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Transnational Criminal Justice and Crime Prevention: An International and African Perspective

Civil Recovery of Corruptly Acquired Assets in Uganda

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DECLARATION OF AUTHORSHIP

I, PHILIPPA BOGERE, declare that Civil Recovery of Corruptly Acquired Assets in Uganda is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

While corruption affects all countries throughout the world, developing countries have been affected the most. It is estimated that developing countries lose $20-$40 billion in stolen public assets per year.\(^1\) Uganda, like many other African and developing countries, is faced with the vice of corruption. Corrupt practices in Uganda mainly occur in the public sector, with economic development programmes funded through foreign aid, public procurement and local government being most prone to such practices. Petty corruption is also common in government departments. Corrupt acts also occur to a lesser extent in the private sector and in non-governmental organisations. As a result, corruption in Uganda can be described adequately as routine and widespread, manifesting itself in the dealings between the public sector, individuals and firms.

The World Bank in 2005 estimated corruption related losses in the country to be at $204 million,\(^2\) while the Global Integrity Report put the amount at $400 million.\(^3\) It was reported also that the country loses about $250 million to corruption annually.\(^4\) In 2013, the East African Bribery Index ranked Uganda top among the countries affected most by corruption in the region.\(^5\)

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2 World Bank (2009).
3 www.socialwatch.org.
4 www.newvision.co.ug.
In November 2012, for instance, donor countries such as Denmark, the Netherlands, the United Kingdom and Sweden suspended their financial support to Uganda after $25.7 million, designated for post-conflict recovery and reconstruction programmes in northern Uganda, were diverted by officials in the Office of the Prime Minister and squandered.6

Pursuant to this occurrence, the donor agencies and partners insisted that the resumption of aid was conditional upon the establishment of control systems within government departments, full investigation and prosecution of the matter, and recovery of the misappropriated funds.7 Other incidents of corruption that have occurred in Uganda in recent years include the misappropriation of $4.5 million meant for the Global Fund to fight AIDS, Tuberculosis and Malaria,8 and $800 000 stolen from the Global Alliance for Vaccine and Immunisation.9

Despite the high level of corruption in Uganda, inquiries into allegations of corruption hardly yield any results. Reports and investigations into political corruption, such as police misconduct and corruption (2000), Junk Helicopters (2001), URA (2003), Global Fund (2006), National Social Security Fund (2007), GAVI Fund (2007) and The National Population, Databanks and Identification Solutions Investigations have resulted neither in prosecutions and convictions nor in the recovery of stolen funds.10

Many times powerful public officials involved in these corruption related offences are not prosecuted or convicted. Often there are claims of insufficient evidence to found an indictment or conviction. Further, statistics and reports show that most of the convictions secured at the Anti-Corruption Court are of lower level public officials who work at the

technical level, usually convicted for embezzling sums averaging $1300.\textsuperscript{11} However, high ranking officials in the central government, who are accused often of misusing much bigger sums of money ($25 000 to $120 000 on average),\textsuperscript{12} escape charges or conviction, through the politics of patronage and syndicates within the public service which conceal evidence of corruption and fraud. Also, such officials may threaten prosecutors and potential witnesses or bribe investigators and prosecutors.\textsuperscript{13}

According to a prosecutor in the Anti-Corruption Court:

“Untouchables. Come rain, come shine, they are never going to Court, not while there’s somebody close to them in power. That is because of the politics involved.”\textsuperscript{14}

The former head of the Anti-Corruption Court also remarked that the Court was fed up with trying lower level officers while corrupt powerful officials were left unpunished.\textsuperscript{15} The Anti-Corruption Court in Uganda also faces staffing shortages and financial constraints. As of June 2014, there were three judges, one registrar, two chief magistrates and four grade one magistrates for the Court.\textsuperscript{16} The Inspectorate of Government and the Directorate of Public Prosecutions, mandated to prosecute acts of corruption, face similar shortages of qualified personnel or technical expertise.\textsuperscript{17}

Further, a considerable number of cases are either closed or referred for further investigations due to insufficient evidence to support prosecutions, often caused by poor

\begin{itemize}
  \item \textsuperscript{11} Human Rights Watch (2013) 9.
  \item \textsuperscript{12} Human Rights Watch (2013) 9.
  \item \textsuperscript{13} See Human Rights Watch (2013) 8.
  \item \textsuperscript{14} Prosecutor in Anti-Corruption Court, 21 May 2013, cited in Human Rights Watch (2013) 1.
  \item \textsuperscript{15} Retired Justice John Bosco Katutsi, cited in Human Rights Watch (2013) 1.
  \item \textsuperscript{16} See ‘The Anti-Corruption Division’ available at www.judicature.go.ug.
  \item \textsuperscript{17} Inspectorate of Government (2012) 79.
\end{itemize}
investigating skills and capacities. Statistics show that in 2011, out of a total of 141 cases completed at the Anti-Corruption Court, there were 44 convictions (31.2%), 43 dismissals (30.5%), 24 *nolle prosequi* decisions (17%), 15 acquittals (10.6%), 10 withdrawals (7.1%), and 5 other matters (3.6%). The Anti-Corruption court may issue orders for confiscation of property after a conviction but this is not mandatory under the law and often not the focus of prosecutors.

The office of the Inspectorate of Government (IG) operates the Asset Recovery Account, an administrative forfeiture account into which confiscated funds are placed. In the period 2008 to 2011, a total of Ushs 859 926 768 ($343 970) was remitted to the Asset Recovery Account. In 2011 alone, Ushs 13 107 226 597 ($5 242 890) were saved as a result of investigations. However, forfeiture in these cases is done administratively, without the force of law, which significantly limits the capacity of the IG to recover stolen funds. The Constitution of the Republic of Uganda was amended in 2005 to provide for the establishment of the Leadership Code Tribunal, but to date the Tribunal has not been constituted. The Inspector General of Government cannot enforce the confiscation of corruptly acquired assets in the absence of the Leadership Code Tribunal.

The above-mentioned incidents of corruption, coupled with the failure to charge, prosecute or convict senior public officials who are involved in corrupt practices, have profound effects on the country. First, the high level of corruption means that the country loses its much needed resources to such public officials. Second, such public officials are left to enjoy illicitly acquired wealth, at the expense of the country’s economic and social development.

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23 See *NestarMichumbi v IGG &Anor* HCT-00-CV-CA-0062-2009.
The prevailing situation demonstrates the need for legal reform to allow for recovery of corruptly acquired assets in instances where it is not possible to prosecute or convict corrupt public officials.

1.2 Legal Framework for Corruption Offences and Forfeiture of Corruptly Acquired Assets

Uganda has developed a robust and comprehensive legal framework for the purposes of combating corruption and recovering stolen assets. Criminal liability for corrupt practices in both the private and public sphere is provided for by the Anti-Corruption Act of 2009. The Anti-Corruption Act criminalises various acts, including embezzlement, causing financial loss, abuse of office, fraud, bribery, influence peddling and nepotism. It allows for forfeiture or permanent deprivation of corrupt proceeds by order of court after a conviction, or where a person charged with an offence has died or absconds.

Furthermore, the Code of Conduct and Ethics for the Uganda Public Service of 2005 and the Leadership Code Act of 2002 regulate certain conduct, such as conflict of interest and receiving gifts. The Leadership Code Act requires public servants to declare their assets every two years. The Inspectorate of Government is responsible for the implementation of the Leadership Code and has powers to require confiscation of property after it is found that a leader has breached the Code.

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24 Section 2 of the Anti-Corruption Act of 2009.
25 Section 63 of the Anti-Corruption Act of 2009.
26 Section 65 of the Anti-Corruption Act of 2009.
The Anti-Money Laundering Act of 2013 criminalises the laundering of proceeds of crime, including corruption, and provides for measures to prevent money laundering.\(^\text{31}\) It provides for seizure and freezing of laundered assets, and outlines procedures for obtaining restraining and confiscation orders.\(^\text{32}\)

In practice, confiscation of assets under Uganda’s current anti-corruption legal regime occurs only after conviction, at the discretion of the Court. As already demonstrated, criminal forfeiture is inadequate to deal with the recovery of stolen assets. In response to this problem, proposals for the amendment of the Anti-Corruption Act have been introduced by a member of parliament through a private member’s bill.\(^\text{33}\) The objectives of the bill, \textit{inter alia}, are to provide for the amendment of the Anti-Corruption Act to allow for the mandatory confiscation of property of persons convicted of corruption offences and to ensure recovery of public funds lost as a result of the criminal acts, without the state having to secure a conviction first.\(^\text{34}\) The government of Uganda also seeks to enact a related piece of legislation, namely, the Proceeds of Corruption Assets Recovery Bill of 2013, for the purposes of recovery of stolen assets, but this effort appears to be in its early stages and the Bill is not available to the public.

1.3 Modes of Asset Forfeiture

In order to assess fully the gaps in Uganda’s laws on asset recovery, one needs to understand the nature of asset forfeiture in general. Corrupt proceeds may be confiscated via different routes, including civil action, criminal forfeiture, administrative forfeiture and civil forfeiture.

\(^{31}\) Part II and III of the Anti-Money Laundering Act of 2013.
\(^{33}\) See the Anti-Corruption (Amendment) Bill, 2013.
\(^{34}\) Preamble to and section 7 of the Anti-Corruption (Amendment) Bill, 2013.
1.3.1 Civil Proceedings *in personam*

An affected state may institute civil proceedings against a defendant in order to recover corrupt proceeds. This method is useful where a conviction may be hard to obtain due to lack of evidence or other reasons. The standard of proof is lower (proof on a balance of probabilities) and proceedings can go ahead even in the absence of the defendant, as long as he was served properly. In the case of foreign assets, proceedings will be instituted in the jurisdiction where the assets are hidden.\(^{35}\)

1.3.2 Administrative Forfeiture

This occurs in circumstances where there is no need for judicial intervention. It happens in cases where the seizure, freezing or confiscation is not contested. In some jurisdictions, administrative forfeiture is subject to confirmation by court.\(^{36}\)

1.3.3 Criminal Forfeiture

Criminal forfeiture involves an order *in personam*, against the person. Criminal proceedings are brought against an accused person, during which it must be proved beyond reasonable doubt that he committed the corruption offence. Once the offender is convicted of the crime, tainted property which constitutes the proceeds will be confiscated as part of the sentence. The standard of proof for confiscation may be lower (proof on a balance of probabilities) or may be the same as that required for a conviction. Criminal forfeiture systems can be either object-based, whereby stolen property is confiscated, or value-based in which case the value of the benefit derived from the stolen property is quantified.\(^{37}\)


offender will be required then to pay the value of the benefit to the victim or the government.

### 1.3.4 Civil Forfeiture in rem

Civil forfeiture, which is the subject of this study, is also referred to as non-conviction based asset forfeiture. It is an action *in rem*, against the thing or property which is suspected to be the proceeds or instrumentality of corruption and not against the offender. This method of confiscation does not require a criminal conviction in order for corrupt proceeds to be attached. Proceedings which are civil in nature are brought against the property itself. Civil forfeiture proceedings are different from any criminal proceedings that may be instituted against the offender. The prosecutor has the burden to prove, on a balance of probabilities, that the underlying offence was committed and also that the property was involved in illegal activity.\(^{38}\)

### 1.4 Historical Development of Civil Forfeiture

The concept of civil forfeiture has roots in feudal England where subjects who committed treason had to forfeit their lives and interest in their land and chattels. Forfeiture was also an important concept in admiralty law where *in rem* orders were passed against ships.\(^{39}\)

In the United States of America, civil forfeiture laws were enacted first in the seventeenth century for smuggling and subsequently piracy and slave trafficking cases. In cases where the owner of the property could not be found or was in another jurisdiction, cargo and ships were forfeited. The 1970s and 1980s saw the enactment of laws, one of them being the Comprehensive Crime Control Act of 1984, which led to the widespread use

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\(^{39}\) Young (2009) 15.
of civil forfeiture in the United States. Subsequently, another law, the Civil Asset Forfeiture Reform Act was passed in 2000.\(^\text{40}\)

Civil forfeiture has spread steadily to other jurisdictions, mainly those in the common law system, including the United Kingdom, Ireland, Australia, South Africa and Canada, where it has been used to address corruption, organised crime and other social evils.\(^\text{41}\)

1.5 **Differences between Civil Forfeiture and Criminal Forfeiture**

Criminal forfeiture and civil forfeiture usually exist together in a legal system and complement each other. In fact, civil forfeiture should be viewed as an alternative when criminal forfeiture is not possible or feasible.

