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The Abacha Case*

I. Introduction

This Chapter attempts to illustrate how creative solutions were found to identify, freeze and repatriate the proceeds of crimes of the family and associates of General Sani Abacha. It is based on my experience, since September 1999, as the Federal Republic of Nigeria's attorney in the proceedings brought in ten jurisdictions (with the exception of civil proceedings in the United Kingdom) against members of the family of the late General Sani Abacha and their associates.

As is well known, the main weakness of mutual assistance in penal matters as a tool for asset tracing and recovery is its slowness. Even in the most co-operative jurisdictions, it usually takes at least one year until the documentary evidence relating to transfers of proceeds of crimes is transmitted to the requesting authority. In most cases, it is then too late to trace the assets to other jurisdictions in time to freeze them.

As for civil proceedings, these are usually hampered by their high cost, the obstacles of banking secrecy in several jurisdictions and the fact that, very often, the information obtained cannot be freely used before other jurisdictions.

In the Abacha case, the Federal Government of Nigeria used a combination of sending requests for mutual assistance and lodging criminal complaints for money laundering in jurisdictions where assets of the Abacha criminal organisation had been identified or were suspected to be.

This strategy resulted in the freezing of about USD 2 billion in ten jurisdictions, of which to date, USD 1.2 billion has been recovered by Nigeria through mutual assistance, forfeiture or settlements.

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II. The Abacha regime

With a population of approximately 140 million inhabitants, Nigeria is the most populous country of Africa. Since 1966, Nigeria's history has been marked by a series of military dictatorships.

On 17 November 1993, General Sani Abacha, Minister of Defence and Chief of Army Staff since 1985, took power through a coup. Systematic violations of human rights, complacency towards drug trafficking and systematic corruption at all levels, isolated Nigeria from the international community. Nigeria was notably excluded from the Commonwealth on 8 November 1995, following the hanging of eight opposition members, among whom the activist Ken Saro-Wiva.

Nigeria had long been plagued by corruption, but under General Sani Abacha, corrupt practices became blatant and systematic. Funds were removed in cash from the Central Bank, sometimes by the truck-load, and taken out of the country by members of the Abacha family and their associates. Inflated public contracts were also awarded to members of the Abacha family and/or their associates. Although many were aware at the time of the exceptional level of corruption of the Abacha regime,¹ the full extent of the practice and the *modus operandi* of those crimes were only revealed to the general public after the end of the dictatorship and the investigations that followed.

III. The return to democracy

General Sani Abacha died of a heart attack on 8 June 1998. He was replaced by General Abdulsalami Abubakar, Minister of Defence, who became Head of State and constituted a transitory Government.

1 See for example James Rupert, *Corruption Flourished in Abacha's Regime*, Washington Post, 9 June 1998 (<http://www.washingtonpost.com/wp-srv/inatl/longterm/nigeria/stories/corrupt060998.htm>).

Political prisoners were set free and a calendar for elections was announced. A new constitution was adopted, which came into force on 29 May 1999.

The presidential elections of 27 February 1999 saw the victory of Mr Olusegun Obasanjo, candidate of the People's Democratic Party, a multi-ethnic party mainly bringing together former opponents of the regime of General Sani Abacha. In 1979, Olusegun Obasanjo had been the first military head of state to return power to civilians. Between 1993 and 1995, Olusegun Obasanjo, who had retired from the army and was notably the Chair of the Advisory Committee of Transparency International, had been one of the fiercest opponents of General Abacha's dictatorship, and had been jailed from 1995 to 1998.

Olusegun Obasanjo took office on 29 May 1999. He was re-elected for a second four-year term which began in May 2003 and ended on 26 May 2007, when he was succeeded by Umaru Musa Yar'Adua.

IV. The Nigerian investigation and criminal proceedings

Following the death of General Sani Abacha, newspaper articles reported allegations of his plundering of the Central Bank of Nigeria's foreign reserves and the systematic corruption that prevailed during his regime. The public began to demand that these allegations be investigated.

On 23 July 1998, the Abubakar Government set up a Special Investigation Panel (SIP) with the task of investigating the looting and corruption that took place during the Abacha Government. The Chairman of the SIP was (and still is) Deputy Commissioner Peter Gana, of the Special Fraud Unit of the Nigerian Police Force.

