

Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework

Research paper submitted in partial fulfilment of the degree of
Masters of Laws: Transnational Criminal Justice and Crime
Prevention - An international and African Perspective.



By

Zainabu Mango Diwa

UNIVERSITY of the

WESTERN CAPE

Student Number: 3368327

Faculty of Law

University of the Western Cape

Supervisor: Professor RA Koen

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Key Words

Accountability

Asset Disposition

Asset Freezing

Asset Recovery

Confiscation

Forfeiture

Management of Assets

Money Laundering

Proceeds of Crime

Trustee



Declaration

I, Zainabu Mango Diwa, declare that **‘Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework’** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: ZAINABU MANGO DIWA

Signed:.....

Date:.....



Supervisor: PROFESSOR RA KOEN

Signed:.....

Date:.....

Dedication

This paper is dedicated to the Almighty *Allah* as the beholder of my life and destiny, and my two sets of parents;

Mr. Mango D. Mango and Mrs. Jasmin L. Mango

and

Mrs. Halima M. Mkali and in the memory of Mr. Rajab A. Mkali



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Last but not least, I am grateful to my family (my husband and children) for their tolerance, moral and material support for the entire period of this course. For them I say *Shukran gazilan*.

List of Abbreviations and Acronyms

AG	Attorney General
AFU	Asset Forfeiture and Recovery Unit
AU	African Union
DPP	Director of Public Prosecutions
FATF	Financial Action Task Force
POCA	Proceeds of Crime Act
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNTOC	United Nations Convention against Transnational Organised Crime
G7	Group of Seven
G8	Group of Eight
SADC	Southern African Development Community
ESAAMLG	East and Southern Africa Anti-Money Laundering Group
IGP	Inspector General of Police

Chapter One

General Introduction and Overview of the Study

1.1 Introduction

Management of the proceeds of crime is a subset of the process of confiscation of the proceeds of crime (tainted assets). Confiscation of assets is regarded as a fundamental principle by the international community in its fight against serious crimes¹ such as corruption, drug trafficking, terrorism and money laundering.² Confiscation of proceeds of crime has been practised for many years. The primary objective of confiscation was restitution to the victims of crime.³ Recently the scope of the objectives of confiscation has been widened by the international community to include confiscation as deterrence and as a means to discourage criminal behaviour.⁴

It has been acknowledged that the best way to combat crime is to cut down its financing and take away the profits generated by its commission, thereby undermining efforts of criminals to generate profit.⁵ The basic aim of asset recovery and forfeiture measures that are in place

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- 1 Serious crimes in this context refers to transnational economic crimes.
 - 2 Schott (2006: V-15).
 - 3 Eissa & Barber (2011: 1).
 - 4 Shams (2004: 142).
 - 5 Bazley & Foster (2004: 293).

within different jurisdictions is recovery of what was obtained as a result of the commission of the crime and restitution of the same to the general public.⁶

This is justified under the policy that people should not profit from unlawful activities. Hence the law must ensure that crime does not pay.⁷ Through this punitive and preventive principle, the proceeds of crime are returned to the public through reparation to victims⁸ or through depositing the confiscated funds into the fiscal system of a country.

Management of the confiscated assets emerges as a complement to confiscation in that it accomplishes the goal of the latter. Confiscation policy will be of no value to society if the confiscated assets are disposed of without transparency and accountability. Society needs more than seeing a criminal being deprived of assets illegally obtained or obtained from the profit of criminal transactions. It needs to see the confiscated proceeds of crime contribute to social services and other aspects of the country's economy. The policy itself aims not only at depriving the criminals peaceful enjoyment of the proceeds of crime but also at making them available for the benefit of society. To ensure that this is achieved, a well-structured and transparent asset management policy is required.

6 Young (2009: 1).

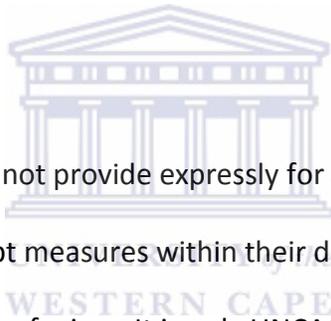
7 Stennens (2008: 51).

8 Stennens (2008: 31).

1.2 Background to the Study

The members of United Nations have signed and ratified a number of conventions and other policy instruments in the fight against serious crimes.⁹ A major measure which is advocated in those instruments is asset recovery in terms of which criminals are not only prosecuted but the proceeds of their crimes are confiscated also.¹⁰ In response to the policy of the international community, Tanzania has enacted the Proceeds of Crime Act,¹¹ the Anti-Money Laundering Act,¹² the Prevention and Combating of Corruption Act¹³ and the Drugs and Prevention of Drug Trafficking Act.¹⁴ These laws provide for recovery of proceeds of crime with the aim of returning them to the victims and general public. How this intention will be fulfilled is where asset management becomes relevant.

The international community does not provide expressly for any asset management system. It only requires states parties to adopt measures within their domestic frameworks to ensure the disposition of confiscated proceeds of crime. It is only UNCAC that has mandated states parties



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- 9 Examples are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Vienna Convention), 1988; United Nations Convention against Transnational Organised Crime and Protocols Thereto, 2004; United Nations International Convention for the Suppression of the Financing of Terrorism, 1999 and the Forty Recommendations of the Financial Action Task Force of 2003.
- 10 Article 31 of the United Nations Convention against Corruption 2000; Article 5 of the United Nations Vienna Convention; Article 12 of the United Nations Convention against Transnational Organised Crime 2003; Article 8 of the United Nations International Convention for the Suppression of the Financing of Terrorism, 1999 and Recommendation 3 of the Forty Recommendations of the Financial Action Task Force of 2003.
- 11 [Cap 256 R.E.2002].
- 12 [Act No.12 of 2006].
- 13 [Cap 329 R.E.2002].
- 14 [Cap 95 R.E.2002].

to establish an administrative framework for preserved assets.¹⁵ Even when the intervention of the international community is necessary, it becomes very difficult to manage the proceeds of crime where there is no pre-established policy within a particular state.¹⁶ This gap negates the purpose of confiscation and in some cases it may facilitate corrupt transactions amongst those to whom the proceeds are entrusted.¹⁷

Despite enacting a number of laws with provisions on confiscation of proceeds of crime, and a general law pertaining to confiscation matters, Tanzania, like many African countries, has not taken seriously the issue of managing the proceeds crime. The fundamental law on confiscation, the Proceeds of Crimes Act (POCA), vests the responsibility for seized property in the Inspector General of Police (IGP).¹⁸ It also provides for the appointment of a trustee where the properties require close supervision.¹⁹ However, the law does not provide for how the trustee will be identified and subjected to a court process of appointment, how the trustee will be remunerated, how the properties will be handled by the IGP or how he will be accountable for such properties.

In practice the confiscated funds are remitted to the government revenue account and the citizenry, which is always after tangible results, cannot feel easily the contribution of such funds

15 Article 31(2) of UNCAC.

16 Jimu (2009: 7).

17 As was the case in the Philippines, elaborated in Jimu (2009: 12-13).

18 Section 35 of POCA.

19 Section 38 of POCA.

towards its basic needs. It is also very difficult to monitor their utilisation, and they may end up being used to pay unnecessary allowances rather than contributing to social services.²⁰ This lacuna necessitates the establishment of a proper asset management system in respect of the confiscated assets.

1.3 Significance of the Study

Management of the proceeds of crime is very important as it serves two main purposes: to maintain the integrity of the proceeds and to ensure accountability. Maintaining the integrity of the proceeds is vital as it protects the value of the asset to be realised and, in case of its return to the original owner, no claim for damages could arise.

A good system of management of the proceeds of crime ensures accountability of the state for how much was confiscated and how it was utilised. Accountability of this nature builds public confidence in the system and encourages co-operation from the public during allocations of the assets subject to seizure and during the entire process of asset recovery. Confiscation policy in Tanzania is growing rapidly, and it is necessary to have a well-structured asset management policy to ensure that the rationale of confiscation is attained. The policy will ensure transparency and accountability for those entrusted with managing the proceeds of crime.

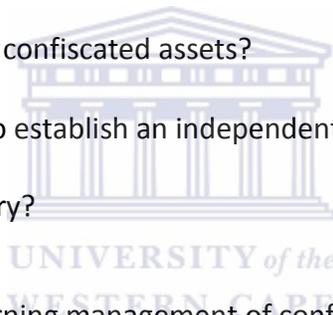
20 Jimu (2009: 9).

The solution to this problem will be of great significance in developing an asset management system in Tanzania. Such a system will ensure safe custody of assets from the time of their seizure to the final court order either confiscating or returning the properties to the original owner.

1.4 Research Questions

This research is intended to find solutions to the following questions formulated in response to the existing problem.

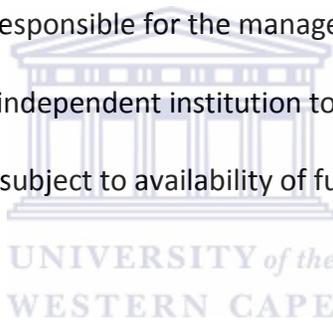
- Whether there is a need to amend the existing laws to provide for a more reliable system of management of confiscated assets?
- Whether there is a need to establish an independent institution to manage the assets during all stages of recovery?



The present legal framework governing management of confiscated assets in Tanzania was analysed, and found to be ineffective for the reason that there is no well-established agency responsible for managing proceeds. The responsibility for preserving proceeds of crime is vested in several institutions. As a result, no institution can be held principally liable for mismanagement. For example, the responsibility for seized assets is vested in the Inspector General of Police (IGP). However, the primary duty of the IGP is crime investigation, so he is focused on maintaining exhibits rather than managing seized assets. The IGP is not responsible

for the confiscated assets. Even the trustee under POCA is not responsible for the confiscated or forfeited assets. He may be entrusted to manage only the seized assets which need special attention before the final court order. Therefore, there is a need to amend the law and establish a more effective framework of managing proceeds.

This paper recommends the establishment of a reliable system of asset management in which the primary responsibility for managing proceeds of crime will be vested in one institution. This will enhance accountability by the institution, though it will also be assisted by other institutions in performing its functions. This paper recommends also the establishment of an independent government agency responsible for the management of the proceeds of crime. However, the establishment of an independent institution to manage proceeds of crime is recommended as a long term goal subject to availability of funds.



1.5 Literature Review

Although managing proceeds of crime is vital to the process of asset recovery, there is not much literature on this subject. Of course, a lot has been written on how the proceeds of crime can be recovered and on the objectives of confiscation policy, but very little consideration has been given to what happens to the proceeds during the very delicate period after seizure but before confiscation and after confiscation.

Jimu advises on how to manage repatriation and utilisation of proceeds of asset recovery.²¹

Writing on the experience of Nigeria, Peru, the Philippines and Kazakhstan, he insists on the need for political will, transparency, accountability through internal and external checks and balances, and the need to have an independent third party to facilitate these.²²

The StAR initiative is also of the view that management of confiscated assets needs policy consideration.²³ It insists on the need for a country to have prior preparations on how repatriated confiscated assets will be handled and utilised.²⁴ In practice this becomes a problem where there is no asset management policy in a particular state and where there is no established agency for managing the proceeds of crime. Repatriated assets in most cases involve large sums of money. However, the need to have a well-established asset management policy is independent of expectations to receive repatriated assets or assets to be repatriated. Asset management policy should be considered at the time confiscation policy is established in a country to ensure reliable management of proceeds within the state.

Brun *et al* consider the importance of managing proceeds of crime generally.²⁵ They explain the requirement of asset management at every stage of confiscation and the need to have

21 Jimu (2009).

22 Jimu (2009: 17).

23 StAR Initiative(2009: 3).

24 StAR Initiative (2009: 37).

25 Brun *et al* (2011).

transparency in managing proceeds.²⁶ Their explanations constitute a skeleton framework of requirements for any state to adopt and follow. They refer to practices of different countries on managing proceeds. The work is useful as it highlights some basic practices on the subject. However, as they note, each country has its own prevailing circumstances such as the nature of legislation and other matters to be considered. There is no single process applicable universally. The crucial requirements are transparency and accountability.

No one has written on managing proceeds of crime in Tanzania. This paper seeks to fill the gap by addressing issues pertaining to asset management and composing a framework that will be convenient for the management of proceeds of crime in Tanzania.

1.7 Research Methodology

The study was conducted through a qualitative research approach. It employed a desk-top data collection method which involved reading and analysing primary sources such as international conventions, national laws and case law on management of proceeds of crime. Secondary resources were utilised also and they ranged from books to journal articles and electronic resources.

