

RESEARCH PAPER

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Research topic

**The international mechanisms relating to mutual assistance in the field of
information exchange and civil forfeiture**

**UNIVERSITY of the
WESTERN CAPE**

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Transnational Criminal Justice and Crime Prevention

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I would like to thank my family who has always supported and encouraged me to pursue my dreams.

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DECLARATION

I declare that *The international mechanisms relating to mutual assistance in the field of information exchange and civil forfeiture* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Abstract

Several international instruments relating to the forfeiture of assets derived through unlawful means have been developed in the last decade. These relate to both civil and criminal forfeiture proceedings. Nevertheless, the processes of tracing the assets and having them forfeit to the State present formidable obstacles to justice authorities enforcers around the world. The fact of the matter is that the advent of the internet has made it easier for money launderers to camouflage the nature and the physical locality of their ill-got gains. This has made it all the more necessary for states and financial institutions to co-operate more closely in hitting the criminals where it hurts most – their pockets. However, the international structures that provide for mutual legal assistance procedures are drafted in broad terms or in guideline-form. Most of the books and journal articles dealing with money laundering devote scant attention to this very important aspect of combating transnational economic criminality. In most of the literature, this topic is simply avoided. This paper, which confines itself to civil recovery proceedings, strives to determine first, what international mechanisms are available for obtaining information located abroad that could be used for domestic civil forfeiture, and second, to identify some of the most intractable problems encountered by justice authorities in their attempts to attach property situated abroad. The idea is to identify the principal point of discordance, and to suggest ways in which the international instruments governing civil forfeiture could be amended so as to make them more user friendly.

Keywords

money laundering, criminal forfeiture, civil forfeiture, *in rem* forfeiture, *in personam* forfeiture, United Nations Convention against Corruption, reverse onus, mutual legal assistance, dual criminality, freezing order

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List of acronyms and abbreviations

CoE Criminal Law Convention	Council of Europe Criminal Law Convention on Corruption
FATF	Financial Action Task Force Recommendations
Harare Scheme	Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth
MLA mutual assistance	Mutual Legal Assistance
Strasbourg Convention	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
UNCAC Merida Convention	United Nations Convention against Corruption
UNTOC Palermo Convention	United Nations Convention against Transnational Organized Crime
UNODC	United Nations Office on Drugs and Crime
Vienna Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
Warsaw Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

CHAPTER 1 INTRODUCTION

Civil forfeiture has been developed in the last couple of decades as a method to address the evolving nature of transnational crimes. Assets forfeiture has evolved from the concept initially proposed under the 1988 *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (hereafter the Vienna Convention). Today, more than 20 years later after the Vienna Convention, the concept of civil forfeiture is very slowly starting to be adopted by the international community. Fisher¹ estimates that between \$500 billion and \$1 trillion are laundered annually. This assessment clearly testifies that money laundering is a big phenomenon that should be addressed with more ingenious and proactive approaches.

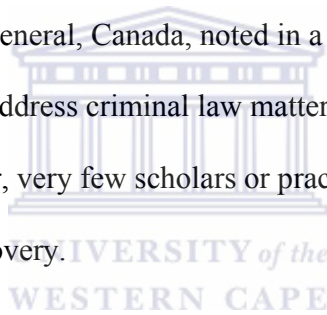
Civil recovery has the potential to become a very useful tool in decreasing the proceeds of criminal activity that are laundered every year. Unfortunately, due to the fact that the two major conventions that encourage the creation of forfeiture systems the *United Nations Convention against Transnational Organized Crime* (UNTOC) and the *United Nations Convention against Corruption* (UNCAC) have been developed only in the last decade, there is limited information on the approaches available to investigators. This study sets out to bring more understanding to how transnational procedures relating to asset recovery at civil law can become more useful to justice systems.

¹ Fisher (2003: 415).

1.1 Framework of the research

There are a number of conventions that have encouraged the creation of forfeiture systems. The Palermo² and the Merida³ conventions have urged states to take the necessary measures to enable the identification, tracing, freezing or seizure of proceeds from a wide range of related offences (corruption, organised crime, human trafficking etc.). Other international agreements, like the *Economic Community of West African States Protocol on the Fight against Corruption* and the *Inter-American Convention against Corruption* have envisioned instead the exchange of information only for proceeds of crimes that have resulted from corruption conduct.

The Legal Director of the Office of Civil Remedies for Illicit Activities Office from the Ontario Ministry of the Attorney General, Canada, noted in a 2008 article that ‘While there is a long-established treaty process to address criminal law matters, there is no such process for civil forfeiture practitioners.’⁴ Moreover, very few scholars or practitioners have published on the mechanisms available for civil recovery.



1.2 Research problem

The research problem presents itself at two levels. First, the paper seeks to enquire into the provisions of the current international mechanisms that make for the exchange of information relating to assets forfeiture in civil proceedings. Second, where provisions are made for the exchange of information, the paper will examine how this process enacts itself in practice. The study aims to identify the recurring hurdles that occur in relation to sharing of information between states.

² *United Nations Convention against Transnational Organized Crime.*

³ *United Nations Convention against Corruption.*

⁴ Simser (2008: 22).

1.3 Objectives and significance of research

This essay critically examines the three asset recovery mechanisms available to countries. These are: private civil proceedings, conviction-based (criminal) system and non-conviction-based (civil) forfeiture. The essay argues that civil forfeiture offers clear advantages over the other two methods and countries should adopt civil forfeiture as an alternative forfeiture mechanism in addition to criminal forfeiture.

To date, there are very few mechanisms in place that facilitate the obtaining of necessary information from foreign sources for criminal forfeiture. Even fewer mechanisms are available for civil forfeiture. Moreover, there is little information available for investigators. Consequently, this paper aims to clarify what options are available for investigators. The methods available at the international level are of potential concern to the few countries which have adopted a civil recovery system.

The findings will be relevant to countries that would like to set up a civil forfeiture system because they will show the best methods for developing a strong anti-money laundering policy.

1.4 Literature survey

There is very little literature on the topic of civil assets forfeiture. Hotte and Heem⁵, Broome⁶, Gallant⁷, Muller *et al.*⁸ deal only with the broad aspects of money laundering. Additionally, while Young⁹ and Alldridge¹⁰ focus their work on civil recovery, they have not

⁵ Hotte and Heem (2004).

⁶ Broome (2005).

⁷ Gallant (2006).

⁸ Muller *et al.* (2007).

⁹ Young (2009).

investigated how states themselves go about exchanging information amongst each other. Only a couple of sources¹¹ have been found on the international cooperation mechanisms that permit the exchange of information in the context of civil recovery. As a result, the paper will synthesize all the options that have been put forward by these practitioners and it will analyse the consequences arising from each mechanism.



¹⁰ Alldridge (2003).

¹¹ Kennedy (2007); U4 Anti-corruption Resource Center (2008) *Mutual Legal Assistance Treaties and Money Laundering*.

CHAPTER 2 THE NEED OF FORFEITURE SYSTEMS IN COMBATING MONEY LAUNDERING

Economic crimes, or white-collar crimes, is an umbrella term that includes a multitude of offences where the offender was motivated by monetary gain or where the victim has incurred an economic loss. The concept of white-collar crime is not new. Long before the recent economic crimes vocabulary was articulated, these crimes were documented. Aristotle wrote about embezzlement of funds by public officials, religious texts condemned exploitative businesses while later in the Middle Ages knights and other noblemen were known for embezzlement.¹²

Traditionally, society has tried to address white-collar crimes through criminal law. However, more recently, there has been a change from criminal law to crime prevention. Instead of pursuing criminals after the commission of the crime, the objective has shifted to chasing the illegal proceeds as an attempt to remove the profit of the crime which constituted the motive and may provide the means to commit future crimes.¹³

The purpose of this chapter is to provide a brief overview of the concept of money laundering. The following paragraphs will present some of the multiple sources of illicit money, the estimated extent of sums laundered and the wide repercussions of money laundering on economies in general. The chapter will conclude with a summary of some of the instruments that have criminalised money laundering and the impact these instruments have had on some high profile dignitaries and the national proceeds of crime legislation.

¹² Benson and Simpson (2009: 3).

¹³ Beare (2003: 256).

2.1 Sources of money laundering

Money laundering (ML) affects all economic sectors and is present worldwide. Money laundering is the process which allows criminals to disguise the illicit origin and ownership of the proceeds of crime. This allows owners to avoid prosecution, conviction and consequently the confiscation of their unlawful assets. Failure to arrest, charge and convict the criminals who launder their money results in the recycling of these funds into other unlawful enterprises, as well as the integration of these funds into legitimate businesses.

“Dirty money” can result from drug trafficking, trafficking in persons, arms trafficking, buying or selling contraband goods, corruption-related activities, and other highly profitable predicate crimes. Many of these crimes have a transnational impact. For example, drug trafficking takes place on all continents and the main drug destinations are North America and Western Europe.¹⁴ The arms cartels buy arms usually in Europe (Russia, Belgium, France, Slovakia, and Italy) and export them to conflict zones in Africa, Latin America and Asia,¹⁵ while prostitution networks recruit their victims in poor Asian and East European states.¹⁶ Similarly, tobacco trafficking is sourced in China and is directed mainly at the European market, while other counterfeit goods come from Asia and Northern Africa and are distributed all over the world.¹⁷

In addition to the amounts laundered as a result of illicit trafficking (for example, human trafficking, arms trafficking, drug trafficking), illicit funds gained through bribery, embezzlement, and other abuses of official functions are an important source of funds that are laundered through the same channels.

¹⁴ Vernier (2008: 36).

¹⁵ Vernier (2008: 36).

¹⁶ Vernier (2008: 36).

¹⁷ Vernier (2008: 36).

More recently, new forms of criminal behavior have come to the attention of AML and anti-corruption policy-makers. These following crimes can also be combated with the current anti-money laundering mechanism. Environmental crimes, such as corruption in the extractive sector,¹⁸ trafficking of counterfeit goods, computer crimes¹⁹ and piracy²⁰ are just a few quick examples. All these examples show the extent of money laundering worldwide.

When it comes to the scale of the money that is laundered, some older statistics show that in Canada for instance, 80% of the money laundering cases had a cross-border component.²¹ Similarly, in the United Kingdom, 80% of the securities fraud cases investigated had an international element.²² These high percentages might be explained by the peculiar geographical position and the economic ties of both countries.²³ Nevertheless, these percentages reveal the intricacies of money laundering operations.

Given the nature of the criminal offences that constitute a source of “dirty money” and the fact money laundering is a global phenomenon, the overall amount of funds that are laundered yearly are difficult to exactly determine. To this impediments, one should add that the illicit funds are transferred between countries and intermediaries in a variety of creative ways. These funds are smuggled in cash, transferred through various legal money transfer mechanisms,

¹⁸ The Kimberley Process Certification Scheme (KPCS), created as a result of the United Nations General Assembly Resolution 55/56, for instance has been designed to guarantee that diamonds come from conflict free areas. It constitutes thus an attempt to provide consumers access to goods that have been obtained as a result of legal business practices. Oil and other minerals (for example, coltan, gold, gems, and cassiterite) extracted in conflict zones are also under scrutiny for fuelling armed conflicts and corrupt practices.

¹⁹ One example of computer criminality is identity theft. It can include (and is not limited to) fabricating, altering identification documents, and illicitly acquiring identification documents or information through phishing and other electronic methods. This offence has been linked to fraud, organised crime activities, terrorism, money laundering and corruption. See: Chryssikos (2010).

²⁰ Piracy has come under an increased international attention following the increase in the number of attacks in 2009. Given that the ransom amounts are in the order of millions of US dollars, a good alternative to deter these criminals is to follow the money trail and confiscate these funds.

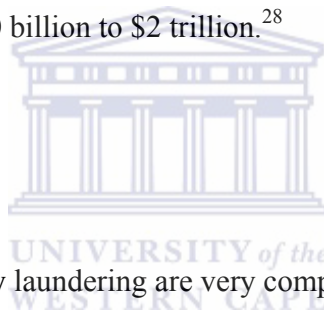
²¹ Savona (2000: 189).