The SIP published a preliminary report in November 1998, which focused on the crimes for which evidence could be found in Nigeria, notably the systematic pillage of the Central Bank of Nigeria. The report described the following *modus operandi*: General Sani Abacha

directed Ismaila Gwarzo, his National Security Adviser, to present him with false funding requests for security operations or equipment, which he had the power to authorise. For the most part, the funds were directly remitted in cash (USD 1,131 million and GBP 413 million) or in travellers' cheques (USD 50 million and GBP 3.5 million) by the Central Bank of Nigeria to Ismaila Gwarzo, who then had most of the funds taken to General Sani Abacha's house. From there they were taken by his oldest son, Mohammed Abacha, and laundered through Nigerian banks or by Nigerian or foreign businessmen to offshore accounts belonging to Mohammed Abacha, Abba Abacha, Abdulkadir Abacha and Abubakar Bagudu. In a limited number of cases (thirty-six transfers, totalling USD 386 million), the monies were transferred directly from the Central Bank of Nigeria by wire to bank accounts abroad, held by offshore companies belonging either to members of the Abacha criminal organisation or to Nigerian or foreign businessmen, who then remitted the same sums to members of the organisation. At least USD 1,491 million and GBP 416 million had thus been found by the SIP to have been embezzled by the Abacha criminal organisation.

During the first stages of the SIP investigation, a large quantity of assets and cash was seized in Nigeria or returned to the Nigerian authorities. Other illegally acquired assets were also identified.

In order to give a legal basis to the forfeiture of these assets, among the final acts of his mandate, General Abdulsalami Abubakar issued the Forfeiture of Assets, Etc (certain Persons) Decree No. 53 of 26 May 1999.

This decree ordered the return to the Federal Republic of Nigeria of real property and movable assets, as well as cash, that had been acquired and held illegally by General Sani Abacha, certain members of his government (notably Ismaila Gwarzo, National Security Adviser, Anthony A. Ani, Minister of Finance and Bashir Dalhatu, Minister of Power and Steel), certain members of his family (notably Mohammed Sani Abacha, General Sani Abacha's eldest son and the latter's brother, Abdulkadir Abacha), and other third parties (Abubakar Bagudu and Abdulazeez Arisekola Alao).

More than USD 800 million was thus returned to Nigeria as a result of this measure, of which USD 635 million and GBP 75 million by Mohammed Abacha, Abba Abacha and Abubakar Bagudu.

These restitutions have no bearing whatsoever on the criminal liability of the authors of the offences. Decree No. 53 of 26 May 1999 did not put an end to the police investigation, which has continued and unearthed additional evidence, allowing the Nigerian investigators to identify other criminal offences and their beneficiaries, as well as obtain additional returns of funds. However, no evidence whatsoever of corruption could be found in Nigeria, although it was well known that General Sani Abacha, in exchange for granting his approval for contracts of over USD 50,000, was taking bribes, representing up to forty per cent of the contract price. This proved to be due to the fact that all corrupt payments were made from offshore bank accounts of the contractors to offshore bank accounts of members of the Abacha criminal organisation.

On 23 December 1998, a Letter Rogatory was sent to Switzerland and Belgium based on the evidence obtained by the SIP. There was no response.

On 18 September 2000, on the basis of evidence gathered in Nigeria, the Attorney-General of Nigeria filed 115 counts of charges of receiving stolen property (Article 317 and 319 Penal Code Law) at the High Court of the Federal Capital Territory, Abuja, against Mohammed Sani Abacha and Abubakar Bagudu. On 22 February 2001, the Attorney-General of Nigeria filed sixty-eight counts of additional charges at the High Court of the Federal Capital Territory, Abuja, against Mohammed Abacha and Abba Abacha, the two oldest surviving sons of the late General Sani Abacha.

The Nigerian criminal proceedings are currently stalled by objections and appeals lodged by Mohammed Abacha. In an 18 April 2005 ruling, the Abuja Court of Appeal found that Mohamed Abacha could not claim any immunity from prosecution based on Decree No. 53 of 26 May 1999, nor on the basis of 'sovereign immunity' that his father allegedly enjoyed. An appeal is still pending before the Supreme Court of Nigeria.

V. Civil proceedings in the United Kingdom

When it assumed power in May 1999, the Obasanjo Government had misgivings regarding the possibility of obtaining assistance from Western authorities to trace and recover the assets that had been embezzled or corruptly received by the Abacha criminal organisation.

In July 1999, the Federal Republic of Nigeria commenced an action before the London High Court against Mohammed Abacha, Abubakar Bagudu and their companies regarding the Ajaokuta Steel Plant debt buy-back fraud. This action concerned the buy-back in 1996 by the Abacha Government of bills of exchange relating to the building of the Ajaokuta Steel Plant owed to a Russian company for DEM 986 million, which had resulted in a fraudulent profit of over DEM 490 million for the Abacha criminal organisation. In March 1999, Compagnie Noga d'Importation et d'Exportation SA, a Geneva-based company, had lodged its own action against the same defendants, claiming that it had been assigned the Nigerian bills of exchange in 1992. Worldwide Mareva injunctions were ordered, and Mohammed Abacha and Abubakar Bagudu were ordered to disclose their worldwide assets, which they claimed to amount to USD 420 million.