1.8 Outline of the Remaining Chapters

This research paper is composed of four more chapters which are enumerated as follows:

26 Brun *et al* (2011: 99-108).

Chapter Two

International Instruments on Asset Recovery and Management

This chapter makes a detailed analysis of international instruments on management of the proceeds of crime.

Chapter Three

Tanzanian Legal Framework for Managing the Proceeds of Crime

This chapter deals with the analysis of asset management mechanisms employed at different stages within the process of asset confiscation in Tanzania. A comparative analysis is made between Tanzania and South Africa and United Kingdom as two countries with best practices in managing proceeds of crime.



Chapter Four

Establishing an Asset Management Policy in Tanzania

This chapter provides solutions to the research questions posed and suggests a legal framework for the management of proceeds of crime in Tanzania.

Chapter Five

General Conclusion

This chapter presents the findings of the study in general and the recommendations.



Chapter Two

International Instruments on Asset Recovery and Management

2.1 Introduction

Serious crimes affect both the particular states in which they are committed and, due to their transnational nature, the international community as a whole. The latter has launched a serious fight against conditions favourable to the commission of such crimes.²⁷ Tanzania, as a member of the international community, is taking part in the fight also. Through the United Nations and other international bodies, legal assistance in criminal matters and general co-operation among states is guaranteed. Multilateral and bilateral treaties have been executed to ensure that criminals do not have a safe haven for their unlawful transactions.²⁸ The co-operation among states against transnational crime is tagged as the internationalisation of law enforcement.²⁹ A current development in the fight against serious crime is the globally accepted policy of asset recovery³⁰ which, as elaborated in the previous chapter, cripples criminals by confiscating what they illegally earned through engaging in corrupt transactions. Asset recovery is cherished worldwide as a tool against transnational crimes and it is addressed in almost all international

27 The international community has signed and ratified a number of conventions against serious crimes. Most of them will be discussed in this chapter.

28 Stessens (2000: 18).

29 Nadelmann E *Cops Across Borders: The Internationalization of US Criminal Law Enforcement*, quoted by Stessens (2000: 18).

30 Pieth (2008: 17).

instruments and non-international instruments with international endorsement.³¹ The main purposes of its advocacy are to ensure crime that does not pay, to discourage criminal behaviour, to provide compensation to victims, and to prevent the integration of proceeds of crime into the economy as legitimate money.³²

The purpose of this chapter is to analyse the international instruments that provide for asset recovery, with a focus on the aspect of managing proceeds of crime during the asset recovery process. This will establish whether the international instruments provide for a general framework for such management and will also lay down a basis for analysing the Tanzanian legal framework for managing the proceeds of crime. Given the purpose, the analysis will be limited to the United Nations conventions and other international and non-international instruments to which Tanzania is party, or which affect Tanzania by implementation of their provisions.

The chapter will focus on the nature and strength of the provisions dealing with managing the proceeds of crime in the designated instruments.

2.2 International Instruments on Asset Recovery

Asset recovery is part of the measures adopted by the international community in its efforts to fight serious crime. The move towards joint efforts against serious crime started in the 1970s,

31 Pieth (2008: 17). See also Center for the Study of Democracy (2012) *Management and Disposal of Confiscated Criminal Assets*, Policy Brief No.33.

32 Ribadu (2008: 30).

with states concluding bilateral agreements to ensure mutual legal assistance in criminal matters.³³ Though there is no limited list of what are referred to as serious crimes before the international community,³⁴ some offences clearly are regarded as such. These are mainly transnational crimes which include money laundering, illicit trafficking in drugs, human trafficking, terrorism, transnational organised crimes, and corruption. The criteria employed in categorisation are, basically, the real impact of the crimes on the community and their transnational nature. The international instruments addressing serious crimes have included aspects of asset recovery among the measures to be adopted by states to deter the commission of the offences and to discourage engagement in criminal transactions.³⁵

2.2.1 The Vienna Convention

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,³⁶ popularly referred to as the Vienna Convention, is the first international instrument to provide for asset recovery.³⁷ The Convention was a result of the efforts of the United Nations Drug Control Programme to combat drug trafficking and money laundering.³⁸ It acknowledges the international community's concern about the magnitude of and the rising

33 The first step was marked by the 1973 Mutual Legal Assistance Treaty between America and Switzerland. See Shams (2004: 23).

34 Article 2(b) of UNTOC.

35 Kaye (2006: 323).

36 Adopted on 19 December 1988, came into force on 11 November 1990. Tanzania ratified on 17 April 1996.

37 Kaye (2006: 324).

38 Schott (2006: III-3).

trend in the illicit production, demand and traffic in narcotic drugs and psychotropic substances and its impact on the welfare of the community.³⁹

The Convention contains effective and very potent provisions on asset recovery which have influenced many other instruments at all levels.⁴⁰ Though focused on drug-related crimes,⁴¹ it provides for confiscation of the instrumentalities of crime⁴² and the proceeds of crime,⁴³ even to the extent of recovering interest accrued from the proceeds of crime.⁴⁴

The Convention mandates states to co-operate and afford one another mutual legal assistance in asset recovery.⁴⁵ To ensure implementation of this provision, each party is required to furnish the United Nations Secretary General with the text of its laws and regulations that facilitate international co-operation in asset recovery, and update him on any subsequent changes to such laws and regulations.⁴⁶

In respect of the management of the recovered assets, the Convention deals with two distinct situations: domestic and international management. In domestic arrangements for managing the proceeds of crime, the Convention leaves the duty on the states themselves to decide what

39 Paras 1 and 2 of the preamble to the Vienna Convention.

40 Kaye (2006: 324).

41 Kaye (2006: 324).

42 Article 5(1)(b) of the Vienna Convention.

43 Article 5(1)(a) of the Vienna Convention.

44 Article 5(6) of the Vienna Convention.

45 Articles 7, 9 and 10 of the Vienna Convention.

46 Article 5(4)(e) of the Vienna Convention.

should be done about the recovered proceeds.⁴⁷ This option was chosen to ensure and respect the sovereignty of states as far as their domestic matters are concerned.⁴⁸ The issue that arises is whether the degree of respect attributed to state sovereignty will help the community attain the goal of asset recovery.⁴⁹ In most cases this will occur, if consideration is given only to illicit trafficking in drug-related offences. When other offences such as corruption are considered, leaving the issue of management of proceeds solely to the particular state, without even providing guidelines, becomes a bar to achieving the purpose of asset recovery. It may facilitate the commission of other criminal offences such as embezzlement by the officers entrusted with those proceeds.⁵⁰ As a result, some financial centres have been reluctant to repatriate confiscated assets, or to co-operate with countries for fear that the returned assets will be wasted, or stolen again because of corruption.⁵¹

The second situation, international management, becomes relevant when the recovery involves participation of more than one state. Here the Convention requires prior arrangements on how the proceeds will be utilised, and it specifically encourages sharing of the proceeds between the states involved.⁵²

47 Article 5(5)(a) of the Vienna Convention.

48 Shams (2004: 103). For the genesis of the principle, legal implications and its current status in the supranational legal order see Shams (2004: 194-201).

49 Lugon-Moulin (2008: 303).

50 Jimu (2009: 12).

51 Smith (2010: 34).

52 Article 5(5)(b) of the Vienna Convention. See also Kaye (2006: 324).

To facilitate this, the Convention encourages the states to have bilateral and multilateral agreements to ensure asset recovery and related matters.⁵³ Of course, management of assets may fall under this article as a necessary feature during all stages of asset recovery. The Convention suggests what may be the best utilisation of the proceeds.⁵⁴ Therefore, it is up to the states to construct a proper mechanism to administer the proceeds and utilise them as suggested.

2.2.2 The Palermo Convention

The United Nations Convention against Transnational Organised Crime,⁵⁵ also known as the Palermo Convention, is another UN instrument adopted to expand the fight against international organised crime.⁵⁶ It contains a broad range of provisions to combat organised crime and compels member states to ratify and implement its provisions through enacting domestic legislation to that effect.⁵⁷

With respect to asset recovery, the Convention requires member states to adopt measures that enable confiscation of both the proceeds and instrumentalities of crime.⁵⁸ It also provides for the confiscation of assets acquired from the proceeds of crime⁵⁹ and profit derived from assets

53 Article 5(4)(g) of the Vienna Convention.

54 Article 5(5)(b)(i) of the Vienna Convention.

55 Adopted on 15 November 2000, came into force on 29 September 2003. Tanzania ratified on 24 May 2006.

56 Shehu (2005: 223). See also the purpose statement in article 1 of the Palermo Convention.

57 Schott (2006: III-3).

58 Article 12(1) of the Palermo Convention .

59 Article 12(3) of the Palermo Convention.

into which proceeds of crime have been transformed or converted.⁶⁰ Where the proceeds have been intermingled with legitimate assets, the corresponding percentage of profit from the intermingled proceeds should be confiscated.⁶¹ Again, as in the previous Convention, international co-operation is insisted upon, and member states are required to promulgate laws and regulations that enhance international co-operation for purposes of confiscation.⁶²

On the aspect of asset management, the Convention has a special provision on disposition of confiscated proceeds of crime.⁶³ This provision stipulates the way in which proceeds can be managed after confiscation. It also categorises management of confiscated assets at two levels, domestic and international.

With regard to domestic disposition of confiscated assets, the Convention requires member states to comply with their domestic law and administrative procedures.⁶⁴ Nothing more is suggested by the Convention on that aspect, hence the states have to develop their own procedures and law to ensure fair and transparent disposition of the confiscated assets.

On management of confiscated assets involving more than one state, the Convention requires the requested state to give priority to considering the return of the confiscated assets to the

60 Article 12(5) of the Palermo Convention. See Montesh (2009: 36).

61 Article 12(5) of the Palermo Convention. See Young (2009: 34).

62 Article 13 of the Palermo Convention.

63 Article 14 of the Palermo Convention.

64 Article 14(1) of the Palermo Convention. See Montesh (2009: 36).

requesting state. The latter is required to consider compensating victims of the crime, or returning the recovered proceeds to their legitimate owners.⁶⁵

With this provision, rather than repatriation of proceeds to the victim state, two things may be noted: first, the need to ensure that the confiscated assets are used to compensate the victims, when monetary compensation is concerned; second, the need to return the proceeds to the legitimate owners. The implication is that the proceeds should be managed well in order to fulfil this purpose.

The Convention, though suggesting that restitution should be done after confiscation, does not provide expressly for any measures to ensure reliable management of the proceeds during other stages of recovery. It only requires the states parties to ensure seizure or freezing of proceeds, without considering the need for a reliable asset management mechanism during the entire process of confiscation.



However, the Convention does encourage the states parties, when making agreements on the utilisation of the proceeds, to consider contributing to a designated UN account⁶⁶ and to inter-governmental bodies specialising in the fight against organised crime.⁶⁷ It also, as do the other Conventions, encourages sharing of the confiscated proceeds of crime after realisation.⁶⁸

65 Article 14(2) of the Palermo Convention. See Kaye (2006: 325).

66 Article 30(2)(c) of the Palermo Convention.

67 Article 14(3)(a) of the Palermo Convention.

68 Article 14(3)(b) of the Palermo Convention.

The aspect of using confiscated funds to finance law enforcement agencies has been criticised for advancing an additional rationale for confiscation policy, namely, profit generation, over and above the punitive and restorative.⁶⁹ This critique, though endorsed to be correct with regard to the experience of certain jurisdictions,⁷⁰ cannot prevail where a state has an effective asset management policy, and confiscated funds are not utilised for private benefit.

The recommended utilisation of confiscated assets highlights important areas to be considered during disposition of confiscated proceeds of crime. However, such disposition can be attained only if the proceeds are managed well and realised with a high degree of accountability and transparency.