One of the main differences between civil forfeiture and criminal forfeiture is that, in the former, proceedings are brought against the property and the owner is only a third party to the proceedings, while in the latter, proceedings are against the accused person. Further, criminal forfeiture requires a criminal trial and conviction before it can be imposed.\(^\text{42}\) The prosecutor must prove beyond reasonable doubt that the accused person was involved in a criminal act whereby he acquired the assets wrongly. In the case of civil forfeiture, conviction is not a requirement. However, unlawful conduct must be proved on a balance of probabilities. There is also a requirement of proof that the property is tainted. Criminal forfeiture may be imposed also as part of a sentence, while proceedings for civil forfeiture may be instituted before, during or after a criminal conviction or even where there is no

\(^{40}\text{Cassella(2009) 24.}\)

\(^{41}\text{Young (2009) 17.}\)

\(^{42}\text{Greenberg et al (2009) 13-14.}\)
conviction. Criminal forfeiture is object-based or value-based whereas civil forfeiture is mainly object-based.\textsuperscript{43}

Civil forfeiture is useful in the following circumstances:

In cases of flight and disappearance of an accused person, as a result of which a criminal trial cannot proceed and conviction cannot be obtained against him;

Where the accused person dies before criminal proceedings against him can commence or be concluded;

Following an acquittal of the accused person because the state has failed to prove his guilt beyond a reasonable doubt;

Where there is insufficient evidence to found a conviction against an accused person;

Where domestic immunity is a bar to criminal proceedings;

Where the accused person is a powerful politician or public official and prosecution against him is not feasible.\textsuperscript{44}

1.6 Civil Forfeiture and Recovery of Corruptly Acquired Assets

Over the last three decades, there has been a policy shift, at both national and international level, from the tradition of imposing only prison terms or fines to depriving criminals of the spoils acquired from their criminal acts. Individuals who engage in offences such as drug trafficking and economic crime do so primarily for monetary gain. Law enforcement authorities realised that many of those involved in such crimes were able still to enjoy

\textsuperscript{43} Greenberg \textit{et al} (2009) 13-14.

\textsuperscript{44} Greenberg \textit{et al} 14-15 and Council of Europe (2013) 17-18.
their loot after serving imprisonment. Confiscation was seen as a way of depriving them of these benefits. In matters relating to corruption, civil forfeiture has been used to recover assets stolen by corrupt officials in developing countries, where it would not have been possible under the traditional criminal justice system. Civil forfeiture cases were used successfully in countries such as Nigeria and the Philippines, whose leaders stole billions of dollars and stashed them away in foreign jurisdictions but who were not available to stand trial.45

Civil forfeiture does not take away the responsibility of the state to prosecute an accused person involved in corruption or to impose other punishments such as fines or imprisonment. Instead, it aims to ensure that much needed funds which were acquired illicitly by criminals do not benefit them but are recovered and used to help the people who need them the most. Forfeiture also aims to prevent illicit funds from being integrated into the legitimate financial system, to help compensate victims and to undermine the operations of organised criminal gangs. It helps to destroy the perception that crime does pay.46

Developing countries, like Uganda, face numerous obstacles in trying to recover stolen assets. Financial constraints and poorly resourced and poorly skilled legal, judicial and investigative departments hinder the prosecution of economic criminals and the recovery of assets. Sometimes public officials are too powerful or influential to be prosecuted.

It has been noted that asset recovery and confiscation systems are most effective when they provide for all forms of forfeiture. Failure to prosecute corrupt officials means that many of them retain and enjoy corruptly acquired assets without punishment. Uganda

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needs a law on civil forfeiture to facilitate recovery of assets where prosecutions are not possible or viable. Such a law should not substitute prosecution, but should complement existing confiscation laws in the country to ensure effective recovery of corruptly acquired assets.

Further, since corruption is a transnational offence, it is important for a country to be able to request enforcement of freezing and confiscation orders and, in turn, to be able to enforce the same.47

1.7 Asset Recovery Processes

1.7.1 Investigation

The first step in asset recovery involves gathering evidence about where the proceeds of corruption might be located. Investigations may be carried out by law enforcement officers, working hand in hand with prosecutors and investigators. When needing to carry out investigations in foreign jurisdictions, a country can seek help through mutual legal assistance requests.48

1.7.2 Seizure and Freezing

When assets have been traced, and are considered to be subject to confiscation, provisional measures must be taken to secure such assets. They may be preserved using restraint, freezing or seizure orders pending further investigations or court proceedings. This is necessary to prevent the dissipation or transfer of such assets.49

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47 Council of Europe (2013) 11.
1.7.3 Proceedings in Court

The next step in the process of asset recovery is the institution of court proceedings. These may be criminal trial and forfeiture proceedings, civil forfeiture proceedings, or private civil actions. These proceedings aim for the award of confiscation orders, orders for compensation or fines. The orders arising from such awards then must be enforced. In foreign jurisdictions, orders may be enforced directly where a country enforces a foreign order issued by another state. Orders may be enforced indirectly also where a country opens its own case upon request from another country, obtains an order and then enforces it.\(^5\)

1.7.4 Return of Assets

Pursuant to the award of confiscation orders in court, assets that have been confiscated must be transferred to a government fund or trust. Where assets are in a foreign jurisdiction, they will vest in a national confiscation fund.\(^5\) An affected state will have to request another state to return assets to their former owners in other jurisdictions.\(^5\)

1.7.5 International Co-operation

Where assets have been transferred to a foreign jurisdiction, it is essential to use international co-operation to carry out investigations, and issue or enforce freezing, seizure and confiscation orders. International co-operation can be sought through mutual legal assistance.\(^5\)

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52 Brunet al (2011) 8.
1.8 Literature Review

Civil asset recovery is a relatively new area in most jurisdictions. Hence publications in this area, although they are emerging, are still scanty. There is currently no scholarly literature on civil asset forfeiture laws in Uganda. The study draws on literature from other jurisdictions on this subject.

In the book *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, the authors detail perspectives and experiences of civil forfeiture laws in different jurisdictions such as the United States, Ireland, South Africa, Canada and United Kingdom. Simser, one of the authors, also offers an introductory article on what civil forfeiture entails. The experiences and best practices from other jurisdictions with civil forfeiture regimes are an important guide for building civil asset forfeiture legal regimes.

Wahn addresses the pitfalls of civil asset forfeiture laws. He argues that civil asset forfeiture is generally a violation of the presumption of innocence. He explains that one of the pitfalls of such laws is that they can be politicised and used against those who criticise the government.

In the book *Emerging Trends in Asset Recovery*, the authors address current developments in asset recovery for corruption related offences, including the misuse of political immunities, mutual legal assistance, international co-operation, piercing the veil of shell companies and hurdles in fighting corrupt acts. The authors also examine case studies such as Equatorial Guinea, Costa Rica, Kenya and the Arab Revolution. Additionally, the book is a

54 Young (2009).
55 Wahn (2014).
guide to the challenges to asset recovery and offers ideas on reform, the role of financial institution laws, and lessons learned from past experiences.

Vlasic & Cooper\textsuperscript{57} have noted that asset recovery is one of the most important means of fighting corruption and strengthening the rule of law, especially in developing countries. They assert that the process of asset recovery usually is filled with many legal challenges, including lack of legal precedents and political interference. They also allude to the fact that to enforce recovery of assets, there is often a requirement of a criminal conviction, which can be difficult if the perpetrator or accused person is dead, is in exile or if the conviction would result in instability. The focus of the article, however, is the Duvalier case of Haiti and what lessons can be learnt from it, particularly for countries that were involved in the Arab Spring. The article argues for the ratification of United Nations Convention against Corruption and the creation of legal tools for co-operation in asset recovery cases at international level, but mentions little about asset recovery mechanisms at the domestic level.

\textit{Civil Forfeiture: A Higher Form of Commercial Law}, an article by Schwarz & Rothman, explains the historical development of civil forfeiture through an analysis of case and statutory law within America and how its application has affected financial institutions. Although the article deals specifically with the potential legal constraints of civil forfeiture and its usurpation of commercial and bankruptcy law principles, it has important lessons for asset forfeiture in corruption related offences.

As already noted, the articles and books cited above are an important source of information for developing comprehensive legal regimes on asset recovery. The significance of this

\textsuperscript{58} Vlasic & Cooper (2011) 18.
research lies in the fact that there is currently no scholarly work on Uganda relating to the area of civil asset forfeiture for corruption offences. There are proposals in the pipeline to amend the existing laws on Uganda’s statute books to provide for non-conviction based asset forfeiture. However, these processes are still in their infancy. This study is thus timely and relevant for purposes of advocacy and information. It may serve as a guide and inform legal, policy and institutional reforms in Uganda.

1.9 Research Questions

The research questions are: What mechanisms are provided for in Uganda’s law for the recovery of corruptly acquired assets? What are the loopholes in the current legislation? What is the way forward concerning Uganda’s legal regime on recovery of corruptly acquired assets? Can civil forfeiture address some of the current loopholes?

1.10 Outline of Remaining Chapters

Chapter Two

This chapter analyses the international legal instruments on civil forfeiture. The discussion is restricted to instruments to which Uganda is a party.

Chapter Three

This chapter identifies and discusses the existing loopholes in the Ugandan domestic legal framework on criminal, administrative and civil forfeiture.
Chapter Four

This chapter addresses the basic elements of civil forfeiture that Uganda should consider in enacting legislation on civil forfeiture.

Chapter Five

This chapter contains recommendations and the conclusion.
CHAPTER TWO

INTERNATIONAL LEGAL FRAMEWORK ON CIVIL FORFEITURE IN RELATION TO UGANDA

2.1 Introduction

This chapter analyses the international and regional anti-corruption legal instruments to which Uganda is party, with a focus on confiscation and on civil forfeiture. It discusses Uganda’s obligations and rights in relation to the recovery of corruptly acquired assets. It also highlights the significance of civil forfeiture at the international level and potential challenges faced in implementing the Conventions.

The concept of confiscation of proceeds of crime is a relatively new one in international law. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) of 1988 was the first international instrument to provide for confiscation of all proceeds or property equivalent to the proceeds derived from drug-related offences.¹ The United Nations Convention against Transnational Organised Crime (Palermo Convention) of 2000 later adapted this concept to a wider range of offences by requiring states parties to establish measures under domestic law to enable confiscation of proceeds and instrumentalities of crimes under the Convention.²

Confiscation is even more recent in the field of international anti-corruption law. The United Nations Convention against Corruption (UNCAC) of 2003 and the African Union Convention

¹ Article 5 of the Vienna Convention.
² Article 12 of the Palermo Convention.
on Preventing and Combating Corruption and other regional instruments\(^3\) all contain provisions on confiscation of proceeds or instrumentalities of corruption offences.

Most international anti-corruption instruments do not prescribe civil forfeiture and, on the whole, have tended to leave it to states parties to decide which system of confiscation to employ. With the advent of UNCAC, however, states parties are required to consider enacting legal measures to enable courts and other competent authorities to enforce orders not only for criminal forfeiture but also for civil forfeiture. By doing so, UNCAC highlights the importance of civil forfeiture in ensuring that criminals do not enjoy proceeds acquired through corruption and in complementing existing systems in criminal forfeiture.