Settlement negotiations took place in July and August 1999, and the Federal Government of Nigeria, unaware that it could identify, freeze and recover assets other than those that had been disclosed by Mohammed Abacha and Abubakar Bagudu in the context of the London High Court proceedings, agreed to settle its claims for DEM 300 million. In September 1999, a mini trial began, the purpose of which was to determine which of three settlement documents was binding. The Nigerian Government's position was that it had only settled its claims deriving from the Ajaokuta debt buy-back, whereas Mohammed Abacha and Abubakar Bagudu claimed that all claims against them and their associates had been settled. On 27 February 2001, following a six month trial, Lord Justice Rix handed down a judgment in favour of the Federal Republic of Nigeria, which was implemented in December 2001 with the payment of DEM 300 million, plus costs. The fact that the Federal Republic of Nigeria could demonstrate, thanks to the results of criminal proceedings and mutual assistance

proceedings initiated in other jurisdictions, that Mohammed Sani Abacha and his associates had grossly breached their duty of disclosure, notably by failing to disclose USD 600 million in Switzerland, USD 630 million in Luxembourg and USD 200 million in Liechtenstein, was instrumental to this result.

In July 2001, new civil proceedings were commenced before the High Court of London, in connection with the plundering of the Central Bank of Nigeria, but these have not allowed making any additional recovery.

VI. The lodging of a Letter Rogatory and a criminal complaint in Switzerland

As mentioned above, the Obasanjo Government did not believe it could obtain assistance from Western authorities to trace and recover the assets that had been embezzled or corruptly received by the Abacha criminal organisation.

Nevertheless, in September 1999, the Obasanjo Government agreed to retain a law firm in Switzerland, which, after the United Kingdom, was the jurisdiction where most of the transfers of the funds embezzled from the Central Bank had been identified (USD 75 million).

On 30 September 1999, an upcoming Letter Rogatory from the Attorney-General of Nigeria was announced to the Swiss Federal Office of Police, who was requested to issue interim freezing orders.

The said freezing orders, directed at five banks, were granted on 13 October 1999 and the following day, the Federal Office of Police issued a press release² announcing that Nigeria had three months to present a formal request for mutual assistance. The said request, dated 20 December 1999, was sent to Switzerland through the diplomatic

² Press release FDJP http://www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/1999/ref_1999-10-14.html

channel and was declared admissible by the Federal Office of Police on 20 January 2000, which confirmed the freezing orders, which concerned USD 80 million.

Due to the existence of appeals and the obligation of secrecy of the Swiss authorities handling the request for mutual assistance, no proper interaction between the Nigerian and Swiss investigators could take place, while it was urgent to identify other assets in Switzerland and trace the funds that might have been transferred in other jurisdictions. Consequently, on 24 November 1999, a criminal complaint was lodged by the Federal Republic of Nigeria before the Attorney-General of Geneva in respect of the criminal offences that were within the jurisdiction of Swiss criminal courts because they had taken place or their result had occurred in Switzerland in accordance with Articles 3 and 7 of the Swiss Penal Code (SPC): breach of trust;³ fraud;⁴ extortion;⁵ unfaithful management;⁶ concealment;⁷ participation in a criminal organisation;⁸ money laundering;⁹ and lack of due diligence in financial matters.¹⁰

Although there was no precedent in qualifying a head of state, his family and members of government as a criminal organisation, this qualification was essential to the success of the Swiss criminal and mutual assistance proceedings, for two reasons.

Firstly, pursuant to Article 260^{ter} Paragraph 3 of the Swiss Penal Code,¹¹ the Swiss authorities had jurisdiction to investigate and prose-

3 Article 138 SPC.

4 Article 146 SPC.

5 Article 156 SPC.

6 Article 158 SPC.

7 Article 160 SPC.

8 Article 260^{ter} SPC.

9 Article 305^{bis} SPC.

10 Article 305^{ter} SPC.

11 Article 260 ter SPC: '1. Whoever participates in an organisation that keeps its structure and personal composition secret and pursues the purpose of committing violent crimes or enriching itself by criminal means, whoever supports such organisation in its criminal activity, shall be sentenced to the penitentiary for up to five years or imprisonment. 2. The judge may, at his discretion, alleviate the punishment if the offender endeavours to prevent further criminal activity of the organisation. 3. The offender shall be also punishable if he committed the crime abroad, provided the organisation carries out, or intends to carry out, its criminal activity fully or partially in Switzerland Article 3, cipher 1, paragraph 2 shall apply'.

cute all members of the Abacha criminal organisation, even if they had not set foot in the country, on the sole basis that the organisation's criminal activity had partially taken place in Switzerland.

