

**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**A Case for Civil Forfeiture in Ethiopia**

Research Paper submitted in partial fulfilment of the requirements for the LLM degree



**Saba Hailu Gebremeskel**

**Student Number: 3471722**

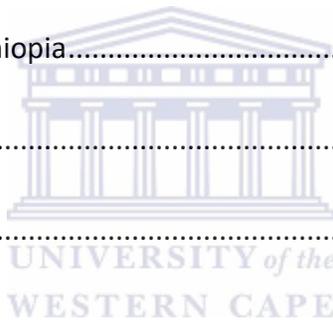
**SUPERVISOR**

**Prof Raymond Koen**

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## Table of Contents

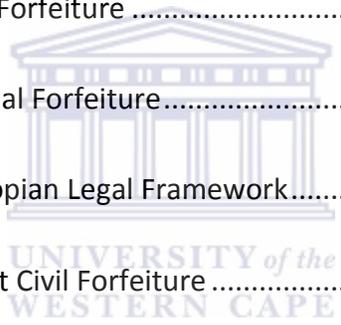
Key Words.....	v
Declaration.....	vi
Acknowledgment .....	vii
List of Acronyms and Abbreviation.....	viii
<b>CHAPTER ONE.....</b>	<b>1</b>
<b>GENERAL INTRODUCTION.....</b>	<b>1</b>
1.1 Background of the Study.....	1
1.2 Level of Economic Crime in Ethiopia.....	4
1.3 Assets Forfeiture in General .....	6
1.4 Assets Forfeiture Procedures.....	6
1.4.1 Criminal Forfeiture.....	7
1.4.2 Civil Forfeiture .....	7
1.5 Significance of the Research .....	8
1.6 Research Questions.....	10
1.7 Literature Survey.....	11
<b>CHAPTER TWO .....</b>	<b>13</b>
<b>LEGAL FRAMEWORK OF ASSETS FORFEITURE .....</b>	<b>13</b>
2.1 Legal Framework of Assets Forfeiture in Ethiopia.....	13
2.1.1 Crime Prevention and Criminal Justice Policy .....	15



2.1.2 Criminal Code of Ethiopia .....	16
2.1.3 Revised Anti-Corruption Special Procedure and Rules of Evidence	
Proclamation No 434 of 2005 .....	17
2.1.4 Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013 ...	17
2.1.5 Anti-Terrorism Proclamation No 652 of 2009 .....	19
2.1.6 Customs Proclamation No 622 of 2009 .....	20
2.2 International Co-operation in Assets Forfeiture under Ethiopian Law .....	20
2.3 International Legal instruments on Assets Forfeiture .....	22
2.3.1 United Nations Convention against Corruption .....	22
2.3.2 United Nations Convention against Transnational Organised Crime .....	26
2.3.3 African Union Convention on Preventing and Combating Corruption .....	27
2.4 Significance of Assets Forfeiture Laws in Combating Economic Crimes.....	28
2.4.1 Assets Forfeiture as a Form of Punishment .....	28
2.4.2 Assets Forfeiture as a Form of Incapacitation.....	29
2.4.3 Assets Forfeiture as a Form of Compensation to Victims .....	29
2.4.4 Assets forfeiture as a Form of Deterre .....	30



<b>CHAPTER THREE</b> .....	31
<b>ADOPTING CIVIL FORFEITURE</b> .....	31
3.1 General Background of Civil Forfeiture.....	31
3.2 Relationship between Civil Forfeiture and Criminal Proceedings .....	34
3.3 Comparing Civil Forfeiture and Criminal Forfeiture.....	35
3.3.1 Advantages of Civil Forfeiture .....	35
3.3.2 Disadvantages of Civil Forfeiture.....	37
3.3.3 Advantages of Criminal Forfeiture .....	38
3.3.4 Disadvantages of Criminal Forfeiture.....	39
3.4 Civil Forfeiture under the Ethiopian Legal Framework.....	40
3.5 The Need for Ethiopia to Adopt Civil Forfeiture .....	40
3.6 Issues in Civil Forfeiture .....	41
3.6.1 Retroactive Application of Civil Forfeiture Law.....	42
3.6.2 The Standard of Proof in Civil Forfeiture.....	44
3.7 Core Elements of Civil Forfeiture Legislation.....	47
3.7.1 Clear Indication of Civil Forfeiture and its Procedure .....	47
3.7.2 Defining Property and Proceeds Subject to Civil Forfeiture .....	49
3.7.3 Agency Responsible for Implementation of Civil Forfeiture .....	51
3.8 Constitutional Challenges to Civil Forfeiture .....	52



