case will remain clouded until the Swiss lift their bank secrecy veil.⁴⁵

VI. THE FORTRESS OF SWISS BANKING SECRECY

The old Swiss bulwarks of bank secrecy, which are hiding the Marcos treasure behind their solid walls, are founded on: (1) privacy and tort law, (2) contract and agency law, and (3) criminal law. A newer wall was created by the criminal sanctions of the Federal Banking Law of 1934⁴⁶ and most recently by a loophole in the bankers' self-policing "Know Your Customer Agreement" of 1977.⁴⁷ Connected, these walls of Swiss bank secrecy form a mighty fortress.

A. *The First Wall: Privacy and Tort Law*

Privacy in financial matters enjoys high priority in Switzerland. Not only must lawyers, doctors and clergymen guard their clients' secrets, so too must bankers. Thus, Article 28 of the Civil Code (under the title "Protection of the Personality, Complaint for Injury") entitles an injured person to request an injunction.⁴⁸ Further protection of secrecy rights is derived from tort law. Article 41 of the Code of Obligations allows an individual to sue for damages for negligent or intentional injury caused by another, while under Article 49 of the same

actual title to the properties, which it considered outside its realm. It thus denied a preliminary injunction, arguing that the plaintiff was not likely to succeed on the merits. A "net worth" approach would fail, held the court, since many of the assets would be immune under the act of state and political question doctrines. The court also argued that the plaintiff would be unable to link the properties to specific illegal money. The Second Circuit downplayed the act of state doctrine, holding that: (1) the defendant had failed to prove that the challenged acts of Marcos were in fact *public* and not private acts; (2) Marcos was no longer the head of state; and (3) by initiating the litigation, the Philippines had weakened the doctrine's application. Litigation concerning title to the New York properties is taking place in Willemstad in the Netherland Antilles. See *Gevecht om Fortuin Marcos Speelt Zich Nu Af Op Antillen (Battle for Marcos Millions Now Rages in Antilles)*, Volkskrant, Sept. 30, 1987.

45. *Frontline*, *supra* note 21, at 27. "Some say they have five, others ten billion dollars. The presidential papers we have obtained suggest an absolute minimum of 2.1 billion dollars." *Id.*

46. See *supra* note 18.

47. See generally, Agreement, *supra* note 17, and accompanying text.

48. See Meyer, *supra* note 1, at 24 n.27.

Code, suit may be brought for damages or equitable relief for harm to an individual's personal affairs.⁴⁹

B. *The Second Wall: Contract and Agency Rights*

In addition to violating express contractual obligations, a banker who reveals secrets about his clients' bank accounts may be held liable for breach of implied contract because a duty to remain silent is implied by law.⁵⁰ Further, under agency law a banker owes his client a continuing duty of loyalty, giving rise to breach of fiduciary claims. Articles 397 and 398, respectively, of the Code of Obligations, set forth an agent's duty to follow directions received from his principal and his general obligation to faithfully and carefully carry out the services of the agency.⁵¹ A fiduciary duty thus arises and guarantees secrecy even before a contract has actually been concluded.

C. *The Third Wall: Criminal Law*

Banking secrecy is further protected by provisions of the criminal code. It is a crime to: (1) disclose a business secret to an official of a foreign government (Article 273), (2) reveal a business secret that a person has a legal or contractual obligation to protect (Article 162), or (3) disseminate confidential facts if disclosure would impair a client's resources (Article 159).⁵² The purpose of these provisions was to protect the Swiss economy more effectively against spying activities.⁵³ These provisions did not adequately protect bank secrecy during the banking crisis of the early thirties, however, creating a situation which gave rise to a federal criminal code.⁵⁴

D. *The Fourth Wall: The Federal Banking Law of 1934*

The fundamental wall of Swiss bank secrecy is the Federal Banking Law of 1934.⁵⁵ This comprehensive statute governing bank secrecy was enacted in the wake of two sensational historical events in the early thirties. During the depression of the thirties, there was first the collapse of the Banque d' Escompte Suisse of Geneva, which caused

49. *Id.*; see also Hurd, *Insider Trading and Foreign Bank Secrecy*, 24 AM. BUS. L.J. 25, 29 (1986).

50. See Note, *supra* note 6, at 117.

51. See Meyer, *supra* note 1, at 24 n.27.

52. See Hurd, *supra* note 49, at 28.

53. See Meyer, *supra* note 1, at 24 n.34.

54. *Id.* at n.30.

55. See *supra* note 18 and accompanying text.

nervous investors to plead for federal protection of deposits.⁵⁶ A second cry for protection came from German Jews, who sought a hiding place in Switzerland for themselves and their assets from Adolf Hitler and his Nazi regime. Not only did German exchange control laws impose the death penalty on illegal foreign transfer, but Berlin also sent Gestapo agents and Nazi investigators into Switzerland to trace and seize assets held in Swiss bank accounts by German Jews. Since some Swiss (in spite of possible criminal and civil sanctions) revealed Jewish bank deposits to the Gestapo, the privacy of the Swiss banking community and the confidence in the Swiss banking system was threatened.⁵⁷

The Swiss government, in response, enacted the Federal Banking Law of 1934. Article 47, the cornerstone of the Act, punishes illegal disclosures. The penalty for willful disclosures is a maximum fine of 50,000 Swiss francs, or up to six months in prison; for negligent disclosures the fine is a maximum of 30,000 Swiss francs.⁵⁸ The Banking Law, however, does not define bank secrecy or change existing obligations; it merely increases the penalty for illegal disclosure. The courts, therefore, must determine on a case-by-case basis whether the duty of secrecy has been breached. Unlike the remaining provisions of the Banking Law, which are enforced by federal officials, Article 47 violations fall within the jurisdiction of the cantons.⁵⁹

The Banking Law also created the Federal Banking Commission to supervise and implement the Banking Law. The functions of the Banking Commission include the duty to make regulations, to interpret the law, and to supervise auditing procedures and reorganizations. The Commission is elected by and under the direct control of the Federal Council.⁶⁰

56. See Meyer, *supra* note 1, at 25.

57. See Hurd, *supra* note 49, at 29.

58. Banking Law, *supra* note 18, art. 47(1)-(2). These subsections state that;

1. Anyone who, in his capacity as officer or executive, in his capacity as an employee, agent, as liquidator or trustee of the bank, as observer from the Bank Commission, or an officer or executive of an approved auditing firm, reveals any secret which was confided to him or which he learned in his capacity or employment, or anyone who incites others to violate the professional secret, will be punished by a maximum of 6 months imprisonment or by a fine not exceeding 50,000 francs.

2. If the offender has acted negligently, the punishment will be a fine not exceeding 30,000 francs.

Id.

59. See Meyer, *supra* note 1, at 27. Switzerland is a loose confederation of cantons and half cantons (twenty-six and one-half), with a relatively weak central government.

Id.