Most countries still have a tradition of confiscation of proceeds arising out of a criminal prosecution. Uganda is one such country which provides for confiscation of corrupt proceeds by way of a conviction. However, the practice of civil forfeiture or non-conviction based asset forfeiture, which has existed for decades in jurisdictions such as the United States of America and Italy,\(^4\) is picking up steadily and several jurisdictions have adopted it\(^5\) as a mechanism against economic crime and drug-related offences.

2.2 United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC), which came into force in 2005,\(^6\) is the first international anti-corruption instrument to contain comprehensive legal provisions on asset recovery. Indeed, asset recovery is one of the fundamental principles on

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\(^3\) See, for instance, article 3(3) of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997; article 15 of the Inter-American Convention against Corruption of 1996; and article 19(3) of the Council of Europe Criminal Law Convention on Corruption of 1999.


\(^5\) Council of Europe 2013.

\(^6\) Uganda ratified UNCAC on 9 September 2004.
which the Convention stands. Before the enactment of UNCAC, developing countries were faced with several issues regarding the recovery of assets stolen by corrupt officials and stashed away in other jurisdictions. Corrupt officials were taking advantage of loopholes to transfer assets and enjoy corrupt proceeds in other jurisdictions. One of the main issues was that states from which assets were being taken often wanted to confiscate and repatriate assets but did not have sufficient proof of the illicit origin of such assets, which proof the requested states always demanded before they would co-operate with the requesting state. Also, there were insufficient mechanisms to enable states to repatriate assets once they had been identified and seized. This often meant that criminals were able to enjoy the benefits of their criminal activity. UNCAC was a breakthrough in this area.

Chapter V of UNCAC contains provisions for the identification, tracing, freezing, confiscation and repatriation of proceeds and instrumentalities of corruptly acquired assets. The Chapter also outlines provisions on mutual legal assistance and international co-operation. Article 51 points out that asset recovery is one of the pillars of the Convention and requires states parties to co-operate with one another to facilitate recovery of assets. The fact that there were intense negotiations and workshops on asset recovery during the discussions leading to UNCAC lends support to the importance of asset recovery in the fight against corruption. Those negotiations established asset recovery as a fundamental principle of the Convention in the fight against corruption.

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7 See article 51 of UNCAC.
12 Article 51 of UNCAC.
2.2.1 Asset Recovery under UNCAC

Confiscation is defined under the Convention as the permanent deprivation of property by order of a court or other competent authority.\(^\text{13}\) This connotes both conviction and non-conviction based forfeiture.

Article 52 provides for measures aimed at detection of proceeds of crime stashed away in financial institutions by politically exposed persons (PEPs) or holders of high value accounts. States parties must require these institutions to verify customer identities and beneficial ownership information, and implement enhanced due diligence for PEPs. Arguably, these measures indirectly promote civil forfeiture because they provide readily available evidence of corrupt offences.\(^\text{14}\)

Article 53 covers direct recovery of property through civil action and forfeiture where mutual legal assistance may not be possible or effective enough. States parties are required to implement measures to enable other states parties to lodge civil actions in their domestic courts,\(^\text{15}\) including civil proceedings against an accused person and civil forfeiture proceedings, in order to establish true ownership of or title to the property. Other measures are aimed at permitting courts to order compensation to parties harmed.\(^\text{16}\) States parties, therefore, can institute claims as private litigants and victims seeking restitution or compensation.

Article 54 requires states parties, pursuant to Article 55(2), to provide measures in domestic law to enable its competent authorities to give effect to a foreign freezing or seizure order.

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\(^{13}\) Article 2 of UNCAC.

\(^{14}\) See Goredema (2009).

\(^{15}\) Article 53(a) of UNCAC.

\(^{16}\) Article 53(b) of UNCAC.
or permit its domestic authorities to issue a freezing or seizure order requested by the authorities of a requesting state party. The order above must provide reasonable proof that such property eventually will be subject to confiscation under paragraph 54(1) of the Convention. States parties are required also to consider taking additional measures to preserve property which had been confiscated on the basis of a foreign arrest warrant or criminal charge.

Article 54 provides also for mutual legal assistance in recovery of stolen assets by confiscation. The requested state party may enforce a court order for confiscation issued by a requesting party or it may permit its own domestic authorities to confiscate illicit property which may be of foreign origin upon adjudication of offences. This article is meant to provide mutual legal assistance pursuant to requests under article 55 of the Convention. States are required to provide for both direct and indirect enforcement within their domestic legislation. This is meant to cover loopholes in mutual legal assistance where previously states could give effect to requests for mutual legal assistance only through executing foreign orders or instituting their own proceedings. This created potential loopholes, where some requests could not be effected because there was no mechanism to enforce them under the domestic legal framework. The Convention envisages, in article 54(1)(a) & (b), confiscation arising out of a criminal conviction.

Civil forfeiture, which is the subject of article 54(1)(c), is not mandatory under the Convention. The provision requires states parties to consider putting in place measures to allow for non-conviction based forfeiture in case of death, flight or disappearance of an

17 Article 54(2)(a) & (b) of UNCAC.
18 Article 54(2)(c) of UNCAC.
19 Article 54(1)(a) of UNCAC.
20 Article 54(1)(b) of UNCAC.
offender. Implementation of this provision requires a state party to enact legislation to provide specifically for civil forfeiture. That provisions on non-conviction based forfeiture are hortatory is perhaps one of the most significant shortcomings of the Convention. It possibly could impede the effectiveness or implementation of the provisions under articles 52, 53 and 54 that provide for civil forfeiture. It also fails to take into account the fact that in many jurisdictions, corrupt officials are in control of state organs and prosecution against them usually is not possible until they leave office or flee.

Article 55 addresses international co-operation. The article requires a state party that receives an order from a fellow state party for confiscation of proceeds of crime to enforce it directly through its own authorities. Alternatively, a state party which receives a confiscation request must enforce it indirectly by obtaining a confiscation order through its domestic authorities and then give effect to it. Upon request, a state party is required to take steps to identify, trace and freeze or seize proceeds of crime for the purpose of eventual confiscation by the requesting state party.

Article 55 also contains provisions on what should be included in a request for mutual legal assistance to recover assets, including details such as the description, location and estimated value of the property that is sought to be confiscated. It further requires states parties to give information about the execution of the order and measures taken to give adequate notification to bona fide third parties. Decisions taken under article 55(1) & (2) are subject to the domestic law and procedural rules of the requested state party, and also to bilateral or multilateral agreements to which the requested state may be party.

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22 Article 55(1)(b) of UNCAC.
23 Article 55(1)(a) of UNCAC.
24 Article 55(2) of UNCAC.
25 Article 55(4) of UNCAC.
parties may refuse to give co-operation where a requesting state party gives untimely or insufficient evidence, or where the property sought to be confiscated is of *de minimis* value.26

Article 57 addresses the return and disposal of confiscated assets. Public funds that were embezzled must be returned to the requesting state party upon request.27 Proceeds arising from other offences will be returned upon the requesting party furnishing proof of prior ownership of such property.28 In other cases, the requested state party will give consideration to returning confiscated property to the requesting state party, to prior legitimate owners or to compensating victims.29

**2.2.2 Challenges and Prospects**

UNCAC has been lauded by many scholars and practitioners for including provisions for non-conviction based confiscation, which is a reflection of the current trends seeing more jurisdictions adopting civil forfeiture. It has been argued also that this is an acknowledgment of the significance of non-conviction based asset forfeiture.30 However, leaving civil forfeiture to the discretion of states parties limits the effectiveness of efforts to recover assets, in that mutual legal assistance requests need not be effected by states parties which have not enacted the relevant provisions. Claman, for instance, points out that failure to require states parties to adopt non-conviction based asset forfeiture limits its impact and reach.31 He argues that it has been discovered that states parties are able to handle better

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26 Article 55(7) of UNCAC.
27 Article 57(3)(a) of UNCAC.
28 Article 57(3)(b) of UNCAC.
29 Article 57(3)(c) of UNCAC.
challenges of flight, immunity and death if they have non-conviction based forfeiture in their domestic legal regimes.

Differences between approaches taken in civil and common law systems, especially concerning jurisdiction, confiscation proceedings and admission of evidence, also pose challenges. Requesting states parties that seek to recover assets often face obstacles in developed countries in the form of high evidentiary and procedural requirements.\textsuperscript{32} Additionally, most jurisdictions recognise only requests for confiscation arising out of a criminal conviction. This is a serious challenge, given that usually corrupt officials take advantage of immunities or may escape.\textsuperscript{33}

Asset recovery is also very costly. Developing countries, such as Uganda, are faced often with the problem of insufficient resources to trace, freeze and confiscate assets domestically and also at the international level. Prosecuting the predicate offence, identifying and tracing, freezing or seizing and confiscating assets require significant financial resources and expertise.\textsuperscript{34}

Experts and practitioners in the field point out that confiscation is often the most challenging phase of the asset recovery process because of the requirement to prove a nexus between the corruption offences and the corrupt proceeds. Other obstacles include inadequate legal frameworks to enable enforcement of confiscation orders.\textsuperscript{35}

However, the enactment of UNCAC led to the development of several initiatives aimed at building the capacity of practitioners and giving technical assistance to prosecutors and

\textsuperscript{33} UNGA (2006).
\textsuperscript{34} Vlassis, Gottwald & Park (2013) 168.
\textsuperscript{35} Vlassis, Gottwald & Park (2013) 168.
lawyers in the developing world on matters of confiscation and recovery of corrupt
proceeds. The Open-ended Intergovernmental Working Group on Asset Recovery, the
Stolen Asset Recovery Initiative (StAR), and the International Centre for Asset Recovery
(ICAR) all have been involved in publishing materials\textsuperscript{36} on confiscation and civil forfeiture in
particular, and also training practitioners at both the international and domestic levels. This
has led to a significant increase in awareness of and enhanced knowledge about
confiscation among practitioners.\textsuperscript{37}

2.3 United Nations Convention against Transnational Organised Crime

The United Nations Convention against Transnational Organised Crime (Palermo
Convention)\textsuperscript{38} places emphasis on the criminalisation of corruption, money laundering and
organised crime, and on the prevention of these offences. The Convention also contains
provisions on the confiscation of proceeds derived from the above-mentioned offences.
Similar to UNCAC, the definition of confiscation under the Palermo Convention is broad and
includes orders for confiscation issued by a court or other competent authority.\textsuperscript{39}

Article 12 covers confiscation of criminal proceeds and requires states parties to include
measures in their domestic legislation that enable forfeiture of proceeds and
instrumentalities of offences under the Convention.\textsuperscript{40} It requires states parties to adopt
measures to enable identification, tracing and freezing or seizure as preludes to
confiscation. This provision also targets proceeds of crime that have been transformed into

\textsuperscript{36} Such as ‘The Good Practices Guide on Non-Conviction Based Forfeiture’ (StAR).
\textsuperscript{37} Vlassis, Gottwald & Park (2013) 164.
\textsuperscript{38} The Palermo Convention was adopted on 15 November 2000. Uganda ratified the Convention on 9
March 2005.
\textsuperscript{39} Article 2 of the Palermo Convention.
\textsuperscript{40} Article 12(1) of the Palermo Convention.
other forms property,\(^{41}\) those that have been intermingled with legitimate property,\(^{42}\) and income derived from proceeds of crime.\(^{43}\) States parties are required also to enable courts and other competent authorities to order the confiscation of bank, financial or commercial records. \(^{44}\) The rights of third parties in relation to claims to property are protected.\(^{45}\)

One of the shortcomings of article 12 of the Palermo Convention is that its implementation is subject to the domestic law of states parties, which condition may hinder immediate enforcement due to differences in legal systems and bureaucratic procedures. As practitioners point out, one of the essential hallmarks of seizure and freezing procedures for stolen assets is that they should be amenable to implementation almost immediately after discovery.\(^{46}\)

Article 13 addresses international co-operation for the purposes of civil forfeiture. States parties are required to give effect to the requests of other states parties for confiscation through indirect\(^ {47}\) or direct enforcement.\(^ {48}\) Upon receiving such a request, the requested state party is required to identify, search for, trace and freeze proceeds and instrumentalities of the offence. Article 13 is subject also to domestic law and bilateral agreements and treaties that may bind the requested and requesting states. The application of article 13 is limited further by a requirement of dual criminality being met before a request can be enforced.\(^ {49}\)

\(^{41}\) Article 12(3) of the Palermo Convention.
\(^{42}\) Article 12(4) of the Palermo Convention.
\(^{43}\) Article 12(5) of the Palermo Convention.
\(^{44}\) Article 12(6) of the Palermo Convention.
\(^{45}\) Article 12(8) of the Palermo Convention.
\(^{46}\) Pieth (2008) 11.
\(^{47}\) Article 13(1)(a) of the Palermo Convention.
\(^{48}\) Article 13(1)(b) of the Palermo Convention.
\(^{49}\) Article 13(7) of the Palermo Convention.
The procedures for repatriation of proceeds of crime that have been confiscated are outlined in article 14 of the Convention. Property and proceeds of crime which have been forfeited are to be returned, upon request, to the requesting state to facilitate the compensation of victims or the return of the property to its legitimate owners.  