²² Savona (2000: 189).

²³ Canada has very strong ties to the United States while the UK, because it is geographically isolated from Europe, it is highly reliant on its connections to the continent.

through underground banking (e.g. hawala²⁴), by regular post, or are invested in goods that are shipped worldwide in an attempt to disguise the origin and the trail of these assets.

However, the World Bank estimates that \$40 billion are looted every year by corrupt public officials from developing countries, an amount equivalent to “the annual GDP of the world’s 12 poorest countries, where 240 million people live”.²⁵ Additionally, Éric Vernier estimates that the money laundered is more than the amount given by the International Monetary Fund to developing countries.²⁶ Similarly, Fisher estimates that between \$500 billion and \$1 trillion are laundered annually across the world,²⁷ while the United Nations Office on Drugs and Crime (UNODC) estimated in 2010 that the amount laundered globally in one year is between 2 and 5% of the global GDP, or \$800 billion to \$2 trillion.²⁸



2.2 Repercussions

The repercussions of money laundering are very complex and have several negative effects on economies. Unger synthesized the effects into three major categories: the “misallocation of resources through price distortions”; “the economic and social effect of ruining the reputation and integrity of the financial sector”; and the political effect of an infiltration by criminal organizations, coupled with the undermining of state authority and democracy.²⁹

More precisely, in addition to the direct costs of the underlying crime, money laundering can negatively affect both the private sector and public sector. When it comes to the private

²⁴ Hawala transactions are conducted through a mostly unregulated, honour-based, money transfer network. It is most prevalent in Africa, Asia and the Middle East.

²⁵ Greenberg (2009: 7).

²⁶ Vernier (2008: 256).

²⁷ Fisher (2003: 416).

²⁸ UNODC, “Money-Laundering and Globalization”, Online: UNODC < <http://www.unodc.org/unodc/en/money-laundering/globalization.html> > [accessed on 6.7.2010].

²⁹ Unger (2007: 174).

sector, money laundering can have an effect on business activities and it can trigger an increase in prices.³⁰ It can cause massive unemployment, and it can decrease the national economic growth rate.³¹ Money laundering has also had a negative impact on the financial sector, be it in the banks' reputation and stability, their liquidity³² or the volatile interest rates and exchange rates.³³

In the public sector, these negative consequences have been linked to unpaid taxes, the undermining of privatization efforts³⁴ and therefore, on a wider scale, money laundering has been blamed for destabilising national economies and democratic systems.³⁵ Even more concerning, Unger suggests that money laundering also increases crime, corruption, bribing,³⁶ and terrorism.³⁷



2.3 Anti-money laundering initiatives

Money laundering has become a subject of serious concern over the last couple of decades. States have recognized that global, regional and national initiatives need to be adopted and synchronized in order to protect themselves from the harmful effects of money laundering. For this reason, anti-money laundering measures involve the cooperation of a large number of countries, international law enforcement agencies, non-governmental agencies and supranational organisations.

³⁰ Masciandaro (2007: 149).

³¹ Masciandaro (2007: 149).

³² Masciandaro (2007: 149).

³³ Masciandaro (2007: 149); Commonwealth Secretariat, *Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses* (2006: 7).

³⁴ Masciandaro (2007: 149).

³⁵ Commonwealth Secretariat, *Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses* (2006: 7).

³⁶ Masciandaro (2007: 149).

³⁷ Masciandaro (2007: 149).

The initial international steps to combat money laundering were taken in conjunction with efforts to address drug trafficking. Article 3.1.b) of the 1988 *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna Convention) criminalised the concept of “money laundering” without actually labeling it as such. Following the Vienna Convention, there have been a multitude of international and regional initiatives that have addressed money laundering. Some of the most well-known initiatives are the Financial Action Task Force Recommendations³⁸, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg Convention)³⁹, the United Nations Convention against Transnational Organized Crime⁴⁰, and the United Nations Convention against Corruption.⁴¹ As a result of these instruments, illegal proceeds from other highly profitable crimes (e.g. arms trafficking, corruption) became subject to money laundering legislation.

As the anti-money laundering initiatives were being introduced, offenders adapted their criminal behaviour. Some of the most widely known assets recovery success cases are those conducted against some former dictators and top level officials such as Sani Abacha, Vladimiro Montesinos Torres, and Ferdinand Marcos. All these were dictators who looted their respective economies shamelessly.

In the case of general Sani Abacha, USD two billion were recovered from Switzerland and the United Kingdom and the recovery efforts are still ongoing⁴², while in the case of Montesinos Torres, USD 175 million were recovered from three jurisdictions.⁴³ When it comes

³⁸ FATF Recommendations, Recommendation 1.

³⁹ *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, art. 6.

⁴⁰ UNTOC, art. 6.

⁴¹ UNCAC, art. 23.

⁴² Pieth (2008: 59).

⁴³ Pieth (2008: 130).

to Ferdinand Marcos, USD 658 million were returned to the Philippines out of an alleged USD five to ten billion stolen and the recovery efforts are still in progress.⁴⁴

These cases have shown that criminals will try to hide their ill-gained assets by placing them in someone else's possession or by holding them in another jurisdiction. Consequently, it becomes difficult to link the proceeds of crime to the original owner. This has meant that new counter-measures have had to be adopted to fight money laundering.

Over the last two decades, policy-makers have developed an anti-money laundering regulatory system that is envisioned to target multiple critical aspects involved in a ML scheme in an effort to address this offence. These policy options provide countries a minimum set of measures that they have to enforce in their respective jurisdictions. For example, the AML framework is designed to create an improved system of financial institution supervision that allows investigators to track the movement of suspicious funds worldwide and begin the necessary investigation procedures early. This can be illustrated more in detail by the implementation of the know-your-customer principle, the creation of a reporting system for suspicious transactions, the adoption of a cross-border currency transfer threshold that triggers investigation, the demand for an increase in diligence for transactions involving politically exposed persons (PEPs), and the creation of national financial intelligence units that work together with financial institutions and police forces during the investigation of ML cases.

The instruments that address money laundering also require a more stringent regulation of the professionals involved in money laundering operations. Financial institutions, lawyers,

⁴⁴ Basel Institute on Governance, Paper presented at the Intermediate Training Programme on Asset Tracing, Recovery and Repatriation, Jakarta, September 2007, "Efforts to Recover Assets Looted by Ferdinand Marcos of the Philippines", Online: Basel Institute on Governance <<http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=62506d95-a33e-11dc-bf1b-335d0754ba85>> [accessed on 6.7.2010].

accountants, hawala dealers, casinos, and dealers in precious metals, are all examples of institutions and professions that have had to re-adjust their practices to the new AML regulations.

Overall, states have enacted laws relating to the proceeds of crime that enable criminal justice authorities to investigate, freeze, seize, recover, and even provide compensation for the victims of economic crimes.⁴⁵

Additionally, when it comes to grand corruption cases, anti-money laundering legislation has allowed and facilitated the repatriation of the assets stolen. While the amounts recovered and repatriated are generally only a fraction of the amounts looted, given the fact that the “dirty money” was stolen from developing countries, any funds that can be repatriated can make a substantial difference to the socio-economic well-being of these countries.

Taking everything into account, as a result of the ever-changing nature of crimes that lead to money laundering and their evolving international amplitude, proceeds of crime legislation has completely changed the way criminal law is applied by states. This is a direct reflection of the increasing awareness states have of the devastating effects of money laundering and their commitment to remedy this through more proactive laws.

The anti-money laundering legislation has reversed the burden of proof, has mixed criminal and civil procedures when it comes to the forfeiture mechanisms available and has, in some instances, undermined the presumption of financial privacy during the investigation and prosecution stage.

Moreover, although some of these measures have been contested in courts, none of these actions has been successful. For instance, critics have alleged that the reversed burden of proof in

⁴⁵ For example, the Ontario law on civil forfeiture, entitled the *Civil Remedies Act*, provides in section 1(a) that the purpose of the Act is to “provide civil remedies that will assist in compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities.” The compensatory powers of the Act were confirmed in 2009 by the Canadian Supreme Court in *Chatterjee v. Ontario (Attorney General)*, 2009 S.C.C. 19, [2009] 1 S.C.R. 624.

the civil forfeiture system is contrary to a fair trial. Despite these allegations, in 2008, the European Court of Human Rights decided in *Grayson v. United Kingdom*⁴⁶ that the shift in the legal burden of proof is not incompatible with a fair trial⁴⁷ once the prosecutor has proved that the accused has been involved in illicit activities during a period of time.

So far, however, there has been little discussion about assets recovery and the options investigators have in confiscating illegally acquired proceeds. The next chapter of the paper examines the mechanisms available to investigators and prosecutors that can allow them to build a successful case provided that states have a well-developed domestic system that provides for the confiscation of illicit proceeds of crime.



⁴⁶ *Grayson v. United Kingdom*, Eur. Ct.H.R., Application no. 19955/05 and 15085/06 (September 23, 2008).

⁴⁷ Article 6 of the *European Convention on Human Rights*.

CHAPTER 3 ASSET RECOVERY MECHANISMS

Asset recovery is a strategy that allows the recuperation of assets that have been obtained through organised crime activities, the embezzlement of public funds by high ranking officials, or by committing other corruption related crimes.

Most times, these proceeds originate in developing states and are transferred to developed states or to offshore havens for safekeeping, and future investment in legal and illegal enterprises. This way, the offenders hope that their illegally acquired funds will be kept safe from any potential investigations from the investigating authorities of the victim country. This phenomenon is more worrying for African countries because this continent is already impoverished, is facing a number of serious challenges (like environmental degradation, a rising number of HIV cases, etc.) and is highly dependent on foreign aid. The amounts looted from this area very disturbing.⁴⁸

Regrettably, the recovery of proceeds of crime by African states has not received a significant national support so far. This slow domestic response can be justified by the existence of multiple factors. Emmanuel Akomaye from the Nigerian Economic & Financial Crimes Commission writes that this can be explained by the implication of important public officials in corruption acts.⁴⁹

Additionally, one should not overlook the negative influence of the lack of adequately trained professionals to conduct an assets recovery operation on the progress and results of an

⁴⁸ Here are a few examples of African officials and their respective looted amounts. Sani Abacha (Nigeria) USD 4.3 billion, Felix Houphouet (Ivory Coast) USD 3.5 billion, Ibrahim Babangida (Nigeria) USD 3 billion, Mobutu Sese Seko (Zaire) USD 2.2 billion, Moussa Traore (Mali) USD 1.8 billion, Henri Konan Bedie (Ivory Coast) USD 200 million, Denis Sassou Nguesso (Congo) USD 120 million, Omar Bongo (Gabon) USD 50 million, Paul Biya (Cameroon) USD 45 million, Haile Mariam (Ethiopia) USD 20 million, and Hissane Habre (Chad) USD 2 million. See: Jermyn Brooks, "The Wolfsberg Principles", Online: Stop Money Laundering < <http://www.antimoneylaundering.ukf.net/speakers.html> > [accessed on 24.09.2010].

⁴⁹ Akomaye, "Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective", p 102.

investigation. This argument can be best illustrated by the now famous rejection of the mutual legal assistance request forwarded by the Nigerian authorities to the French government on the basis that it did not comply with the French language requirement because it was submitted in English.

Further, Akomaye explains that the growing interest of African countries in asset recovery operations is a consequence of the “globalisation, [the] pressure from civil society and the growing number of democracies in Africa.”⁵⁰

Recent assets recovery success cases have also led to a renewed interest by states and international organisations in this topic. The current efforts in this area are focused on improving the domestic and the international framework used during the investigation, the prosecution and the repatriation of assets.

An effective assets recovery case depends on the success of all the steps involved in this process, whether it is intelligence gathering, mutual legal assistance between the states involved, the confiscation of the assets, or the actual repatriation of assets to the victim state. The following section discusses some of the most decisive and critical steps that should be analysed during the initial decision to open a matter.