2.2.3 The International Convention for the Suppression of the Financing of Terrorism

The international community saw the threats of terrorism already prior to the 11 September 2001 attacks.⁷¹ Manifesting its serious concern, the UN adopted the International Convention on the Suppression of the Financing of Terrorism in 1999.⁷² The Convention establishes acts that constitute terrorism⁷³ and requires states parties to criminalise terrorism in their domestic law.⁷⁴

69 Stessens (2000: 56-58).

70 Stessens (2000: 56-58).

71 Schott (2006: III-4).

72 The Convention came into force on 12 April 2002. Tanzania ratified on 22 January 2003.

73 Article 2 of the UN Convention on Terrorism.

74 Article 4(a) of the UN Convention on Terrorism.

With regard to recovery of the proceeds of crime, the Convention requires each state party to take appropriate measures, in accordance with its domestic legal framework, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences established by the Convention. It provides the same with regard to the proceeds derived from such offences.⁷⁵

With respect to the management of forfeited assets, the Convention proposes a realistic strategy which requires member states to consider establishing mechanisms whereby the funds derived from forfeitures under the Convention are used to compensate the victims of the offences or their families.⁷⁶

Though not obligatory,⁷⁷ a suggestion to have such mechanisms may have a great influence on member states to develop an efficient asset management mechanism to facilitate effective confiscation. It acts as a red light, bringing to the attention of member states the necessity of compensating victims of offences, and funding relevant projects in the fight against serious crime. Hence, having a permanent and well regulated asset management mechanism will ensure disposition of confiscated assets in a manner that is beneficial to the state.



75 Article 8(1) & (2) of the UN Convention on Terrorism.

76 Article 8(4) of the UN Convention on Terrorism.

77 The relevant article uses words 'shall consider,' meaning that its provisions are not mandatory. See Shehu (2005: 223).

2.2.4 The United Nations Convention against Corruption

Corruption is among the serious crimes facing the international community, and it links with other forms of crime, especially organised crime and other economic crime.⁷⁸ It poses serious problems and threats to the stability of societies by undermining the institutions and values of democracy, ethics and justice. It also jeopardises sustainable development and the rule of law.⁷⁹ The international community, being concerned about the seriousness of the problem, adopted the UN Convention against Corruption.⁸⁰

Asset recovery is regarded as a fundamental principle of the Convention in its fight against corruption.⁸¹ The Convention obligates the states parties to afford one another the widest measure of co-operation in effecting asset recovery.⁸² It mandates each party to take necessary measures to enable identification, tracing, freezing or seizure⁸³ and confiscation of the proceeds of corruption.⁸⁴ It also provides for confiscation of income or other benefits derived from proceeds of corruption.⁸⁵

On the aspect of managing confiscated assets, the Convention addresses all the various stages systematically. Firstly, it requires member states to adopt, in accordance with their domestic law, such legislative and other measures as may be necessary to regulate the administration by

78 Para 1 of the preamble to UNCAC.

79 Para 2 of the preamble to UNCAC.

80 Adopted on 31 October 2003, came into force on 14 December 2005. Tanzania ratified on 25 May 2005.

81 Article 51 of UNCAC

82 Article 51 of UNCAC.

83 Article 31(2) of UNCAC.

84 Article 31(1) of UNCAC.

85 Article 31(6) of UNCAC

the competent authorities of frozen, seized or confiscated assets covered by the Convention.⁸⁶

This provision distinguishes the Convention from any of the previous Conventions by giving consideration to what should be done with the proceeds after seizure or freezing, but before actual confiscation. For the first time, the international community has addressed the matter expressly by obligating member states to have the proceeds not only seized or frozen, but also administered by competent authorities within their legal framework.⁸⁷ Though there are no punitive measures provided to ensure that member states comply with this, addressing it is a step forward in the move to have the proceeds administered within defined legal limits.⁸⁸

Secondly, the Convention addresses the issue of disposition of the confiscated assets. In this, it identifies two aspects: return, and other modes of disposition.⁸⁹ The aspect of return has two limbs, firstly, returning the assets to legitimate owners and compensating victims of offences and, secondly, returning the assets to the requesting state where they are within the territory of another state.⁹⁰ When the return of assets to a requesting state is executed, the latter is required to consider returning the assets to legitimate owners or compensating the victims.⁹¹

With other modes of disposition, the Convention provides that the requested state, where international asset recovery is concerned, may deduct reasonable expenses incurred in the

86 Article 31(3) of UNCAC.

87 Article 31(3) of UNCAC. Conventions prior to UNCAC did not address expressly the issue of administration of proceeds.

88 See UNODC Review Mechanism for the Review of Implementations of UNCAC basic document (2011: 4).

89 Article 57 of UNCAC.

90 Article 57 of UNCAC.

91 Article 57(c) of UNCAC.

investigation, prosecution or judicial proceedings leading to the return or disposition of confiscated assets.⁹² It further allows states parties to conclude agreements or have mutually acceptable arrangements on a case-by-case basis for the final disposal of confiscated assets.⁹³

The manner of disposition suggested by the Convention creates a fundamental objective of asset management mechanisms to be developed by member states through establishing priorities to be considered during disposition of confiscated assets.

In addition to addressing seizure, freezing, administration and disposition of confiscated assets, the Convention also addresses the danger of the laundering of proceeds by transferring them from one state to another.⁹⁴ It obligates the states to co-operate for purposes of preventing and combating the transfer of proceeds of offences established by the Convention and to promote ways and means of recovering such proceeds.⁹⁵ Furthermore, it requires the states to establish within their jurisdictions a financial intelligence unit (FIU) to be responsible for receiving, analysing, and disseminating to the competent authorities reports of suspicious financial transactions.⁹⁶

Again, this is another step in the fight against serious crime and strengthens the aspect of asset recovery. With the FIUs established, accountability can be attained easily as there will be

92 Article 57(4) of UNCAC.

93 Article 57(5) of UNCAC.

94 Article 58 of UNCAC.

95 Article 58 of UNCAC.

96 Article 58 of UNCAC.

reporting of what transpires in the financial institutions and proceeds of crime will be detected timeously and managed well.

Though the Convention does not obligate member states to establish FIUs, as a matter of necessity and in consideration of the seriousness of the offences, most states have opted to comply with the provisions of the Convention.⁹⁷

2.2.5 African Union Convention on Preventing and Combating Corruption and SADC Protocol against Corruption

The fight against transnational crime involves regional efforts in which countries, within their regional integrated bodies, join their forces and fight together for the same goal. Among the regional integrations to which Tanzania is party is the African Union. In its fight against corruption, the AU adopted the Convention on Preventing and Combating Corruption,⁹⁸ aimed at promoting and strengthening the development of required mechanisms, co-operation between states and the harmonisation of the policies and legislation between states parties for the purpose of the prevention, detection, punishment and eradication of corruption on the continent.⁹⁹

In respect of asset recovery, the Convention obligates member states to adopt legislative measures to enable their competent authorities to search for, identify, trace, administer, freeze

97 See www.egmontgroup.org/about/list-of-members

98 The Convention was adopted in Maputo on 11 July 2003. Tanzania ratified on 22 February 2005.

99 Article 2 of the AU Convention

or seize and later confiscate proceeds of corruption.¹⁰⁰ It also provides for repatriation of proceeds from one country to another when recovery was executed upon request from a particular state.¹⁰¹

On the aspect of management of confiscated assets, the Convention deals with the matter in a very brief manner. It only provides for administration of the seized or frozen proceeds without stipulating how the proceeds should be disposed of. Being a regional integration and hence having member numbers capable of easy supervision, compared to United Nations, it was expected that it would formulate effective steps to implement what the international community is preaching.¹⁰² Obligating states to have administration mechanisms without a means to ensure the implementation of those obligations may render the whole purpose meaningless.



At the regional level, it would have been useful to have practical implementation of strategies such as establishing FIUs, obligating states to submit reports on the administration of proceeds on a periodical basis to ensure accountability, fair disposition of proceeds, and issues of compensation to victims being addressed well. Insisting only on the repatriation of proceeds without setting priorities to be considered when disposing of them amounts to taking one step forward in the fight and two backward, thus making it ineffective.

100 Article 16(1)(a) & (b) of the AU Convention.

101 Article 16(1)(c) of the AU Convention.

102 Article 22 of the AU Convention.

Unfortunately, the Southern African Development Community reproduced, *mutatis mutandis*, the provisions of the Convention on confiscation in its Protocol against Corruption.¹⁰³ It, being a very small community, ought to have had more focus on having provisions on matters of monitoring and evaluation of the strategies set by the international community and developing its own practical strategies that are suitable for its member states. A good example is the response of the Council of Europe in complying with the international community's efforts against transnational crime. It developed strategies such as formulating special guidelines and a monitoring group to assist member states to achieve the international community's goals.¹⁰⁴

2.2.6 The Forty Recommendations of the Financial Action Task Force

The Financial Action Task Force is an inter-governmental body formed by the G-7 countries¹⁰⁵ in 1989 for purposes of developing and promoting an international response to combat money laundering.¹⁰⁶ In October 2001, the FATF expanded its mission to include combating the financing of terrorism, thus making it a policy-making body which brings together legal, financial and law enforcement experts, to achieve national legislation and regulate anti-money laundering and counter-terrorism reforms.¹⁰⁷

103 Adopted at Blantyre, Malawi on August 2001, came into force on 6 July 2005.

104 Committee of Ministers for the Council of Europe Resolution (97)24, 6 November 1994 and Resolution (99)5, 1 May 1999.

105 Schott (2006: III-7).

106 Schott (2006: III-7). Also see Shams (2004: 210-230) on the origin, membership, activities and mandate of the FATF.

107 Schott (2006: III-8).

In 1990, the FATF issued its forty recommendations for combating money laundering and later, in 2004, issued nine recommendations for combating terrorism.¹⁰⁸ The recommendations are not static and are revised whenever the need arises.¹⁰⁹ The current FATF recommendations were revised in 2012.¹¹⁰

The FATF is not an international instrument, so its recommendations are not binding on non-member states, but they have been accepted and endorsed by the international community and international organisations as the international standard for combating money laundering and terrorism.¹¹¹ They are now regarded as a mandate for action for countries which want to be viewed by the international community as meeting international standards.¹¹²

Among the FATF recommendations is confiscation of proceeds of crime in combating both money laundering offences¹¹³ and financing of terrorism.¹¹⁴ It requires states to take steps to become party to and implement international instruments such as the Vienna and Palermo Conventions.¹¹⁵

On the aspect of managing confiscated assets, the FATF has developed a laudable strategy for domestic and international asset management. With domestic asset management, it

108 Special recommendations on terrorist financing issued on 22 October 2004.

109 For reasons for revision See Damals (2007: 74).

110 See [www.fmu.gov.pk/docs/FATF_RECOMMENDATIONS_2012_\(REVISED\)/FATF_40_Recommendations.pdf](http://www.fmu.gov.pk/docs/FATF_RECOMMENDATIONS_2012_(REVISED)/FATF_40_Recommendations.pdf)

111 Damals (2007: 71-72).

112 Schott (2006: III-9).

113 Recommendation 38 of the FATF Recommendations of 2003.

114 Recommendation III of the FATF Special Recommendations on Terrorist Financing of 2004.

115 Recommendation 35 of the FATF Recommendations of 2003.

encourages states to consider establishing an asset forfeiture fund in which all or a portion of confiscated assets will be deposited for law enforcement, health, education, or other appropriate purposes.¹¹⁶ The fund will serve the states in a number of ways. Firstly, it will establish a better mechanism for the safe-keeping of confiscated assets during all stages of case proceedings. Secondly, it will ensure transparency as to how much was confiscated and deposited into the fund. Lastly, it will ensure accountability as to how much was taken from the fund and for which purpose.

Enumerated specific areas in which confiscated funds can be utilised ensure consideration of the public interest and builds up public confidence in the system. The fund will serve also as a ready and stable place to receive funds from internationally confiscated and realised assets, as it is recommended that, on assets recovered from co-ordinated efforts, the states should consider taking measures that will be necessary to enable them to share the recovered assets.¹¹⁷

The implementation of the recommendations is not dependent on the political will of states. It is assessed by a monitoring process in two stages: self-assessment and mutual evaluation.¹¹⁸ In self-assessment, each member responds to a standard form questionnaire, on an annual basis,

116 Interpretive notes to the Forty Recommendations on recommendation 38 at p. 6.

117 Interpretive notes to the Forty Recommendations, on recommendation 38 at p. 6.

118 Schott (2006: III-9).

regarding its implementation of the forty recommendations.¹¹⁹ Mutual evaluation normally is conducted by a site visit of a team of experts from member states. The team draws up a report on the extent to which the evaluated state has complied with the recommendations and highlights areas in which further progress may still be necessary.¹²⁰ For a state which is unwilling to comply with the recommendations, peer pressure is the only way to compel it.¹²¹ Actions such as blacklisting, through the name-and-shame mechanism, are useful in making countries comply with the recommendations.¹²² For member states, suspension of membership for non-compliance with the recommendations can be employed.¹²³

The same methodology and procedure have been adopted by all other international bodies and organisations¹²⁴ that produce reports based on the FATF Recommendations in order to ensure global consistency of assessment.¹²⁵ The major organisations include the World Bank and the International Monetary Fund.¹²⁶ There are also FATF-styled regional bodies such as East and Southern African Anti-Money Laundering Group (ESAAMLG) for East and South African countries. The bodies function within their regional jurisdictions as the FATF functions internationally.¹²⁷ With this kind of evaluation every state is being assessed as to its compliance

119 Schott (2006: III-9).

120 Damals (2007: 76).

121 Schott (2006: III-10).

122 See Shams (2004: 220-227) on enforcement measures by FATF.

123 Schott (2006: III-10).

124 Schott (2006: III-12; IV-1).

125 Damals (2007: 76), See also Schott (2006: III-12).

126 Schott (2006: III-12).

127 Schott (2006: IV-1).

with the forty recommendations and the same measures can be taken against countries for non-compliance.