60. See Meyer, *supra* note 1, at 25. Once a weak institution, the Federal Banking Commission is now a watchdog organization in charge of supervising Swiss banking eth-

E. The Fifth Wall: The Dummy Paragraph of the "Know Your Customer Agreement"

In 1977, Swiss bankers attempted to put their house in order by establishing the self-policing good conduct code called the "Know Your Customer Agreement."⁶¹ The Swiss Bankers Association agreed therein to carefully examine a customer's identity in order to prevent assets from being invested in the Swiss banking system anonymously.⁶² However this voluntary agreement has one big loophole. Clients can conceal their identity by opening accounts through a Swiss lawyer or notary,⁶³ both of whom enjoy a professional duty of secrecy. When representing clients, lawyers need only sign a form (Form-B) in which they declare that they are familiar with the "economic beneficiary" and unaware of any inadmissible business within the meaning of the Agreement. This is the notorious Article 6 of the Agreement, known as the "dummy" or *Strohmann* paragraph.⁶⁴ The form thus allows lawyers or notaries to take responsibility for a customer's good standing,⁶⁵ and since profes-

ics. See Glynn, *supra* note 12, at 99.

61. See Agreement, *supra* note 17.

62. The agreement was captured in the Introduction, art. 1, Preamble, of the Agreement. *Id.*

63. Unlike in the United States, where notaries merely certify documents, notaries in civil law countries like Switzerland are highly trained, appointed officials, with numerous duties including the drafting of articles of incorporation, pre-nuptial agreements, real estate transfers, and the like.

64. Agreement, *supra* note 17, art. 6. Article 6 states:

- (1) Where a customer acts through a person domiciled or with a registered office in Switzerland who is bound by a legally protected professional secrecy, or who is a member of an association affiliated to the 'Schweizerische Treuhand-und Revisionskammer/Chambre Suisse des Societes fiduciaires et des Experts-comptables,' the bank must obtain from such a person on Form B a written declaration to the effect that the beneficial owner is known to him and no forbidden transaction within the meaning of this agreement is being concluded.
- (2) A written declaration is waived in the case of accounts and deposits of domestic and foreign banks.

Id.

65. Despite advice by the Banking Commission to restrict the use of Form-B, the Swiss Bankers Association refused to replace it. *Switzerland to Make Money Laundering a Crime and Curb Use of Bank Secrecy Form*, 177 *Doing Bus. In Europe (CCH)* 1, 19 (Mar. 19, 1987). Still, the 1987 Agreement added a new paragraph which provides some safeguards against the use of "dummy" lawyers. This new paragraph reads:

In this declaration, the person bound by professional confidentiality must confirm that he or she knows the beneficial owner and that, having displayed due diligence, he or she is not aware of any fact that might indicate that the beneficiary is abusing the right to banking secrecy, or, in particular, that the assets concerned are the fruit of any criminal activity. Further, said person must

sionals are shielded by their professional privilege, this responsibility poses few risks.⁶⁶ Meanwhile, depositors enjoy double protection. They are insulated by bank secrecy laws as well as by the lawyer's or notary's professional privilege.

Obviously, some bankers have been misusing this loophole by bringing in lawyers who are unfamiliar with their clients or unconcerned with where the money comes from, but who are nevertheless willing to sign Form-B for a fee.⁶⁷ Evidence found in the Malacanang Palace sustains this position. In a letter to President Marcos, a Swiss money manager instructed him to appoint a certain lawyer as the representative of one of his Liechtenstein foundations because "the independent lawyer can offer the additional secrecy of his professional privilege."⁶⁸

VII. CRACKS IN THE WALL

Cracks in the wall of secrecy result from: (1) the criminal law, (2) bilateral and multilateral agreements, and (3) the new Federal Law of Judicial Assistance in Criminal Matters (IMAC) of March 20, 1981,

confirm that he or she is acting in his/her professional capacity as attorney, notary, fiduciary, trustee or asset administrator, that such powers conferred upon him/her are not merely of a provisional nature, nor are they aimed primarily at concealing the name of the beneficial owner from the bank.

Id.

66. Article 321(1) of the Swiss Penal Code states:

Violation of Vocational Secrets:

1. Clergymen, attorneys, defenders, notaries public, secrecy bound auditor according to the Code of Obligations doctors, dentists, pharmacists, midwives, and their assisting personnel, who divulge a secret entrusted to them, or of which they have become aware in their professional capacity, shall, on petition, be punished by imprisonment or by a fine. Students who divulge a secret they have become aware of during their study are punished as well. The violation of a professional secrecy remains punishable even after termination of the exercise of the profession or after termination of the study.

Code penal suisse [C.P.] art. 321(1) (Switz.).

67. Although refusing to change Form-B, the Bankers Association agreed to set up a committee of independent observers to ensure (subject to a fine of 10 million Swiss Francs) that the secrecy is not to be used temporarily or merely to assure anonymity for ordinary bank clients. *Swiss Banking: Confidentiality of Financial Transactions in Switzerland Will Diminish Somewhat Later This Year*, BUS. INT'L, Mar. 30, 1987, at 103; see also the new paragraph cited at *supra* note 65. Further, new Form-B notes that the bank may disclose the attorney's name to a requesting state in judicial assistance procedures. See *Swiss Banking: Confidentiality of Financial Transactions in Switzerland Will Diminish Somewhat Later This Year*, *supra*.

68. Zanetti, *Liebe Excellenz*, SCHWEIZER ILLUSTRIERTE, Oct. 6, 1986, at 175.

which went into effect on January 1, 1983.⁶⁹

A. Criminal and Civil Proceedings

Generally, when called to testify in Swiss criminal cases, federal and most cantonal procedural laws prohibit bankers from invoking the secrecy privilege.⁷⁰ Thus, when asked under oath in criminal cases, bankers must reveal their clients' names and accounts.

Information sought by other countries, however, is only provided if the conduct is also considered criminal in Switzerland. For example, tax evasion (non-declaration of taxes) as opposed to tax fraud (falsifying of records) is not a crime in Switzerland.⁷¹ Also, insider trading, which the United States views as clearly unlawful, has not risen to a criminal offense in Switzerland as yet.⁷² Furthermore, even if "double criminality" exists, Switzerland cooperates with foreign investigations only when obligated to by an international treaty. Consequently, Swiss bank secrecy has rarely been lifted even in criminal cases.

B. Multilateral and Bilateral Treaties

Since treaties are a *sine qua non* for Swiss cooperation in foreign criminal matters, many countries have entered multilateral or bilateral treaties with Switzerland. Switzerland is a party to the European Convention on Mutual Assistance in Criminal Matters.⁷³ This Convention is a broad arrangement which covers extradition and the enforcement

69. Bundesgesetz über internationale Rechtshilfe in Strafsachen, Systematische Sammlung des Bundesrechts [SR] 351.1, AS 1982 846 (translation by Dr. Lionel Frei and H.P. Wyssman of the Federal Office for Police Matters (Berne), on file at the New York Law School Library) [hereinafter IMAC].

70. Honegger, *supra* note 2, at 6. Switzerland has federal criminal codes which apply uniformly in all cantons. Yet efforts to testify in court and furnish information to the government in criminal cases is not centrally regulated, but is subject to federal or cantonal jurisdiction. For example, Article 47 of the Banking Law provides that "federal and cantonal regulations concerning the obligations to testify and to furnish information to a governmental authority shall remain reserved." Banking Law, *supra* note 18, art. 47. The codes of civil procedure differ. Under the Federal Law of Civil Procedure, bankers must testify in civil cases; the cantons differ. Eight cantons uphold bank secrecy, eleven deny it, and the remainder leave the determination to the judge.