Practitioners in this area have divided the asset forfeiture process into five individual stages. These are: the investigative phase, the freezing of assets, the maintaining of assets into custody, the forfeiture and the disposal of the assets.⁵¹

During the investigative phase, the investigation team verifies the reliability and the relevance of the information that triggered the investigation, and tries to trace and identify the

⁵⁰ Akomaye, “Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective”, p 102.

⁵¹ Akomaye, “Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective”, p 102.

assets. When processing the information into intelligence, it is advisable to conduct an analysis based on six standard⁵² questions: Who?⁵³, What?⁵⁴, Where?⁵⁵, When?⁵⁶, How?⁵⁷, and Why?⁵⁸.

These questions will help establish the value of intelligence received, will help determine if there are gaps in the intelligence received and if a follow up is necessary in order to transform the intelligence into useful information and potential evidence.

It is strongly recommended that investigation teams are made of professionals that can bring together different backgrounds and skills to respond to the challenges of an assets recovery case. For this reasons, a team should include for example people with a background in law enforcement, forensics accounting, computer forensics, corporate law, and banking law. Some of the potentially useful sources of information can be accessed directly (such as data available on the internet, in the local news), while other sources might need to be obtained via a production order or a search warrant (e.g. bank documents, mortgage papers, safety box records, private electronic documents). Investigators should be aware that there is specialized software that can help organise and link all the intelligence obtained together. This type of software can facilitate the analysis and can be used to draw interferences between the information inserted. One such a

⁵² Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵³ For example, name, nationality, address, alias, criminal records, languages spoken, family members involved. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵⁴ For example, criminal activities, degree of involvement, accomplices, ‘legitimate’ business activities. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵⁵ For example, locations and spread of criminal activities, means of transport and other travel details. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵⁶ For example, dates, periods of time. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵⁷ For example, criminal methods, means of communication, assets employed, such as vehicles. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

⁵⁸ For example, motivation, lifestyle, frequency of criminal activities. See: Bacarese, “The Role of Intelligence in the Investigation and the Tracing of Stolen Assets in Complex Economic Crime and Corruption Cases”, p 40.

package has been developed by UNODC.⁵⁹ This initiative demonstrates that investigators must be aware of the latest advancements available and should be constantly looking for new ways to facilitate their investigation so that they can react faster and anticipate the requirements of such a complex, and potentially cross-border investigation.

Thomas Lasich, Head of Training at the International Centre for Asset Recovery (ICAR) section in Basel, Switzerland, suggests that an investigation should have three aims. The first goal is to link the assets to the illegal conduct.⁶⁰ The second goal of the investigation is to gather enough evidence for the prosecution of both money laundering and the predicate offences.⁶¹ Thirdly, the investigation should aim to identify and locate the looted or the illicit assets.⁶²

This can be achieved through two different approaches. Giuliano Turone, former senior judge of the Italian National Anti-Mafia Prosecuting Office, writes that there are two ways of looking at an investigation. Investigators can conduct an analysis towards the base of the criminal enterprise or they can conduct an examination towards the apex of the criminal organisation. An examination towards the apex would allow investigators to follow the money laundering trail and will reveal all the related assets that have been acquired by the criminal group.⁶³ On the other side, an investigation towards the base of the criminal enterprise, will expose the link between the dirty money and the predicate offences committed that resulted in

⁵⁹ GoCASE is a software that helps investigators and prosecutors manage their cases. It can interact with other specialized software employed in the Criminal Justice System process, like the software used in court administration and the correction systems. See: International Money Laundering Information Network, "goAML/goCASE - UNODC's Software for Financial Intelligence Units and Law Enforcement/Regulatory Agencies and Criminal Intelligence and Prosecutorial Services", Online: IMoLIN < <http://www.imolin.org/imolin/en/goAML-goCASE.html#goaml> > [accessed on 23.09.2010].

⁶⁰ Lasich, "The Investigative Process – a Practical Approach", p 50.

⁶¹ Lasich, "The Investigative Process – a Practical Approach", p 50.

⁶² Lasich, "The Investigative Process – a Practical Approach", p 50.

⁶³ Savona (2000: 225).

acquiring these funds.⁶⁴ Turone advises investigators to combine the two investigating methods. This is a valid suggestion as both approaches have their weaknesses and strengths.

As a further precaution to keep in mind during a money laundering case, Akomaye suggests that the investigative authority needs to determine in the course of the investigation whether the assets aimed at by the recovery procedures are worth the expense of the investigation. This should be decided by assessing the value of the potential assets that might be recovered and by determining the aim of the investigation.⁶⁵ In other words, it must be assessed whether the goal is the recovery of assets or both the prosecution of the offenders and the assets recovery.⁶⁶ In Akomaye's experience if the suspect is cooperative about the return of the assets, than it would be advisable not to press charges.⁶⁷ This advice is only applicable to the jurisdictions where the prosecutor enjoys a discretionary power to prosecute because a cost analysis might be irrelevant to a state where the prosecutor is compelled to prosecute at any cost. Further, if the prosecuting team can convince the alleged offender to settle the matter, the agreement should be drafted carefully enough to allow for future actions if the person has not disclosed the full extent of his assets at the time of the settlement.⁶⁸

Despite this, if the investigative team decides to pursue the matter further, requests for mutual legal assistance on information located abroad can be sent to the foreign jurisdictions where the assets are supposedly being hidden, such as tax havens or the countries most visited by the alleged offender, his family, and his potential accomplices. The request for mutual legal assistance⁶⁹ would have to be forwarded by the law enforcement unit to the section responsible

⁶⁴ Savona (2000: 225).

⁶⁵ Akomaye, "Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective", p 103.

⁶⁶ Akomaye, "Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective", p 103.

⁶⁷ Akomaye, "Tracking, Seizing & Repatriating The Proceeds of Corruption: N African Perspective", p 103.

⁶⁸ Pieth (2009: 262).

⁶⁹ Lasich suggests that to minimize the possibility that the MLA request is rejected by a foreign state, and thus in order to save valuable time that can be critical to the successful outcome of an investigation, the foreign central

for mutual legal assistance requests at the Department of Justice or at the Department of Foreign Affairs.⁷⁰

A request for mutual legal assistance can seek to obtain for example financial intelligence located in a foreign jurisdiction. This could be in the form of bank statements, visa and debit card statements, and other similar financial documents that a foreign financial institution might have on an individual.⁷¹ Lasich strongly suggests that the MLA request should be drafted in such a way that it would allow foreign investigators to add additional relevant documents. Thus, phrasing a request as “including but not limited to” certain documents is advisable.⁷²

authority in the country where the information is sought should be contacted prior to sending an official mutual legal assistance request. He further adds that countries should explain the matter to the foreign central authority, obtain the required MLA form, and demand for guidance throughout the process. This would ensure that the requesting authorities will use the correct format and will provide all the necessary details required by the foreign jurisdiction. See: Lasich, “The Investigative Process – a Practical Approach”, p 54.

Additionally, investigators should be aware that States Parties to UNCAC or UNTOC can use either one of these conventions as a basis for submitting a mutual legal assistance request to another State Party, unless a more advantageous treaty on international cooperation between the two countries can be identified. Article 18(15) of the Palermo Convention is similar to article 46(15) of the Merida Convention and to article 7.10 of the Vienna Convention. The provisions of these conventions provide that: “A request for mutual legal assistance shall contain: (a) The identity of the authority making the request; (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding; (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents; (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed; (e) Where possible, the identity, location and nationality of any person concerned; and (f) The purpose for which the evidence, information or action is sought.”

Consequently, these provision give investigators an idea of the elements that should be included in their MLA request. Moreover, another useful tool for legal practitioners has been developed by UNODC. The Mutual Legal Assistance Request Writer Tool (MLA Tool) requires no prior knowledge and assists states in drafting a complete and efficient MLA request based on different templates. It is currently available in a few different languages: English, French, Spanish, Russian, Portuguese, Bosnian, Croatian, Montenegrin, and Serbian. See: UNODC, “Mutual Legal Assistance Request Writer Tool”, Online: UNODC < <http://www.unodc.org/mla/index.html> > [accessed on 23.09.2010].

⁷⁰ In Canada, this section is called the International Assistance Group and it is situated within the Department of Justice. The Group acts as an intermediary between the investigative teams of the police and its equivalent in a foreign states. If the coordinates of the central authority responsible for MLA requests in a foreign states are not known, this information can be obtained from UNODC in Vienna, Austria.

⁷¹ For example, during the Abacha investigations conducted in Switzerland, a request from this country for MLA was sent to the United Kingdom. The information requested was: “(i) the account debited, (ii) the owner or beneficial owner of the debited account, (iii) the payer, (iv) the third party giving the transfer order and details of the account debited and (v) the holder and beneficial owner thereof.” See: *Abacha & Ors v. Secretary of State for The Home Department* [2001] EWHC Admin 787 (18 October 2001).

⁷² Lasich, “The Investigative Process – a Practical Approach”, p 55.

Although a mutual legal assistance request has the potential to supply investigators with new pieces of evidence, the investigating team conducting the investigating procedures should be aware that a MLA request can be challenged in court by the person subject to this order.⁷³

If there is enough evidence to secure a temporary freezing order, investigators should apply for one pending the results of the judicial proceedings against the offender. This would make sure that the offender would not remove those assets from the jurisdiction of the court and thus will ensure that the assets are available for a future confiscation order. Similarly, if the assets are located abroad, a state can issue a request to a foreign state to freeze those funds pending the outcome of the trial involving the offender. A request to a foreign state to freeze assets on its behalf can also be issued after the conclusion of a trial, but investigators will incur higher risks that the assets would have disappeared by then.

William Snider, Forfeiture Counsel from the United States Drug Enforcement Administration, advises that when a state requests the enforcement of a freezing order abroad because the assets are located in that jurisdiction, the domestic laws of the requested state apply in regards to the applicable standard.⁷⁴ Moreover, as a consequence of this fact, if the property located in the requested state is frozen, only this state has the authority to lift this order.⁷⁵

Several other questions may arise concerning the freezing procedure. Keith Oliver, specialist in civil fraud and asset tracing, writes that based on his professional experience, if

⁷³ For example, in October 2001, the Abacha family submitted two applications for judicial review before the Queen's Bench in London to challenge the Secretary of State's decision taken in December 2000 to transmit the evidence gathered following a Swiss MLA request and an MLA request from the Government of Nigeria. The court dismissed the application on the basis that the mere transmission of evidence to a foreign jurisdiction does not amount to a trial and the claimant will have the opportunity to make submission in regards to that evidence when the matter will be before the foreign courts. Second, the justices from the Queen's Bench wrote that unless there are very compelling reasons not to transmit this evidence, the court must honour the country's treaty obligations with other states. See: *Abacha & Ors v. Secretary of State for The Home Department* [2001] EWHC Admin 787 (18 October 2001).

⁷⁴ Snider (1995: 379).

⁷⁵ Snider (1995: 379).

freezing orders in England are not respected and the offender disregards the order, he may be charged of contempt.⁷⁶ Third parties who disregard a freezing order risk the same consequences.⁷⁷ Oliver further warns that if the assets subject to the freezing order are located abroad and a third party located abroad breaches the order, the court in the country issuing it would have no jurisdiction to enforce it, and the order would have to be domesticated first by the foreign forum in order to be enforced.⁷⁸

Finally, following the conviction of the individual in case of criminal forfeiture or the obtaining of a final confiscation order in case of civil forfeiture, the confiscation of the assets becomes final.

The last phase of assets recovery is the disposal phase where the property is disposed by the confiscating state in accordance with the law and with regard to any claims made by a victim state.⁷⁹

As described above, the task of putting a successful assets recovery case needs a lot of coordination, the use of specialized knowledge, and the intuition to anticipate the alleged offender's tactics. Even though each case is different, investigators and prosecutors must be familiar with the possibilities that are available to them, not only at the investigation phase, but also during the prosecution part of the matter.