2.3 The Role of the International Community in Managing Confiscated Assets

Despite the fact that asset recovery is cherished worldwide as a weapon against prosperity derived from criminal transactions, and it being addressed in almost all international instruments and non-international instruments with international endorsement,¹²⁸ the aspect of asset management, though very important, is scarcely addressed and when addressed, it is taken as an optional aspect for the states to decide individually.¹²⁹ Given the doctrine of state sovereignty, not even monitoring and evaluation efforts in the aspect of managing the confiscated assets are being implemented.¹³⁰ The major issue that arises is whether the international community has any role in ensuring transparency and accountability in managing the proceeds of crime within a state. Considering its initiatives against transnational crimes, the international community has played a great role in modifying the legal frameworks of states. This suggests that the international community has a role to play in modifying the legal frameworks of states on managing proceeds of crime by advising, supervising or co-ordinating some aspects.

128 Pieth (2008: 17).

129 Shehu (2005: 224).

130 See Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) report for Tanzania 2009.

2.3.1 Advisory Role

The most noticeable role in asset management is advisory, that is, suggesting what is important for a state to consider.¹³¹ The actual impact of this in terms of implementation of what is resolved depends very much on the political will of the member states. Where there is no political will and there are no means of cross-checking whether implementation is effected or not, the possibility of enforcing what has been resolved becomes negligible.

More consideration is given to confiscation of assets. For example, states are required to submit their instruments that enable international asset recovery to the UN Secretary General.¹³² At least it can be established which states have complied with the requirement and which have not. There are no measures similar to this in respect of instruments that allow state authorities to administer and dispose the confiscated assets. In these circumstances, it is not easy to ensure that the victims of crime are being compensated and to determine whether the recovered funds are being utilised on matters of public interest. This vacuum creates favourable conditions for confiscated assets to be embezzled by officials to whom they have been entrusted.¹³³

2.3.2 Supervisory Role

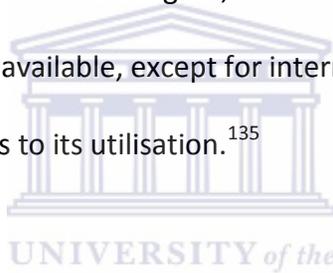
The relevant issue here is whether the international community can exercise a supervisory role in managing confiscated assets. The answer to this question is in affirmative on the ground that

131 Gallagher & Karlebach (2007: 23).

132 Almost all UN instruments provide for this aspect as mandatory.

133 See Jimu (2009: 12) for a discussion of the embezzlement of repatriated funds in the Philippines.

if the FATF, a mere inter-governmental body, can evaluate and take measures against non-compliance with its recommendations,¹³⁴ why should the international community not do the same to ensure compliance with international instruments? In order to ensure compliance with the international instruments on asset management, the international community can also employ measures such as (a) reporting requirements as a mechanism of self-assessment and evaluation, (b) the naming-and-shaming measures employed by inter-governmental bodies, (c) conducting country visits for assessment as a means of external evaluation, and (d) ranking the member states in terms of their level of performance in managing confiscated assets. However, due to the absence of strict provisions in this regard, no accounting for funds realised after the disposition of confiscated assets is available, except for international confiscations where funds were repatriated with conditions as to its utilisation.¹³⁵



2.3.3 Co-ordination

The international instruments require parties to agree on the disposition of confiscated assets, and in most cases the repatriated assets are required to be utilised for compensating the victims or they should be returned to the legitimate owners. How can a repatriating state interfere with the domestic affairs of a receiving state when the funds are not utilised as agreed? Will it not violate the celebrated doctrine of state sovereignty? It is quite easy to enter

134 Shams (2004: 220-227) provides for FATF enforcement measures that can be employed also by the international community.

135 A good example is the report generated by the World Bank on utilisation of Abacha's confiscated proceeds in Nigeria. See Jimu (2009: 7).

into such agreements but their enforceability depends completely on the political will of the receiving state.

To cure the situation, a neutral party is required to perform the duty of co-ordination.¹³⁶

However, there are no such legislative arrangements in the international instruments, and in most cases the states themselves have to find a neutral party to oversee and co-ordinate the utilisation of confiscated funds.¹³⁷ Had the international community formulated a pre-arranged system of co-ordination for the utilisation of repatriated proceeds, the parties simply would have employed the mechanism and the sense of accountability to the receiving state would have been maintained easily.

2.4 Conclusion

Though not contained in a single document, when considered as a whole, the international instruments do provide for a general framework for dealing with the proceeds of crime from their seizure to final disposition. They provide for the administration of proceeds after seizure or forfeiture. They also provide for the handling and disposition of funds realised from recovered assets. States, as members of the international community and party to those international instruments, are bound in one way or another to comply with all their stipulations. Therefore, at the end of the day, through complying with different provisions of

136 For example, the World Bank has been used as a neutral party to guarantee transparent disposition of the proceeds in Nigeria. See Jimu (2009: 8).

137 See Jimu (2009: 7) for the experience of Switzerland in finding a neutral Party.

the international instruments and recommendations from internationally endorsed bodies, states will be capable of establishing a mechanism that will ensure transparency and accountability in the management of the proceeds of crime.

Tanzania, as a member of the international community, is supposed to have implemented the international instruments and recommendations from those bodies in all aspects. Thus, it is expected to have a well-structured mechanism of managing the proceeds of crime. The status of Tanzania in complying with international instruments, especially on the aspect of asset recovery and specifically on managing proceeds of crime during the process of asset recovery, will be analysed in chapter three



Chapter Three

The Tanzanian Legal Framework for Managing the Proceeds of Crime

3.1 Introduction

The United Republic of Tanzania is a union of two states, Tanganyika and Zanzibar.¹³⁸ The country has two types of laws: Acts of Parliament and Decrees of the House of Representatives. The Acts are laws enacted by the Parliament of Tanzania.¹³⁹ In most cases they are applicable in the territory now known as Tanzania mainland, formerly Tanganyika, and in special circumstances, they can be applicable in both Tanzania mainland and Zanzibar.¹⁴⁰ The Decrees are laws enacted by the House of Representatives for Zanzibar, a special legislative organ for Zanzibar, and they are applicable only in Zanzibar.¹⁴¹ For an Act of Parliament to be applicable in Zanzibar it should be provided for expressly in the Act.¹⁴² The confiscation law of Tanzania is an Act of Parliament applicable in both parts of the union.¹⁴³ However, this chapter will analyse its application in Tanzania mainland only.

Tanzania consolidated its confiscation laws in 1991, by enacting the Proceeds of Crime Act (POCA) as a general law for the confiscation of proceeds of crime from different offences. The enactment of POCA, however, did not repeal or amend any asset recovery provisions that exist

138 Article 1 of the Constitution of the United Republic of Tanzania of 1977.

139 Articles 62 and 64 of the Constitution.

140 Article 64(4) of the Constitution.

141 Article 106 of the Constitution.

142 Article 64(4)(a) of the Constitution.

143 Section 2(1) of POCA.

in other laws.¹⁴⁴ The application of POCA in Tanzania differs from what obtains in other countries such as South Africa. Specifically while the South African Prevention of Organised Crime Act is applied retrospectively, POCA Tanzania in general has a prospective application. This exempts from the application of the law proceeds derived from criminal transactions committed prior to its enactment.

As to the confiscation of proceeds of crime, the law provides only for conviction based confiscation. Civil based forfeiture, which is encouraged by the international community,¹⁴⁵ is not applicable in Tanzania. This has a negative impact on the forfeiture regime. However, any discussion of the impact of Tanzania not having *in rem* proceedings is beyond the scope of this paper.

The chapter will analyse the Tanzanian legal framework for managing the proceeds of crime in terms of (a) the general coverage of the law, (b) roles of and challenges to the institutions involved in managing proceeds of crime, (c) the established mechanisms for the realisation and disposition of confiscated assets and (d) other challenges in respect of the application of the law.

3.2 General Coverage of the Law

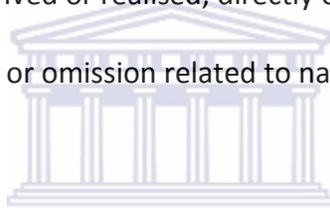
In compliance with the standards set by the international community, Tanzania has included in its law mechanisms to administer the proceeds of crime from the early stages of the recovery

144 Section 78 of POCA.

145 Article 54(1)(c) of UNCAC.

process.¹⁴⁶ The administration of proceeds of crime aims at two purposes: (a) to preserve their evidential value before being tendered in court; and (b) to preserve the economic value of proceeds for both realisation and returning them to their legitimate owners where no forfeiture order is made against them.¹⁴⁷

POCA aimed to improve provisions for dealing with proceeds of crime.¹⁴⁸ However, its motive seems to have been influenced significantly by the provisions of the Vienna Convention.¹⁴⁹ For example, its construction gives priority to drug offences over other offences. This can be observed from its approach to the concept of proceeds of crime.¹⁵⁰ The Act defines proceeds of crime to mean any asset that is derived or realised, directly or indirectly, from the commission of any serious offence, and any act or omission related to narcotic drugs and psychotropic substances.¹⁵¹



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The specific reference to drug offences suggests that they are the primary target of the law. However, the law covers proceeds from other crimes, and it has an open-ended list of offences encompassed in its definition of a serious crime.¹⁵² Though the law begins by defining a serious crime in relation to narcotic drugs and psychotropic substances, it also includes other offences

146 Part V of POCA
147 Section 35 of POCA.
148 Preamble to the POCA.
149 The Vienna Convention (1998).
150 Section 3 of POCA.
151 Section 3 of POCA.
152 Section 3 of POCA.

such as money laundering, which is specifically mentioned, and any offences which the Minister may prescribe.¹⁵³

In addition, the law has double standards when it comes to its application. It categorises serious crimes into domestic and foreign crimes and its application depends on the category of crime from which the proceeds were generated. It has retroactive application in the execution of foreign forfeiture orders, especially foreign pecuniary penalties,¹⁵⁴ and prospective application for the proceeds of domestic crime.¹⁵⁵ This creates a safe haven for tainted assets acquired from domestic crime committed before the Act was enacted.

As to the management of the proceeds of crime, the Act provides for two procedures to preserve assets believed to be the proceeds of crime: restraint and seizure.¹⁵⁶ The duty to administer assets under restraint may be vested in a registered institution, the suspect or a trustee. The first option involves employing the services of the registered institution which has been dealing with the assets before the restraint order.¹⁵⁷ This may be applicable to assets such as bank accounts, shares and any other assets which the suspect has been operating through

153 Section 3 of POCA.

154 Section 57 of POCA.

155 Section 2(2) of POCA.

156 Restraint order refers to a preservative order in which no physical control over the tainted assets is exercised by the law enforcement agency; Seizure order is a preservative order which involves physical control of the tainted assets. See Part V of POCA.

157 ForSaith *et al* (2012: 31).

the offices of such institution.¹⁵⁸ The institution to which the assets will be entrusted will bar the suspect and other interested persons from the usual dealings with them

Secondly, the assets can be put into the custody of the suspect, or any person in whose custody the assets were found.¹⁵⁹ This may be applied when the respondent or the person who holds the assets can be trusted to continue holding them, subject to the conditions prescribed by the court. The conduct of the suspect, or any other person entrusted to continue holding the restrained assets, may be controlled by court orders which do not involve any tangible expenses.¹⁶⁰

Finally, appointment of a trustee to manage restrained assets becomes an option only when necessary, especially where the restrained assets need special asset management skills.¹⁶¹ For example, where the restrained asset is a business and the manager of the asset should have skills in business administration, the services of a trustee would be required. Hence, when a restraint order is issued against assets which need special management skills for their preservation, additional expenses become inevitable as a trustee who holds particular skills will be appointed to preserve them.¹⁶² The restraint procedure as depicted above generally is presumed to be cheap as it does not involve additional expenses in its application, except where a trustee has to be appointed.