71. See Hurd, *supra* note 49, at 31 n.53.

72. See *Bill Clears Swiss Lower Chamber*, *supra* note 16. This may soon change, however. The Swiss government has also proposed criminalizing money laundering. See *Switzerland To Make Money Laundering A Crime and Curb Use of Bank Secrecy Form*, *supra* note 16.

73. SR 0.351.1, cited in Federal Office for Police Matters, IMAC Guidelines (1983) [hereinafter Guidelines].

of foreign judgments as well as giving assistance in criminal matters. On a more limited scope, Switzerland has concluded several bilateral agreements,⁷⁴ the most important of which is the Treaty on Mutual Assistance in Criminal Matters of January 23, 1977 with the United States.⁷⁵ With the Mutual Assistance Treaty the United States sought to lift Switzerland's bank secrecy laws, especially in cases where they were used to protect tax violations, insider trading and organized crime activities. Although this goal has not been fully accomplished, Switzerland and the United States are establishing an evolving working relationship.⁷⁶

C. IMAC

Since Switzerland was under no obligation to assist foreign investigations in the absence of a treaty, and even *with* a treaty the rules were not always clear, Switzerland unilaterally adopted the Federal Act on International Mutual Assistance in Criminal Matters on March, 20, 1981, effective January 1, 1983.⁷⁷ The purpose of this Act was to streamline Swiss cooperation with all nations in connection with a broad range of international criminal matters. For example, IMAC governs: (1) extradition of persons who are the subject of criminal prosecution, (2) assistance aimed at supporting criminal proceedings abroad, (3) the transfer of proceedings and the punishment of offenders, and (4) the execution of foreign criminal judgments.⁷⁸ Help under IMAC is conditioned upon whether the requesting state would offer reciprocity to Switzerland if Switzerland were to ask for similar assistance.⁷⁹

74. With West Germany (SR 0.351.913.61/62) and Austria (SR 0.351.916.32/321), for instance. See Guidelines, *supra* note 73, at 3. No such agreement exists with the Philippines.

75. Mutual Assistance in Criminal Matters, Jan. 23, 1977, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter Mutual Assistance Treaty]. Switzerland has enacted a law implementing that treaty (SR 351.93). Guidelines, *supra* note 73, at 2.

76. See *International Agreements*, *supra* note 16, at 439; see also Meyer, *supra* note 1, at 62; Honegger, *supra* note 2, at 13; Note, *The Recent Swiss-American Treaty to Render Mutual Assistance in Criminal Law Enforcement (an application of the Bank Secrecy Act): Panacea or Placebo?*, 7 N.Y.U. J. INT'L L. & POL'Y. 103 (1974).

77. See IMAC, *supra* note 69, and accompanying text.

78. See *id.* arts. 32-62, 63-84, 85-93, 74-108.

79. See *id.* art. 8(1). As a rule, a request shall be granted only if the requesting state guarantees reciprocity. The Federal Office for Police Matters of the Federal Department of Justice and Police (Federal Office) may require a guarantee of reciprocity if this is deemed necessary.

1. Principles and Scope

Assistance under IMAC is not a matter of right but rests within the discretion of the Swiss authorities.⁸⁰ In considering requests, Swiss authorities must take into account the sovereignty and security of the state⁸¹ and the effect that the requested assistance would have on the Swiss economy.⁸²

IMAC's section on assistance in criminal matters is probably the most important.⁸³ According to Article 63, that assistance may consist of the giving of information, aiding in litigation, or the returning of proceeds.⁸⁴ Article 74 additionally provides for the surrender of objects.⁸⁵ IMAC thus allows the lifting of bank secrecy as well as the return of the disclosed bank accounts' contents to the rightful owners.⁸⁶ A state may also ask, pursuant to Article 18, for the "freezing" of an account's assets pending further review of the request for assistance.⁸⁷

IMAC has retained the dual criminality rule. Assistance will thus be granted only if the type of crime committed abroad would also be a

80. *Id.* art. 1(4) ("This act shall confer no right to demand international cooperation.").

81. *Id.* art. 1(2) ("In the application of this act, the sovereignty, security, public order or similar interest of Switzerland shall be taken into account.").

82. *Id.* art. 10(2). Disclosure of manufacturing or business secrets in the sense of Article 273 of the Swiss Penal Code, or of facts which a bank must usually keep secret, shall not be allowed if it may be assumed to cause essential prejudice to the Swiss economy and does not appear justified in relation to the seriousness of the offense. *Id.*

83. *Id.* pt. 3 ("Other Acts of Assistance.").

84. *Id.* art. 63(1)-(2). Assistance within the meaning of this part shall comprise the transmission of information, as well as procedural and other official acts permitted under Swiss law, as far as these acts appear to be necessary for proceedings carried out abroad in criminal matters or serve to retrieve the proceeds of the offense. . . [a]cts of assistance shall include in particular: service of documents, obtaining of evidence, production of records or papers, search of persons or rooms, seizure, confrontation and transit of persons.

Id.

85. *Id.* art. 74. This article states that:

1. Upon request, objects, particularly documents and valuables whose seizure is permitted by Swiss law, as well as official records and decisions, shall be placed at the disposal of the authorities competent in criminal matters or for issuing or withdrawing driving licenses, as far as these objects may be of significance in their decision.
2. Other objects and valuables originating from an offense may be surrendered for the purpose of returning them to the entitled person even outside criminal proceedings in the requesting State.

Id.

86. IMAC has not yet established a precedent for the return of proceeds. *Id.*

87. *Id.* art. 18.

crime under Swiss law (albeit under a different name).⁸⁸ Further, assistance is limited to those criminal matters which can be appealed to a judge in the requesting state.⁸⁹

There are also limitations which may apply due to procedural defects or the nature of the offense. For example, if the foreign procedure violated basic human rights,⁹⁰ is a subterfuge for punishing an individual's political beliefs, associations, race, religion or nationality,⁹¹ or has other serious defects,⁹² assistance will be denied. Also, if the crime is of a political or fiscal nature, is in violation of military duty, or is directed against the national defense, IMAC denies cooperation.⁹³

2. Procedure

Requests for assistance must be submitted by persons authorized to investigate crimes or render certain decisions⁹⁴ and must be directed to the Federal Office of Police in Berne.⁹⁵ Article 28 prescribes the form and content of the request. The request must: (1) be in writing (in German, French or Italian),⁹⁶ (2) state its source, reason and sub-

88. *Id.* art. 64(1). Measures according to Article 63 which require the application of compulsory measures may be ordered only if the description of the relevant facts of the case shows that the offence prosecuted abroad contains the elements, other than intent or negligence, of an offence punishable according to Swiss law. They have to be carried out in accordance with Swiss law. *Id.*

89. "This act shall apply only to criminal matters in which an appeal to a judge can be made according to the law of the requesting state." *Id.* art. 1(3).

90. A request will not be granted if the proceeding: does not "meet the procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November, 1950. . . ." *Id.* art. 2(a).