It follows that investigators need a thorough knowledge of the options available to them to recover the illicit proceeds of economic criminality and organised crime. These options are:

⁷⁶ Oliver (2009: 89).

⁷⁷ Oliver (2009: 89).

⁷⁸ Oliver (2009: 89).

⁷⁹ If the return to the victim state is done according to UNCAC, art. 57.3 establishes three possibilities that can be followed by states. In case of embezzlement of public funds or the laundering of these assets, they are returned to the requesting state (57.3(a)). Second, if the funds are a result of other offences under UNCAC, the requesting state will have to fulfill other conditions, such as the establishment of prior ownership (57.3(b)). Third, in all other cases, priority should be given to the return of confiscated property to the requesting state (57.3(c)). Lastly other case-by-case arrangements may be made by the two states (57.4).

administrative proceedings⁸⁰, *qui tam* proceedings⁸¹, private civil proceedings, criminal confiscation, and civil forfeiture. Nevertheless, the last three types of proceedings mentioned are the ones most relevant for addressing transnational criminality because they are the ones that can be of most help to states in combating a wide range of predicate offences. Because the goal of my research is to present the international mechanisms that allow for the exchange of information for non-conviction-based forfeiture, the emphasis will be placed on civil forfeiture.

3.1 Private civil proceedings

Private civil proceedings allow the victim, whether it is an individual or a state, to institute civil action in a foreign state. As a result, the victim becomes a party to the proceedings. Acknowledged by article 53 of UNCAC,⁸² this type of action is similar to regular civil proceedings. Private civil proceedings are based on the idea that the plaintiff can be awarded compensation if the defendant is found guilty of a tort recognized by the country where the action is commenced and therefore if the action is won, the illicit assets can be recovered.

⁸⁰ Administrative proceedings are initiated as a reaction to a breach of the customs legislation. They are therefore instituted based on the domestic custom act and aim mostly at goods that have been illegally imported into the country.

⁸¹ *Qui tam* proceedings are actions based on the US *False Claims Act* 31 U.S.C. § 3729. This act allows citizens to file actions against federal contractors suspected of fraud or where a contractor is suspected of submitting false claims to the US government. These cases have involved health care and military spending for example. The people opening these actions have insider knowledge of these activities and are viewed as whistleblowers. The incentive for whistleblowers to report these irregularities is that the people receive a percentage of the recovery proceedings. In addition, these type of actions have been equally beneficial for the state. Statistics show that during October 1986 to September 2008 USD 22 billion was recovered. See: False Claims Act Legal Center, Online: taf.org < <http://www.taf.org/FCA-stats-DoJ-2008.pdf> > [accessed on 21.09.2010].

⁸² Article 53 of UNCAC which deals with the measures for direct recovery of property states as follows: “Each State Party shall, in accordance with its domestic law:
(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences”.

As an example, in May 2001 the Nigerian Government instituted civil proceedings before the courts in London because some of the stolen funds during the Abacha regime were identified in United Kingdom banks. Despite this action opened by the Government of Nigeria, this matter did not proceed to trial.⁸³ Nevertheless, the Commonwealth Secretariat⁸⁴, Daniel and Maton⁸⁵, have suggested that this type of proceedings could be used to recover proceeds of crime located abroad.

A connection to the jurisdiction where the matter is open is required and usually this requirement is met due to the fact the assets are located in this jurisdiction.⁸⁶ Civil proceedings are an alternative when there is not enough evidence to convict using a criminal trial because the burden of proof is lower. A second advantage is that this alternative can be used even when the defendant is not present in the jurisdiction provided he has been notified of the proceedings. A third advantage, suggested by Daniel and Maton, is that contrary to criminal proceedings, civil proceedings will not necessarily create feelings of support for the accused from the defendant's sympathizers.⁸⁷

However, a major disadvantage for this type of proceedings could be obtaining evidence if there are cross-border elements involved in the matter. For this reason, if one state wishes to recover "dirty money" located in another jurisdiction, private civil proceedings may not be the best option. This is because they can be highly dependent on the cooperation between the state where the matter is brought before the court and the foreign state party to the proceedings. On the other hand, the other options for recovery of illicit assets, criminal and civil forfeiture, have

⁸³ Pieth (2008: 75).

⁸⁴ Commonwealth Secretariat, "Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses" at par. 68.

⁸⁵ Pieth (2008: 245).

⁸⁶ *Attorney-General for and on behalf of the Republic of Zambia and Meer Care & Desai & Ors* [2005] EWCH 2102. See: Pieth (2008: 246).

⁸⁷ Pieth (2008: 249).

the benefit of being able to be used in conjunction with various international instruments and mechanism for the purpose of obtaining intelligence and evidence located abroad in order to be used in the country initiating the matter.

3.2 Confiscation systems

The criminal forfeiture systems can be traced back to the medieval times in England. In cases of treason or other serious crimes, the guilty person's chattels and estates were confiscated⁸⁸ and the guilty person was subject to a number of criminal penalties. For example, the following punishments took place: the death penalty, the "corruption of blood"⁸⁹, and the "*peine forte et dure*" (hard and forceful punishment).⁹⁰ By the late eighteenth century the number of cases of criminal forfeiture decreased considerably in England and in America.⁹¹ These changes took place because the criminal system undergone major changes in the United Kingdom and the United States and the penalties mentioned above were eliminated.

Still, the historical roots of the current concept of civil forfeiture are controversial. When it comes to non-conviction based (*in rem* forfeiture), German claims it is based on the deodand, a system which permitted the attribution of guilt to an object or an animal in the event of someone's death. This resulted in the forfeiture of the respective object or animal.⁹² However, Greek suggests that *in rem* forfeiture is based on the English Navigation Acts and it was used to

⁸⁸ Beare (2003: 258); Mieczkowski (1992: 111).

⁸⁹ If a person was found guilty of a serious crime (such as treason), the person lost his property and the right to pass it to his heirs.

⁹⁰ Mieczkowski (1992: 112).

⁹¹ Mieczkowski (1992: 117, 124).

⁹² German (2009: 21-2).

confiscate contraband goods in an effort to protect the English state's monopoly on imported goods.⁹³

The current criminal and civil forfeiture systems⁹⁴ were revived internationally by numerous multilateral and regional conventions, Council of Europe directives, and other instruments. Some of the prominent initiatives that encouraged the creation of criminal and civil forfeiture are the Vienna Convention⁹⁵, the Palermo Convention⁹⁶, the Merida Convention⁹⁷, the Council of Europe Strasbourg Convention⁹⁸ and other instruments like the Harare Scheme⁹⁹, and the FATF Recommendations.¹⁰⁰

Gilmore noted in regard to the provisions of the Vienna Convention¹⁰¹ that the reason for its being worded so broadly is to allow States Parties the discretion to adopt the most effective measures to achieve these results.¹⁰² Although it is true that the Vienna Convention does not mention what specific forfeiture mechanisms States Parties are expected to adopt, Gilmore's

⁹³ Mieczkowski (1992: 125).

⁹⁴ The terms confiscation and forfeiture are used interchangeably for the purpose of this paper. The Commonwealth Secretariat notes that “[d]epending on the law and practice, legislation in this area [i.e. asset confiscation] uses the term forfeiture or confiscation.” Also, pursuant to art. 2.(g) of UNTOC “[c]onfiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority”. See: Commonwealth Secretariat, “Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses” at p 19; UNTOC, art. 2(g).

⁹⁵ Vienna Convention, art. 5.

⁹⁶ UNTOC, art. 12.

⁹⁷ UNCAC, art. 54.1(b) for criminal forfeiture and art. 54.1(c) for civil forfeiture.

⁹⁸ *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg Convention) at art. 2.

⁹⁹ *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth* at par 54.

¹⁰⁰ FATF Recommendations, Recommendation 3.

¹⁰¹ Article 5 on Confiscation of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* states that:

“1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

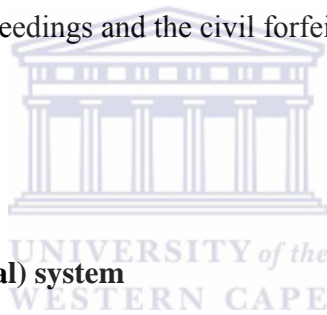
b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.”

¹⁰² Gilmore (2004: 56).

comment, however, is applicable to all instruments that require the creation of forfeiture mechanisms. States are thus not limited in the forfeiture approaches that they can adopt provided of course that these forfeiture mechanisms respect the constitutional powers of the countries where they are implemented.

UNCAC is the only convention that specifically refers to non-conviction-based forfeiture. The other instruments resort to a more general wording and refer to measures that allow for the confiscation of the proceeds of crime. Consequently, some of the options states have at their disposal in addition to private civil proceedings are conviction-based (criminal) forfeiture proceedings, and non-conviction-based (civil) forfeiture proceedings. These two last options, namely the criminal forfeiture proceedings and the civil forfeiture proceedings will be discussed in the following paragraphs.



3.2.1 Conviction-based (criminal) system

Most countries have adopted a conviction-based (criminal) forfeiture system which requires a criminal trial. Following the conviction, and depending on the jurisdiction, the court has the option to require the confiscation of assets as proceeds of crime by calculating the benefit of the offence to the defendant or by confiscating all tainted property.¹⁰³

For example, the German legal system makes a distinction between the two methods of calculating the value to be confiscated by assessing the nature of the criminal conduct. When the assets have resulted from criminal activity, all assets are confiscated.¹⁰⁴ However, when the assets are gained during the fulfillment of a partially lawful activity, such as a bribery act that led

¹⁰³ Commonwealth Secretariat, “Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses” at p 19.

¹⁰⁴ German Federal High Court (Criminal Section) 47, 369.

to the award of a contract, the Federal High Court decided that confiscation will only be granted for the direct benefits acquired following the bribery offence and will not include the lawful indirect revenues resulting from the unfair gain of the contract.¹⁰⁵

Additionally, within the context of illicit benefits acquired, some national laws presume that the assets acquired in the previous five or seven years have stemmed from criminal conduct. This concept is usually covered under the provision of criminal lifestyle.¹⁰⁶

3.2.2 Civil forfeiture

Civil forfeiture (also referred to as non-conviction-based forfeiture, civil recovery, civil confiscation or *in rem* proceedings), is a more recent development in the confiscation of proceeds of crime.

The US developed its forfeiture system in the 1970s, the Irish legislation on this topic was adopted in the 1990s,¹⁰⁷ South Africa adopted civil forfeiture in 1998, the United Kingdom passed the *Proceeds of Crime Act* in 2002 and the province of Ontario, is the first Canadian province that incorporated civil confiscation into the provincial law in 2001.

Due to the fact that civil forfeiture is still a novel assets recovery mechanism, there are still relatively very few countries that have this confiscation system in place. Examples¹⁰⁸ are the

¹⁰⁵ German Federal High Court (Criminal Section) 2006, 334.

¹⁰⁶ For example, s. 10(8) of the UK *Proceeds of Crime Act* (POCA) 2002 assumes 6 years prior to the start of the proceedings while s. 462.37 (2.01)(a) of the Canadian Criminal Code includes the assets obtained 10 years prior to the proceedings.

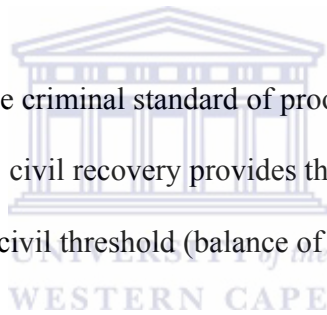
¹⁰⁷ Gallant (2006: 68).

¹⁰⁸ For a complete list of jurisdictions that have established non-conviction based asset forfeiture and the relevant legislation see Theodore S. Greenberg et al., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington D.C.: World Bank, 2009) at p 22.