Secondly, and more importantly, pursuant to Article 59 cipher 3 of the Swiss Penal Code,¹² the qualification as a criminal organisation would result, for the persons who has participated in or supported it, in reversing the burden of the proof, as they would have the onus of proving the lack of connection between the assets subject to confiscation and the criminal organisation, as was confirmed by the Swiss Supreme Court on 7 February 2005.¹³

Furthermore, as the victim of the crimes denounced in the complaint, the Federal Republic of Nigeria asked to be granted the status of party suing for damages (*partie civile*) in the criminal proceedings in order to be able to actively participate in the investigation.

The criminal complaint was immediately admitted by the then Attorney-General of Geneva, Bernard Bertossa, and the investigation entrusted to Examining Magistrate George Zecchin, who granted party status to the Federal Republic of Nigeria on 3 December 1999.

The Federal Republic of Nigeria also requested a blanket disclosure and freezing order be sent to all Swiss banks, targeting all accounts, in existence or closed, held or beneficially owned by the main members of the Abacha criminal organisation. On 14 December 1999, the Examining Magistrate sent the blanket order to the headquarters of the 385 banks registered in Switzerland. In addition – due largely to the press release of the Federal Office of Police following the lodging of the Nigerian request for interim freezing orders pending the lodging of a Letter Rogatory – Swiss banks had, pursuant to their obligation under the Federal Law on Money Laundering, begun to report suspicious bank accounts, even in cases where false identities had been used to open the accounts, and these report were forwarded to the Geneva Examining Magistrate.

12 Article 59 cipher 3: 'The judge shall order the confiscation of all assets over which a criminal organisation has powers of disposal. Assets belonging to a person who has participated in or supported a criminal organisation (260ter) shall be presumed to be at the disposal of the organisation until the contrary is proven' (on 1 January 2007, this provision became Article 72 of the Swiss Penal Code, with minor wording changes).

13 See below.

As a consequence, by the end of December 1999, a total of USD 645 million were frozen in Switzerland by the Examining Magistrate, including the USD 80 million frozen by the Federal Office of Police on 13 October 1999. A total of 130 bank accounts in Switzerland were identified as having been used by the Abacha criminal organisation. It should be noted that all accounts that had been identified by the Nigerian police and were specifically designated in the request for mutual assistance had been closed and their assets sent to other jurisdictions before September 1999.

On 22 March 2000, the first money laundering suspect, an Indian businessman involved in the Ajaokuta fraudulent debt buy-back, was indicted of forgery. This moment was a turning point: under the Geneva rules of criminal procedure, the parties gain access to the file and are entitled to levy copy thereof, only once the first indictment has taken place. The access to the file enabled the attorneys representing Nigeria to proceed with the forensic analysis of the documents that were sent by the requested banks on an almost daily basis to the Examining Magistrate, to request further freezing orders in Switzerland and to use those documents in support of requests for mutual assistance in other jurisdictions.¹⁴ In this respect it is noteworthy that Mohammed Abacha and Abubakar Bagudu attempted to limit Nigeria's access and use of the document from the domestic criminal proceedings, alleging that its access to the criminal investigation was circumventing provisions of the Federal Law on Mutual Assistance in Penal Matters. On 7 December 2001, the Federal Tribunal, Switzerland's Supreme Court, ruled that, as any victim of a crime, Nigeria was entitled to have access to the file of the Geneva criminal investigation and to use those documents in furtherance of its claims, notably in support of civil proceedings, requests for mutual assistance and criminal complaints, provided that the Federal Republic of Nigeria formally undertook not to use those documents, directly or indirectly, in criminal, civil or administrative proceedings in Nigeria until the end of the mutual assistance proceedings.¹⁵

¹⁴ See below.

¹⁵ ATF 1A.157/2001 and 1A.158/2001 of 7 December 2001 (published on <http://www.bger.ch/>).

The Geneva Examining Magistrate indicted Mohammed Abacha and Abubakar Bagudu of fraud, unfaithful management, participation in a criminal organisation and money laundering, respectively on 26 May 2000 in Lagos and on 26 April 2000 in the Swiss Embassy in London.

In the course of spring and summer 2000, other accomplices were indicted, most of whom confessed to their crimes. The Examining Magistrate issued sentencing orders pronouncing fines of up to CHF 1 million for participation in a criminal organisation and money laundering, and forfeiture orders¹⁶ totalling about USD 70 million, which were allocated to the Federal Republic of Nigeria as victim of the crimes.¹⁷ Those convictions mainly concerned the laundering of the proceeds of the plundering of the Central Bank of Nigeria through Swiss bank accounts.