91. A request will not be granted if the proceeding "is 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. . . ." *Id.* art. 2(b).

92. Assistance will be denied, for instance, if the foreign proceeding "could result in aggravating the situation of the person pursued for any of the reasons mentioned under letter b. . . [or if the proceeding]. . . is tainted with other grave defects." *Id.* art. 2(c)-(d).

93. *Id.* art. 3(1), (3). A request shall not be granted if the subject of the proceeding is an act which, according to the Swiss concept, has a predominantly political character, constitutes a violation of the obligation to perform military or similar service, or appears to be directed against the national defense or military strength of the requesting state. *Id.* art. 3(1). In addition, a request "shall not be granted if the subject of the proceeding is an offence which appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade or economic policy." *Id.* art. 3(3).

94. *Id.* art. 75(1) ("Requests for assistance may be submitted by authorities which are competent to investigate offences or to render decisions in other proceedings to which this act is applicable.").

95. *Id.* art. 27(2) ("Foreign requests shall be addressed directly to the Federal Office.").

96. *Id.* art. 28(1), (5). If a foreign request is not submitted in German, French or

ject matter,⁹⁷ (3) identify the accused,⁹⁸ and (4) contain sufficient supporting data.⁹⁹ Upon a finding that: (1) the requesting state grants reciprocity, (2) the request is proper as to form and content (incomplete requests may be supplemented leaving the freeze intact),¹⁰⁰ and (3) that assistance will not jeopardize Switzerland's sovereignty, security or economy, the Federal Police will send the request on to the appropriate cantonal authorities.¹⁰¹

The cantonal authorities must then decide whether to grant assistance,¹⁰² and in doing so they must consider the merit of the request¹⁰³ according to their own procedural rules.¹⁰⁴ If a request is deemed admissible, the judge may then order to continue the case and to seize the necessary documents.¹⁰⁵ The judge draws up an inventory of any such seized documents, and if the documents are subject to bank secrecy and the order is contested, the list will be put in safekeeping.¹⁰⁶

Italian, it must be accompanied "by a translation into one of these languages." *Id.* art. 28(5).

97. *Id.* art. 28(2). The request must contain "the office from which it emanates and if necessary, the authority having criminal jurisdiction. . . the subject matter of and the reason for the request. . . the legal qualification of the offence. . ." *Id.* art. 28(a)-(c).

98. *Id.* art. 28(2)(d). The request must contain "indications as exact and comprehensive as possible on the person being the target of the criminal proceeding." *Id.*

99. *Id.* art. 28(3). A request must also contain "a summary of the relevant facts, except in cases of requests for service of process. . . [and] the text of the regulations applicable at the place where the offence was committed." *Id.*

100. *Id.* art. 28(6). If a request does not meet the formal requirements, the Federal Office may demand its completion or correction. *Id.*

101. *Id.* arts. 77(1), 78(1). Requests must "be addressed to the appropriate cantonal authority through the intermediary of the Federal Office." *Id.* art. 77(1). The Federal Office, in turn, will determine whether "the request meets the formal requirements of this act and forward it to the appropriate cantonal authority unless assistance appears to be obviously inadmissible." *Id.* art. 78(1).

102. *Id.* art. 79(1). The cantonal authorities shall decide on the granting of assistance and on questions of interstate procedure unless a federal authority is exclusively competent to do so. *Id.*

103. *Id.* pt. 3, ch. 2, § 1, art. 79(2) ("Insofar direct contacts between the competent Swiss and foreign prosecuting authorities are agreed upon, they deal with the merits of the requests. . .").

104. *Id.* pt. 1, ch. 2, § 3, art. 12 ("If this act does not specify otherwise, the federal administrative authorities shall apply, by analogy, the Federal Act on Administrative Procedure and the cantonal authorities their own procedural rules. The procedure rules observed in criminal matters shall apply to acts of procedure.").

105. For a recent case on IMAC procedures, see Judgement of Feb. 4, 1987, BGE I, 10-11 [hereinafter Geneva Appellate Case]. If the request is deemed incomplete, the judge may ask for additional information or refuse the request (page numbers refer to an English translation available at the Office of N.Y.L. Sch. J. Int'l & Comp. L.).

106. Geneva Appellate Case, *supra* note 105, pt. II, No. 8(d)-(e), at 13; IMAC, *supra* note 69, pt. 3, ch. 1, 2, art. 83(2). "The documents of execution may be delivered to the

The judge must decide whether to communicate in full or in part those documents subject to secrecy.¹⁰⁷ Where the request concerns merely the transmission of seized documents the judge may order the case closed, decree that the documents be transmitted to the requesting state, and transfer the file to the Federal Office for Police Matters.¹⁰⁸ If further steps have to be taken the closing order must wait.¹⁰⁹

All orders must be in writing stating their grounds and that an appeal may be taken.¹¹⁰ Generally, appeals do not suspend the obligation to remit the seized documents to the judge; however, appeals against closing orders suspend the transmission of secret documents to a foreign state.¹¹¹ Both intermediate and closing orders by the highest cantonal authority may be appealed directly to the Federal Supreme Court.¹¹² Throughout the process, the Federal Banking Office coordinates the requests which are pending before several cantonal courts.¹¹³

requesting authority (a) if no appeals were made during the execution of the request; (b) if the check under paragraph 1 shows that neither secrets of third persons are affected nor that there are doubts regarding the granting of assistance." *Id.*

107. Geneva Appellate Case, *supra* note 105, pt. II, No. 8(f), at 14.

108. IMAC, *supra* note 69, pt. 3, ch. 1, § 2, art. 83(1), (2). These provisions state that:

(1) When the executing authority considers the assistance proceeding concluded, it shall forward the files to the competent cantonal or federal authority. This authority shall check whether the request has been executed correctly and, if necessary, return the files to the executing authority for completion. (2) The documents of execution may be delivered to the requesting authority (a) if no appeals were made during the execution of the request; (b) if the check under paragraph 1 shows that neither secrets of third persons are affected nor that there are doubts regarding the granting of assistance.

Id.

109. *Id.* pt. 3, ch. 1, § 2, art. 83(1).

110. *Id.* pt. 1, ch. 3, § 2, art. 22 ("(1) Decrees and decisions of federal and cantonal authorities shall be valid only if they provide with notice regarding legal remedies. (2) The notice regarding legal remedies must mention the appeal allowed, the court to which the appeal shall lie and the time for appealing.").

111. *Id.* pt. 1, ch. 3, § 2, art. 21(4) ("The appeal of a decree which grants. . .the release of information from the privacy has a suspensive effect. . .").

112. *Id.* pt. 1, ch. 3, § 2, art. 25(1). "Decrees of federal authorities of the first instance and of the highest cantonal appellate authorities shall be subject to administrative court appeal directly to the Federal (Supreme) Court in so far as this act does not otherwise stipulate." *Id.*

113. *Id.* pt. 3, ch. 2, § 2, art. 80 ("If the execution of a request necessitates investigations in several cantons, the Federal Office may charge the competent authority of one of these Cantons with directing the investigations."); *see also id.* pt. 1, ch. 3, § 2, art. 25(3) ("The Federal Office may file appeals of decrees of the highest cantonal appellate authorities. The cantonal authority is entitled to appeal against the refusal of the Federal Office to make a request.").