US¹⁰⁹, Ireland¹¹⁰, UK¹¹¹, Canada¹¹², Australia¹¹³, Slovenia¹¹⁴, the Philippines¹¹⁵, and South Africa.¹¹⁶

This confiscation regime is aimed at the property itself, not the owners of the property, and the kind of asset forfeited is recognizable in the way the court case is cited: for example, *Attorney General of Ontario v. \$29,020 in Canada Currency, Exhaust Fan, Light Ballast, Light Socket (in Rem) and Robin Chatterjee*.¹¹⁷ Gallant characterized it as “the imposition of a form of limited liability on property owners, a liability limited by the value of the property taken.”¹¹⁸ As a result, the most important advantages of civil forfeiture are that the asset recovery takes place irrespective of the offender’s criminal liability¹¹⁹ and the retroactive effect of the predicate offence.

For example, even when the criminal standard of proof (beyond a reasonable doubt) to convict the offender cannot be met, civil recovery provides the prosecution with the alternative of determining liability on a lesser civil threshold (balance of probabilities). Once the



¹⁰⁹ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA PATRIOT) Act of 2001, Public law 107–56 115 Stat. 272.

¹¹⁰ *Proceeds of Crime Act* 1996 (Act No. 30/1996).

¹¹¹ *Proceeds of Crime Act* 2002.

¹¹² Most provinces have enacted proceeds of crime legislation. Here are a few examples: British Columbia *Civil Forfeiture Act*, S.B.C. 2005, c. 29; Manitoba *Criminal Property Forfeiture Act*, C.C.S.M. c. C306; Ontario *Civil Remedies Act*, S.O. 2001, C 28.

¹¹³ *Proceeds of Crime Act* 2002 (Act No. 85 of 2002).

¹¹⁴ *Law on the Prevention of Money Laundering* (Official Gazette of the Republic of Slovenia, No. 62/96). Article 52 Official Gazette No. 79/2001 published on 10 October 2001, entry into force 25 October 2001.

¹¹⁵ *Anti-Money Laundering Act* 2001 (Act No. 9160 of 2001).

¹¹⁶ *Prevention of Organized Crime Act*, 121 of 1998.

¹¹⁷ Mr. Chatterjee was before the court as the property claimant, not as an accused. See: *Ontario (Attorney General) v. \$29,020 in Canada Currency*, [2005] O.J. No 2820; *Ontario (Attorney General) v. Chatterjee*, [2007] O.N.C.A. 406; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624.

¹¹⁸ Gallant (2006: 68).

¹¹⁹ Commonwealth Secretariat, “Combating Money Laundering and Terrorism Financing: a Model of Best Practice for the Financial Sector, the Professions and Other Designated Businesses” at par 62; Pieth (2008: 135).

prosecution has established, on a balance of probabilities, that the assets are tainted, the onus shifts to the accused to prove that the property has been obtained legally.¹²⁰

Gallant notes too, that civil forfeiture attaches liability, which means that a separate action for the execution of the judgment against that property is not required¹²¹ as is in the case of criminal forfeiture. In other words, civil forfeiture is a fast option to recover the proceeds of crime whether it is illicit assets or tainted assets.

Illicit assets are assets derived directly from an illicit enterprise while tainted assets are assets that have resulted indirectly from a criminal activity. This takes place for instance when proceeds of crime are mixed with legally acquired funds or when proceeds of crime are laundered. In both cases, although the resulting funds may seem legal, they are tainted by the previous association with a criminal activity.

At the same time, civil assets forfeiture is restrictive when compared to criminal forfeiture. The confiscation is limited to the assets linked directly to the offence and does not include the possibility of forfeiture of an estimated value-based assessment of the assets, as is possible in case of a conviction-based system. This basically means that civil forfeiture is only useful if the alleged offender actually owns assets that can be located and are worth forfeiting. If the prosecution however, suspects based on the offender's previous involvement in illicit activities that he should own a certain amount of funds that cannot be located, then other methods of forfeiture should be considered depending on the outcome sought.

Civil confiscation has the potential to be an easier alternative to recover illicit proceeds of crime in a wide range of offences, for example, in cases of human trafficking, smuggling of

¹²⁰ Article 5.7 of the Vienna Convention introduced in the 1980s the reverse onus of proof regarding the origin of the alleged illegal proceeds.

¹²¹ Gallant (2006: 68).

goods, corruption-related crimes and even terrorism.¹²² This is because the prosecution does not have to prove these offences and only has to prove that it likely that the proceeds originated from an illegal enterprise. In addition, it can also prevent the laundering of money stemming from these offences.

For instance, crimes of corruption and embezzlement of public funds are not easy to prosecute, especially if the alleged criminal conduct occurred in another country and the prosecuting state suffered no material damages. In such cases, a criminal conviction would be difficult to obtain because of a lack of sufficient evidence to meet the criminal standard of proof. As a result, civil forfeiture might be the best solution in these instances because the guilt of the accused is not relevant factor in the civil proceedings.

This was the case in the Abacha matter¹²³ that ended up before the Swiss courts. In that case the Swiss court¹²⁴ used the provisions of the Swiss Penal Code for confiscation without a criminal conviction (art. 58 *Code Pénal suisse*) and the reversal of the burden of proof (art. 59 *Code Pénal suisse*) to secure a conviction.

In light of this example, it can be concluded that civil forfeiture is preferable in a number of distinct situations. For instance, in cases where the crime occurred in the same jurisdiction but there is not enough evidence to convict the person on the standard of proof required for criminal convictions, in cases where the crime occurred in another jurisdiction but the proceeds are found

¹²² In regards to some of these offences, investigators and prosecutors should also be aware that in the event that crucial evidence required for the case is located abroad, states might be more willing to collaborate for MLA request purposes involving a money laundering case than a criminal prosecution for the predicate offence. This is particularly relevant for terrorism due to its controversial nature among states.

¹²³ General Sani Abacha from Nigeria is known as one of the most corrupt leaders who looted over USD 4 billion in the 1990s. Following his death, the Government of Nigeria brought actions in countries where the former dictator and his accomplices were alleged to have deposited the money. Actions in Switzerland were opened in order to obtain information on the accounts where the funds were located as well as to obtain the release of some of this money to the Nigerian government. USD 2 billion were recovered so far and the recovery efforts continue. See: Pieth (2008: 59).

¹²⁴ Arrêt du 7 février 2005, Ire Cour de droit public, *Abacha et consorts c. Office fédéral de la justice et autres*, 1A.215/2004 du 7 février 2005.

locally (for example, the case of Duvalier¹²⁵ in Haiti), where the accused is immune from criminal prosecutions or where the accused is not available for prosecution (either because he/she is deceased or cannot be located).¹²⁶

In addition to these examples, Casella from the Asset Forfeiture and Money Laundering Section of the US Department of Justice adds the situations where the interests of justice do not require a criminal conviction (such as in minor cases or in cases involving corporations), where the wrongdoer is unknown or the property belongs to a third party who is not charged.¹²⁷

Further, Hofmeyr, the former head of the South African Asset Forfeiture Unit, gives another additional advantage for civil forfeiture. He argues that offenders have been reluctant to fight civil assets forfeiture matters because this implies “making statements under oath that can be used against them in a criminal case.”¹²⁸ This has also been acknowledged by Casella who writes that civil recovery has the benefit to be used successfully where the forfeiture is uncontested.¹²⁹

According to Casella, citing some statistics from 2006, the United States Department of Justice recovered \$1.2 billion through assets forfeiture. Out of this amount, 38 per cent came from uncontested civil cases (\$456 million), 29 per cent resulted from contested civil cases (\$348 million), and 33 per cent came from criminal cases (\$400 million).¹³⁰ Given that more than two-thirds of the illicit funds recovered were recovered through uncontested and contested civil cases,

¹²⁵ Jean-Claude Duvalier became president of Haiti in 1971 and fled to France after a popular uprising in 1986. In the following years, Haiti has tried to obtain some of the funds plundered by the former president and his entourage. Proceedings for misappropriation of public funds were started in 1986 and 2007 in Haiti. See: Basel Institute on Governance, Jean-Claude "Baby Doc" Duvalier, Online: Basel Institute on Governance < <http://www.assetrecovery.org/kc/node/558ce875-a33e-11dc-bf1b-335d0754ba85.3> > [accessed on 8.8.2010].

¹²⁶ Art. 54.1 (c) of UNCAC recommends State parties to “allow confiscation of ... 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.”

¹²⁷ Cassella (2008).

¹²⁸ Pieth (2008: 138).

¹²⁹ Cassella(2008: 9); Greenberg (2009: 15).

¹³⁰ Cassella(2008: 10).

this should serve as a strong incentive for more countries to adopt a civil recovery mechanism. This is especially relevant given that there is a trend to turn the law enforcement agencies involved in the anti-money laundering efforts into self-sustaining bodies and to redirect the forfeited assets to the victims in cases where they can be identified (e.g. grand corruption¹³¹).

At the same time, it is very likely that given the transnational nature of money laundering and its predicate offences, some of the evidence required to secure a conviction order using civil forfeiture might be located abroad. This might have a detrimental impact on the outcome of an investigation, and unless there is a good international information exchange system, there is a risk that instead of an early freezing order and a successful prosecution, criminals would disperse their assets and will conceal them under different unlawful enterprises.

Fortunately, unlike criminal confiscation, civil forfeiture does not require double criminality when it comes to MLA requests,¹³² which means that it is not necessary for the conduct to be a crime in both states in order for the requested state to provide information to the requesting state. The following chapter discusses the potential avenues available to investigators in obtaining intelligence and evidence located in a foreign jurisdiction.

¹³¹ Grand corruption refers to corruption acts perpetrated by top level public officials and usually involve significant amounts that are looted.

¹³² Pieth (2008: 138).

CHAPTER 4 MECHANISMS ALLOWING FOR THE EXCHANGE OF INFORMATION FOR CIVIL FORFEITURE

Although civil assets recovery has the potential to enable investigators to increase the proceeds of crime forfeited through criminal confiscation, there has been very little written on the topic. Even less has been published on the issue of information gateways that can be used in fighting money laundering in the context of civil forfeiture. This lack of information has been acknowledged by practitioners,¹³³ and it is due to the novelty of this forfeiture system and the relatively few number of countries that have adopted this system.

The existing treaties are largely inapplicable to civil recovery investigations and proceedings because they were initially envisioned for international cooperation in criminal matters. This constitutes an obstacle, not only for the exchange of information for purposes of civil forfeiture, but also for the confiscation of assets. Ideally, investigators should have the possibility to access all financial information required to build a successful case.

The key to putting a successful case together is to identify as many elements possible of the laundering scheme used, and the predicate offence employed by the criminal to acquire the illicit funds. A fruitful financial investigation therefore depends on the investigators' ability to identify these elements and to obtain reliable evidence that can be used in court.

Illicit assets are usually dispersed in an effort to hide their criminal origin from law enforcement agencies and also in an attempt to integrate those assets into the economy. Law enforcement bodies have been traditionally hampered in their efforts to track down criminals by jurisdictional limitations and also by the lack of local and international inter-departmental cooperation. Given the transnational operation of organized criminal groups and the current

¹³³ Simser (2008: 22).

sophisticated technology that allows the speedy and effortless transfer of funds worldwide, an effective way of tackling money laundering requires strong international cooperation between national law enforcement agencies.

This chapter seeks to identify the international cooperation mechanisms available to investigators that allow them to obtain vital information located abroad for use in domestic *in rem* proceedings. As was illustrated in the previous chapter, quick access to information located in a foreign country can significantly improve the chances of success of a civil confiscation action which can, in some cases, translate into the repatriation of assets to victim states that greatly need them. Further, civil confiscation can constitute a potential source of revenue for domestic law enforcement bodies. This chapter will add to the mechanisms suggested by Kennedy¹³⁴ and will attempt to explore other alternatives.