2.4 African Union Convention on Preventing and Combating Corruption

The AU Convention places its emphasis on criminalisation and prevention of corruption. However, it provides also for confiscation of corrupt proceeds derived from offences created in the Convention. Confiscation is defined to mean “any penalty or measure resulting in the final deprivation of property, proceeds or instrumentalities ordered by a court of law following proceedings relating to a criminal offence or offences connected with or related to corruption”.  

The definition and scope of confiscation in the AU Convention is more restricted than in UNCAC and the Palermo Convention. In the AU Convention, confiscation orders can be issued only by a court of law and proceedings relating to confiscation must arise out of a criminal charge or criminal proceedings. In effect, confiscation orders issued by non-judicial bodies, such as prosecutorial bodies and anti-corruption agencies, are not enforceable under the Convention.

According to article 16 of the AU Convention, states parties are required to adopt legislative measures to enable competent authorities to identify, trace and seize proceeds and instrumentalities pending a final judgment. States parties are required also to implement legislative measures to facilitate confiscation of proceeds and property acquired through

50 Article 14(2) of the Palermo Convention.
51 Article 1 of the AU Convention.
52 Article 16(1)(a) of the AU Convention.
offences under the Convention and to facilitate the repatriation of such proceeds and
property.\textsuperscript{53} Article 16(2) states that any proceeds or property that a state party requests
another state party to seize either should be required as evidence or should be the result of
an offence for which extradition is sought under the Convention. Assets can be handed
over to the requesting state upon request, even where extradition is not possible due to
flight, disappearance or death.\textsuperscript{54}

Co-operation and mutual legal assistance are provided for in article 18 of the Convention.
The article requires requested states parties to provide the greatest possible assistance and
co-operation to competent and recognised authorities of a requesting state in anti-
corruption proceedings.\textsuperscript{55}

Article 19 covers international co-operation. Countries are to adopt legislative measures
that allow for freezing of foreign accounts and repatriation of corrupt proceeds and
property to the country of origin. The AU Convention does not provide expressly for non-
conviction based confiscation. However, it can be inferred from the definition of
confiscation which refers to orders arising from proceedings related to a criminal offence.

2.5 Revised Draft East African Community Protocol on Preventing and Combating
Corruption

The Revised Draft East African Community Protocol on Preventing and Combating
Corruption (EAC Protocol) has been proposed by partner states of the East African
Community in an effort to combat the rampant practice of corruption in the region, but is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{53} Article 16(1)(b) & (c) of the AU Convention.
\item \textsuperscript{54} Article 16(3) of the AU Convention.
\item \textsuperscript{55} Article 18 of the AU Convention.
\end{itemize}
\end{footnotesize}
yet to be signed by member states.\textsuperscript{56} Article 1 defines confiscation to include forfeiture or permanent deprivation of property by order of court or any other competent authority. Parties are required to adopt measures within their domestic legal framework to ensure confiscation of proceeds or instrumentalities derived from offences under the EAC Protocol.\textsuperscript{57} A notable challenge is the limited range of offences established under the Protocol. It criminalises only bribery, illicit enrichment, embezzlement, trading in influence as well as fraudulent use or concealment of property derived from any of these acts. Such a small number of offences is likely to limit the reach of confiscation measures.

Legal measures adopted by member states must enable competent authorities to identify, trace and freeze proceeds and property derived from corruption, as temporary measures leading to eventual confiscation.\textsuperscript{58} Partner states are required to afford one another the broadest assistance possible in asset recovery, from identification through confiscation to transfer of proceeds of crime.\textsuperscript{59} Under the EAC Protocol, partner states cannot invoke bank secrecy laws as a reason for failure to co-operate. The Protocol also envisages the establishment of financial intelligence units within partner states to assist in the recovery of proceeds of crime.\textsuperscript{60}

The enforcement of these measures among partner states is subject to domestic law and international treaties, which condition is likely to impede the implementation of the EAC Protocol. Already, one of the reasons that has stalled the signing of the Protocol is the

\begin{itemize}
  \item\textsuperscript{56} See www.eac.int.
  \item\textsuperscript{57} Article 8(1)(a) of the EAC Protocol.
  \item\textsuperscript{58} Article 8(1)(b) of the EAC Protocol.
  \item\textsuperscript{59} Article 8(4) of the EAC Protocol.
  \item\textsuperscript{60} Article 14 of the EAC Protocol.
\end{itemize}
difference in the domestic law of partner states. 61 The Protocol requires that prosecutorial powers be given to competent authorities. 62 “Competent authorities” have been interpreted to mean anti-corruption agencies. Differences in domestic law have seen Kenya vesting its prosecutorial powers in the Director of Public Prosecutions, while Uganda has vested prosecutorial powers in both the Director of Public Prosecutions and the Inspectorate of Government. 63 Such differences have delayed signing of the EAC Protocol, with some member states, like Kenya, requesting amendment of the provision on prosecutorial powers. 64

2.6 Recommendations of the Financial Action Task Force

The Financial Action Task Force (FATF), established in 1989, is a group of inter-governmental bodies from 39 member jurisdictions. The FATF has developed a peer review mechanism and soft law to help member states effectively implement frameworks of legislation, policy and regulation on money laundering and terrorist financing and proliferation. 65 The FATF Recommendations of 2012 66 are recognised universally but are binding only on member countries. Uganda is not a member state of the FATF but recognises its principles for the purposes of guidance.

Recommendation 4 requires countries to adopt legislative and other measures to empower authorities to search, trace and identify and freeze proceeds and instrumentalities used in money laundering and predicate offences such as corruption. Countries are advised also to

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62 Article 6(3) of the EAC Protocol.
64 The East African 28 June 2014.
66 FATF 2012.
consider adopting measures that allow for non-conviction based confiscation, subject to domestic law.

Recommendation 38 requires that countries should be able to respond to requests to identify, freeze and seize proceeds and instrumentalities which arise from non-conviction based proceedings if they are in accordance with the requested state party’s domestic law. The FATF Best Practices Paper notes that non-conviction based confiscation may be enforced through or outside criminal proceedings. Non-Conviction based forfeiture is recommended also in the Best Practices Paper in situations where there is insufficient evidence to found a conviction, where the offender has immunity from prosecution or where there is failure to secure a conviction because of technical defects in the prosecution.

2.7 The Commonwealth Heads of Government Meeting

The Commonwealth Heads of Government Meeting (CHOGM), in which Uganda participates, has urged states, based on the advice of the Expert Working Groups on UNCAC, to put in place legislative measures for civil forfeiture so as to make provision for non-conviction based orders in relation to foreign jurisdictions and to support mutual legal assistance in such matters. The CHOGM also compiled draft legislation on civil forfeiture based on the recommendations of the Expert Working Groups.

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67 FATF’Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery’.
68 Paragraph 15, Best Practices Paper.
69 See Aso Rock Declaration of 2003.
2.8 Conclusion

Non-conviction based forfeiture is a relatively new concept in the field of international anti-corruption law. Most of the international and regional anti-corruption instruments do not provide expressly for civil forfeiture or require it. This has slowed development of the concept of civil forfeiture in the fight against corruption. With the advent of United Nations Convention against Corruption, however, states parties have realised the importance of enacting provisions on civil forfeiture to counter the loopholes in criminal forfeiture.

Further, Uganda, as a party to the international conventions above, is required to consider taking steps, including enacting legislation on civil forfeiture, to enable recovery of corruptly acquired assets at both domestic and international level. While most jurisdictions still favour criminal confiscation, many member countries now are embracing civil forfeiture to address the challenges of confiscation. It is incumbent upon developing countries such as Uganda to embrace the concept of civil forfeiture to enhance the fight against corruption and enable confiscation of corrupt proceeds.
CHAPTER THREE
THE ANTI-CORRUPTION AND CIVIL FORFEITURE LEGAL FRAMEWORK IN UGANDA

3.1 Introduction

Uganda, as a party to international anti-corruption conventions such as UNCAC and the African Union Convention on the Preventing and Combating of Corruption, must keep in mind its obligations under the Act. Under Uganda’s current legal regime, corrupt proceeds may be confiscated after a conviction for an offence under the Anti-Corruption Act of 2009 or Anti-Money Laundering Act of 2013. However, this is not mandatory and is at the discretion of the court. Prosecutors focus on successfully prosecuting corrupt acts and securing custodial punishment for offenders, paying little attention to the issue of depriving culprits of corruptly acquired property. What is more, insufficient evidence, flight, death, immunity and the fact that some public officials are too powerful hinder prosecution of a considerable number of cases.

Assets may also be confiscated administratively by the Inspector General of Government with suspects returning stolen assets to avoid prosecution. However, cases instituted in relation to these modes of forfeiture are still few compared to the amount of resources lost to corruption. Also, administrative confiscation of corruptly acquired assets is not backed by the force of law.

At present, the Anti-Corruption Act provides for civil forfeiture by implication, while the Anti-Money Laundering Act makes but scanty provisions for it. Civil forfeiture in these two statutes is limited to cases of death or flight, only after a person has been charged.
The remainder of this chapter discusses in more detail the current anti-corruption legislation in Uganda as it relates to civil forfeiture and highlights the need for Uganda to introduce legislation on civil forfeiture and asset recovery as whole in order to complement the existing criminal and administrative confiscation systems. It also considers the current efforts, in the form of two bills, to introduce civil forfeiture.

3.2 Constitution of the Republic of Uganda, 1995

Parliament is mandated by the Constitution to enact the Leadership Code of Conduct\(^1\) and to establish the Leadership Code Tribunal\(^2\) for which it is to prescribe composition, jurisdiction and function. Whereas the former has been enacted as the Leadership Code Act of 2002, the latter has not yet been established. This has hindered enforcement of the provisions on administrative confiscation as they can be enforced only after determination or enforcement by the establishment of the Tribunal under Article 235A of the Constitution of the Republic of Uganda.\(^3\) The Constitution does not provide for criminal forfeiture or civil forfeiture.

3.3 The Leadership Code Act (2002)

The Leadership Code Act does not create any corruption-related offences but regulates the conduct of leaders and the acceptance of gifts and benefits; and requires leaders to declare their incomes, assets and liabilities. Under the Leadership Code, the President and his ministers, members of parliament, judges and civil servants are required to declare their

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1 Article 233 of the Constitution.
2 Article 235A of the Constitution.
assets. 4 Asset declarations are to be made upon the designated person assuming office, every two years thereafter and also upon leaving office. Leaders are required also to submit similar information in respect of spouses, children and dependants. These declarations are made public and include information on assets, liabilities and income which information is important during investigations and tracing of proceeds of corruption.

The Leadership Code Act is enforced by the Inspector General of Government (IGG). Where there is a breach of the Code, the IGG will inquire into the alleged misconduct. During investigations and inquiries, the IGG has powers to place restrictions on the operation of any bank account or property of a person being investigated to prevent dissipation of funds or to ensure payment of compensation. A leader is allowed reasonable access to the account for subsistence funds. Also, the IGG may authorise an officer to inspect a bank account, share account, purchase account or expense account safe in a bank. These provisions are meant to help to identify, trace, freeze or seize corrupt proceeds.