Numerous Letters Rogatory were sent to other jurisdictions in view of identifying the origin or destination of funds controlled by the Abacha criminal organisation. In addition, in 2000, the Geneva Examining Magistrate went twice to Nigeria to examine witnesses and collect evidence.

In November 2003, Mr. Daniel Zappelli, who had succeeded Bernard Bertossa as Attorney-General of Geneva issued a further sentencing order for forgery, participation in a criminal organisation and money laundering against an English businessman whose account had only been reported by his bank in January 2002, and CHF 110 million was forfeited and allocated to the Federal Republic of Nigeria. The funds laundered were identified as bribes paid by this businessman and third parties to Mohammed Abacha and Abba Abacha in exchange for inflated public contracts, which required General Sani Abacha's approval.

In April 2005, Abba Abacha was extradited from Germany to Switzerland and indicted of forgery, participation in a criminal organisation and money laundering. It should be noted that the Geneva Examining Magistrate, Mr. Daniel Dumartheray, requested and obtained the freezing of Abba Abacha's accounts in Luxembourg based on

¹⁶ Article 59 cipher 1 SPC (corresponding to Article 70 SPC since 1 January 2007).

¹⁷ Article 60 SPC (corresponding to Article 73 SPC since 1 January 2007).

Swiss jurisdiction over the forfeiture of any assets controlled by a member of a criminal organisation, in respect of which the burden of the proof of the origin of the assets is reversed.¹⁸

To date, the Geneva investigation into the activities of the Abacha criminal organisation in Switzerland is still ongoing, with the active participation of the Federal Republic of Nigeria. When the trial of Mohammed Abacha and/or Abba Abacha takes place before the Criminal Court of Geneva, Nigeria will be entitled to participate in the hearings and pleadings, to support their conviction, request the allocation of any forfeited assets, notably the accounts frozen in Luxembourg, and lodge claims for damages.

In 2000, the copies obtained from the Geneva domestic criminal proceedings were able to be used immediately to trace funds controlled by the Abacha criminal organisation, in Switzerland or other jurisdictions.¹⁹ Had the Nigerian authorities relied on mutual assistance proceedings, it is only in August 2003 that they would have received the evidence, after the Swiss Federal Tribunal rejected on April 2003²⁰ the Abacha family's last appeal against the Federal Office of Justice's decision of 24 January 2002 to transmit the evidence²¹ (the appeal procedure was suspended for six months, while the Nigerian Government and the Abacha family negotiated a global settlement, providing for the return of USD 1 billion to Nigeria, on which Mohammed Abacha reneged in August 2002).

VII. Requests to Luxembourg, the United Kingdom, Liechtenstein and Jersey

On 29 February 2000, a Letter Rogatory was sent to Luxembourg, based on evidence gathered in Nigeria, which showed seven transfers

18 See above.

19 See below.

20 ATF 1A.49-54/2002 ATF of 23 April 2003 (published on <http://www.bger.ch/>).

21 Press release FDJP 25 January 2002 http://www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/2002/ref_2002-01-25.html

totalling less than USD 32 million to two accounts with M.M. Warburg & Co Luxembourg S.A. The request for mutual assistance was accepted by Luxembourg on 17 March 2000, and on 20 March, eight accounts with that bank, with assets totalling USD 630 million, were frozen. The Luxembourg authorities indicated that, although they would have been willing to initiate domestic criminal proceedings for money laundering, they lacked a legal basis as, until August 1998, the only predicate offence to money laundering was drugs trafficking. The evidence was transmitted to Nigeria on 9 May 2000, before any appeal could be lodged. With the Luxembourg authorities' authorisation, the Federal Republic of Nigeria remitted to the Geneva Examining Magistrate in charge of the Swiss criminal proceedings a copy of the documents that concerned Swiss bank accounts, and lodged also a supplemental request for mutual assistance to Switzerland.

On 23 June 2000, a request for mutual assistance was lodged with the United Kingdom's Home Office, based on the Commonwealth Scheme Mutual Assistance in Criminal Matters (Harare Scheme), providing evidence of suspect transfers to London banks in excess of USD 1 billion. It is only on 8 May 2001 that, after having given the Abacha family members the possibility to make allegations, the Home Office decided to execute the Nigerian request, as far as the gathering of evidence was concerned, against which the Abacha family sought a judicial review. On 18 October 2001, the High Court of London, Administrative Division, rejected their appeal. It is, however, not until December 2004 that evidence was actually transmitted to Nigeria. Despite the insistence of the Nigerian Government, no investigation whatsoever had been initiated by the United Kingdom authorities to identify the whereabouts of the funds laundered through London banks in view of initiating criminal proceedings for money laundering or forfeiture proceedings. No freezing of assets, formal or informal, was ever ordered by the authorities of the United Kingdom. As a consequence of the lack of domestic investigation, the evidence sent to Nigeria was mostly useless.