3.8.1 The Right to Property .....	52
3.8.2 Presumption of Innocence .....	56
<b>CHAPTER FOUR</b> .....	<b>58</b>
<b>CONCLUSION AND RECOMMENDATIONS</b> .....	<b>58</b>
4.1 Conclusion .....	58
4.2 Recommendations .....	61
4.2.1 Adopting a Comprehensive Civil Forfeiture Law .....	61
4.2.2 Establishing a Special Assets Recovery Unit.....	62
4.2.3 Awareness Creation .....	63
<b>BIBLIOGRAPHY</b> .....	<b>65</b>



## **KEY WORDS**

Assets forfeiture

Assets recovery

Civil forfeiture

Criminal forfeiture

Corruption

Confiscation

Instrumentalities of crime

Money laundering

Proceeds of crime



## DECLARATION

I, Saba Hailu Geberemeskel, declare that '*A Case for Civil Forfeiture in Ethiopia*' 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.

Signature:.....

Date:.....



Supervisor: Prof R Koen

Signature:.....

Date:.....

## Acknowledgment

My sincere appreciation goes to God Almighty and his Mother for bestowing me with strength to undertake my study and this research paper. Special thanks to my supervisor, Prof R Koen, for his enormous contributions and close supervision.

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Many thanks to my dearest families and friends for the love, support, and encouragement they have given me throughout my study.



## List of Acronyms and Abbreviation

<b>AU Convention</b>	African Union Convention on Preventing and Combating Corruption
<b>CoE Conventions</b>	Council of Europe Criminal and Civil Law Conventions on Corruption
<b>ECOWAS Protocol</b>	Economic Community of West African States Protocol on the Fight against Corruption
<b>FATF</b>	Financial Action Task Force
<b>FDRE</b>	Federal Democratic Republic of Ethiopia
<b>OCED Convention</b>	Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
<b>OAS Convention</b>	Organisation for American States Inter-American Convention against Corruption
<b>SADC Protocol</b>	Southern African Development Community Protocol against Corruption
<b>Vienna Convention</b>	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

**UNCAC**

United Nations Convention against Corruption

**UNCTOC /Palermo Convention**

United Nations Convention against Transnational Organised  
Crime



# CHAPTER ONE

## GENERAL INTRODUCTION

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### 1.1 Background of the Study

Assets forfeiture has been identified as an important tool to combat international and domestic organised crime, which includes crimes such as terrorism, money laundering, drug trafficking, terrorist financing and corruption. These crimes usually are committed in structured and sophisticated ways that make the investigation process complicated and challenging for law enforcement. In response, countries have turned to civil forfeiture as a mechanism to combat these crimes by tracing and confiscating any property which has links to them.<sup>1</sup>



Civil forfeiture is a method of seizing and confiscating proceeds of crime by instituting a civil case against the property only, without the need for securing a criminal conviction.<sup>2</sup> Since it is a non-conviction based forfeiture procedure, the prosecutor only needs to prove the nexus between the property and the crime. It covers a wider scope than criminal forfeiture.<sup>3</sup>

Unlike general forfeiture, which was practised traditionally by confiscating all personal property as a punishment for crimes such as treason, modern forfeiture laws aim at preventing offenders from profiting from their crimes and incapacitating criminal organisations from committing future crimes.<sup>4</sup>

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1 Young (2009: 1) and Simser (2010: 329).