VIII. THE PHILIPPINE RESPONSE

Outraged for years by the dictatorial and excessive lifestyles of the Marcos family and their enclave, the new President, Corazon Aquino, upon taking office immediately took steps to recoup the Marcoses' illegally acquired assets.¹¹⁴

A. *Presidential Commission on Good Government*

On February 28, 1986, President Aquino created the Presidential Commission on Good Government (PCGG) to search for, investigate and return to the Philippine government the funds, moneys, assets and properties illegally acquired and misappropriated by Ferdinand and Imelda Marcos, their relatives, close business associates, subordinates, dummies, agents or nominees, whether in the Philippines or abroad.¹¹⁵ Mr. Jovito R. Salonga was appointed chairman.¹¹⁶

In addition, the Swiss Federal Banking Commission was also alerted. They were alerted once on March 4, 1986, when a large gold transport from the Philippines was spotted at the Swiss border, and again on March 21, 1986, when an agent of former President Marcos, outfitted with a valid power of attorney, attempted to withdraw all of Marcos's assets from a Zurich bank.¹¹⁷ This last event caused the Federal Council to issue a provisional freeze on the money Marcos had in the six banks under the Council's constitutional powers on March 24, 1986.¹¹⁸ On March 26, the Federal Banking Commission extended the freeze to all Swiss banks and to all Marcos-related accounts anywhere in Switzerland. At the same time the PCGG dispatched a representative to Switzerland and hired lawyers to follow up on the temporary, though unilateral,¹¹⁹ freeze by the Swiss authorities.¹²⁰

114. Although a certain level of bribery is tolerated as inevitable in the Philippines, it was the enormity of it which spearheaded the moral revulsion against an incredibly corrupt regime. See B. ROMULO, *INSIDE THE PALACE: THE RISE AND FALL OF FERDINAND & IMELDA MARCOS* 255 (1987).

115. Exec. Order No. 1 (Feb. 28, 1986); Exec. Order No. 2 (Mar. 12, 1986); Exec. Order No. 14 (May 7, 1986).

116. See Exec. Order No. 1 (Feb. 28, 1986).

117. See generally, *Frontline*, *supra* note 21.

118. See *supra* note 23; see also Judgement of July 1, 1987, BGE I, A 156/1987, pt. B, at 5 (page numbers refer to an English translation available at the Office of N.Y.L. Sch. J. Int'l & Comp. L.) [hereinafter Zurich Supreme Court Case].

119. The unprecedented freeze caused much concern among Swiss bankers, "who said they feared it could compromise Switzerland's reputation as a haven of banking secrecy." *Manila Pursuing Assets of Marcos in Switzerland*, N.Y. Times, Apr. 27, 1986, at 19, col. 3. This called for fast action on the part of the Philippine government. *Id.*

120. Author Hoets acted as a New York legal consultant for the Philippines, was instrumental in selecting "three Swiss lawyers from diverse linguistic backgrounds to

B. *The IMAC Request*

In the absence of a bilateral agreement with Switzerland, the Philippines sought help under IMAC. On April 18, 1986, the Embassy of the Philippines in Berne, under Article 28 of IMAC, applied to the Federal Police Office for judicial aid. The Philippines requested Switzerland to ascertain, freeze, disclose and return all the assets of Marcos and his agents. This request came on the strength of the initial request for assistance by the Solicitor General of the Philippines dated April 7, 1986. On April 25, 1986, the Philippine Embassy in Berne supplemented their earlier request with evidence obtained from the Palace Malacanang¹²¹ and a memorandum drafted by Swiss lawyers. These documents provided further evidence establishing the Marcoses' theft. By April 29, 1986, the Philippine Embassy indicated the intention of the Philippine government to file criminal and civil actions against the Marcos group with the Sandiganbayan, a special court for the trying of public officers and government employees on charges of corruption and graft.¹²²

handle their case," and assisted in administering the Philippines' IMAC request for assistance from the Swiss Federal Police. *See supra* note 119.

121. In the authors' opinion, many of the documents had already escaped the Marcoses' shredding machines.

122. President Marcos created the Sandiganbayan court by Decree No. 1606 in 1973, as amended by Decree No. 1860 of 1983, pursuant to art. XIII, § 5 of the Philippine Constitution of 1973. Section 5 states that:

Sec. 5. The National Assembly shall create a special court, to be known as Sandiganbayan, which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law.

PHIL. CONST. of 1973, art. XIII, § 5. On December 24, 1986, by Exec. Order No. 101, President Corazon Aquino amended this decree further by allowing court sessions to be held outside the Philippines:

Sec. 2. *Official Station: Place of Holding Sessions:* The Sandiganbayan shall have its principal office in the Metro Manila area and shall hold sessions thereat for the trial and determination of all cases filed with it irrespective of the place where they may have arisen; provided, however, that the Presiding Justice may authorize any division or divisions of the court to hold sessions and decide cases at any time and place outside Metro Manila, and where the interest of justice so requires, outside the territorial boundaries of the Philippines. The Sandiganbayan may require the services of personnel and use of the facilities of the courts or other government offices where any of the divisions is holding session, and the personnel of such courts or offices shall be subject to the orders of the Sandiganbayan.

Id. According to art. XIII, § 6 of the Philippine Constitution, only the Tandobayan (ombudsman) is empowered to bring charges before the Sandiganbayan. PHIL. CONST. art. XIII, § 6.

The Philippine government also guaranteed reciprocity, noting that seizure of bank accounts and other assets is authorized under Philippine law.¹²³ The "dual crimes" listed in the request were bribery, corruption, graft, theft, embezzlement, fraud, and unlawful abuse of special authority.¹²⁴

Subsequently, the Swiss Federal Police in Berne concluded that the request was complete and that Switzerland's sovereignty, security, public order or economic interests were not at stake.¹²⁵ On April 21, 1986, the Federal Police referred the request to the courts in those cantons whose banks were suspected of holding the Marcoses' accounts, that is, Zurich, Geneva, Fribourg, Lucerne and Lausanne.

C. *The Proceedings*

Following up on the Federal Police's request to decide on the material admissibility of the mutual assistance and prior to deciding what steps would ultimately be taken, the trial judges in the several cantons all continued the freeze. For example, on April 22, 1986, the investigating judge in Geneva ordered eight Geneva banks to freeze their Marcos-related assets for immediate seizure and asked the banks for all information on the accounts so seized.¹²⁶ This order was confirmed on June 6, 1986.¹²⁷

Immediately after its institution, an army of attorneys representing Marcos and other persons whose assets were affected by the freeze opposed the blocking of the accounts.¹²⁸ By letter of October 30, 1986,

123. IMAC, *supra* note 69, pt. 1, ch. 1, § 3, art. 8(1) ("As a rule, a request shall be granted only if the requesting State guarantees reciprocity. The Federal Office for Police Matters of the Federal Department of Justice and Police (Federal Office) may require a guarantee of reciprocity if this is deemed necessary.").