The international cooperation in recovering the proceeds of crime is a newer form of cooperation based on a complex network that has yet to reach its full potential. Due to this fact, it remains a relatively unknown area, even to the authorities that work on the enforcement of mutual legal assistance (MLA) requests.

At the same time, the current study has one limitation. Broome¹³⁵ differentiates between the information obtained for an initial investigation and the information obtained for prosecution. This paper does not separate the two clearly because there is usually an overlap between the two types of information. Nevertheless, in practice it is expected that informal mechanisms will be used during the investigation stage while formal mutual assistance mechanisms will more likely be used during the prosecution phase. This chapter explores the formal as well as the informal mutual assistance mechanisms available to investigators and prosecutors.

¹³⁴ Kennedy (2007: 388).

¹³⁵ Broome (2005: 494).

4.1 Formal mutual assistance mechanisms

The following sections deal with formal mutual legal assistance mechanisms. It analyses the benefits and drawbacks of Rogatory Letters, the multilateral international conventions, regional treaties, bilateral treaties and other less known international instruments that can be used as a basis for international cooperation.

4.1.1 Rogatory letters

Rogatory Letters (Letter Rogatory, Letter of Request or *Commission Rogatoire*¹³⁶) are requests for assistance issued by the judicial authority of one state to its corresponding authority in another state. Some of their weaknesses is that their enforcement are at the discretion of the receiving state¹³⁷, are ineffective between countries with different legal traditions¹³⁸, and they take a long time to produce results because they are forwarded through diplomatic channels.¹³⁹

More importantly though, they are issued by a judge, which means they cannot be used during the investigative stage of a matter. This becomes especially relevant in common law countries where the police and prosecutors are responsible for gathering all the necessary evidence.

On the other hand, German notes that Rogatory Letters are an important alternative for countries that do not have a treaty relationship in place.¹⁴⁰ For example, during the investigations

¹³⁶ Brown (2008: 278).

¹³⁷ German (2009: 18-5); Snider (1995: 385).

¹³⁸ Brown (2008: 143); Prost, "Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime"; Savona (2000: 202).

John Evans from the International Center for Criminal Law Reform and Criminal Justice Policy, Canada writes that in several instances where the Canadian authorities have had to collect evidence in civil law countries, this evidence was later found to be inadmissible in Canada. See: Savona (2000: 202).

¹³⁹ Brown (2008: 143); Prost, "Breaking Down the Barriers: Inter-National Cooperation in Combating Transnational Crime"; Pieth (2008: 140).

¹⁴⁰ German (2009: 18-5).

conducted in 2000 in the Abacha matter by the Swiss authorities, Letters Rogatory were sent to other jurisdictions in an effort to identify the origin or destination of illicit proceeds controlled by the Abacha clan.¹⁴¹

4.1.2 Direct mutual assistance

More recently, there has been a demand for faster ways to obtain information located abroad and the solution has been to rely on a permanent mutual agreement.

Mutual legal assistance (MLA or mutual assistance) is a form of international cooperation that allows for the exchange of a wide range of information between states. This information can be potentially used during the investigation or can be introduced as evidence in criminal or civil proceedings. A request for assistance can include, for example, taking evidence or statements from persons, tracing proceeds of crime, searching, freezing and seizure of assets, the production of evidentiary items, and the service of documents.¹⁴²

There are multiple ways to enter into a MLA agreement. The agreement can be based on international instruments (such as the Commonwealth Harare Scheme or UNCAC) or can be done through regional treaties, for example the Strasbourg Convention, or the Inter-American Convention against Corruption. Another alternative to have access to MLA is found in domestic legislation that allows for spontaneous disclosure (e.g. Switzerland). The treaty-based mechanisms usually provide for a local central authority (most times located within the Department of Justice) that deals with the mutual assistance requests and forwards them to the appropriate domestic body.

¹⁴¹ Pieth (2008: 51).

¹⁴² Vienna Convention, art. 7.2; UNTOC, art. 18.3; UNCAC, art. 46.3.

4.1.2.1 Treaty-based assistance

Traditionally, the efforts to establish international cooperation agreements have focused on inter-state cooperation in criminal matters (e.g. *European Convention on Mutual Assistance in Criminal Matters*, Vienna Convention). During the last 20 years, the concept has been expanded to include an increasingly wider range of predicate offences as well as non-conviction based forfeiture mechanisms which can be characterized as a mixed criminal-civil system.

a) Multilateral international conventions

The 1988 *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna Convention) is recognized at the moment as the most important instrument that paved the way for the subsequent conventions. This is due to the fact that it included a stand-alone clause on mutual assistance,¹⁴³ thus acknowledging the importance of international cooperation in domestic crime prevention and in combating transnational crimes. Because the Vienna Convention is one of the oldest instruments that encourages international cooperation, and owing to the fact that it has received considerable support from States Parties, it still remains an easier basis on which to exchange information on drug-related offences.

Similar provisions on mutual assistance have been subsequently included in both UNTOC¹⁴⁴ and UNCAC.¹⁴⁵ This ensures that in circumstances where there are no bilateral

¹⁴³ Article 7 of the Vienna Convention on mutual legal assistance states as follows:

“1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.”

¹⁴⁴ UNTOC art. 18.1, 18.2.

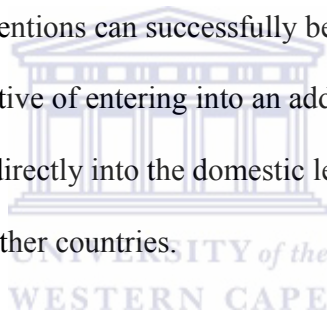
¹⁴⁵ Article 46 of UNCAC on mutual legal assistance states as follows:

“1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings

agreements between States Parties, compliance of a State Party to a MLA request on the offences subject to these conventions is not discretionary. The mandatory compliance of States Parties to the conventions, coupled with the fact that cooperation during the investigation stage is possible, represents a radical shift from the concept of Rogatory Letters and proves the importance of international cooperation in fighting crime.

Furthermore, the success of these international conventions relies on the number of states that are party to them. These States are required to render MLA requests in respect of the offences covered (e.g. drug trafficking, organized crime, corruption) to other State Parties to these instruments.

Lastly, although these conventions can successfully be used as a basis for international cooperation, states have the alternative of entering into an additional regional multilateral treaty, a bilateral treaty, or incorporating directly into the domestic legislation mechanisms that allow the exchange of information with other countries.



b) Regional treaties

When it comes to regional mechanisms that allow for the exchange of information for civil forfeiture, there are a number of regional conventions that can provide the legal basis for the exchange of information for civil forfeiture depending on the underlying offence committed.

The 2005 *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*¹⁴⁶, the Inter-

in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.”

¹⁴⁶ Article 15 of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* on the general principles and measures for international co-operation states as follows:

*American Convention on Mutual Assistance in Criminal Matters*¹⁴⁷ and the *Inter-American Convention against Corruption*¹⁴⁸ can be alternatives for the countries interested in international cooperation depending on the requestor state's location. Similar to UNTOC and UNCAC, some of these conventions include a wider range of predicate offences, while others are limited to corruption-related acts.

Overall, regional treaties would be advantageous for adopting specific prevention activities designed to respond to the socio-economic needs of a particular geographic area. Second, they could also prove to be helpful in unifying the criminalisation of offences, whether it is money laundering or its predicate offences. However, when it comes to international cooperation, either for the purpose of mutual legal assistance or extradition, regional treaties might not be as efficient as the global instruments.

This disadvantage of regional treaties is due to the fact that participation is only regional, and thus the number of signatories is considerably less when compared to that of multilateral conventions. This can be an obstacle to international cooperation because more treaties have to

¹⁴⁷ “1 The Parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2 Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

a for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b for investigative assistance and provisional measures with a view to either form of confiscation referred to under a above.

3 Investigative assistance and provisional measures sought in paragraph 2.b shall be carried out as permitted by and in accordance with the internal law of the requested Party. Where the request concerning one of these measures specifies formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to the fundamental principles of its law.

¹⁴⁷ Article 2 of the *Inter-American Convention on Mutual Assistance in Criminal Matters* provides as follows:

“The states parties shall render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction at the time the assistance is requested.”

¹⁴⁸ Article 15 of the *Inter-American Convention against Corruption* provides that:

“ 1. In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention. [i.e. Acts of Corruption, Transnational Bribery, Illicit Enrichment].”

be concluded to obtain the same number of potential countries that are willing to collaborate for mutual legal assistance purposes.

c) **Bilateral treaties**

States that are interested in fighting money laundering and recovering proceeds of crimes have the option of signing bilateral treaties with countries with which they will most likely collaborate. One such bilateral treaty is between United States and Switzerland, a treaty that was signed in 1970s.¹⁴⁹

Bilateral treaties have the advantage of best addressing the needs of the respective States Parties involved and thus the provisions of the treaty can reflect the complexity of the national laws, the evidentiary requirements, and the domestic authorities involved. However, on the other hand, they might not be an option for all states because their implementation is costly and time-consuming. Australia, for example, has signed 24 bilateral treaties on mutual legal assistance¹⁵⁰, the United States 50, the United Kingdom 20, South Africa seven, and Thailand five.¹⁵¹

This shows that countries adopt various measures to address transnational criminality. These numbers do not necessarily imply that some countries are more willing to engage in mutual legal assistance because, in the end, irrespective of the number of bilateral treaties signed, countries must have the capacity and the political will to give effect to the MLA requests.

¹⁴⁹ *United States – Switzerland Treaty on Mutual Assistance in Criminal Matters* January 23, 1977, 27 UST 2019, TIAS 8302.

This is the first bilateral treaty on criminal matters concluded by the United States. It was intended to replace the old and inefficient system of Rogatory Letters. The treaty was designed to allow US the opportunity to obtain evidence that could be used for investigations and could be admissible in the US courts. See: Abbell and Ristau (1995: 12-4-1).

¹⁵⁰ Australian Government, Attorney-General's Department, *A Better Mutual Assistance System: A Review of Australia's Mutual Assistance Law and Practice* at p 9.

¹⁵¹ UNODC, *Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice*, Vienna 2001 at p 27.

As an illustration, Canada signed in 1992 a bilateral treaty with the Netherlands on mutual assistance in criminal matters.¹⁵² The treaty designates the central authorities in both countries, and the offences covered by the treaty. It also defines what type of assistance is included (e.g. investigation, prosecution and suppression of the offences) and the way this assistance will be offered.¹⁵³ Furthermore, the treaty establishes the preferred method of submission of the requests, their content, and provides for the payment of the expenses of MLA requests and the expenses associated with a testimony in the requesting state.

Furthermore, states wishing to develop a bilateral treaty can also consult the *Model Treaty on Mutual Assistance in Criminal Matters* developed by the United Nations in 1990 and included in the UN General Assembly Resolution 45/117 of 14 December 1990.¹⁵⁴ Similarly to the treaty mentioned before between Canada and the Netherlands, the UN model treaty contains provisions on the designation of competent authorities, the content of requests, the service of documents, provisions on obtaining evidence, and the repartition of costs.

The provisions mentioned are only an example of the aspects that can be included in a bilateral treaty by the countries wishing to pursue this alternative for international cooperation. Countries are therefore encouraged to consult other bilateral treaties and to customize the UN *Model Treaty* to fit the needs and the special difficulties faced by the parties.

¹⁵² *Treaty Between Canada and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters.*

¹⁵³ As an example, the bilateral treaty provides that assistance will be offered on providing information and objects, locating or identifying persons and objects, taking statements, executing requests for search and seizure, locating, restraining and forfeiting the proceeds of crime and other property.

¹⁵⁴ *Model Treaty on Mutual Assistance in Criminal Matters*, GA Res. 45/117, 68th plenary, (14 December 1990).

d) Other international instruments

In his article entitled ‘Winning the information wars’, Kennedy¹⁵⁵ referred to the Commonwealth Harare Scheme as one potential mechanism available to investigators wishing to obtain information located abroad for non-conviction forfeiture.