158 ForSaith *et al* (2012: 31).

159 Section 38(2)(a) of POCA.

160 Section 43(b) of POCA.

161 Section 38(2)(b) of POCA.

162 Section 50(1) of POCA.

As noted above, the law also provides for seizure as a means of preserving tainted assets.¹⁶³

This is employed mainly where there are reasonable grounds to believe that it will not be safe for the assets to be left under the control of the suspect.¹⁶⁴ It may be due to fear that he can tamper with the evidential value of the assets or deal with them in a manner that will harm their economic value. The process of managing the assets after seizure is expensive in terms of finance and manpower. The responsible machinery in relation to seizure is constituted by three institutions, namely, the police, the trustee and the judiciary, each having a distinct role in ensuring the smooth execution of this process.

After confiscation, the law provides for disposition of seized and restrained assets in two scenarios. In the first scenario, no order to confiscate or forfeit the assets is made. The procedure is simple and direct in respect of seized assets. The law requires the responsible officer to return the assets to the person from whose possession they were seized¹⁶⁵ or to any person who claims an interest in them, upon being granted a court order to that effect.¹⁶⁶

With regard to restrained assets, the law does not provide expressly for what should be done after cessation of the order. This poses no challenge if the assets were in the custody of the suspect or an established institution. However, challenges might arise where the assets are in the custody of a trustee.

163 Section 31 of POCA.

164 ForSaith *et al* (2012: 31).

165 Section 36(2) of POCA.

166 Section 36(1) of POCA.

In this circumstance, the following questions arise: What should be considered by the trustee before handing over the assets to the owner? What procedure should the trustee follow? How long would the court order be executed? All these questions remain unanswered. Perhaps it is presumed that the AG will act *suo moto* to ensure that the assets are returned to the owner.

This is because the restraint order is normally granted to the AG who is a party to the case, and the reverse order also will be issued against him if it is proved that the assets are not tainted.

In the second scenario, a forfeiture order will be granted, and when no challenge has been lodged against it within the prescribed time, the assets will be forfeited to the government.¹⁶⁷

Furthermore, the law provides that, if in need of registration, the assets should be registered in the name of Treasury Registrar.¹⁶⁸ Similarly, in case of monetary assets (including shares and cash) transfers are made also to the Treasury Registrar.¹⁶⁹ However, the law has no provision on what should be done with the realised funds and all other assets realised following the entire exercise. This creates challenges for the government in complying with international standards which require states to have transparency in the disposition of confiscated assets.

3.3 Roles of and Challenges to Institutions Managing Proceeds of Crime

The law does not vest the duty of managing the proceeds of crime in one specific institution.

Several institutions are involved with differing roles. However, the law does not provide

167 Section 25(1) of POCA.

168 Section 25(3) of POCA.

169 Section 25(2) of POCA.

expressly for their co-ordination, but the link between them arises naturally, through performance of their respective duties.

The institutions responsible for the management of proceeds of crime comprise the Inspector General of Police, the Attorney General, the Court, the Trustee, and the Treasury Registrar.

3.3.1 The Inspector General of Police

The administration of seized assets under POCA is vested specifically in the Inspector General of Police (IGP).¹⁷⁰ He is the head of investigations, hence preserving seized assets is his statutory duty.¹⁷¹ Before the enactment of POCA, much consideration was given to seizing the instrumentalities of crime for evidential purposes. Hence the role of IGP was mainly to safeguard them as exhibits rather than administering them as suspected proceeds of crime. POCA provides for confiscation of both instrumentalities of crime and anything which was accrued as a result of commission of the crime, including profits. This widens the category of assets that can be put into custody of the IGP from instrumentalities of crime only to proceeds of crime generally.

Conserving seized assets as exhibits differs from administering them subject to realisation. In conserving assets as exhibits, consideration is given to their evidential value, while in securing them for realisation, their economic value is more important. The difference between conserving seized assets as exhibits and administering them as proceeds of crime subject to

170 Section 35 of POCA.

171 Section 7 and of Police and Auxiliary Police Act. See Section 10 of the Criminal Procedure Act.

realisation can be seen in the consequences of mismanagement. When assets are conserved only for evidential purposes (exhibits), their mismanagement may reduce their evidential value. The loss of evidential value may result in failure to prove a particular case and other incidental expenses, such as costs incurred by the government in maintaining attorneys, investigators and witnesses engaged in the case and failure to fulfil legitimate expectations on the part of the society, especially the victims of the offence.

Mismanagement of assets subject to realisation usually causes direct and indirect costs to the government. Direct costs to the government may be incurred when the asset is not forfeited, and its economic value has depreciated beyond normal wear and tear. In such circumstances, the return of the asset to the person from whose possession it was seized becomes difficult.

The right to property being a constitutionally guaranteed right,¹⁷² the persons who may be aggrieved by mismanagement of their assets are at liberty to sue the government for damages. Most of the aggrieved persons do not sue. However, the few who are aware of their constitutional rights, and who are capable and courageous do sue. For example, the government has been sued for damages estimated at USD 15776 million for mismanagement of assets seized in a single case.¹⁷³ The amount of damages claimed suggests the quantum of

172 Article 24 of the Constitution.

173 *Katheleen Mkanda v Permanent Secretary Ministry of Home Affairs and The AG*, Civil Case No. 61/2001. High Court of United Republic of Tanzania, Dar-es-Salaam Registry.

direct costs the government could have incurred, had a good number of aggrieved persons sued.

Indirect costs to the government due to mismanagement may arise when the asset is forfeited while having no economic value to be realised. This cannot be established directly as loss on part of the government, since nothing was gained and lost. Moreover, if the asset forfeited was expected to be realised and contribute to the state's revenue, then the failure to preserve the realisable value amounts to loss. A good example of this kind of loss is the value of the ship which was confiscated in the *Hun Chin Tai* case.¹⁷⁴ The government did not benefit from the confiscation as by the time the order was granted the ship reportedly was sinking.¹⁷⁵ Despite the fact that the sinking was publicised by the media, nothing was ever done and a ship, which had the capacity to fish on the high seas, completely sank.¹⁷⁶ Though this may not be seen by many as a loss to the government, it is actually a great loss in two ways: firstly, the government was left with nothing to realise; and secondly, the government would have been liable to pay damages had the confiscation order not been granted.

Despite the increased risks attached to asset management, the law does not provide for the manner in which the assets under IGP control are to be handled. Also, it does not provide for a mechanism of accountability for negligent mismanagement.

174 Crim. Sessions Case No.38 of 2009 High Court of Tanzania.

175 See www.globalpublishers.info/profiles/blogs/meli-ya-magufuli-tawaliq-1-yaanza-kuzama.

176 See www.freemedia.co.tz/daima/habari.php?id=50758.

3.3.2 The Attorney General

The initial decision to restrain assets believed to be tainted is vested in the Attorney General (AG), a presidential appointee responsible for advising the government on legal matters.¹⁷⁷ This is challenging as the country has a Director of Public Prosecutions (DPP), a constitutional creature, responsible for prosecutions¹⁷⁸ and a head of the National Prosecutions Service.¹⁷⁹ The only link between the AG and the DPP is the administrative structure in terms of which the DPP is responsible to the AG, and the National Prosecutions Service is regarded as a directorate within the Attorney General's Chambers.¹⁸⁰ However, the Attorney General's Chambers, through its administrative structure, created a special unit, the Asset Forfeiture and Recovery Unit (AFU), within the office of the DPP to take responsibility for matters pertaining to asset recovery.¹⁸¹

The decision to seize or restrain assets is crucial and the actual beginning of asset management procedures.¹⁸² The decision to preserve tainted assets requires legal and asset management skills to determine the proper method to employ.¹⁸³ The AFU, through the co-ordination of investigation powers vested in the DPP, plays a fundamental role at this stage.¹⁸⁴ Though

177 Article 59 of the Constitution.

178 Article 59B of the Constitution.

179 Section 9 of the National Prosecution Services Act, No.1 of 2008.

180 Section 11 of the Attorney General's Discharge of Duty Act, No. 4 of 2005.

181 See www.agctz.go.tz/department_page.php?_id=88

182 Greenberg *et al* (2009: 86).

183 Greenberg *et al* (2009: 86).

184 Section 24 of the NPSA.

composed only of lawyers, it does consider the consequences of taking control of the assets from both the legal and the asset management perspective.

The AG, being a party to the case in which forfeiture is sought,¹⁸⁵ is presumed to be responsible to the court for any damage or mismanagement of the assets under restraint or seizure orders.

Though the assets will be administered by the police,¹⁸⁶ or placed under the trustee,¹⁸⁷ everything is done in execution of orders granted in favour of the AG. Therefore, he holds a primary responsibility for ensuring proper execution of the orders.¹⁸⁸

This poses a challenge to the AFU as it does not have skilled asset management officials to oversee the implementation of the granted orders and attend to other matters pertaining to asset management.¹⁸⁹

3.3.3 The Court

POCA defines a court in relation to its jurisdiction to adjudicate cases of serious offences.¹⁹⁰ It designates an appropriate court to mean the court that convicts a person of a serious offence, other than a primary court.¹⁹¹ The exclusion of primary courts from adjudicating serious



185 Sections 38, 40, 46 and 56 of POCA.

186 Section 35 of POCA.

187 Section 38(2)(b) of POCA.

188 Sections 46 and 56 of POCA.

189 See Greenberg *et al* (2009: 85) for the importance of asset management skills in asset recovery.

190 Section 8 of POCA.

191 Section 8 of POCA.

offences mean that the magistrates' courts are courts of first instance with regard to confiscation matters, followed by the high court and the court of appeal.

The high court can act as both a court of first instance and an appellate court in respect of the cases originating in the magistrates' courts. However, the law vests in the high court exclusive jurisdiction as far as the appointment of the trustee to manage restrained assets is concerned.¹⁹²

The court exercises a wide range of powers in respect of managing the proceeds of crime. It is responsible for the determination of both procedural and substantive matters relevant to applications by the AG or other interested persons.¹⁹³ The active role of the court can be seen also in relation to the preservation of the proceeds of crime. At this stage nothing can be done to the proceeds of crime without the court's authorisation.¹⁹⁴

During the disposition stage, the law provides for a court officer to be among the persons who can facilitate the transfer of ownership of assets, which requires registration of documents.¹⁹⁵

Thus, the court performs active roles during all stages of the confiscation process, and may be referred to as a supervisory organ in confiscations. These roles were vested properly in the court as the organ responsible for the administration of justice. The same has been done in

192 Section 3 of POCA.

193 See, for example, the powers of the court under sections 9, 11, 23, 38, and 43 of POCA.

194 See, for example, sections 25(4)(a) and 47(2) of POCA.

195 Section 14(5) of POCA.

other jurisdictions, such as South Africa, in respect of confiscations and other matters pertaining to the administration of justice.¹⁹⁶

3.3.4 The Trustee

The powers of the trustee in managing assets subject to forfeiture arise after his being appointed by the court.¹⁹⁷ The trustee can be appointed only where the restrained assets need special asset management skills or the circumstances so require.¹⁹⁸ After being appointed he becomes responsible to the court.¹⁹⁹

The powers of the trustee range from administering the assets pending resolution of the case²⁰⁰ to the actual disposition of the assets.²⁰¹ He can take physical control of the assets, or any reasonable action necessary for the preservation of the assets pending resolution of the case.²⁰² Where the assets are forfeited, the trustee is responsible for the realisation of the assets in his custody, as he may be directed by the court.²⁰³

Despite the delicate roles entrusted to the trustee, the law does not provide for a detailed definition as to who may become trustee, nor does it provide for minimum

196 See the South African Prevention of Organised Crime Act, 1998.

197 Section 38(5) of POCA.

198 Section 38(2)(b) of POCA.

199 Section 43(1)(e)(i) of POCA.

200 Section 38(5) of POCA.

201 Section 44 of POCA.

202 Sections 38(5) and 55(6) of POCA.

203 Sections 44 and 48 of POCA.

qualifications, for a person to be appointed as a trustee. POCA authorises the court to order the suspect to furnish the trustee with the restrained assets.²⁰⁴ The opportunity to identify a trustee of his own choice given to the suspect in respect to assets subject to a restraint order, if exercised properly and in good faith, may reduce the risk of appointing an inefficient trustee to manage the assets. However, it may be challenging if the suspect decides to act *mala fide* in order to benefit from the assets in defiance of a confiscation order to be made. The courts should act with caution when dealing with trustees suggested by suspects.