After investigations and inquiries, the IGG will issue a report. The report should record the nature of and circumstances surrounding the breach, a summary of the evidence against the

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4 Section 4 of the Leadership Code Act.
5 Section 4(2)(b) of the Leadership Code Act.
6 Section 4(3) of the Leadership Code Act.
7 Section 4(4) of the Leadership Code Act.
8 Section 7 of the Leadership Code Act.
9 Section 3(1) of the Leadership Code Act.
10 Breaches of the Leadership Code Act by a Leader may be reported through complaints lodged under section 18(1).
11 See section 18(2) of the Leadership Code Act.
12 Section 22(1) of the Leadership Code Act.
13 Section 22(3) of the Leadership Code Act.
14 Section 22(2) of the Leadership Code Act.
15 Section 30(1) of the Leadership Code Act.
16 Section 19(1) of the Leadership Code Act.
leader in question, and the findings of the investigation. The report may recommend criminal proceedings or any other action against the leader.

One of the actions that can be taken against the leader is forfeiture. Section 21 of the Act provides for forfeiture of property where a leader is proved to have obtained such property in violation of the Code. The property will then be held in trust for the government until disposal. The IGG may require such person to pay compensation to the government or other public body for any loss suffered. Confiscation of corrupt proceeds provided for under the Act is administrative and not conviction-based. In practice, it is an administrative arrangement that may apply when public officials offer to refund stolen assets instead of being prosecuted. In the year 2013, the IGG recovered $470 000 in this way.

Other penalties for the breach of the Code include confiscation of excess or undeclared property and gifts or benefits. However, the IGG currently is unable to enforce any of these actions, penalties and decisions in the absence of a Leadership Code Tribunal. The case of Nestor MuchumbiGasasira vs Inspector General of Government & The Attorney General best illustrates this point. In that case, the IGG carried out inquiries into the appellant’s income, assets and liabilities. During the investigations, the IGG found that the appellant, who was the Principal Accountant in the Ministry of Finance, allegedly had property in excess of what he had declared. The IGG gave directions for the appellant’s dismissal and for forfeiture of the excess undeclared property. On appeal, the Court set aside the orders and found that such penalties, including forfeiture, could be imposed only

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17 Section 19(2) of the Leadership Code Act.  
18 Section 21 (1) of the Leadership Code Act.  
19 Section 21(2) of the Leadership Code Act.  
21 Section 35(a) of the Leadership Code Act.  
22 Section 35(c)(i) of the Leadership Code Act.  
23 HCT-00-CV-CA-0062/2009.
by the proposed Tribunal under Article 235A of the Constitution of Uganda, after complaints had been heard by the Tribunal.

Proposals have been made for the amendment of the Leadership Code Act through the Leadership Code (Amendment) Bill to establish the Leadership Code Tribunal, but the Bill is yet to be passed. Absence of the Leadership Code Tribunal means that provisions on administrative forfeiture cannot be enforced.

Another shortcoming of the Leadership Code Act is that it lacks comprehensive provisions on the asset recovery process. Moreover, proposed amendments to the Leadership Code Act do not seem to include provisions for civil forfeiture.

3.4 The Anti-Corruption Act (2009)

The Anti-Corruption Act of 2009 is the main piece of anti-corruption legislation in Uganda. It criminalises corrupt acts, prescribes penalties and provides for the investigative powers of the Inspector General of Government (IGG) and the Director of Public Prosecutions (DPP).

In order to help trace corrupt proceeds the IGG and the DPP are granted special investigative powers under the Act. The IGG and DPP can authorise an Assistant Superintendent or any officer above that rank, an Inspectorate Officer or a special investigator to investigate a bank account, share account or purchase account of a person reasonably suspected of having committed an offence under the Act.

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24 See The Observer ‘Lokodo’s hands tied as cabinet fails to approve graft tribunal’ 15 September 2014 available at www.observer.ug/index.
26 Section 33 of the Anti-Corruption Act.
27 Section 33 of the Anti-Corruption Act.
The court may restrict disposal of assets or bank accounts, upon application by the DPP or IGG in order to enable compensation of victims and to prevent dissipation. The Act also provides for the recovery of corruptly acquired assets as a civil debt or as compensation. Under section 28, a principal who gives a gift to an agent in contravention of the Act, can recover the money or value of the gratification as a civil debt from the agent or the person who gave the gratification to the agent. An acquittal or conviction against the agent is not a bar to such an action.

Section 35 provides that an agent convicted of an offence maybe liable to pay compensation to the principal who suffered loss as a result of the commission of the offence. Such compensation is to be paid out of any money or property belonging to the convicted person. Where compensation is to be paid out of property, such property will be sold and proceeds of the sale will be awarded to the convicted person to the extent of the loss.

The Anti-Corruption Act makes provision for restraining orders to preserve tainted property. The court may issue such orders, upon application by an authorised officer, to prevent the disposal of property in possession of a person charged with an offence or about to be charged. Such application is to be supported by an affidavit stating the grounds of belief that the said property is tainted in relation to the offence, and also that the property is likely to be subject to a confiscation order. Notice of application for the restraining order

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28 Section 34 of the Anti-Corruption Act.
29 Section 28 of the Anti-Corruption Act.
30 Section 53 of the Anti-Corruption Act.
31 Section 53 of the Anti-Corruption Act.
32 Section 54(d) of the Anti-Corruption Act.
33 Section 54(f) of the Anti-Corruption Act.
is to be given to third parties who may have an interest in the property, unless doing so will prejudice the property.  

If the court is satisfied that the property should be subject to a restraining order, it will issue the order prohibiting disposal of the property or any other dealing that may be contrary to the order and may appoint a person to manage or otherwise deal with the property.

Once the restraining order is issued, it gives directions for, *inter alia*, determination of any dispute arising from the property, payment of administration of the property, payment of a subsistence allowance and legal expenses for the accused. Any disposition of or dealing with property that is subject to a restraining order is null and void and may be set aside by the court. The provisions regarding restraining orders, however, are not mandatory.

The Act provides also for confiscation of corruptly acquired proceeds. It defines confiscation to include forfeiture and permanent deprivation of property by order of court where applicable. In effect, this includes civil forfeiture but such cases are yet to be instituted.

The court may make an order for confiscation of property of a convicted person which has been acquired directly or indirectly through an act of corruption. Such property will then vest in the government. A confiscation order may be issued also where a person facing charges, dies or absconds, upon application by the IGG or DPP, acting on a belief that the

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34 Section 57 of the Anti-Corruption Act.
35 Section 55(a) of the Anti-Corruption Act.
36 Section 55(b) of the Anti-Corruption Act.
37 Section 56(1)(a) of the Anti-Corruption Act.
38 Section 56(1)(b) of the Anti-Corruption Act.
39 Section 56(1)(c)(i) of the Anti-Corruption Act.
40 Section 56(1)(c)(iii) of the Anti-Corruption Act.
41 Section 60(1) of the Anti-Corruption Act.
42 Section 1 of the Anti-Corruption Act.
43 Section 63(1) of the Anti-Corruption Act.
44 Section 63(2) of the Anti-Corruption Act.
property is tainted. The DPP or IGG must prove beyond reasonable doubt that the property in question is tainted.

This provision for civil forfeiture is restricted to cases where there is a charge against a person who dies or disappears. This is a significant weakness of the Act and means that where there is insufficient evidence, or failure to prosecute a high ranking public official, or even failure to secure a conviction, the proceeds of corruption still cannot be recovered.

Moreover, the standard of proof is proof beyond reasonable doubt which is difficult to meet in such circumstances compared to the usual standard of proof on a balance of probabilities commonly used for civil forfeiture cases. Thus, there is need for legal reform in this respect.

Further, the provisions on criminal confiscation are not mandatory and are left to the discretion of the court. Confiscation is also not a sentence allowed for separately under the Act or under any other law, and can be imposed only in addition to other sentences fixed under the Act. Further, confiscation of assets registered in the names of associates, relatives or friends is not provided for in the Act. This is a loophole likely to be taken advantage of by corrupt public officials who may register proceeds of crime in the names of spouses, children or business partners.

Additionally, the definition of assets recoverable is insufficient as the Act omits to outline specifically the nature of property recoverable. Property is defined under the Act to mean movables and immovables, corporeals and incorporeals. The Act does not define the term proceeds. It does not consider also what would happen in the case of commingled proceeds, the determination of benefit or value acquired by a corrupt official where the original proceeds cannot be traced, substitute assets or even for assets of other forms of value.

45 Section 65(1) of the Anti-Corruption Act.
46 Section 1 of the Anti-Corruption Act.
Significantly, the Anti-Corruption Act omits also to provide for the management and disposal of assets, international co-operation and mutual legal assistance matters, establishment of an asset forfeiture unit to manage and maintain property that has been restrained or confiscated, and an enforcement authority. Further, the Act contains only scanty provisions on the asset recovery process as a whole.

3.5 The Anti-Corruption (Amendment) Bill (2013)

There have been proposals to amend the Anti-Corruption Act of 2009. One such proposal is the Anti-Corruption Bill, a private member’s bill which is currently before the Legal Affairs Committee of parliament, before being debated in parliament. The Bill notes that there are gaps in the Anti-Corruption Act and that:

‘due to the nature of offences under the Anti-Corruption Act, it is very difficult to prove that a particular property was derived directly or indirectly from an act of corruption. This creates a lacuna in the law given that securing a conviction does not necessarily guarantee that the convicted person will make good the loss occasioned to the government or any other organisation. There is, therefore, a need to amend the Anti-Corruption Act in order to bridge the gap.’

The Bill contains eleven clauses but this discussion will focus on those clauses relevant to confiscation. Clause 4 seeks to insert a new section 21A into the Anti-Corruption Act in order to deter people from dealing with property that is suspected of being the proceeds of corruption. Clause 5 seeks to place restrictions on the bank accounts of accused persons. It advocates the repeal of section 34(5) of the Act, which states that the DPP is to ensure that an order issued in relation to the restrictions on property or bank accounts of an accused

47 According to the ruling party’s chief whip, the government supports the Bill.
person be served on such a person. These two clauses appear to be redundant because the issues they raise already are dealt with under section 34 of the Anti-Corruption Act, which places restrictions on the disposal of an accused’s property or bank account to ensure compensation.

Under Clause 7 of the Bill, there are proposals to replace section 63 of the Anti-Corruption Act and to introduce the idea of mandatory confiscation of corrupt proceeds. The object of this proposal is to ensure that corrupt proceeds can be recovered without proof that the property is derived from an act of corruption. However, this clause seems to run counter to the way in which confiscation usually works and would be a violation of constitutionally protected rights. In order for property to be confiscated, it must be proved on a balance of probabilities to be tainted and to have been derived from an act of corruption.

The powers and duties of a public trustee, presumably in relation to confiscated property, are outlined under clause 8. Clause 9 aspires to introduce a provision on powers of the Minister of Ethics and Integrity to regulate the remuneration of the public trustee. The Anti-Corruption Act currently provides that confiscated property is to vest in the government and does not specify the authority which is to receive and manage it.\(^4\) Appointment of a public trustee to manage confiscated assets thus would resolve this uncertainty. The Leadership Code Act, however, already provides for an agent or broker appointed by the Inspectorate of Government in whom confiscated property vests. This may lead to duplication of roles, a possibility which highlights the need to harmonise the current provisions on this issue.

\(^4\) Section 63(2) of the Anti-Corruption Act.
A perusal of the Amendment Bill shows that it would go a long way in addressing some of the loopholes in the Anti-Corruption Act. However, it still falls short and runs the risk of not engaging pertinent gaps in the Anti-Corruption Act, as discussed above.

Also, the bill does not make any reference to the Anti-Money Laundering Act, which contains provisions on forfeiture, discussed later on in this chapter.