124. PHIL. PENAL CODE arts. 210-221; Anti-Graft and Corrupt Practices Act No. 3019, Nos. 3-6.

125. IMAC, *supra* note 69, pt. 1, ch. 1, § 1, art. 1(2) ("In the application of this act, the sovereignty, security, public order or similar essential interests of Switzerland shall be taken into account."); Zurich Supreme Court Case, *supra* note 118, pt. C, at 5.

126. Geneva Appellate Case, *supra* note 105, Statement of Facts, No. 3, at 2.

127. *Id.*, Statement of Facts, No. 6, at 4. The Court in Zurich also issued two orders. On May 29, 1986, the District Prosecutor's Office ordered all banks in Zurich to block the Marcoses' accounts and to hand over information and vouchers on those accounts dating to 1966. On Aug. 5, 1986, the same office stopped inspection of the files by the Marcoses' group beyond that granted under the Federal Law of 20.3. 1981 concerning Mutual Assistance in Criminal Matters (Legal Assistance Act), Bundesgesetz über Internationale Rechtshilfe in Strafsachen, SR 351.1, AS 1982, [IRSG] art. 79, para. 3, sentence 2; Zurich Supreme Court Case, *supra* note 118, pt. C, at 6; *see also supra* note 102.

128. *See* Judgement of July 1, 1987, BGE I, A 117/1987, A 123/1987, A 125/1987 (BGE I), pt. C, at 5 (page numbers refer to an English translation available at the Office of N.Y.L. Sch. J. Int'l & Comp. L.) [hereinafter Geneva Supreme Court Case]; *see also*

however, the investigating judge in Geneva informed the Marcoses' lawyers that he was maintaining the procedure over their objections. On November 10 and 12, 1986, the Marcos group appealed this order to the Geneva Chamber of Accusation. Rejecting the appeal on February 4, 1987, the Geneva Chamber of Accusation held that the order to ascertain and to freeze the Marcos accounts was properly taken.¹²⁹

Defendants then appealed directly to the Federal Supreme Court. Raising several procedural and substantive defenses, defendants asked the Supreme Court to annul the decision and to declare the request inadmissible or, alternatively, to remand the case for a cantonal ruling on admissibility.¹³⁰ A similar procedure was followed in the other cantons that were holding the Marcoses' frozen assets.¹³¹ All cases were heard jointly by the Federal Supreme Court on July 1, 1987.¹³²

No closing orders to inform the Philippine government about the accounts or to return the assets had been issued by any of the cantons at the time of the appeal. Thus, the only issue before the Federal Supreme Court was the propriety of the orders freezing the assets and asking for information.

1. Procedural Defenses

Procedurally, defendants argue that they have been denied due process of law. First, they claim the cantonal courts failed to state sufficient reasons and failed to apprise them of their right to appeal.¹³³ They also claim they have unjustly been denied access to the complete file.¹³⁴ Defendants also state the Federal Police Office unduly meddled with the proceedings and told the Philippine government more than they should have prior to a closing order.

Zurich Supreme Court Case, *supra* note 118, pt. C, at 6; IMAC, *supra* note 69, pt. 1, ch. 3, arts. 21(1) and 21(2) (“(1) The person pursued may retain counsel. . . (2) other persons who are affected by the measure of judicial assistance or who, as injured parties, are present enquiries. . .”).

129. See Geneva Appellate Case, *supra* note 105. The Appellate Court in Zurich (Public Prosecutor's Office) rejected the Marcoses' appeals on Feb. 17, 1987. See In Re Marcos, Judgement of Feb. 17, 1987 (page numbers refer to an English translation available at the Office of N.Y.L. Sch. J. Int'l & Comp. L.) [hereinafter Zurich Appellate Court Case].

130. Geneva Supreme Court Case, *supra* note 128, No. 3(d), at 10.

131. See, e.g., Zurich Supreme Court Case, *supra* note 118, pt. D, at 7.

132. Because the individual claims arose from the same set of facts, the Supreme Court grouped the several defendants together (Ferdinand E. Marcos, Imelda Marcos, Roberto S. Benedicto, and Ignacio Gimenez). See Geneva Supreme Court Case, *supra* note 128.

133. *Id.* No. 4, at 11.

134. *Id.*

Defendants further criticize the form of the request for mutual assistance. Arguing that under the Philippine Constitution the Tanodbayan (ombudsman) is the proper body to bring cases against government officials before the Sandiganbayan and not the public prosecutor, they claim the public prosecutor lacks authority to issue an IMAC request.¹³⁵ They also assert that the memorandum by Swiss counsel should not have been accepted and that the request is therefore no more than a fishing expedition.¹³⁶

At the outset, the Federal Supreme Court noted that the procedure was still in its initial stage in both Switzerland and the Philippines. In Switzerland, the cantonal courts had merely decided to go ahead with the procedure and to seize assets and documents under Article 19 of IMAC. An order closing or terminating the procedure and authorizing the transmitting of information, documents and assets to the Philippines under Articles 63 and 74 of IMAC was not in issue yet.¹³⁷ In the Philippines, too, criminal investigations leading to proceedings against Marcos were still only in the beginning stages.

In light of these facts, the court held that whatever the procedural flaws in the lower proceedings, the defendants were not prejudiced in their defense. For instance, despite a lack of succinct reasoning by the lower cantonal court and despite that court's failure to inform the defendants of their right to appeal, defendants did file a timely and proper appeal.¹³⁸ The court further notes that only those appeals which challenge a closing order to transmit data or assets to a requesting state operate as stays; this is not the case with an appeal from a provisional freezing order.¹³⁹ Otherwise, a freeze would have little effect.

135. Geneva Appellate Case, *supra* note 105, pt. III, No. 16, at 23-24; Geneva Supreme Court Case, *supra* note 128, No. 5(a), at 16-17; Zurich Supreme Court Case, *supra* note 118, No. 6(b), at 18.

136. Geneva Appellate Case, *supra* note 105, pt. III, No. 17, at 24-25; Geneva Supreme Court Case, *supra* note 128, No. 5, at 15; Zurich Supreme Court Case, *supra* note 118, No. 4, at 14.

137. Zurich Supreme Court Case, *supra* note 118, No. 2, at 10. The court held: In the present case the Federal Court has not to judge on the transmission of information nor on the delivery of objects or assets to the requesting State within the meaning of Art. 63 and 74 IRSG [IMAC]. The only matter to be decided here is the question of the fundamental admissibility of the legal aid applied for and of the provisional measures ordered on the basis of Art. 18 IRSG [IMAC] [blocking of accounts] and also of the order to take evidence [gathering of information].

Id.; see also Geneva Supreme Court Case, *supra* note 128, No. 2, at 8.