In addition, the law does not provide for a procedure for appointment of a trustee in the case where he has not been suggested by the suspect. It also does not provide expressly for the trustee's remuneration. It only provides for the trustee's right to be remunerated, and mandates the minister responsible for legal affairs to make regulations in that respect.²⁰⁵ However, the regulations are not yet in place. This lacuna suggests that, though the law has been in force for more than twenty years already, its efficiency in terms of application is doubtful.

Despite the mentioned limitations with regard to the responsible machinery for the preservation and realisation of the proceeds of crime, there are cases in which the funds and assets have been confiscated successfully. This brings the asset management process to its final

204 Section 43(e)(iii) of POCA.

205 Section 50 of POCA.

stage, that is, the disposition process. The law vests the responsibility for this stage in the Treasury Registrar, in the following manner.

3.3.5 The Treasury Registrar

The established role of the Treasury Registrar is only to act as a depositary for the confiscated assets. With this role, all funds and assets are put into his custody. There are a number of challenges with regard to this role, especially as to the aspect of accountability for the funds entrusted to Treasury Registrar. This is caused mainly by a lack of a specified procedure for the disposition of realised assets, as the law treats the realised funds as general revenue to the state. This aspect is analysed in relation to the mechanism for the realisation and disposition of confiscated assets established under POCA.

3.4 Realisation and Disposition of Proceeds of Crime under POCA

After successful confiscation, the proceeds of crime need to be realised and disposed of. The law provides for realisation and disposition of assets confiscated through both domestic and foreign orders. The realisation and disposition of registered foreign forfeiture orders, though regulated by the POCA,²⁰⁶ are regulated also by the Mutual Legal Assistance Act under the supervision of the AG.²⁰⁷

206 Sections 19(1) and 57 of POCA.

207 Section 19(2) of POCA.

For the proceeds of crime from domestic forfeiture orders, the law requires the transfer of ownership of the assets to the government.²⁰⁸ Where monetary sums are concerned, they should be paid to the Treasury Registrar.²⁰⁹ When the transfer of the title requires registration, it should be registered in the name of Treasury Registrar.²¹⁰

However, the law does not provide for the specific utilisation of confiscated funds, nor for the accountability of the Treasury Registrar. This does not exempt the Treasury Registrar from accountability as there are other laws that provide for accountability in respect of government assets and funds.²¹¹ Unfortunately, they apply generally to all assets without any specificity required in the disposition of proceeds of crime. POCA, being the law specifically enacted to provide for asset forfeiture and related matters, ought to have provided for accountability in the disposition of assets in a more elaborate manner, as provided by the international standards.

The international standards for managing the proceeds of crime require the existence of the following elements: (a) Transparency and accountability on the part of the institution entrusted to deal with the proceeds of crime; and (b) After realisation, special consideration should be

208 Section 15(1) of POCA.

209 Section 21(1) of POCA.

210 Section 15(3) of POCA.

211 Part II of the Finance Act of 2006.

given to (i) compensation to victims, (ii) contributing to projects of law enforcement agencies and (iii) contributing to social services such as schools and hospitals.²¹²

The international standards are the existing yardstick of a country's performance in asset management. Therefore, the Tanzanian framework on asset management should be analysed in relation to the same elements.

3.4.1 Transparency and Accountability in Disposition

Proceeds of crime in Tanzania, as already mentioned, are treated as part of government's general revenue collection,²¹³ and hence, after being deposited, cannot be audited separately from other government funds. This limits the level of accountability as to how much was disposed of, how it was spent, and most importantly, on what it was spent.

The international community encourages states to have a special fund for forfeited assets to promote accountability.²¹⁴ The purpose of having a special fund is to ensure special accountability with regard to the forfeited assets. The fact that no special fund is established under the law means that the other aspects, such as contributions to social services and financing of projects of the law enforcement agencies, cannot be established. This limits accountability in the disposition of proceeds of crime.

212 Recommendation 38 of the FATF Recommendations of 2003.

213 Section 4 of the Finance Act.

214 Recommendation 38 of the FATF Recommendations of 2003.

3.4.2 Victim Compensation

The purpose of the confiscation of proceeds of crime is regarded to be restorative rather than punitive.²¹⁵ It is regarded as the act of the state to reclaim what the criminals have taken unjustifiably from society.²¹⁶ The entire community is a victim of serious crime, such as drug dealing which affects the community as a whole. Taking this into consideration, the efficiency of a confiscation policy should be determined by how much the victims benefit from it, more than the quantity of confiscations in terms of number and economic value.

The confiscation policy of Tanzania as portrayed in POCA does not encompass victims' compensation. However, the law covers the rights of persons who have an interest in the forfeited assets.²¹⁷ Considerations to third parties who hold interests in the assets begin at the stage of preservation of assets subject to confiscation.²¹⁸ The issue is whether victims can be included under the provisions covering third parties.

The provisions for third parties have special conditions, such as establishing the monetary value of the claimed interest. The victims cannot establish specific damages, hence the provisions for third parties cannot be applied in their favour. This is due to the fact that victims have no automatic or pre-established interest in the assets. Therefore, they need special considerations as to their status as victims of the crime.

215 Eissa (2011: 2).

216 Eissa (2011: 2).

217 Sections 40(3) & (4) of POCA

218 Sections 40(1)(a) and 41 of POCA

Compensation to victims is among the best modes of disposition for confiscated proceeds of crime recommended by the international community.²¹⁹ Its non-existence means a failure to implement the international standards on asset recovery.

In addition to compensation for the victims, the law has other limitations that affect the economic value of the assets subject to confiscation. These are analysed in the section that follows.

3.5 Other Challenges in Respect of the Application of POCA

The inclusion and non-inclusion of certain provisions in POCA are challenging in relation to the preservation of the economic value of realisable assets and their subsequent confiscation. The problematic provisions include the payment of legal and living expenses from the restrained asset, and non-taxation of the proceeds of crime. The two matters are analysed below.

3.5.1 Payment of Legal and Living Expenses

The purpose of confiscation policy, rather than being retribution, may be punitive, and a means of deterrence by ensuring that crime does not pay.²²⁰ This being the basic purpose, authorising criminals to benefit from the fruits of their crimes seems to disguise the rationale of confiscations. POCA allows the suspect to use the restrained assets to pay legal expenses, living expenses and a specified debt which has been incurred in good faith.²²¹ The provision

219 Article 8(4) of the UN Convention against Terrorism.

220 De Koker (1998: 278-279).

221 Section 38 of POCA.

pertaining to living expenses also includes the living expenses of the suspect's dependants and reasonable business expenses.²²² With the exception of the debt, which is subject to measurable conditions such as the amount owed, the legal and living expenses do not have any limitation. They are required only to be reasonable.²²³

The process of allowing criminal suspects to pay legal expenses from the restrained assets has been held to be improper, and it may affect the psychology of society as to the real purpose of confiscations.²²⁴

However, the relevant issue is whether the law contravenes the purpose of confiscation by allowing the said expenses to be paid out of the restrained assets. The response to this issue brings to attention other constitutionally guaranteed rights such as the right to be presumed innocent,²²⁵ the right to property²²⁶ and the right to legal representation to ensure a fair trial.²²⁷ During the restraint stage, the assets have not yet been declared proceeds of crime, nor has the suspect been found guilty of any offence. In such circumstances, refusal to allow legitimate expenses will mean placing the burden of proof on the suspect,²²⁸ and the refusal to allow payment of legal expenses will infringe the suspect's right to legal representation.

222 Section 38(3)(a) of POCA.

223 Section 38(3)(a) & (b) of POCA.

224 *DPP v Aereboe and Others* [2000] 1 All SA 105 (N).

225 Article 13(6)(b) of the Constitution.

226 Article 24 of the Constitution.

227 Article 13(6)(a) of the Constitution.

228 *Re 'D'* Queens Bench Division, as quoted in Ndzengu & Von Bonde (2011: 312).

This kind of construction was considered in respect of a similar provision in South African law.²²⁹ The analysis was made as to whether the provision could be utilised as a loophole for criminals to benefit from the proceeds. It was argued that the provision may create an opportunity for criminals to use techniques, such as endless applications against the forfeiture orders, so that they can continue to benefit from the crimes which they committed.²³⁰ However, it was found to be against the established rights of the suspect to refuse payment of his legal expenses.²³¹ The only way that was found to be neutral in curing the situation, is to set a maximum for such payments.

3.5.2 Taxation of Proceeds of Crime

Taxation of proceeds of crime is argued to be the simplest way of facilitating their confiscation.²³² This is due to the fact that most illegally obtained assets are not subjected to proper taxation. That is why a tax system is proposed as a preferred means of dealing with acquisitive crime.²³³ Some states, such as the United Kingdom, impose tax on the proceeds of crime after they have been identified.²³⁴ The UK has vested in its asset recovery agency the

229 The repealed South African Proceeds of Crime Act, 1996, as quoted in Ndzengu (2011: 312).

230 Greenberg *et al* (2009: 74).

231 Ndzengu (2011: 331).

232 Alldridge & Mumford (2005: 357).

233 Alldridge & Mumford (2005: 356).

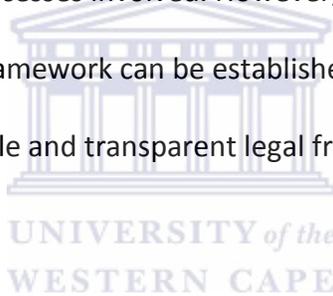
234 Section 319 of the UK Proceeds of Crime Act, 2002.

jurisdiction to raise tax assessments in respect of the proceeds of crime.²³⁵ When assessments are raised, the burden of proof shifts to the suspect.

The Tanzanian Income Tax Act does not provide expressly for non-taxation of illegally obtained income.²³⁶ However, in practice it does not impose any tax on them. The position is also reflected in POCA having no provision for the taxation of the proceeds of crime. This reduces the chances of facilitating confiscation based on tax evasion and other tax offences.

3.6 Conclusion

The management of confiscated assets in Tanzania has a number of limitations in respect of the responsible machinery and the processes involved. However, these limitations can be confronted and a more efficient framework can be established. What should be done in order to develop an effective, accountable and transparent legal framework will be recommended in the next chapter.



235 Alldridge & Mumford (2005: 357).

236 Section 6 of the Income Tax Act, Cap. 322.

Chapter Four

Establishing an Asset Management Policy in Tanzania

4.1 Introduction

Asset management is an essential tool in maintaining the efficiency of a confiscation regime. It assists in validating, strengthening and communicating the purpose of the confiscation policy in a country. It acts as a conduit of information between the administrative authorities, such as the law enforcement agencies involved in implementing confiscation policy, and the general public. As a result of this, it tends to build public confidence in the policy.

The operation of a confiscation policy depends heavily on public co-operation with the law enforcement agencies. For example, during the investigation stage, especially during the asset tracing exercise, the agencies need public co-operation in identifying tainted assets. The agencies expect to obtain clues from the society in which the criminals live or operate, for them to start enforcing the law against the criminal activities, which includes confiscation of tainted assets. The law enforcement agencies need also to obtain information on suspicious transactions from financial institutions such as banks, insurance companies and other institutions for them to act upon.

Without public confidence in the confiscation policy, it will definitely collapse. Asset management policy for confiscated assets similarly aims to build public confidence in the confiscation policy and other administrative action. Management of seized, frozen and

confiscated assets establishes a means of accountability to the public as to what has happened to the proceeds of crime after confiscation. Tanzanian confiscation policy, as reflected in POCA, lacks a clear asset management policy. A number of challenges relating to managing confiscated assets were identified in previous chapters in respect of the responsible machinery and other provisions of POCA.

Lack of a clear asset management policy is a problem facing not only POCA Tanzania, but even the international conventions, with exception of UNCAC.²³⁷ Whereas much consideration is given to the confiscation policy, asset management is mainly considered relevant as a matter of practice in high profile confiscation cases, especially where international asset recovery is concerned.²³⁸

This chapter aims at suggesting a workable asset management system for Tanzania and providing solutions to the research questions: whether there is a need to amend the existing laws to provide a more reliable mechanism for management of confiscated assets; and whether there is a need to establish an independent body to manage the assets during all stages of asset recovery? The chapter will provide for both short-term and long-term solutions with regard to the establishment of an asset management policy in Tanzania.

237 Article 31(3) of UNCAC mandates states to establish asset administration mechanism for preserved and confiscated assets. No similar provision is found in other international conventions.