The evidence obtained in Switzerland and Luxembourg showed important transfers coming from Liechtenstein banks. On 28 July 2000, a request for mutual assistance was lodged in Liechtenstein, which was admitted on 22 August 2000, leading to the freezing of

more than ten bank accounts, for which assets totalled more than USD 200 million. To date, appeals are still pending in Liechtenstein against the transmittal of evidence to Nigeria. However, in parallel, the Liechtenstein authorities initiated their own criminal investigation into money laundering, in which the Federal Republic of Nigeria was admitted as a party suing for damages, without access to the file, though. In the context of their domestic investigation, the Liechtenstein authorities obtained mutual assistance from Nigeria, Switzerland, Germany, Austria and Luxembourg, among others. On 19 January 2005, the Liechtenstein Attorney-General's Office requested the indictment of Mohammed Abacha, Abba Abacha and four Liechtenstein businessmen for breach of trust and money laundering. On 10 October 2006, a criminal trial began, which was converted into forfeiture proceedings regarding the assets frozen in Liechtenstein, due to the absence of the accused from the proceedings. At the end of the proceedings, Nigeria, as victim of the crimes, shall be entitled to receive the allocation of the forfeiture proceeds.

On 1 January 2001, a request for mutual assistance was lodged in Jersey, where monies totalling initially USD 160 million were frozen through an informal freeze by the Jersey police ('no consent'). The Jersey authorities initiated investigations into the activities of money laundering which took place on the island. In that context, they sought mutual assistance from Nigeria, Switzerland, the United States of America and the United Kingdom. On 18 May 2003, Abubakar Bagudu was arrested in Houston, Texas at the request of Jersey, who sought his extradition on 18 July 2003. A settlement was concluded between the Nigerian Government and Abubakar Bagudu, whereby he agreed to return USD 160 million, and Abubakar Bagudu was deported to Nigeria. A trial against an Indian businessman who obtained inflated contracts from General Sani Abacha against the payment of bribes representing forty per cent of the contract price is pending.

In addition, mutual assistance and/or criminal proceedings have been initiated in Austria, the Bahamas, Belgium, the Cayman Islands, France, Germany, Kenya and the United States.

VIII. The Swiss decision to return USD 500 million

At the end of 2000, after about one year of international investigations, more than ninety-five per cent of the assets of the Abacha criminal organisation that have now been identified worldwide had already been frozen. The investigations showed that more than twenty companies had paid bribes at the request of General Abacha and that numerous inflated public contracts had been granted to companies controlled by the Abacha family. General Abacha was designated as beneficial owner of only 3 of the 130 accounts used by the Abacha criminal organisation. The designated beneficial owners of the other accounts were in most cases his sons, and in some cases businessmen who had gained his trust.

Since the beginning, General Abacha's sons have resorted to delaying tactics, without ever providing law enforcement authorities with any explanation as to the origin of their fabulous wealth.

Between 1999 and 2003, the Federal Republic of Nigeria made substantial recoveries: forfeiture orders were issued, some of them based on the reversal of the burden of proof applying to assets under the control of a criminal organisation.²² In the context of domestic criminal proceedings for money laundering, plea bargaining negotiations with local authorities also took place, in which an attenuation of the sentencing or the delegation of the prosecution to Nigeria was exchanged for voluntary restitution.

However, these recoveries, although they exceeded USD 700 million, also showed their limits with non-co-operating suspects, notably the sons of the late General Sani Abacha.

After the Federal Tribunal had confirmed in its 23 April 2003 decision that mutual assistance could be granted, the Federal Republic of Nigeria insisted that the restitution of the USD 500 million of assets frozen in Switzerland should intervene before a final forfeiture decision was rendered in Nigeria. This request, already contained in the 20 December 1999 Letter Rogatory, was based on paragraph 3 of Article

²² See above.

74a of the Federal Law on Mutual Assistance in Penal Matters (EIMP), according to which:

Remittance can take place at any stage of the foreign proceedings, in general upon final and executory decision in the requesting State.

Case law on the possibility of such an anticipated remittance, which had been introduced into the law in 1997, was scarce and mostly negative.²³ According to this jurisprudence, an anticipated remittance was only possible in exceptional cases, when both the tracing of the assets to a specific crime and the circumstances of the said crime were limpid. Article 74a EIMP was deemed to be an empowering provision (*Kann-Vorschrift*) which gives the authority wide powers of discretion for the purpose of deciding, on the basis of a thorough examination of all the circumstances, whether and under what conditions an anticipated remittance could take place.