According to art.3(3) of the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme)*¹⁵⁶, a criminal matter includes civil forfeiture proceedings and as a result, pursuant to art. 1(1) and 1(2) requests for assistance can be based on the Scheme.

The Commonwealth Working Group on Asset Repatriation clarified that although the Harare Scheme is a non-treaty based scheme, its enforcement is totally voluntary and is effected through the enactment of domestic legislation in line with the Harare Scheme.¹⁵⁷ Consequently, the domestic enforcement may hinder effective mutual assistance between states where provisions of the treaty are not incorporated into national law.

¹⁵⁵ Kennedy (2007: 388).

¹⁵⁶ Commonwealth Secretariat, “Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth”, London LMN (86) 13, Online: Commonwealth Secretariat < www.thecommonwealth.org > [accessed on 12.7.2010]. The Harare Scheme provides as follows:

“1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.

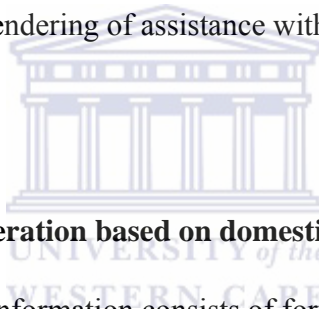
(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order

- (a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been
 - (i) derived or obtained, whether directly or indirectly, from; or
 - (ii) used in, or in connection with, the commission of an offence;
- (b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or
- (c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).”

¹⁵⁷ Commonwealth Secretariat, “Report of the Commonwealth Working Group on Asset Repatriation” (London: Marlborough House, 2005) at p. 33.

As an example of a mutual legal assistance request based on this instrument, in the year 2000, Nigerian investigators presented a request to the United Kingdom based on the Harare Scheme.¹⁵⁸ Therefore, if the states have incorporated the Harare Scheme's provisions into their respective domestic laws, the scheme could become a useful tool. However, as the name suggests, the scheme is limited to the Commonwealth countries because it is based on the similarities of the common law system.¹⁵⁹

The Report of the Commonwealth Working Group on Asset Repatriation advised that, given the fact that some states require a bilateral treaty as a legal basis for MLA requests, and because developing states do not have the resources to negotiate them, ideally, national legislation should provide for the rendering of assistance without the requirement of a treaty.¹⁶⁰



4.1.2.2 International cooperation based on domestic legislation

Spontaneous disclosure of information consists of forwarding information on illicit proceeds to another state without a prior MLA request. This can address a gap in the information exchange between states. It can assist a state in a recovery action, and has the potential to strengthen the cooperation between states.

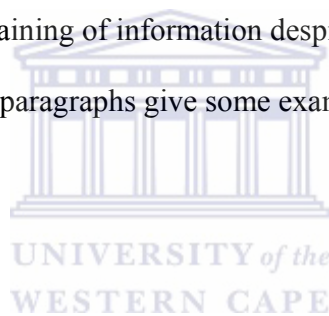
¹⁵⁸ The MLA request indicated the suspicious transfer of over \$1 billion to London banks. Following the Abacha family's response to the allegations the UK Home Office decided to execute the request. An action for judicial review of this decision was opened and, on 18 October 2001, the High Court of London, Administrative Division, rejected the appeal. The evidence requested was forwarded to Nigeria in December 2004. See: Pieth (2008: 53); *Abacha & Ors v. Secretary of State for The Home Department* [2001] EWHC Admin 787 (18 October 2001).

¹⁵⁹ Brown (2008: 144).

¹⁶⁰ Commonwealth Secretariat, "Report of the Commonwealth Working Group on Asset Repatriation" (London: Marlborough House, 2005) at p. 27.

There are a number of instruments that recommend spontaneous disclosure as an additional mechanism in fighting money laundering. For instance, art. 46.4 of UNCAC¹⁶¹, art. 18.4 of UNTOC, art. 10 of the Strasbourg Convention¹⁶², art. 20 of the Warsaw Convention¹⁶³, art. 28 of the CoE Criminal Law Convention¹⁶⁴, and FATF recommendation 40. All of these encourage spontaneous disclosure for the purpose of non-conviction forfeiture. Pursuant to these conventions, this type of collaboration is optional. However, bilateral treaties and MLA agreements are not necessarily required for international cooperation and some governments have enacted legislation that allows for spontaneous disclosure.

A flexible domestic law has the advantage of overcoming the lack of a bilateral agreement and it allows for the obtaining of information despite the existence of a formal international treaty. The following paragraphs give some examples.



¹⁶¹ Article 46. 4 of UNCAC on mutual legal assistance states:

“Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.”

¹⁶² Article 10 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime on Spontaneous* information states:

“Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under this chapter.”

¹⁶³ Article 20 of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (Warsaw Convention) on spontaneous information states:

“Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under this chapter.”

¹⁶⁴ Article 28 of the *Council of Europe Criminal Law Convention on Corruption* on spontaneous information states: “Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter.”

One of the first known cases where spontaneous cooperation was used took place during the Montesinos¹⁶⁵ investigation in Switzerland. The information provided by the Swiss authorities revealed the identity of the account holders and the dates of the transactions. As a result, Peruvian authorities were able to determine the origin of the illicit funds.

Art. 67a of the Swiss Act on International Assistance in Criminal Matters¹⁶⁶ provides as follows:

According to this article, the prosecuting authority may spontaneously transmit to a foreign authority information acquired during its own investigation when it determines that this information will permit the initiation of criminal proceedings or will facilitate an ongoing investigation (my translation).¹⁶⁷



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¹⁶⁵ Following the April 2000 re-election of Alberto Fujimori in Peru, video tapes surfaced, showing Vladimiro Montesinos, the head of Peruvian National Intelligence Service, bribing various officials. In October 2000, suspicious reports were sent by Switzerland banks to the national agency that deals with combating of money-laundering, the Swiss Money Laundering Reporting Office (MROS). A criminal investigation was opened to examine the allegations for money laundering and USD 48 million were frozen in Swiss bank accounts. The Peruvian government was informed of these funds and was asked to investigate these allegations. See: Pieth (2008: 116); Basel Institute on Governance, Paper presented at the Intermediate Training Programme on Asset Tracing, Recovery and Repatriation, Jakarta, September 2007, “Efforts to Recover Assets Looted by Vladimiro Montesinos of Peru” Online: Basel Institute on Governance < <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=1aafec73-a345-11dc-bf1b-335d0754ba85> > [accessed on 6.8.2010].

¹⁶⁶ RS 351.1 *Loi fédérale sur l’entraide internationale en matière pénale* (Loi sur l’entraide pénale internationale, EIMP) du 20 mars 1981.

¹⁶⁷ RS 351.1 *Loi fédérale sur l’entraide internationale en matière pénale* provides that :

“Art. 67a Transmission spontanée de moyens de preuve et d’informations

1 L’autorité de poursuite pénale peut transmettre spontanément à une autorité étrangère des moyens de preuve qu’elle a recueillis au cours de sa propre enquête, lorsqu’elle estime que cette transmission:

- a. est de nature à permettre d’ouvrir une poursuite pénale, ou
- b. peut faciliter le déroulement d’une enquête en cours.

2 La transmission prévue à l’al. 1 n’a aucun effet sur la procédure pénale en cours en Suisse.

3 La transmission d’un moyen de preuve à un État avec lequel la Suisse n’est pas liée par un accord international requiert l’autorisation de l’office fédéral.

4 Les al. 1 et 2 ne s’appliquent pas aux moyens de preuve qui touchent au domaine secret.

5 Des informations touchant au domaine secret peuvent être fournies si elles sont de nature à permettre de présenter une demande d’entraide à la Suisse.

6 Toute transmission spontanée doit figurer dans un procès-verbal.”

The International Center for Asset Recovery advises that this article includes the disclosure of information usually covered by secrecy if this will enable a foreign government to make a MLA request to Switzerland.¹⁶⁸

Another example of a similar provision can be found in the Jamaican *Proceeds of Crime Act*.¹⁶⁹ This law allows the Assets Recovery Agency (also the Financial Investigations Division) to provide information to a foreign agency. Section 15 states:

“(1) Information obtained by the Agency in connection with the exercise of any of its functions may be disclosed by the Agency if the disclosure is for the purposes of -
(a) any criminal investigation that is being or may be carried out, whether in Jamaica or elsewhere;
(b) any criminal proceedings that have been or may be started, whether in Jamaica or elsewhere;
....
(g) investigations or proceedings outside Jamaica, in accordance with the provisions of the Mutual Assistance (Criminal Matters) Act;”

The above examples show that cooperation based on domestic law is possible in the absence of a treaty relationship between states. The initiating state would have a designated procedure for sending, receiving and executing requests. Although this type of collaboration would undoubtedly be cheaper and faster than a traditional, treaty-based MLA procedure, spontaneous disclosure based on domestic legislation is entirely discretionary and each initiative would be considered on a case-by-case basis.

In sum, spontaneous disclosure is more likely to achieve results if the receiving state can use the information received to launch proceedings in its jurisdiction. If, however, a state already has a pending investigation, it would be up to the states themselves that have this mechanism in place to volunteer this information. As a result, the success on a forfeiture investigation is highly

¹⁶⁸ International Center for Asset Recovery, Switzerland Country Profile: MLA in Relation to Asset Recovery, online < <http://www.assetrecovery.org/kc/node/c044788d-ab23-11dc-addd-cb8cc23f500a.0.jsessionid=75C404238E8F6142F433DDBA84CBF623#toc3> > [accessed on 6.7.2010].

¹⁶⁹ *Proceeds of Crime Act*, 2007 (Act 4 of 2007), Jamaica Gazette Supplement, Bills and Acts, 2007-03-09, Vol. CXXX, No. 5.

dependent of the concurrent cooperation of the prosecuting authorities (and/or central authorities). For this reason, this cooperation mechanism seems more promising at the regional level as the relevant bodies involved in the exchange of information have more chances of being aware of their neighbor's political, economic and social interests in pursuing an information tip further.

4.2 Informal mutual assistance mechanisms

One of the biggest issues in mutual legal assistance is the delay occasioned by the processing of a request. In most cases, requests are forwarded to the foreign state's central authority which, in turn, will send them to the appropriate domestic agency. Once processed, the request would go back through the same channels. This can have damaging consequences for the assets recovery process because of the easiness and speed with which the illicit proceeds can be relocated.

One way to overcome this problem is to shorten the communication channels between the entities involved in MLA. This could be done through direct communication between counterparts in different countries (e.g. police-to-police and agency-to-agency-assistance) and through joint investigations.

Interagency assistance is a separate tool that can be accessed by investigators independently of a MLA request. It consequently offers the possibility of enhancing or minimizing the speed of the formalities characteristic of the mutual assistance process. Mutual legal assistance treaties do provide a good legal basis for collaboration but on the other hand, international informal assistance can bypass some obstacles that confront countries with an

inadequate domestic infrastructure. Some of the potential impediments to this exchange of information are legislation (for example privacy laws) and limitations included in the interagency agreements on the ways that information could be shared between agencies.¹⁷⁰

Cooperation between similar agencies is usually achieved through informal agreements such as memoranda of understanding (MOU). Informal assistance is easiest to set up when coercive powers are not required (for example search and seizure) and can allow, for example, for the gathering of information publicly available abroad, and the obtaining of information from cooperative witnesses and government departments.¹⁷¹

The UNODC 2001 Expert Working Group's Report on Mutual Legal Assistance Casework Best Practice also identified the interagency assistance as "faster, cheaper and more flexible than the more formal route of mutual legal assistance."¹⁷² The report further recommended that communication should be done through Interpol, Europol and other similar bodies under any applicable arrangements that are in place.¹⁷³

In addition to the exchange of information exchanged through police channels, lawyers and policy makers¹⁷⁴ have recognized the value of establishing joint investigative teams on transnational crime. Depending on the jurisdiction, law enforcement agencies have access to various instruments¹⁷⁵ that allow them to set up joint investigations. This option can allow multiple states interested in pursuing a matter that has wide ramifications and requires synchronized inter-state investigation efforts to share information.