### 3.6 Proceeds of Corruption Assets Recovery Bill (2013)

This Bill, proposed by the Ministry of Ethics and Integrity to help recover corruptly acquired assets, is not available to the public yet. The Bill, according to reports, has been handled by the First Parliamentary Counsel and is before the Cabinet. Reports indicate that it aims to empower anti-corruption agencies to trace, freeze or seize, and confiscate and dispose of assets of individuals implicated in corruption. The Bill will specifically provide for civil recovery of corruptly acquired assets. The Bill is meant also to empower the Inspectorate of Government (IG), the Criminal Intelligence and Investigations Directorate (CIID) and the DPP to follow up on corruptly acquired assets of accused persons. Its provisions will, extend to spouses, children and business partners of officials, especially in efforts to make up for the difference where the assets of the convicted person fall short.

The Bill is also meant to facilitate compensation of victims of corruption and recovery of resources lost to corruption. It aims also to establish asset recovery processes, and provide the appropriate management of seized proceeds and instrumentalities of corruption.

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52 Statement of the Minister of State for Ethics and Integrity at the 4th IAACA Annual Seminar in Dalian, China, June 2012.
Once made public, there is need to analyse the Bill to ascertain whether it takes into account Uganda’s commitments in regional and international conventions, in relation to civil recovery of corruptly acquired assets and asset recovery as a whole. Given the loopholes in the Anti-Corruption Act highlighted previously however, the Bill is a big step forward. By providing for civil forfeiture and asset recovery, it promises to open a new chapter in Uganda’s asset recovery legal regime.

3.7 The Anti-Money Laundering Act (2013)

This Act criminalises laundering of proceeds of all offences designated under the laws of Uganda, including corruption. The Act empowers authorised officers to carry out investigations necessary for identifying, tracing, freezing or seizing, and eventually confiscating and disposing of illicitly acquired property. Section 44 of the Act empowers an authorised officer to make an *ex parte* application in court for production of documents necessary for identifying, locating, quantifying or transferring tainted property, where the officer suspects a person reasonably to be in possession or control of such property. The officer is granted authority to inspect, copy or retain such documents under the production order. The Act authorises officers to search land and premises in order to seize documents that they believe may be helpful for locating property. The above provisions apply also in cases where a foreign state seeks assistance in locating or seizing property which is suspected to be tainted property.

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53 Section 1(a) of the Anti-Money Laundering Act.
54 See also section 45 of the Anti-Money Laundering Act.
55 Section 46(1) of the Anti-Money Laundering Act.
56 Section 49 of the Anti-Money Laundering Act.
57 Section 55 of the Anti-Money Laundering Act.
The Act allows an authorised officer to enter any land or premises to search for tainted property and to seize any documents\(^{58}\) or to apply for a search warrant in respect of tainted property\(^{59}\) and to seize it. In other words, the act allows an authorised officer to search premises for tainted property without a search warrant if he has reasonable suspicion or in the case of emergency searches and seizures, to prevent loss or destruction of the said property.\(^{60}\) Lastly, the Act allows for searches with a search warrant. Searches and seizures can be carried out also in respect of tainted property upon request by a foreign state.\(^{61}\)

An authorised officer may apply also for a restraining order in relation to the property of a person who is under criminal investigation, or has been charged or convicted for money laundering or any other crime.\(^{62}\) An authorised officer can apply \textit{ex parte} to court also for a monitoring order to compel a financial institution to give information about transactions through an account held by a person suspected to be about to commit a crime or to have committed a crime, or who has benefited from or was involved in a crime.\(^{63}\)

Under the Act, confiscation is defined to include forfeiture, and it means the permanent deprivation of property by an order of court.\(^{64}\) This definition by implication includes both criminal and civil forfeiture. In addition to any other sentence imposed, a confiscation order may be made against tainted property or property in which a convicted person has an interest.\(^{65}\) An authorised officer can apply also to court for confiscation of additional

\(^{58}\) Section 61 of the Anti-Money Laundering Act.
\(^{59}\) Section 62 of the Anti-Money Laundering Act.
\(^{60}\) Section 67 of the Anti-Money Laundering Act.
\(^{61}\) Section 70 of the Anti-Money Laundering Act.
\(^{62}\) Section 71 of the Anti-Money Laundering Act.
\(^{63}\) Sections 56, 57 and 59 of the Anti-Money Laundering Act.
\(^{64}\) Section 1 of the Anti-Money Laundering Act.
\(^{65}\) Section 83(1) of the Anti-Money Laundering Act.
property that may have been discovered after conviction.\textsuperscript{66} The court may issue an order for confiscation upon application once it is shown that certain property is tainted in relation to a crime.\textsuperscript{67} The provision does not specify the official or authority responsible for making the application but refers to an applicant.

In order to determine if property is tainted, the court must consider whether the property was used for or in connection with the committed crime or whether the property was derived from the crime, and the convict person’s income cannot, on proof on a balance of probabilities, enable the acquisition of that property.\textsuperscript{68} The effect of a confiscation order is that it vests the property absolutely in the Republic of Uganda.\textsuperscript{69}

The Anti-Money Laundering Act provides for civil forfeiture but only in limited circumstances, similar to the Anti-Corruption Act. Forfeiture can be carried out only where a person who is undergoing investigations dies or absconds, and is about to be charged or has been charged already; or has been convicted of a crime or before the commencement of investigations in respect of such a person.\textsuperscript{70} The court has to be satisfied on a balance of probabilities.\textsuperscript{71}

Third party interests are provided for under the Act, where an applicant who has a legal interest in the property, was not involved in the commission of the crime and acquired the interest for reasonable consideration with no knowledge of the circumstances or the fact that the property was used to commit the crime. In such instances the court will issue an order declaring the nature and extent of the applicant’s legal interest or directing the

\begin{itemize}
\item \textsuperscript{66} Section 83(2) of the Anti-Money Laundering Act.
\item \textsuperscript{67} Section 86(1) of the Anti-Money Laundering Act.
\item \textsuperscript{68} Section 86(2) of the Anti-Money Laundering Act.
\item \textsuperscript{69} Section 87 of the Anti-Money Laundering Act.
\item \textsuperscript{70} Section 85 of the Anti-Money Laundering Act.
\item \textsuperscript{71} Section 85(1) of the Anti-Money Laundering Act.
\end{itemize}
Republic of Uganda to transfer the property to the applicant or to make payments equivalent to the value of obtaining to the applicant's interest.\textsuperscript{72}

The court can make an order for payment instead of confiscation in certain circumstances, including where the property has lost value, cannot be located or has been transferred to a third party.\textsuperscript{73} The Act outlines rules that should be considered in determining the benefit and the value derived from the commission of a crime by an individual.\textsuperscript{74} The court is granted powers also to make orders for the sale or transfer of confiscated property.\textsuperscript{75} Section 104 outlines the management of restrained and confiscated property. It requires regulations to be made to help in the management of restrained and confiscated property. These regulations, however, have not been drafted to date.

Property derived from foreign crimes and which is within Uganda may be confiscated upon request by an affected state, provided that the requirements of dual criminality are met.\textsuperscript{76} Under provisions for international co-operation, the Minister may enter into agreement with the ministry or department of any other country for the purposes of exchange or sharing of information.\textsuperscript{77} Section 106 requires the court or other competent authority in Uganda to co-operate with the competent authorities in other states in order to enforce measures such as confiscation.

A competent authority in Uganda may make requests to another state or enforce requests from another state for legal assistance in relation to civil, criminal, administrative or investigative matters and also to identify, trace, freeze, seize or confiscate property derived

\textsuperscript{72} Section 89(2) of the Anti-Money Laundering Act.
\textsuperscript{73} Section 91 of the Anti-Money Laundering Act.
\textsuperscript{74} Section 93 of the Anti-Money Laundering Act.
\textsuperscript{75} Section 101 of the Anti-Money Laundering Act.
\textsuperscript{76} Section 102 of the Anti-Money Laundering Act.
\textsuperscript{77} Section 105 of the Anti-Money Laundering Act.
from corruptly acquired assets. A foreign judgment or confiscation order regarding property derived from money laundering or other crimes may be used as evidence in confiscation proceedings.

The Act provides for direct or indirect enforcement of foreign orders for confiscation. An authorised officer in Uganda can submit a foreign request to court in order to obtain a confiscation order or enforce an order granted by a court of a requesting state. Proceeds of crime recovered in Uganda shall be transferred to a foreign state upon request. The Minister may deduct all expenses incurred in the recovery of proceeds. Section 112 outlines measures for the disposal of confiscated property. Property confiscated through foreign requests may be disposed of in accordance with regulations to be made under the Act. These regulations have not been drafted either, which hinders enforcement of this provision.

Upon request by the affected state, the court should consider returning confiscated property to the requesting state party to enable compensation or return to the legitimate owners. The section also requires that the court or competent authority make arrangements or reach conclusions for sharing of assets or funds that have been confiscated, or contributing the value of such assets to government agencies in fighting against money laundering and other crimes or sharing funds that have been derived from the sale of assets.

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78 Section 107 of the Anti-Money Laundering Act.
79 Section 108 of the Anti-Money Laundering Act.
80 Section 109(1) of the Anti-Money Laundering Act.
81 Section 110 of the Anti-Money Laundering Act.
82 Section 112(2) of the Anti-Money Laundering Act.
83 Section 112 (3) of the Anti-Money Laundering Act.
Section 103 of the Act provides for the establishment of a special account with funds to help in the management and maintenance of restrained or confiscated property. The fund is meant also to pay for the expenses of trustees or other authorised officers who have been appointed to enforce the provisions of the Act. This fund too, yet is to be established.

In conclusion, the Anti-Money Laundering Act contains more comprehensive provisions on asset recovery in comparison to the Anti-Corruption Act. However, its main focus is not recovery of corruptly acquired assets and it does not, in fact make any reference to the Anti-Corruption Act. This also highlights the current problem of duplicity of provisions in Uganda’s asset recovery regime.

A significant weakness of the Act is that it restricts the application of civil forfeiture to only a few instances, which limits the successful recovery of corruptly acquired proceeds. Another weakness is the failure to provide for or designate a particular asset forfeiture unit or competent authority to enforce the relevant provisions of the Act. Instead reference is made to an authorised officer, competent body or applicant to carry out processes involved in civil forfeiture. The Anti-Corruption Act on the other refers to the IGG and the DPP.

3.8 Conclusion

The Anti-Corruption Act, which is the main piece of anti-corruption legislation, is complemented by the Leadership Code Act of 2002 and the Anti-Money Laundering Act of 2013. Although both the Anti-Corruption Act and the Anti-Money Laundering Act allow for civil recovery of assets, they do so only by implication. Further, the asset recovery provisions contained in both Acts do not support civil recovery of corruptly acquired assets or asset recovery adequately. Moreover, civil forfeiture can apply only in cases of death or flight.
There is also duplication of efforts in the current legislation in relation to asset recovery, as contained in the Anti-Corruption Act, the Anti-Money Laundering Act and the Leadership Code Act.

The current efforts aimed at amending the Anti-Corruption Act and introducing comprehensive legislation on recovery of proceeds, including the Anti-Corruption (Amendment) Bill of 2013, and the Recovery of Proceeds of Corruption Bill of 2013, are praiseworthy efforts but need to take into account the pertinent gaps, mentioned above, in order to build an effective civil forfeiture and asset recovery legal regime. The Bills should also address Uganda’s commitments in regional and international anti-corruption conventions, specifically through making provision for mutual legal assistance and international co-operation, to enable civil recovery of corruptly acquired assets both at the domestic level and across borders. It is recognised that the two Bills are not final and some of the outstanding issues may be addressed eventually.
CHAPTER FOUR

BASIC ELEMENTS OF CIVIL FORFEITURE LAW

4.1 Introduction

This chapter addresses the salient issues that should be considered in enactment of the Proceeds of Corruption Assets Recovery Bill (2013) and the Anti-Corruption (Amendment) Bill 2013, based on existing loopholes in the current anti-corruption legal regime, some of which have been highlighted in the previous chapter. It canvasses important issues pertaining to civil forfeiture law including the definition of key terms, establishment of an enforcement body, key procedural and evidentiary issues, and human rights and constitutional challenges.