Thanks to the thorough investigation in the Geneva domestic criminal proceedings, the criminal origin of the funds was clearly demonstrated, which was summarised in a letter of 2 October 2003 to the Federal Office of Justice.

On 19 August 2004, the Federal Office of Justice agreed to transmit to Nigeria all the assets in Switzerland beneficially owned by the Abacha family, waiving the condition of a prior judicial forfeiture decision in Nigeria. To facilitate that decision, Nigeria had undertaken to use the repatriated funds for development projects monitored by the World Bank.

That decision was upheld for the most part by the Swiss Supreme Court on 7 February 2005, which made the following findings.²⁴

- Mohammed Sani Abacha and Abba Abacha had no *locus standi* to appeal against the Federal Office of Justice's decision in as much as it concerned accounts opened under the false identities of 'Mohammed Sani' and 'Abba Sani', among others.

23 ATF 115 Ib 517; ATF 123 II 134; ATF 123 II 268; ATF 123 II 595 (published on <http://www.bger.ch/>).

24 ATF 1A.215/2004 of 7 February 2005 (published on <http://www.bger.ch/>).

- The assets which were clearly derived from specific crimes in respect of which criminal proceedings were pending, namely the pillaging of the Central Bank of Nigeria, could be transmitted immediately.
- As to the other assets (about USD 50 million), the Federal Tribunal found that the structure set up by General Sani Abacha and his accomplices constituted a criminal organisation and that the burden of proof regarding the origin of the assets ought to be reversed. Because this decision is exemplary, notably in view of the implementation by State Parties of the United Nations Convention against Corruption, adopted on 31 October 2003 (UNCAC), an excerpt from the Federal Tribunal's decision in this respect deserves to be quoted extensively:

According to Article 59 ch. 3 CP, the judge must order the confiscation of any securities over which a criminal organisation has powers of disposal; securities belonging to a person who has been involved in or aided and abetted a criminal organisation as defined by Article 260 ter CP shall be presumed to be subject, until it is proved otherwise, to the power of disposal of the said organisation. It must be proved that the person in question participated in or supported such an organisation. On the other hand, it is not necessary to prove that the person or organisation in question committed a specific offence, or that the securities are derived from a criminal offence. Confiscation will not be waived unless the person in question is discharged from the criminal proceedings, in Switzerland or abroad; yet this is subject to a reservation where the confiscation proceedings in Switzerland uncover fresh evidence proving the role played by the person concerned in the organisation in question (FLORIAN BAUMANN, "Basler Kommentar", Strafgesetzbuch, I, Notes 58 et seq. to Article 59 CP; NIKLAUS SCHMID, op. cit., Notes 130 et seq. to Article 59 CP). Article 260 ter CP defines a "criminal organisation" as one which keeps its structure and personnel secret and pursues the aim of inter alia obtaining income by criminal means. Any person who shall have supported such an organisation is liable to punishment (ch. 1), including where the offence is committed abroad, provided that the organisation carries on or must carry on its criminal activity in Switzerland (ch. 3).

The question as to whether confiscation can be ordered in Switzerland pursuant to Article 59 ch. 3 CP (on this point cf. ATF 128 IV 145) does not need to be decided in these appeal proceedings. The question does, on the other hand, arise

as to whether Article 74a (3) EIMP should not be interpreted in the light of that Article.

In its Message of 30 June 1993 relating to the amendment of the Penal Code, which led to the introduction of ch. 3 of Article 59 CP, in accordance with the Law of 18 March 1994, in force since 1 August of the same year, the Federal Council emphasised that the purpose of this new law was to repeal the prevailing rule in both internal law and mutual assistance, according to which an asset can only be confiscated where it is possible to prove the criminal offence from which it is derived. With regard to the criminal organisation, confiscation extends to all the assets in its possession. This is explained by the fact that if the assets in question are held by a criminal organisation, it is entirely probable that they are derived from an equally criminal activity (FF 1993 III, pp. 269 et seq., 308). The Federal Council has justified the adoption of a specific rule in that respect inter alia by the need to facilitate mutual assistance and the execution of foreign confiscation orders relating to property and assets transferred to Switzerland by criminal organisations (ibid., page 309). It follows - even if the Message does not say so - that Article 59, ch. 3, second sentence, CP, also applies in the field of mutual assistance (for a similar opinion, see HARARI, op. cit., p. 185, note 78; Baumann is more reserved in his comments; while emphasising that Article 74a EIMP refers to the surrender of the proceeds of the offence and not securities within the power of disposal of a criminal organisation, it admits such a surrender provided that the rights of third parties acting in good faith are safeguarded, op. cit., note 77 to Article 59 CP). *Thereafter, funds held by a criminal organisation are presumed to be of criminal origin unless the holders prove the contrary.* Unless they have reversed the presumption in Article 59 ch. 3, second sentence, CP, delivery must be ordered in accordance with Article 74a (3) EIMP, without any further examination of the provenance of the funds reclaimed. *The structure set up by Sani Abacha and his accomplices constitute a criminal organisation* as defined by Article 59 ch. 3 CP, since its object was to embezzle funds from the Central Bank of Nigeria for private purposes, and to profit from corrupt transactions (cf. Bernard CORBOZ, 'Les infractions en droit Suisse', vol. II, Bern, 2002, on Article 260 ter CP).