238 See, for example, the case of Nigeria and the Phillipines as elaborated in Jimu (2009: 7-13).

In formulating an asset management system for Tanzania, reference will be made to the international best practices for managing seized, frozen and confiscated assets provided by the UNODC, the FATF and the G8. The element of each practice will be discussed and then employed in formulating a Tanzanian asset management system.

4.2 Best Practices by United Nations Office on Drugs and Crime

The United Nations Office on Drugs and Crime (UNODC) published a special manual on international co-operation for the purposes of confiscation of proceeds of crime in 2012.²³⁹ The manual covers all aspects of confiscation, from asset tracing to confiscation and disposition. It is a model law for the confiscation process.²⁴⁰ On the aspect of asset management it states categorically what should be done during the pre-confiscation and post-confiscation stages.²⁴¹ It borrowed much from the Financial Action Task Force (FATF) recommendations and the provisions of the United Nations Convention against Corruption.²⁴² The UNODC insists on the importance of the preservation of the assets in the following manner.

4.2.1 Pre-Preservation Planning

The UNODC requires countries to consider having a pre-preservation plan in which the consequences of seizing or freezing of assets will be considered.²⁴³ It provides further that the process should involve investigators, prosecutors and asset managers. The process is very

239 UNODC Manual on International Co-operation for the Purposes of Confiscation of Proceeds of Crime, 2012.

240 Para 9 of the UNODC Manual.

241 Part VI and VII of the UNODC Manual.

242 Para 209 of the UNODC Manual.

243 Para 196 of the UNODC Manual.

important as it involves also the decision as to the terms and conditions to be included in the preservation order to be sought.

The UNODC warns states against unnecessary asset preservation orders during the early stages of a case. It insists that preservation orders be sought only where there is a reasonable concern that the assets could disappear.²⁴⁴ When preservation orders are sought, consideration should be given to the terms and conditions to be contained in them.²⁴⁵ It has been argued that it is a mistake to assume blindly immediate adherence to any preservation order or a continued interest in maintaining targeted assets once frozen.²⁴⁶

4.2.2 The Application for and Issuing of a Preservation Order

The UNODC affirms the use of the two types of preservation orders, freezing and seizure.²⁴⁷ It requires states to consider the costs of each preservation order and avoid the common assumption that the assets can manage themselves or that the issuance of freezing order is enough to preserve a particular asset.²⁴⁸ For example, the value of a house which has been frozen will depreciate unless the owner maintains it or the agency responsible for asset management maintains it. If it is a business, adequate management and finance are required as

244 Para 97 of the UNODC Manual.

245 Para 196 of the UNODC Manual.

246 Para 196 of the UNODC Manual.

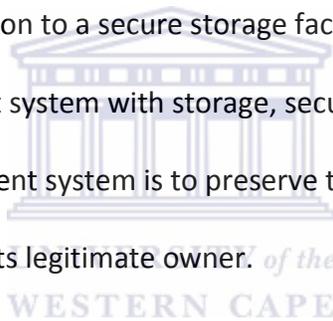
247 Para 23 of the UNODC Manual.

248 Para 204 of the UNODC Manual.

in most cases criminals use illicit funds to run their businesses, and once a business has been frozen they tend to abandon it by stopping injecting funds into it.²⁴⁹

In such scenarios, the terms and conditions of the orders must be tailored to reflect the asset management consideration,²⁵⁰ and the asset manager should perform an active role by ensuring that the contents of a freezing order are formulated to cover all aspects concerned in managing a particular asset,²⁵¹ together with conducting periodic inspections to ensure compliance with the terms and conditions of the court order.²⁵²

Further, the UNODC insists that where seizure is effected, assets must be safeguarded by adequate security and transportation to a secure storage facility.²⁵³ This implies the need for a well-structured asset management system with storage, security and transportation services. The purpose of an asset management system is to preserve the value of the seized assets subject to realisation or return to its legitimate owner.



Over and above the need to preserve seized assets, the UNODC provides for the valuation of the assets immediately after seizure as a means of accountability.²⁵⁴ This aims at establishing their value at the time of seizure to avoid doubts that may arise during later stages of the

249 See explanations given in para 204 of the UNODC Manual.

250 Para 221 of the UNODC Manual.

251 Para 222 of the UNODC Manual.

252 Para 221 of the UNODC Manual.

253 Para 217 of the UNODC Manual.

254 Para 218 of the UNODC Manual.

case.²⁵⁵ Doubts as to the value of the seized assets may arise when the owner claims damages because the asset was not properly preserved and it was damaged. Doubts may arise also with regard to the realisable value when the confiscated assets were not valued prior the confiscation order.

The UNODC provides further for the possibility of seizing a bank account.²⁵⁶ In this case, money available in the seized account will be transferred to the court's or the government's account pending final disposition of the matter. It suggests that the domestic law of a requested state be applicable in the case of an international request to seize a bank account.²⁵⁷

With regard to the components of a workable asset management system, the UNODC endorses the asset management institutional structure given by the FATF²⁵⁸ which contains the following elements.



4.3 FATF Best Practices on Managing Confiscated Assets

The Financial Action Task Force has produced a framework for confiscation and asset recovery in general. The recommended framework for the management of frozen, seized and confiscated assets forms part of this framework. As discussed in previous chapters, the FATF recommendations are internationally enforced, therefore the framework needs to be

255 Para 218 of the UNODC Manual.

256 Para 219 of the UNODC Manual.

257 Para 219 of the UNODC Manual.

258 Para 209 of the UNODC Manual.

considered when thinking of establishing an asset management policy for a country, in this case Tanzania.

The FATF general framework on asset recovery²⁵⁹ recommends the establishment of an authority within a state responsible for ensuring international co-ordination in asset recovery.²⁶⁰ The establishment of such an authority is intended to speed up the process of asset recovery domestically and internationally by facilitating expeditious responses to requests from foreign states on matters pertaining to asset recovery.²⁶¹ The authority will be responsible also for other arrangements such as co-ordinating the preservation of tainted assets and confiscation proceedings, including arrangements for the sharing of confiscated assets where appropriate.²⁶²

In addition, the FATF recommends the establishment of an authority for the management of frozen, seized and confiscated assets.²⁶³ This aims at enhancing the regime which countries need to implement for the efficient management of frozen, seized and confiscated assets and, where necessary, disposal of the assets. The recommended forms of the authority includes: having a single competent authority, use of contractors, a court appointed manager and employing the service of a person who holds the property subject to appropriate restrictions of

259 FATF Best Practice Paper: Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for ongoing Work on Asset Recovery, 2012.

260 Part IV of the FATF Best Practices on Confiscation.

261 Para 9 of the FATF Best Practices on Confiscation.

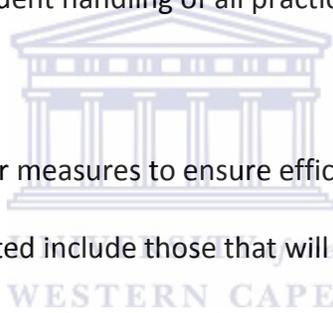
262 Para 9 of the FATF Best Practices on Confiscation.

263 Para 25 of the FATF Best Practices on Confiscation.

use or sale.²⁶⁴ The FATF recommends that countries employ one or combination of the mentioned forms when establishing an asset management system for confiscated assets.²⁶⁵ The functions of the established authority can be directed either at managing the assets or overseeing the management of the said assets.²⁶⁶ When the authority is entrusted with managing the assets, it should also be entrusted with sufficient powers to enable it preserve the assets at all stages of the case.²⁶⁷

The authority should have sufficient resources, human and financial, to enable it deal with all aspects of asset management, such as giving support and advice to law enforcement in relation to preservation orders and subsequent handling of all practical issues in relation to asset management.²⁶⁸

Also, there should be in place other measures to ensure efficient functioning of the designated authority.²⁶⁹ The measures suggested include those that will ensure proper care and preservation of the assets, such as keeping appropriate records,²⁷⁰ dealing with third party rights in relation to the preserved assets,²⁷¹ disposition of confiscated assets²⁷² and taking



264 Para 26 of the FATF Best Practices on Confiscation.
265 Para 26 of the FATF Best Practices on Confiscation.
266 Para 27(a) of the FATF Best Practices on Confiscation.
267 Para 27(a) of the FATF Best Practices on Confiscation.
268 Para 27(e) of the FATF Best Practices on Confiscation
269 Para 27(d) of the FATF Best Practices on Confiscation
270 Para 27(d)(i) & (iv) of the FATF Best Practices on Confiscation
271 Para 27(d)(ii) of the FATF Best Practices on Confiscation
272 Para 27(d)(iii) of the FATF Best Practices on Confiscation.

responsibility for any damages to be paid following legal action by an individual in respect of loss of or damage to the assets.²⁷³

There should be also mechanisms to ensure transparency and assessment of the effectiveness of the system.²⁷⁴ Such mechanisms include tracking of the preserved assets (especially the seized assets), valuation of the assets after the preservation order is issued, and keeping a record of their ultimate disposition (for example, in the case of a sale, keeping a record of the value realised is necessary).²⁷⁵

For purposes of accountability, the FATF encourages countries to consider establishing an asset forfeiture fund into which all or portion of confiscated assets will be deposited for law enforcement projects, education or other appropriate purposes.²⁷⁶ Even where an asset forfeiture fund has not yet been established, as a matter of best practice the FATF requires countries to endeavour to use the confiscated assets transparently to fund projects that further the public good.²⁷⁷

In addition to those provided by the FATF, there are also best practices from other inter-governmental organisations which might be useful in formulating the desired asset

273 Para 27(d)(v) of the FATF Best Practices on Confiscation.

274 Para 27(k) of the FATF Best Practices on Confiscation.

275 Para 27(k) of the FATF Best Practices on Confiscation.

276 Para 20 of the FATF Best Practices on Confiscation.

277 Para 20 of the FATF Best Practices on Confiscation.

management system for Tanzania. A good example are the practices published by the G8 countries.

4.4 G8 Best Practices for Administration of Seized Assets

The Group of 8 (G8) was launched in 1975 as a group of six, then became a group of seven, finally expanding to eight after the inclusion of Russia in 1998.²⁷⁸ The other members of the group are the United States of America, France, the United Kingdom, Germany, Canada, Japan, and Italy.²⁷⁹ The group aims at bringing together the top eight industrial democracies based on inter-governmental agreements and permanent secretariats.²⁸⁰ It is now considered to be a central component of global governance. Even the FATF, whose recommendations have attained global endorsement, is the product of G8 activities.²⁸¹

According to the G8 best practices, the administration of seized assets starts at the pre-seizure stage, characterised by pre-seizure planning.²⁸² The planning is considered to be essential to anticipate resource expenditure and make an informed decision about what assets are targeted for seizure, how and when they will be seized and, most importantly, whether there is reasonable ground for their seizure.²⁸³ The countries are supposed to be careful about their

278 Hajnal (2013).

279 The European Union is considered to be the ninth member of the G8. See Hajnal (2013).

280 Hajnal (2013).

281 Schott (2006: III-7).

282 G8 Best Practices for Administration of Seized assets (2005: 2).

283 G8 Best Practices (2005: 2).

decisions to seize assets and, crucially, they must consider that the purpose of seizure is confiscation and hence must target seizing assets rather than liabilities.²⁸⁴

The G8 argued for countries to establish asset management mechanisms which will ensure strong control over the seized assets. In establishing a particular mechanism, states should strive for an efficient and cost-effective system.²⁸⁵ The G8 suggests that countries establish clear separation of duties within the asset management system. Specifically, it discourages vesting in a single person plenary authority over all aspects of asset administration. Where it is necessary to vest asset administration authority in a single person, countries should consider having a system of accountability for that person to a higher authority.²⁸⁶

The authority responsible for asset management should ensure the valuation of the property after seizure, record keeping, and consider the interest of the defendants and third parties throughout the period of asset seizure. Most importantly, the authority should ensure that no officer responsible for the seizure of assets receives a personal reward connected to the value of the seizure, nor should the funds from any mechanism for administration of seized assets be used for personal purposes.²⁸⁷ The states are encouraged also to establish an asset forfeiture fund to ensure accountability in managing the proceeds of crime.²⁸⁸

284 G8 Best Practices (2005: 2).

285 G8 Best Practices (2005: 2).

286 G8 Best Practices (2005: 2).

287 G8 Best Practices (2005: 2).

288 G8 Best Practices (2005: 2).

To ensure transparency in the management of seized assets, the authority responsible for asset management should be subjected to annual examination by independent auditors in all aspects, including the certification of the financial records, and the findings should be made available to the public where appropriate.²⁸⁹

States are encouraged to consider employing an information technology (IT) system for managing the proceeds of crime.²⁹⁰ An effective financial and asset management IT system can be useful for tracking and managing inventory or meeting expenses associated with seized assets, as well as maintaining a transparent and accountable system.