4.2 Basic Concepts in Civil Forfeiture Law

4.2.1 Definition of Key Terms

The assets or proceeds which are subject to civil forfeiture must be defined. The widest possible range of assets should be subject to confiscation. In the process of enacting the law on civil forfeiture, proceeds, instrumentalities, commingled proceeds and substitute assets should be listed among assets that are forfeitable. As pointed out in the previous chapter, Uganda’s current legislation does not define comprehensively the nature of assets subject to confiscation. This section considers the types of proceeds that should be considered under the new legislation.

1 Greenberg (2009) 38.
4.2.1.1 Proceeds

The term “proceeds” needs to be defined clearly in the civil forfeiture legislation to ensure that all forms of assets are captured under said legislation. Proceeds have been defined generally as valuable items that are obtained directly or indirectly as a result of crime. Indirect proceeds are those that accrue where there is an increase in the value of proceeds. Thus profits which accrue from corruptly acquired assets can be recoverable. Some jurisdictions have adopted the definitions of proceeds contained in UNCAC and the Palermo Convention as a guide.

4.2.1.2 Instrumentalities

These are items that may be used to commit a crime. They must have been used substantially in the commission of the offence in order to be regarded as instrumentalities. For instance, in the South African case of NDPP v RO Cook & Others, the Supreme Court of Appeal found that the items must have been instrumental to the accused person in committing the crime. This should be specified in the legislation. The Court also held that there must be a “functional relation” between the property and the crime. The definition of “use” should be considered also in order to avoid uncertainties.

4.2.1.3 Commingled Proceeds

Sometimes proceeds may be laundered and mixed with legitimate assets or maybe converted into other assets. Civil forfeiture may aim at recovery of the part of the assets

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3 Council of Europe (2013) 88.
6 Brunet al(2011) 111.
that are tainted or may provide for confiscation of all proceeds, including the non-proceeds that were mingled with the proceeds of crime. An example is South Africa’s Prevention of Organised Crime Act of 1998 which provides for confiscation of all assets, including those that have been mingled with proceeds of crime. The civil forfeiture statute should be couched in language that provides for such options and should allow also for forfeiture of commingled assets.  

4.2.1.4 Substitute Assets

Where it is proved that the accused derived proceeds from crime but they cannot be traced, any other untainted property belonging to the accused person ought to be attached. These are known as substitute assets and they must be of equal value to the proceeds of crime derived by the accused person. Forfeiture of substitute assets may take place where it is not possible to locate the actual assets, after all reasonable efforts to do so; if the assets have been transferred outside the court’s jurisdiction; where the assets have been transferred to a third party; and when proceeds have diminished in value or have been concealed. In some jurisdictions, the law provides for confiscation of substitute assets which must be owned by the accused person and must have equal value to those assets that have dissipated.

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7 Brunet al (2011) 109. See also Article 31(4) & (5) of UNCAC and Article 12 of the Palermo Convention.
9 See for instance Colombia Law 793, Article 3; and the United States Code, Section 853 (p).
In other jurisdictions, the defendant may be required to pay an amount equivalent to the assets.\textsuperscript{10} If such provisions are not included in a civil forfeiture statute, then criminals may have an incentive to hide, transfer or use proceeds of corruption as quickly as possible to avoid their being forfeited.

4.2.1.5 Assets of Other Forms of Value

It is important to consider also other forms of value like shares, intangible assets such as royalties or literary proceeds, stocks, or information recorded in various forms. Further, terms that can encompass all forms of value should be used to avoid having to resort to amendments every few years.\textsuperscript{11} Greenberg \textit{et al} refer to terms such as recordings, documents and materials to encompass forms of information and objects ranging from material in photographic form like videotapes and discs; handmade materials like paintings or drawings; and electronic materials including discs, electronic notebooks memory sticks and other electric or digital data storage devices.

4.2.1.6 Proceeds Derived from Foreign Offences

The statute should provide also for confiscation of assets that have been derived from offences committed abroad and that are listed as offences under a country’s criminal legal regime.\textsuperscript{12} The statute may designate particular corruption crimes to which this provision applies.

\textsuperscript{10} The Republic Act 1960, Section 12 (c) (Philippines).
\textsuperscript{11} Greenberg \textit{et al} (2009).
\textsuperscript{12} Brunet \textit{al} (2011) 110.
4.2.2 Enforcement Authorities

4.2.2.1 Establishing an Enforcement Authority

Civil forfeiture law usually establishes enforcement authorities that are in charge of enforcing the new legislation. South Africa established the Asset Forfeiture Unit, within the office of the National Director of Public Prosecutions, which is responsible for both criminal confiscation and civil forfeiture.\(^\text{13}\) The United Kingdom initially entrusted this duty to a new body, the Asset Recovery Agency, but eventually transferred its powers to the Serious Fraud Office, the Crown Prosecution Service and the Serious and Organised Crime Agency.\(^\text{14}\)

Uganda already has established various institutions to combat corruption and prosecute corruption related offences including the Directorate for Ethics and Integrity (DEI) which is mandated to guide and develop anti-corruption policies and legal frameworks and to oversee the implementation of anti-corruption legislation.\(^\text{15}\)

The Office of the Inspectorate of Government (IG) commonly referred to as the Inspector of General of Government (IGG), which is established under Chapter 13 of the Constitution of the Republic of Uganda of 1995 (as amended), is responsible for investigations and prosecutions of offences related to corruption, abuse of authority and public office.\(^\text{16}\) The Inspectorate of Government also enforces the Leadership Code Act and, as already noted, has powers to confiscate stolen assets through administrative forfeiture. The Inspectorate

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\(^{13}\) Council of Europe (2014) 55-58.

\(^{14}\) Council of Europe (2014) 64.

\(^{15}\) www.dei.go.ug. It is established under the Ministry of Ethics and Integrity.

\(^{16}\) Section 8 of the Inspectorate of Government of Act 2002 and 'The IGG' available at www.go.ug
of Government Act also gives the IG the mandate to eliminate and foster the elimination of corruption and abuse of authority and public office.\(^\text{17}\)

The Directorate of Public Prosecutions which is responsible for prosecution of criminal acts in the entire country is established under article 120 of the Constitution of Uganda.\(^\text{18}\) The DPP has a special unit responsible for prosecuting corrupt offences. Consequently, the DPP and the IGG would be well suited to enforce civil forfeiture in Uganda.

### 4.2.2.2 Investigative Agency

An authority which is responsible for conducting investigations in relation to corruptly acquired assets should be established legislatively. In Uganda, both the IGG and the DPP are responsible for investigations in relation to asset recovery. The IGG is mandated to investigate cases of corruption and abuse of public office. The DPP relies on the specialised fraud squad of the Criminal Investigations Department of the Police to carry out investigations, but may offer legal advice and guidance in such situations. The DPP is empowered under the Anti-Corruption Act to order investigations of a bank account, share account or purchase account. The DPP can apply also for orders to limit or restrict the transfer or disposal of assets of persons accused of carrying out corrupt acts. The DPP may authorise also the inspection of documents and the obtaining of documents and other information. The IGG is bestowed with similar powers to enforce production and disclosure orders.\(^\text{19}\)

The DPP and IGG both have powers of search and seizure. Under section 41 of the Anti-Corruption Act, the DPP and IGG may compel a person employed by a public body to

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17 Section 8(1)(b) of the Inspectorate of Government Act of 2002.
18 See ‘What is DPP’ available at [www.dpp.go.ug](http://www.dpp.go.ug).
19 Section 37 of the Anti-Corruption Act.
produce information about property he owns. The IGG is empowered also to conduct inquiries and investigations.20 These powers should be extended to the civil forfeiture legislation.

Other important investigative powers for consideration include customer information orders and account monitoring orders, the latter being provided for under the Anti-Money Laundering Act.21 Customer information is information about whether a person has held an account at a particular financial institution.22 The account monitoring order relates to information relating to a particular account.23

4.2.2.3 Recovered Assets Fund

The Anti-Corruption Act does not make provision for an assets recovery body. The recovered assets fund is necessary to pay expenses for management and maintenance of restrained and confiscated property. It also would meet the remuneration expenses for the receiver, trustee or the authority appointed under the civil forfeiture legislation to enforce the act.

Further, after hearing and after any appeals, the civil forfeiture order becomes permanent. The responsible agency will then take possession of the confiscated property and sell it off. The money acquired from the sale will be deposited into the recovered assets fund and used either for law enforcement purposes or to compensate victims.24

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20 Section 12 of the IGG Act.
21 Sections 56 and 57 of the Anti-Money Laundering Act.
22 Council of Europe (2014) 90.
23 Council of Europe (2014) 90.
4.2.3 International Co-operation

Provisions on international co-operation enable enforcement of requests for foreign preservation and confiscation orders. The Anti-Corruption Act contains scanty provisions on international co-operation. Taking this into consideration, the upcoming law on forfeiture, should be finalised in relation to Uganda’s commitments under articles 51-59 of UNCAC to facilitate recovery of corruptly acquired assets across borders.

The new law should provide for various aspects of asset recovery including tracing, freezing, seizing and confiscation orders both domestically and at the international level, and should propose the possibility of direct enforcement of foreign civil forfeiture orders. The law should provide also for the transfer or return of confiscated property to its country of origin.

4.2.4 Civil Proceedings

Article 53 of UNCAC, as previously discussed, requires state parties to put in place legislation that allows another state to institute civil litigation for the recovery of proceeds and also to enable it join proceedings for compensation. Such a provision will benefit not only Uganda in terms of international co-operation and mutual legal assistance but also is a way for the country to meet its obligations under this article.

4.2.5 Recovered Property and Expenses

It is important to make provisions on procedures to be taken for the handling of confiscated proceeds. There must be provisions also for disposal of property.
4.2.6 Standard of Proof

The common standard of proof used in civil forfeiture proceedings is proof on a balance of probabilities,\textsuperscript{25} which means that the facts appear more likely true than not. This standard of proof is used in civil proceedings in common law jurisdictions such as Uganda and is also the internationally accepted standard of proof for civil forfeiture proceedings.\textsuperscript{26} It is advantageous because it is easier to meet compared to the standard of proof in criminal proceedings which is proof beyond a reasonable doubt. The new legislation should provide clearly for this standard of proof.

4.2.7 Third Party Rights

While the Anti-Money Laundering Act considers third party rights, the Anti-Corruption Act does not. Confiscation may affect third parties and therefore provision should be made for third party interests in the new civil forfeiture legislation. A third party should be given notice of forfeiture proceedings, and should be availed other fair trial guarantees, like the right of appeal.\textsuperscript{27} The law should allow a person who has been affected by the order to apply within a certain time to exclude the order from his legal interests if that person did not receive notification.\textsuperscript{28} However, where the third party was complicit in the offence or had prior knowledge that the property was proceeds of corruption, then that property should be subject to forfeiture proceedings. In cases where the third party acquired the property in good faith, such property should not be subject to forfeiture.

\textsuperscript{25} See Greenberg (2009) 59.
\textsuperscript{26} Namulodi Hasadivs Uganda SCCA 16/97 and CoE (2014) 44.
\textsuperscript{27} Attiso (2010) 12.
\textsuperscript{28} Council of Europe (2014) 87.
4.3 **Principal Constitutional and Human Rights Challenges of Civil Forfeiture**

This section highlights the main legal challenges that are commonly raised in respect of civil forfeiture legislation, and are likely to be raised in respect of Uganda’s new asset recovery law. It discusses constitutional and human rights challenges and how they have been addressed in other jurisdictions. Legal challenges such as whether civil forfeiture proceedings are civil and not criminal proceedings in nature and whether, as a result, they violate protections guaranteed for criminal proceedings; and whether civil forfeiture interferes with property rights are discussed in detail below.