9.2 In the course of the decisions it is required to take regarding the surrender of funds still attached, the Federal Office must offer the holders of the accounts in question the opportunity to put forward any appropriate arguments *to reverse the presumption* laid down in Article 59 ch. 3, second sentence, CP, that is to say to *prove that the attached funds are not of criminal origin.*

Afterwards, when given the opportunity by the Federal Office of Justice, the Abacha family did not even attempt to reverse the presumption by proving that the balance of the attached funds was not of criminal origin. Consequently, all their assets in Switzerland, a total of USD 508 million, were transmitted to Nigeria between 2005 and 2007.

IX. Conclusion

In many regards, the Abacha case deserves to be considered a ‘success story’, not only because of the amounts recovered so far (USD 2 billion, of which USD 1.2 billion internationally), but because the recoveries were obtained through the mutual co-operation of prosecutors, examining magistrates and police in several jurisdictions.

The reason why the co-operation was successful was not only because those authorities wished to assist Nigeria in its efforts to recover the proceeds of crimes committed at its expense, but mostly because they deemed that it was in the public interest to investigate and prosecute the acts of fraud, money laundering and participation in a criminal organisation that had taken place within their respective jurisdictions on a very large scale.

The acknowledgment that the laundering of the proceeds of corruption and embezzlement of public funds was a very serious domestic issue, and that the requested authorities should not limit their role to passively waiting for the lodging of Letters of Request or the commencement of civil proceedings by Nigeria, prefigured the principles contained in UNCAC.

By initiating domestic criminal forfeiture proceedings, Switzerland, Liechtenstein and Jersey adopted the behaviour described at Article 54, paragraph 1 (b).²⁵

²⁵ Article 55, paragraph 1 UNCAC: ‘Each State Party, in order to provide mutual legal assistance pursuant to Article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (...) (b) Take such measures as

The Swiss Supreme Court ruling of 7 February 2005 is an example of implementation of Article 31, paragraph 8²⁶ regarding the reversal of the burden of proof and of Article 54, paragraph 1 (c)²⁷ regarding confiscation without a criminal conviction.

Cases of grand corruption and embezzlement of public funds such as those committed by the Abacha criminal organisation are a challenge for judicial authorities, given the slowness of mutual assistance and the sheer number and variety of crimes committed.

In cases of such complexity, prosecutors may decide to concentrate on a few crimes to secure a conviction. This pragmatic approach is, however, incompatible with the requirement in many confiscation proceedings that the criminal origin of the assets must be proven to the last cent, which is virtually impossible in cases of such magnitude.

The existence of a system of confiscation orders that is independent from a criminal conviction is therefore a necessity in grand corruption cases. In this context, reversing the burden of proof or imposing procedural consequences on the failure of the asset holder to cooperate regarding the origin of the assets, appear to be best legislative practice. The presumption of innocence does not necessarily apply to confiscation proceedings and ‘presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle’ and therefore do not breach the right to a fair trial.²⁸

may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law’.

26 Article 31, paragraph 8 UNCAC: ‘States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings’.

27 Article 55, paragraph 1 UNCAC: ‘Each State Party, in order to provide mutual legal assistance pursuant to Article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (...) (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases’.

28 European Court of Human Rights, *Judgment Phillips v. the United Kingdom of 5 July 2001* (Application no. 41087/98), para. 35 and 40.

To conclude, one should note, that for the first seven years of the Abacha investigation, recoveries took place exclusively with the cooperation of asset holders who wanted to avoid prosecution or mitigate their punishment. To date, after more than eight years of international recovery proceedings in ten jurisdictions, the bold decision of the Swiss Supreme Court in February 2005 has not been repeated, although forfeiture proceedings are pending in several other jurisdictions.

It is to be hoped that in the future, similar grand corruption cases may find a solution in a shorter timeframe, particularly through anticipated remittances. It took extraordinary political will by successive Nigerian governments to pursue the investigations and recovery efforts, despite efforts to destabilise by members of the Abacha criminal organisation, who were still rich and powerful. Other countries might not be as fortunate, and might not withstand the political pressure that more than eight years of bitter international proceedings entail.