138. Geneva Supreme Court Case, *supra* note 128, No. 4(a), at 12.

139. IMAC, *supra* note 69, pt. 1, ch. 3, § 2, art. 21(4) (stating that "the appeal of a decree which grants extradition or the release of information from the privacy has a suspensive effect contrary to Article III paragraph 2 of the Act on the Organization of

The mere filing of an appeal would allow the targeted party to empty his accounts. This also provided another argument against the defendants' claim that they were prejudiced by the cantonal court's failure to inform them of their right to appeal. An earlier appeal would not have lifted the provisional freeze either.¹⁴⁰

In addition, the court also held the refusal to show all files and exhibits did not jeopardize the defense. Defendants were given all files essential to their appeal, and those not given were not mentioned in any of the decisions.¹⁴¹ The court did, however, mention that according to Article 79(3), the defendant may only be denied files when such a denial is necessary to protect the security of the Confederation or the cantons.¹⁴² Thus, defendants may have a right to review more or all files at a later stage of the proceedings. The court also noted that the Federal Police Office has supervisory as well as coordinating functions. The Federal Police Office may, as it has, call meetings of experts to coordinate the cantonal proceedings. Further, the Police Office has correctly informed the Philippines of the status of the proceedings, the claims, and the decisions. It did not disclose the contents of the accounts.¹⁴³

The Federal Supreme Court, when commenting on the challenged form of the request, noted that even though the authority to criminally charge government officials before the Sandiganbayan in the Philippines rests with the Tanodbayan,¹⁴⁴ Article 75(1) of IMAC allows requests for assistance to be made by those competent "to make pronouncements or make decisions."¹⁴⁵ This obviously includes, said the court, the public prosecutor. In addition, not all of those charged were government officials. Those defendants who were not government officials would be subject to criminal charges by the public prosecutor in the regular Philippine courts.¹⁴⁶

the Federal Administration of Justice.").

140. Geneva Supreme Court Case, *supra* note 128, No. 4(b), at 12-13.

141. *Id.* No. 4(c), at 14.

142. IMAC, *supra* note 69, pt. 3, ch. 2, § 1, art. 79(3) ("[A]rticles 6, 26 and 27 of the Federal Act on Administrative Procedure (SR 172.021) shall be applicable to the examination of records also in a cantonal proceeding. The entitled person may also examine the request for assistance and the accompanying documents as far as this is necessary for the safeguard of his interest. . ."); see also Geneva Supreme Court Case, *supra* note 128, No. 4(c), at 13-14.

143. Zurich Supreme Court Case, *supra* note 118, No. 4, at 14.

144. PHIL. CONST. art. XIII, § 6.

145. IMAC, *supra* note 69, pt. 3, ch. 2, § 1, art. 75(1) ("Requests for assistance may be submitted by authorities which are competent to investigate offences or to render decisions in other proceedings to which this act is applicable.").

146. Geneva Appellate Case, *supra* note 105, pt. III, No. 16, at 23-24.

Also, it is not crucial to an Article 1 IMAC request that a criminal case actually be pending.¹⁴⁷ All that is required for a valid request is that it involve a criminal case which may eventually be brought before a judge.¹⁴⁸ The court supported such an argument by Article 11(1) of IMAC, which includes "any persons suspected" in the definition of persons pursuable under IMAC.¹⁴⁹ Thus, the court concluded that the public prosecutor was entitled to make a preliminary request for assistance against the defendants.¹⁵⁰

The court refuted the defendants' argument on the inadmissibility of the Swiss lawyers' memorandum. Generally, legal assistance is considered a basic right and may be denied sparingly.¹⁵¹ Also the lawyers' memorandum was "an expression of the opinion of the authorities" of the Philippines.¹⁵² Further, because the Philippines are not otherwise represented, the lawyers' presence did not raise defendants' costs.¹⁵³ The Federal Supreme Court finally rejected defendants' claim that the request was a mere fishing expedition. According to the court, assistance in unfolding the facts is particularly important in the build-up phase of a case; therefore, a holding that the state was collecting evidence at random should not be made lightly.¹⁵⁴

2. Substantive Defenses

Defendants raised several substantive defenses, the most important of which was the assertion that assistance should be denied since no criminal prosecution had yet been instituted in the Philippines. In response, the court first noted that Article 1(2) IMAC requests are indeed limited to "criminal matters"¹⁵⁵ and that the PCGG, an adminis-

147. Zurich Supreme Court Case, *supra* note 118, No. 6(b), at 19; Geneva Supreme Court Case, *supra* note 128, No. 5(a), at 15-16. For example, the Geneva Supreme Court noted that an American Securities and Exchange Commission investigation warrants a request for aid under the Swiss-American Treaty. *Id.*

148. IMAC, *supra* note 69, pt. 1, ch. 1, § 1, art. 1 (3) ("This act shall apply only to criminal matters in which an appeal to a judge can be made according to the law of the requesting state.").

149. *Id.* pt. 1, ch. 1, § 1, art. 11 (1) ("A person pursued within the meaning of this act is any person suspected, under investigation, or affected by a sanction.").

150. Geneva Supreme Court Case, *supra* note 128, No. 5(a), at 15-18.

151. See Geneva Appellate Case, *supra* note 105, pt. III, No. 17, at 25. (citing in support the Vienna Convention on Diplomatic Relations of Apr. 18, 1961 (RS 0.191.01)).

152. Zurich Supreme Court Case, *supra* note 118, No. 5(a), at 15. The memorandum was handed in by the Embassy of the Philippines as a supplement to the initial request of the Solicitor General of Apr. 7, 1986, which was already sufficient in itself.

153. Geneva Supreme Court Case, *supra* note 128, No. 5(b), at 18.

154. *Id.* No. 5(c), at 18-19.

155. *Id.* No. 5(a), at 16.

trative body not authorized to bring criminal charges before the Sandiganbayan or other criminal courts,¹⁵⁶ was not within the purview of the IMAC limitation. The court thus agreed with the defendants that no criminal case had yet been brought. The court goes on, however, to hold that an IMAC request and an initial response are proper as long as they involve future criminal proceedings in the requesting state. Here the Philippines had stated their intention of bringing Marcos before the Sandiganbayan on several occasions and the documents left no doubt that criminal theft was at issue.¹⁵⁷ Consequently, the request as well as the orders to freeze and seize were on solid legal grounds.¹⁵⁸

The court limited its review, however, to the provisional orders under Article 18 of IMAC.¹⁵⁹ It did not rule on the requirements for the communicating of information or for the delivering of objects under Articles 63 and 74 of IMAC.¹⁶⁰ For example, the Geneva Appellate Court stated that it did not "prejudge in any way" what should be done when the time came to transmit information and assets to the Philippines.¹⁶¹

Whether actual criminal charges in the Philippines against Marcos are necessary before Switzerland will disclose the amounts of the accounts and return their contents remains unclear. The Geneva Supreme Court did not answer this question explicitly, while the Zurich Supreme Court clearly stated that the making available of information would be conditioned on the "actual existence" of criminal proceedings.¹⁶²

A further substantive argument for denying the request for assistance was that a fair Marcos trial in the Philippines would not be forthcoming, as is required by Article 2 of IMAC and by the European

156. *Id.* No. 5(a), at 17.

157. *Id.* No. 5(a), at 16-18; Zurich Supreme Court Case, *supra* note 118, No. 6(b), at 19-20.

158. Geneva Supreme Court Case, *supra* note 128, No. 5(a), at 17-18.

159. IMAC, *supra* note 69, pt. 1, ch. 3, § 1, art. 18 ("Upon express request by another State, provisional measures may be taken to preserve the existing situation, to safeguard threatened legal interest or to protect jeopardized evidence if the proceeding according to this act does not appear obviously inadmissible or inappropriate. . . .").