4.3.1 **Civil Forfeiture Proceedings are Civil in Nature**

Civil forfeiture proceedings are civil in nature and not criminal. Legal challenges may be raised as to whether civil forfeiture proceedings are criminal or civil in nature and whether as a result they offend protections offered for criminal proceedings. In *Charrington*\(^{29}\) it was found that there was no charge, arrest, conviction or penalty or criminal record and in the absence of such hallmarks, civil forfeiture proceedings were civil in nature. In *Gale vs SOCA*\(^{30}\) it was found that civil forfeiture proceedings do not enjoy protections offered in criminal proceedings. Further, the Supreme Court of Canada found in *Charterjee vs Ontario*\(^{31}\) that civil forfeiture laws were civil and imposed no penalty.

Whether civil forfeiture proceedings are civil or criminal in nature also raises issues of double jeopardy. Both criminal proceedings and civil forfeiture proceedings may be instituted against a person without violating the protections against double jeopardy. In

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29 *Charrington* [2005] EWCA Civ 335.
30 *Gale vs SOCA* UKSC 2010/190.
31 *Charterjee vs Ontario* 2009 SCCA 17.
such cases, it is possible to convict an accused person and still initiate separate civil forfeiture proceedings. Various jurisdictions have held that civil forfeiture is not penal in nature and thus imposing it after a conviction would not be a punishment.\textsuperscript{32} In \textit{United States vs Ursery}, the defendants had been prosecuted but were faced still with civil forfeiture proceedings. The question raised was whether this amounted to facing a second prosecution. The Supreme Court found that \textit{in rem} proceedings did not amount to a punishment but were simply a means of getting back property that a person did not own. Civil forfeiture was found to be a remedial civil action, and also different from other civil penalties, including fines and compensation.\textsuperscript{33}

Civil forfeiture proceedings no doubt will appear to infringe the presumption of innocence. In criminal proceedings, one is presumed innocent until proved guilty.\textsuperscript{34} In civil forfeiture proceedings, property may be confiscated without a conviction,\textsuperscript{35} that is, without proof of guilt. This may appear to be a violation of the presumption of innocence. However, it has been held by the European Court of Human Rights that legal presumptions in civil forfeiture cases do not violate the presumption of innocence as long as they are reasonable and rebuttable.\textsuperscript{36} Further, given that civil forfeiture proceedings are civil in nature and not criminal, the presumption of innocence may not apply.\textsuperscript{37}


\textsuperscript{33} See \textit{United States v Ursery} 518 US 267, 278 (1996).

\textsuperscript{34} See Article 11 of the Universal Declaration of Human Rights; Article 28(3)(a) of the Constitution of the Republic of Uganda.

\textsuperscript{35} \textit{Attiso} (2010) 12.

\textsuperscript{36} See \textit{Salabiakouvs France} (1988) 13 EHRR 379.

\textsuperscript{37} \textit{Attiso} (2010) 12.
4.3.2 Interference with Property Rights

The process of seizure, restraint and civil forfeiture may deprive an individual of his property temporarily or permanently. This may create the impression of infringing on a person’s property rights, since there is no conviction to found the deprivation. The right to own property is protected under the Constitution of most states and in international human rights conventions such as the European Convention on Human Rights and the African Convention on Human and Peoples Rights. However it is not absolute. Article 1 of the Protocol of the European Convention on Human Rights explains the nature of this right. It states:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not however impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

The European Court of Human Rights (ECtHR) uses a three pronged approach to determine constitutionality, asking whether the measure is lawful under domestic law, whether it is a legitimate aim and whether it is proportionate. The first two elements are not usually challenged but the question of proportionality often raises issues. In the South African case of *Mohunram vs NDPP*, for instance, the court quashed a civil forfeiture order for a factory where unlicensed gaming machines were kept. It was found that even if the factory housed

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38 *Mohunram vs NDPP* [2007] 2 ACC 4.
the machines, its forfeiture was disproportionate to the aim. In the United Kingdom, Courts have found that such laws do not interfere with property rights.39

In relation to this right, Uganda’s Constitution provides that:

‘1) Every person has a right to own property individually or in association with others. 2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-

a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-

i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

ii) a right of access to a court of law by any person who has an interest or right over the property.’40

The Constitution of Uganda appears to permit the deprivation of property only where, in addition to other conditions, there is payment of fair and adequate compensation to the affected party. Thus, civil forfeiture legislation might appear to breach the Constitution in relation to article 26. Hence there is a need to amend the Constitution in that respect to allow for deprivation of property as provided for under the civil forfeiture law and without making the need for compensation mandatory.

The agency enforcing the law could refer to international legal norms that have been applied in other jurisdictions, as discussed here. In various jurisdictions, property usually is confiscated under explicit rules and only in conditions where the said property was found to have been obtained illegally. Some jurisdictions also rely on the theory that no one can

39 See R vs He & Chen [2004] EWHC 3021 Admin.
acquire title in property that has been acquired illegally. Thus, the right to own property is not violated in such cases.41

4.3.3 Retroactivity of Civil Forfeiture Legislation

In order to cast the net as wide as possible, legislators should consider retroactive application of the new law. Uganda has suffered an insurmountable asset loss to corruption in recent years. Retroactive application of civil forfeiture would allow for the recovery of assets derived from offences committed before the statute came into existence, provided that the conduct was criminalised at the time.

Many jurisdictions have adjudicated on issues concerning the constitutionality of retrospective civil forfeiture legislation. Criminal law prohibits the enactment of legislation to try an act which was not defined as a crime at the time of commission. In the same way, it also prohibits meting out heavier penalties than were prescribed legally at the time of commission of the offence. However, civil forfeiture is not a criminal process, but rather a civil one, and is thus not subject to the principle prohibiting the enactment of ex post facto legislation. Various courts in both civil and common law jurisdictions have found also that civil forfeiture cannot be defined as a punishment because it is not criminal in nature.42 It is a civil consequence of an unlawful act from which an accused person has derived a certain benefit.43

41 Greenberg (2009) 45.
42 Greenberg (2009) 45.
43 Greenberg (2009) 45.
4.4 Conclusion

The efforts to introduce civil forfeiture in Uganda, including the Anti-Corruption (Amendment) Bill (2013) and the Proceeds of Corruption Assets Recovery Bill (2013) are laudable. However, for the new legislation to be effective and comprehensive, provision should be made for the basic elements of civil forfeiture, including the nature of property recoverable, establishment of enforcement agencies and international co-operation and mutual legal assistance.

Different jurisprudence in various jurisdictions has been used to challenge the constitutionality of civil forfeiture legislation and its perceived violation of certain protected rights. However, it has been recognised generally that civil forfeiture is a necessary remedy where criminal prosecution is not possible. Of course, civil legislation must be in line with international human right norms of legality, necessity and proportionality and should not offend against the Constitution of any given state. In the case of Uganda, amendments to the Constitution should be considered to ensure that the new civil forfeiture law is not open challenge as violating the constitutionally protected right to property.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Uganda, like many other developing countries, is faced with high levels of corruption among public officials. Estimates show that the country has one of the highest levels of corruption in East Africa. This has led to enormous loss of public funds as officials divert these funds for private use.

Although the Anti-Corruption Act provides for prosecution of corrupt officials, many times powerful and highly placed officials avoid indictment or conviction due to insufficient evidence, immunity, and the fact that they are too powerful to be indicted. As a result, mainly the lower level technical staff are indicted and convicted at the Anti-Corruption Court. This means that even if the Act expresses provides for criminal confiscation, this cannot be applied effectively in relation to such officials.

Civil forfeiture, which allows for confiscation of corruptly acquired assets without conviction, would address existing loopholes. Civil forfeiture is applicable in situations where there is insufficient evidence to support a conviction, where the accused person absconds or dies before criminal proceedings against him can commence or be concluded. It may apply also where an individual has been acquitted or where domestic immunity is a bar to prosecution. It is also easier for the prosecution to prove since the standard of proof is proof on a balance of probabilities.
The United Nations Convention against Corruption requires states parties to consider enacting legislation in relation to civil forfeiture. It also requires states parties to establish such measures that would allow for institution and enforcement of civil proceedings, including civil forfeiture. Other international and regional anti-corruption conventions, including the United Nations Convention against Transnational Organised Crime and the African Union Convention on Preventing and Combating Corruption, also provide for civil forfeiture although by implication. Uganda is a party to these conventions and consequently, should honour her commitments under these conventions in relation to civil forfeiture.

Under domestic law, the Anti-Corruption Act of 2009 and the Anti-Money Laundering Act of 2013 provide expressly for criminal forfeiture. This has been applied in a considerable number of cases. Both Acts also provide for civil forfeiture. However, this is by implication and only in cases of death or flight of an accused person. The Leadership Code Act of 2002 allows only for administrative forfeiture. Another issue is that Uganda’s legal regime on asset recovery is not fully developed and comprehensive. It is also set out in different laws which contain different provisions.

The Anti-Corruption (Amendment) Bill, a private member’s bill, and the Proceeds of Corruption Assets Recovery Bill (2013), which is a government effort, seek to introduce civil forfeiture of corruptly acquired assets. In order to ensure effectiveness of the new laws, salient issues relating to civil forfeiture need to be considered.

These include precise definition of the nature of assets or property that would be subject to civil forfeiture. This would require proper consideration of definitions of the term proceeds, allowing for use of substitute assets, how to deal with commingled proceeds and foreign
assets. There is also a need to consider the establishment of enforcement bodies that would implement the provisions of the new law.

It is also important to take note of the principal constitutional and human rights challenges that have been raised against the application of civil forfeiture legislation in different jurisdictions.

5.2 Recommendations

5.2.1 Establishment of Enforcement Bodies

Uganda does not have an asset forfeiture unit. It would be sensible to establish an asset forfeiture unit that will be responsible for applications for both civil and criminal forfeiture. The unit would manage proceeds and instrumentalities that have been restrained or confiscated. This would ensure effectiveness of the Anti-Money Laundering Act which does not provide for an asset forfeiture unit but instead tasks an applicant or an authorised officer to carry out functions under the Act.

The Anti-Corruption Act 2009 empowers the DPP and the IGG to carry out investigations. The new legislation should provide for these institutions to be in charge of all civil forfeiture related investigations.

An asset recovery fund should be established which will meet expenses for the management and maintenance of preserved and confiscation property. The fund will also manage money realised from the sale of confiscated assets and meet other expenses related to civil forfeiture.

The Constitution provides for the establishment for a Leadership Code Tribunal. This should be established to enable administrative confiscation in addition to civil forfeiture.
5.2.2 Harmonising Laws on Confiscation

Article 26 of the Constitution requires, *inter alia*, that property can be expropriated only in circumstances where there is adequate and fair compensation in relation to the expropriation. A strict interpretation of this provision would require compensation in cases of civil forfeiture.

Thus, there is a need to amend the Constitution to allow expressly for confiscation of property where it has been acquired illegally and without requiring compensation in such circumstances.

In order to ensure effectiveness, it is necessary to harmonise existing laws, including the Anti-Corruption Act, the Anti-Money Laundering Act and the Leadership Code Act on confiscation to avoid duplication. Currently, the Anti-Corruption Act and the Anti-Money Laundering Act provide for civil and criminal forfeiture but establish different procedures. This is bound to cause confusion in the application of these procedures. The laws therefore should be harmonised to ensure effectiveness of civil forfeiture and to avoid replication of procedures.

The Anti-Corruption (Amendment) Bill (2013) and the Proceeds of Corruption Assets Recovery Bill, 2013 are two efforts that propose to introduce the recovery of corruptly acquired assets without the need for conviction. To avoid depletion of resources, it is desirable to harmonise the two bills to avoid duplication and ensure effectiveness in introducing civil forfeiture.

The Anti-Money Laundering Act provides for drafting of administrative rules to ensure management of restrained and confiscated property but these have not been enacted yet.
Enacting these rules would ensure effectiveness of the Proceeds of Corruption Assets Recovery Bill.
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