¹⁷⁰ Broome (2005: 496).

¹⁷¹ Pieth (2008: 139).

¹⁷² UNODC, Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, Vienna, 2001, Online: < http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf > at p 9 [accessed on 7.8.2010].

¹⁷³ *Ibid.*

¹⁷⁴ UNODC, Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, Vienna, 2001, Online: < http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf > at p 9 [accessed on 7.8.2010]; Kennedy (2007: 388); U4 Anti-corruption Resource Center (2003) *Recovery of Corruption-Related Assets*.

¹⁷⁵ For example the *European Convention on Mutual Assistance in Criminal Matters*, s. 13(10), UNCAC joint investigation, art. 49.

Currently there are a few other options that might develop into useful informal information exchange tools. Kennedy has proposed that the CARIN Network (Camden Assets Recovery Inter-Agency Network)¹⁷⁶ might be able to suggest additional ways to practitioners on the possibilities of obtaining information.¹⁷⁷

A second option has been proposed by the European Commission. The Commission has created the European Evidence Warrant (EEW) in 2008. The EEW will allow judicial authorities to issue a warrant that would facilitate the obtaining of information that is directly available in another European Union member state.¹⁷⁸ The Warrant excludes information obtained through interviews, statements, interception of communications, evidence requiring analysis of existing documents or data¹⁷⁹ but its recognition is not subject to dual criminality.¹⁸⁰

This cooperation system has the potential of developing into a mechanism that will replace the existing mutual assistance regime in the European Union and thus, provided it is adopted by EU countries, it will make international cooperation possible even with countries that have not signed and implemented a relevant convention.

¹⁷⁶ The CARIN Network (Camden Assets Recovery Inter-Agency Network) is an informal network that can act as an advisory group on the recovery of proceeds of crime. However, participation is limited to the EU Member States and a few observer states.

¹⁷⁷ Kennedy (2007: 388).

¹⁷⁸ *Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters* OJ L 350 of 30.12.2008.

¹⁷⁹ *Ibid.* at art. 4(2).

¹⁸⁰ *Ibid.* at art. 14.

CHAPTER 5 POLICY RECOMMENDATIONS

Criminals have always been aware that international criminal operations have less chances of being detected by law enforcement professionals because of the multitude of jurisdictions involved, the lack of international cooperation between them, and the differences in their legal systems. Other hurdles, such as language and cultural barriers, can also put a strain on the international cooperation in criminal matters.

The elimination of borders, in Europe, as a result of the creation of the Schengen area, and in North America, as a result of the North American Free Trade Agreement, has expanded not only the opportunities for international commerce but also for transnational criminality. Also, the increase in international travel, immigration, the ease of global communication and access to information, have facilitated the movement of criminals worldwide.

Modern day offenders have adapted their criminal behaviour to escape investigation and prosecution and as a result, they have increased the complexity of their illegitimate operations. Criminals are aware of the efforts made by local authorities and the existing legislation and, as a result, they have modified their criminal behaviour to take advantage of the existing loopholes in the regulation of financial institutions and the regulation of business practices.

Criminals have access today to professional advisors (such as lawyers, accountants, tax advisors, and real estate agents) who can facilitate for them the creation and running of complex transnational money laundering schemes. This has made the collection of intelligence and evidence more difficult for domestic investigators and unless states start to take a more proactive approach in arresting criminals, they will always be a step behind them and will only apprehend the so called “small fish”. A proactive approach would include employing the most appropriate confiscation mechanism for each matter investigated, depending on the peculiarities of the assets

targeted, the jurisdiction where those assets are located, the location of the offender, the potential claims of third party *bona fide* third party owners, and the evidence available to investigators.

To achieve this, countries need to put together teams of investigators who have the knowledge to investigate economic criminality and who can contribute with their experience a wide knowledge and a multitude of skills. These teams must reflect the essential skills of a number of professionals, such as computer forensics analysts, forensic accountants, lawyers specialized in corporate law and professionals from the banking sector who are knowledgeable about international money transfer procedures.

Furthermore, in order to facilitate the communication between the various players who interact at the investigative and prosecutorial stage of a matter, UNOC has created a few specialized software packages that look very promising for professionals working on anti-money laundering cases. These tools can be found on the International Money Laundering Information Network (IMoLIN) website (www.imolin.org).

UNODC has developed a Mutual Legal Assistance Request Writer Tool¹⁸¹, a software designed for Financial Intelligence Units¹⁸², a Case Management System for Member States' Law Enforcement and Regulatory Agencies as well as for Criminal Intelligence and Prosecutorial Services.¹⁸³ These software tools have the potential to increase the efficiency of law enforcement agencies and to decrease the gap between similar agencies in different countries.

¹⁸¹ UNODC, “Mutual Legal Assistance Request Writer Tool”, Online: UNODC < <http://www.unodc.org/mla/index.html> > [accessed on 23.09.2010].

¹⁸² GoAML is an integrated software application that allows countries that do not have the IT capacity to develop their own application to have access to a standard package that meets the current AML and anti-terrorism financing standards. See: International Money Laundering Information Network, “goAML/goCASE - UNODC's Software for Financial Intelligence Units and Law Enforcement/Regulatory Agencies and Criminal Intelligence and Prosecutorial Services”, Online: IMoLIN < <http://www.imolin.org/imolin/en/goAML-goCASE.html#goaml> > [accessed on 23.09.2010].

¹⁸³ See: International Money Laundering Information Network, “goAML/goCASE - UNODC's Software for Financial Intelligence Units and Law Enforcement/Regulatory Agencies and Criminal Intelligence and Prosecutorial

Additionally, a few other helpful projects are being developed by UNODC and its partners. The Library of Laws and Jurisprudence Relevant to the United Nations Convention against Corruption is one such an example. It will be partially available on December 1st, 2010. This will allow practitioners to consult other States Parties' legislation, jurisprudence and other materials relevant to assets recovery and this can be instrumental in developing improved policies on combating economic crimes and transnational criminality. Another initiative is the recent launch by StAR and INTERPOL of the Asset Recovery Focal Point Database. This is a 24 hour, seven days a week, StAR Focal Point Contact List of officials that can be reached in case of urgent requests for assistance.¹⁸⁴ The interaction between the members of this network will no doubt facilitate the coordination on cross-border investigations in assets recovery cases.

Therefore, investigators and prosecutors have access to a number of useful tools, not only at the investigation phase, but also during the prosecution. Once the gaps in the information needed to proceed with the case are identified, and depending of the type of intelligence or evidence needed, the investigation team should decide if this information can be acquired through formal or informal mutual assistance.

If it can only be obtained through formal mutual legal assistance, investigators, depending on the treaties and convention in place, should forward all requests through the national central authority responsible for MLA. However, if the information can be obtained through informal mutual assistance, the investigation team should contact directly their foreign counterparts directly and see whether it can be obtained through these channels.

Services”, Online: IMoLIN < <http://www.imolin.org/imolin/en/goAML-goCASE.html#goaml> > [accessed on 23.09.2010].

¹⁸⁴ UNODC, “Asset Recovery on the Road to Doha: Activities Under the Stolen Asset Recovery Initiative”, Online: UNODC < <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2009-May-14-15/V0981905e.pdf> > at p 8 [accessed on 7.10.2010].

This paper has tried to present the benefits of non-conviction forfeiture and the potential avenues for the exchange of information available in the context of this forfeiture system. When it comes to crimes such as drug trafficking, human trafficking, and corruption, actions that lead to transnational money laundering, domestic laws are toothless without international cooperation.

The successful recovery of proceeds of crime is extremely dependent on international cooperation and an effective MLA framework can help combat money laundering and pave the way for the recovery and repatriation of illicit assets. In addition, as Daniel Thelesklaf, the Co-Director of the Basel Institute on Governance suggested, it is entirely possible that a mutual legal assistance request from a foreign country will trigger a “reverse” MLA in the requested state.¹⁸⁵ In other words, Thelesklaf points out that a foreign mutual legal request will make the domestic authorities of a country aware of the existence of irregularities concerning an individual which in turn may trigger questions on the possibility of similar suspected offences that might have been committed in the requested country.

Despite the advantages of the non-conviction-based forfeiture, the paper is not intended to promote one forfeiture system above another, and thus *in rem* forfeiture is presented as a useful alternative forfeiture system.

As civil forfeiture will be adopted increasingly by states, countries should consider adopting different mechanisms that will allow the international cooperation for the purpose of obtaining information located abroad. This will enhance the nations’ ability to achieve a successful inter-state cooperation and will result in the increase of the states potential to fight crimes, recover the illicit proceeds of crime, and repatriate those funds to their rightful owners.

When deciding on the effectiveness of using one forfeiture mechanism against another, prosecutors should consider the scale of the criminal enterprise being targeted and the result

¹⁸⁵ Thelesklaf, “Using the Anti-money Laundering Framework to Trace Assets” at p 64.

sought by the prosecution team. This observation is based on the fact that within larger criminal organizations, it could be difficult to establish and prove a link between the primary beneficiary and the predicate offences. Most of the time, the incriminating work, such as the placement of the illicit funds, will be delegated to associates or family members. For this reason, civil forfeiture might be the best solution in these cases. Moreover, simultaneous *in rem* proceedings conducted in the countries where the defendant is suspected to own assets could greatly limit the person's capacity to move them to another jurisdiction.

Practitioners involved in assets recovery cases have also advised that in instances where the alleged offender is willing to cooperate with the investigators, this should be considered by the investigating team because it will save precious resources and time. To summarize, the following practical measures are strongly recommended.

Treaties of cooperation: States should consider concluding or ratifying (multilateral- or bilateral) treaties that could provide for quick international cooperation in civil recovery proceedings irrespective of the type of underlying offence and the criminality of the offence in the requested state.

When it comes to combating corruption, UNCAC is an innovative convention because it includes a wide range of anti-corruption measures, such as preventive measures, provisions on the criminalization of corrupt activities, provision relating to international cooperation, technical assistance, and assets recovery. Due to the fact that its comprehensive structure covers so many interrelating aspects that deal with corruption, and because it is the most ratified anti-corruption instrument, states should aspire to sign, ratify and implement its provisions into national law. A worldwide implementation of UNCAC would undoubtedly facilitate the exchange of information between States Parties.

Moreover, civil confiscation is not a form of punishment because it does not criminalize conduct but it is a system that tries to mitigate the effects of crime. Therefore, states should provide their support by having available a flexible legal base for cooperation, as well as trained personnel who can assist with the incoming mutual legal assistance requests.

Domestic legislation: States need to consider enacting laws that allow the spontaneous disclosure of information if that information could trigger an investigation or could facilitate an ongoing investigation in another state. This type of legislation has the potential to address the gaps in the implementation of instruments on criminal mutual assistance.

Central authorities: Countries should designate a central authority to process foreign requests for information. This would enhance and speed up the international cooperation as well as the outcome of a successful prosecution. The members of the designated central authority should be constituted in an international network that will allow a quick exchange of knowledge and information.

Law enforcement agencies: the UK Home Office allows its money-laundering taskforce to keep a part of the amounts forfeited. There have been discussions on the ethics of this trend but given that this allows the redirecting of funds to crime prevention programs, which is provided for by UNCAC for example, more states should follow this example and aim towards a partially or a fully self-sustaining law enforcement body.

Informal mechanisms: Memoranda of understanding between financial intelligence units, proceeds of crime units and other law enforcement units that are involved in the investigation and prosecution proceedings should be set up to speed up the communication between parties.

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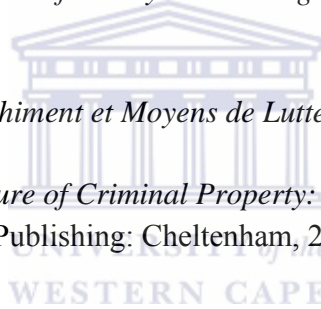
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