160. Geneva Supreme Court Case, *supra* note 128, No. 2, at 8; Zurich Supreme Court Case, *supra* note 118, No. 6(b), at 20.

161. Geneva Appellate Case, *supra* note 105, pt. IV, No. 22, at 30.

162. Zurich Supreme Court Case, *supra* note 118, No. 6(b), at 20 ("[G]ranting judicial assistance and making available the information obtained would be conditioned by the actual existence of criminal proceedings before the Sandiganbayan."). The court added that "[w]hen transmitting documents to the requesting State it would then be required (possibly by formulating a corresponding reservation or by obtaining previously adequate assurances) to make sure that the information obtained may not be used by the PCGG (cf. Judgement of the Federal Court BGE 109 Ib 334/335 C. 15(a))." *Id.*

Convention to Safeguard Human Rights and Fundamental Liberties.¹⁶³ Marcos claimed that he was not permitted to return to the Philippines, and even if he could go, a free choice of defense counsel would be denied to him. He claimed that the Sandiganbayan was not an impartial court since it was subject to the new President, who had already replaced several of the justices.¹⁶⁴ The court responded that an "objective and serious risk of a tainted procedure" in the sense of Article 2 of IMAC had not been demonstrated,¹⁶⁵ and further, this issue did not have to be decided before a final closing order could be issued to transmit data and assets to the Philippines.¹⁶⁶ When and if that time came, the court could require guarantees to protect the Marcoses' human rights.¹⁶⁷

Marcos finally pleaded governmental immunity. Here the court replied that such immunity applies only to the acts of acting chiefs of state and not to private acts.¹⁶⁸ The court added that the immunity defense can only properly be raised before a Philippine court which decided the case on its merits.¹⁶⁹ The Swiss mutual assistance proceedings are merely accessory to a foreign legal process.¹⁷⁰

IX. CONCLUSION

Switzerland has clearly shown its willingness to aid the Philippines in the recovery of the Marcos millions hidden in Swiss bank accounts. Generally, such a recovery process passes through several stages. In the initial stage, the accounts are frozen while the Swiss authorities internally explore their contents. In the next stage, data concerning the accounts are transmitted to the requesting state. In the last stage, Switzerland returns the money. Thus far, the Marcos accounts have been frozen since March 25, 1986, when the Swiss Council unilaterally—an

163. Geneva Supreme Court Case, *supra* note 128, No. 6, at 19 (citing the European Convention to Safeguard Human Rights and Fundamental Liberties, Nov. 4, 1950); Zurich Supreme Court Case, *supra* note 118, No. 7(a), at 21.

164. Geneva Supreme Court Case, *supra* note 128, No. 6, at 20; Zurich Supreme Court Case, *supra* note 118, No. 7(b), at 22.

165. Geneva Supreme Court Case, *supra* note 128, No. 6, at 21.

166. *Id.* The Geneva Appellate Court added to this point that Switzerland should avoid through "over-scrupulousness allowing an ill-gotten fortune" to remain in Marcos and his family possessions, simply because he had acted during his public office. Geneva Appellate Court Case, *supra* note 105, pt. IV, No. 26, at 34. See also Zurich Supreme Court Case, *supra* note 118, No. 7(b), at 23-24.

167. Zurich Supreme Court Case, *supra* note 118, No. 7(b), at 24.

168. Geneva Supreme Court Case, *supra* note 128, No. 7, at 21-22.

169. *Id.* No. 7, at 22.

170. Zurich Supreme Court Case, *supra* note 118, No. 8, at 24-25.

act unheard of before—ordered the freeze. Since then, the freeze has been confirmed by the respective cantonal courts and the Federal Supreme Court following the official request for assistance by the Philippines on April 7, 1986. Meanwhile, the banks involved have notified the Swiss authorities of the contents of the frozen accounts. In the wake of the Supreme Court decision of July 1, 1987, the Philippines have filed a civil case before the Sandiganbayan in July, 1987.¹⁷¹

Presently at stake is the transmission of the data to the Philippines and the return of the money. Here the parties face a new round of litigation before the cantonal and federal courts. A first problem is the necessity of bringing criminal charges against Marcos. Swiss foreign judicial assistance appears to be limited to "criminal" matters, and presently, the PCGG is merely an administrative body, unauthorized to bring criminal cases. In addition, the question remains whether the Philippines will be able to bring such a claim before the Sandiganbayan or their regular criminal courts.

The country is still in turmoil, which can be expected after twenty years of Marcos' presidency, mismanagement and dictatorship.¹⁷² However, the recently completed election of more than 16,000 local officials throughout the country is a hallmark that the days of the dictatorship are fading and that a truly viable democracy as envisioned by the late President Aquino is emerging from the chaos. Also, with respect to Marcos's lawyers' argument that it is questionable whether their client can expect a fair trial in the Philippines, the Court of Appeals of Zurich has indicated loudly and clearly that a fair criminal proceeding by the present independent judiciary should be possible.

One thing all Philippine factions agree on is that "Marcos raped the Nation."¹⁷³ On the Swiss side, the feeling exists that justice should not be obstructed because of technical difficulties.

Solutions have been offered. The Philippines could perhaps bestow the PCGG with criminal powers, or Marcos could be tried *in absentia* like the accused in the Nuremberg Trials of 1946 (a principle of penal procedure recognized and accepted in Switzerland as it is in most European countries).¹⁷⁴ The court of Appeals of Zurich has said "a fair criminal proceeding should be possible, even when the accused is not

171. See *Aquino Needs a New Miracle*, FORTUNE, Sept. 14, 1987, at 90.

172. See generally *Praying for Time: As Intrigue and Chaos Grow, Can Cory Be Saved?* TIME, Nov. 23, 1987 at 36; *Manila's Mood: As Terrorism Spreads in Philippines, Mrs. Aquino's Presidency Seems to Be in Jeopardy*, Wall St. J., Oct. 29, 1987, at 1, 21, col. 1; *President Aquino Risks Frittering Away Philippine Democracy*, Wall St. J., Sept. 28, 1987, at 33, col. 1.

173. *Aquino Needs a New Miracle*, *supra* note 171, at 90.

174. N. HARRIS, TYRANNY ON TRIAL, at 477 (1953).

present” and “judicial assistance cannot be denied until the accused can return to the Philippines; the criminal proceedings can also take place without them.”¹⁷⁵

Finally, the Sandiganbayan could perhaps arraign and indict Marcos outside the boundaries of the Philippines. According to a recent presidential decree, the Sandiganbayan may hold sessions outside the Philippines if the interests of justice so require.¹⁷⁶ In fact, such a session could be held in the United States, provided such a procedure met with the approval of the United States Government.

The Marcos case remains viable. Hope exists that the Philippines will criminally charge Marcos somehow, somewhere, and that the Swiss courts will, as long as Marcos is guaranteed a fair trial, accept a flexible and broad interpretation of the Philippine penal procedures. The Swiss bank accounts belong neither to Marcos nor to Switzerland; they belong to the Filipino people who should regain that which is rightfully theirs.

175. Zurich Appellate Court Case, *supra* note 129, at 23.

176. Exec. Order No. 101 (Dec. 24, 1986).