In addition to these elements, the FATF and the G8 countries suggest that special consideration be given to other miscellaneous matters such as the payment of legal, living and business expenses. The countries are encouraged to institute strict controls and, where possible, prohibit the payment of such expenses from the preserved assets.²⁹¹ This is intended to limit the possibility of suspects restructuring their demands and continuing to benefit from the proceeds of crime to the detriment of the state's interests.

In summary, the framework for best practices from the UNODC and the two inter-governmental organisations, if implemented effectively, means that the states will have well-structured, transparent and accountable asset management systems. Therefore, the elements

289 G8 Best Practices (2005: 2).

290 G8 Best Practices (2005: 3).

291 G8 Best Practices (2005:3).

of an exemplary asset management system from the UNODC, the FATF and the G8 will be employed also in improving the Tanzanian asset management system for preserved and confiscated assets.

4.5 Recommendations on an Asset Management System for Tanzania

The recommendations on the Tanzanian asset management system are expected to take into consideration all measures contained in the framework provided by the UNODC and the FATF, and other matters deemed necessary for the management of confiscated assets and the public good. It may include also some elements from the G8 best practices.

The elements of the preferred system for managing confiscated assets being already given by the international framework, and the existing system in Tanzania having been analysed in the previous chapter, the first research question can now be answered. The question asks whether there is a need to amend the laws of Tanzania to provide for a more reliable system of asset management.

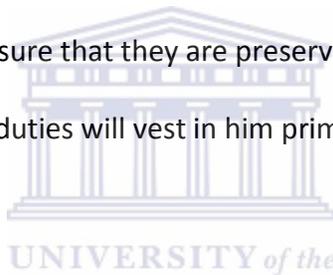
Considering the challenges identified during the analysis of the Tanzanian asset management system, especially the roles of the institutions involved and the lack of legally established coordination between the said institutions, the answer to this question is in affirmative. The amendments to the law and the making of regulations to ensure effective application of the law are recommended in order to effect improvements to the system in the following manner.

4.5.1 The Roles of the Responsible Institutions in Managing the Proceeds of Crime

The first area that needs improvements is the roles of the responsible institutions dealing with the management of the preserved and confiscated assets. The law needs to provide a clear co-ordination between them by establishing which institution will have the primary role in managing those assets. The following changes are recommended for each institution involved in the management of confiscated assets.

4.5.2 The Inspector General of Police and the Treasury Registrar

The responsibility of the IGP in relation to administration of seized assets should be extended to include responsibility in relation to all preserved assets. This will include the duty to inspect the assets under restraint orders to ensure that they are preserved in accordance with the court orders. The extension of the IGP's duties will vest in him primary responsibility in relation to managing the proceeds of crime.



Also, it should be stated clearly within the law or regulations how the assets under preservation orders should be treated. The valuation of the assets both under restraint and seizure orders should be effected immediately after the issuance of the order. A record of the particulars of the assets should be kept together with liabilities attached to them, if any. This will help the law enforcement machinery to ensure preserving assets for confiscation rather than liabilities. The assessment will be easy as, after valuation and reviewing liabilities, it can be established easily whether the asset has any realisable value. The service of the government valuator can be employed for the fair valuation of the assets, and in record keeping the use of information

technology is recommended to ease asset tracking and integration of data from all over the country.

The law should entrust the IGP with the power to dispose of the assets under his control after a confiscation order is issued. This should be done subject to the court order, and funds from the realised assets should be preserved in accordance with the law.

There should be established an asset forfeiture fund to be supervised by the Treasury Registrar in which all confiscated funds will be deposited. Expenditures from the fund should focus on compensating victims of crime and funding law enforcement projects and other projects that will promote the public good.

The fund should be staffed by an independent board which has amongst its member's representatives from parliament and civil society organisations to ensure public participation in managing the proceeds of crime. The functions of the board will involve considering and suggesting expenditures from the fund, subject to the approval of the Parliament. The board will be responsible also for advising the administrative machinery on other matters pertaining to asset recovery in general. There should also be a special accounting arrangement to ensure that the functions of the board do not interfere with payment of court approved damages and asset management costs.

In addition, the expenditures from the fund should be subjected to auditing by the Auditor General. The report of such auditing should be made available to the public to ensure accountability and build the public trust which is the heart of confiscation policy.

The establishment of the fund will change the role of Treasury Registrar from being a depository of confiscated assets to a supervisor of the fund. The utilisation of the funds deposited will be known to the public through the action plans approved by Parliament and annual reports by the Auditor General.

4.5.3 The Attorney General and the Director of Public Prosecutions

The role of the AG should be extended to include co-ordination powers in respect of the management of preserved and confiscated assets, together with international co-ordination in relation to all matters pertaining to confiscation.

This will require the establishment of a special sub-unit in the AFU which will be responsible for co-ordinating and overseeing the asset management process. The sub-unit should be staffed by personnel with asset management skills rather than lawyers. The sub-unit will be useful also in advising the law enforcement agencies, including the AFU, on matters pertaining to asset management.

In addition, when considered appropriate, the functions of the AG in relation to asset recovery should be vested in the DPP, as is the practice in states such as South Africa.²⁹² Vesting the said functions in the DPP will ensure his direct involvement as head of the prosecution service rather than as head of the directorate of public prosecutions overseeing the execution of the functions of his superior, the AG.

4.5.4 The Trustee and the Court

The role of a trustee in relation to the preserved assets that will be entrusted to him should not be disturbed. However his basic qualifications, manner of identification and appointment and remuneration should be stipulated in the law or regulations to be made to implement the law.

In addition to the powers of the trustee, the powers of the court should remain intact also.

4.6 Other Limitations

In addition to challenges in respect of the responsible machinery for the management of preserved and confiscated assets, limitations were identified also in respect of certain provisions of the law which seem to affect the economic value of the preserved assets. The limitations include payment of legal, business and living expenses from the preserved assets, lack of compensation to victims and non-taxation of the proceeds of crime. These limitations can be dealt with as follows.

292 See part 2 and 3 of the South African Prevention of Organised Crime Act, 1998.

4.6.1 Payment of Legal, Business and Living Expenses

The law should limit the payment of the said legitimate expenses to a more specific test rather than reasonableness. It is very difficult to assess what is reasonable in different cases. The amount of business expenses can be limited easily to what the books of accounts of a particular business provide; the amount of living expenses, except where medical and educational fees are concerned, should be limited to, for example, the rate of salaries of medium-rank public servants; and legal expenses should be limited according to the provisions of the Advocates Act,²⁹³ specifically those relating to compulsory legal service. These limits, coupled with the reasonableness test, will ensure proper preservation of the assets.

4.6.2 Compensation to the Victim of the Offence

The provisions of the law should allow compensation to victims where they can be identified. Where victims cannot be identified, the general public should be treated as the victim of the offence and money realised from the confiscated assets should be used to fund projects that will further the public good, for example, educational projects. This will also strengthen the society's confidence in the system.

4.6.3 Taxation of Proceeds of Crime

The issue of taxation of the proceeds of crime, though not mentioned amongst the elements of the preferred asset management system, should be also considered. Where no tax has been paid, the chances of a successful confiscation through tax related offences, such as tax evasion,

293 [Cap. 341 R.E 2002].

increase. This will ensure confiscation of proceeds of crime which may not be easily linked to other predicate offences. The service of the Tanzania Revenue Authority can be employed in facilitating the process.

The incorporation of these changes can be effected on a short-term and a long-term basis. For example, matters that do not require the amendment of the law, such as those recommended in respect of the trustee, and the manner the assets should be handled by the IGP, can be easily incorporated through regulations.²⁹⁴ The other recommendations can be effected on a long-term basis following the procedures involved in amending the laws.

The second research question as to whether Tanzania needs to have a special agency for managing confiscated assets is also answered affirmatively, as having such an agency will reduce the work load attached to the offices of the Attorney General and the Inspector General of Police. However, the suggestion to employ the services of these two institutions in asset management was done with concern for the budgetary constraints that will be attached to the establishment of a new agency.

As the G8 best practices provide, the system should be efficient and cost effective. The Inspector General of Police has offices all over Tanzania, enough space for storage of the seized assets and human resources of various professions including material management (asset

294 Section 79 of POCA empowers the minister to make regulations prescribing matters which are required by the Act or are necessary, or convenient to be described for the carrying out of the Act.

management). Hence, entrusting him with managing assets will be more cost effective than establishing a new institution.

Moreover, as a matter of convenience, Tanzania should see the establishment of a special agency for managing preserved and confiscated assets as a long-term goal, subject to the availability of funds.

4.7 Conclusion

Proper management of preserved and confiscated assets is the heart of confiscation policy. Any mismanagement may lead to the collapse of the policy which is also the heart of international efforts against transnational crime. Hence, Tanzania should endeavour to have a transparent and accountable system of asset management, to ensure that Tanzanians benefit from the confiscated assets, and maintain the policy and the status of the country before the international community.



Chapter Five

General Conclusion

The study was conducted to analyse the alignment of the Tanzanian legal framework for managing confiscated proceeds of crime with the international framework on management of proceeds of crime.

The study found that the international community considers the confiscation of the proceeds of crime to be an important tool in the fight against serious crime. This is reflected in the fact that almost all international conventions mandate states to confiscate proceeds of crime, ranging from instrumentalities of crime to profits generated from proceeds of crime.

It was also found that confiscation policy is not only retributive, aimed at punishing criminals, but also restorative, aimed at reclaiming what criminals have unjustifiably taken from the society. Restoration includes two major areas: firstly, compensating the victims where they can be identified and, where the victims cannot be identified, financing projects furthering the public good; secondly, financing law enforcement projects, which is also beneficial to society, as efficient law enforcement agencies are a threat to criminals.

The restorative part of confiscation policy was found to be the major reason that necessitated the existence of a mechanism to manage assets from the time they are suspected to be proceeds of crime, to their confiscation and disposition. Asset management was not a primary focus of the international community, hence it received little attention and most of the international conventions, with the exception of UNCAC, do not mandate states to have mechanisms to manage the proceeds of crime.

UNCAC mandates states to develop an administrative framework responsible for managing proceeds of crime. However, it does not provide for any measures to ensure that states comply with this mandate. This has left asset management to be governed by the political will of member states.

Along with the international confiscation efforts, there are inter-governmental bodies with international endorsement and influence, such as the FATF and the G8. These bodies addressed the issue of asset management and formulated best practices from various states as a source of technical assistance to other states facing challenges in developing asset management systems for preserved and confiscated assets. The FATF best practices were endorsed by the UN through their inclusion in the UNODC manual for confiscation, thereby upgrading their status to the level of an international framework.

The Tanzanian framework for managing the proceeds of crime was analysed on the basis of the international framework laid down by the FATF and the UNODC. The Tanzanian framework was

found to be faced with a number of challenges, including lack of co-ordination between institutions dealing with the management of the proceeds of crime, as well as issues of transparency and accountability in managing the proceeds of crime.

Recommendations were made to improve the system by amending the law to provide for institutions which will have primary responsibility over the management of proceeds of crime, establishing co-ordination between the institutions involved, and promoting transparency and accountability in the management of the proceeds of crime by providing for an auditing programme.

Some actions were recommended to ensure transparency, such as record-keeping for the preserved and confiscated assets, together with their valuations at the time of the issuance of the court order to preserve or confiscate the proceeds.

It was recommended also that the payment of legal, living and business expenses from the preserved assets should be limited to specifically established amounts, subject to the provisions of other laws, such as the Advocates Act in respect of legal expenses.

The establishment of an asset forfeiture fund was recommended to ensure accountability and it was suggested that some of board members responsible for the fund should be drawn from the parliament and civil society organisations to ensure public participation in managing the proceeds of crime.

Establishing a special agency for asset management was recommended as a long-term goal of the country, subject to budgetary conveniences. All recommendations were made with one principle in mind, to have an efficient and cost-effective mechanism for managing confiscated assets.



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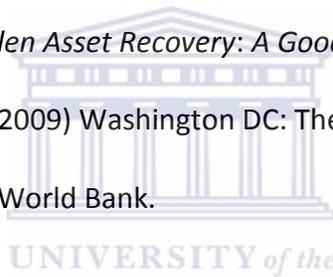
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