2 Nikolov (2011: 17 & 22) and (2012: 3).

3 Greenberg *et al* (2009: 13) and Nikolov (2011: 22).

4 Young (2009: 1) and Alldridge (2003: 46-8).

The United States of America was the first country to introduce modern civil forfeiture in the 1970s and 1980s. During that time, law enforcement was facing problems in recovering all proceeds of crime using only criminal forfeiture. It was found to be difficult to prove beyond reasonable doubt the guilt of the offenders involved in sophisticated crimes. Thus, civil forfeiture was introduced as a solution to the problem.<sup>5</sup> However, civil forfeiture should not be taken as an alternative to criminal forfeiture. Rather, the two procedures should be used together to achieve the purpose of assets forfeiture which is, among others, to deter the offenders from committing further crimes.<sup>6</sup>

Civil forfeiture is practised mostly in countries which have a common law legal system. As can be inferred from the experiences of these countries, introducing civil forfeiture into their legal system has not been an easy task. Its compatibility with domestic laws has to be checked and experiences of other countries have to be studied critically. Civil forfeiture usually is open to criticisms in relation to its allegedly violating constitutional and human rights in general. Courts in different countries have been dealing with civil forfeiture by implementing it in line with human rights and justice principles, which will be discussed further in the coming chapters.<sup>7</sup>

Under international legal instruments, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) and United Nations Convention against Corruption (UNCAC), it is mandatory for member countries to incorporate assets forfeiture laws into their domestic legal frameworks. However, there is no consensus as to the use of civil forfeiture as a tool of confiscation. As a result,

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5 Young (2009: 2-3) and Kennedy (2006: 252).

6 Young (2009: 5).

7 Young (2009: 4).

international legal instruments in the area do not obligate member countries to adopt civil forfeiture.<sup>8</sup>

Ethiopia has been taking measures to strengthen its legal framework to combat crimes such as corruption, money laundering, terrorism and terrorist financing. The amendments to the Anti-Money Laundering and Terrorist Financing Proclamation of 2013 and the Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation of 2005 were part of these measures. However, due to the complicated nature of the crimes, the amendments still do not achieve their objective of fully combating them. The existing legal framework on assets forfeiture does not have the capacity effectively to recover all proceeds of major economic crimes. Criminals ought not to profit from their crimes; rather the proceeds of their crimes ought to be forfeited and used to compensate the society which has been harmed.



This research paper aims to clarify and argue the need for Ethiopia to include civil forfeiture in its assets forfeiture legal framework. It will analyse the existing domestic assets forfeiture laws and international instruments on assets forfeiture. It will show how the new Anti-Money Laundering and Terrorist Financing Proclamation and the other anti-corruption laws deal with assets forfeiture in general and civil forfeiture in particular. For a number of reasons, Ethiopian law enforcement is struggling to investigate crimes such as money laundering and corruption to obtain convictions.

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8 Young (2009: 2).

## 1.2 Level of Economic Crime in Ethiopia

Economic crimes such as corruption and money laundering are threats to the security, stability and economic development of any country. Growth in business transactions and the geographical location of Ethiopia have made the country prone to corruption and other economic crimes.<sup>9</sup> Through these crimes, it is losing a substantial amount of wealth that could have been used to facilitate the ongoing development of the country.<sup>10</sup> Hence, the government has been taking steps to combat corruption and other economic crimes.

Establishing an independent body called the Ethics and Anti-Corruption Commission was amongst the most important measures taken to combat corruption.<sup>11</sup> Similarly, due to the country's vulnerability to other economic crimes such as money laundering and terrorist financing, the country has been strengthening its regime to combat these crimes by enacting and amending laws, by creating awareness within law enforcement and society, and by establishing institutions since 2010.<sup>12</sup>

There has not been a comprehensive study to determine the level of economic crime in Ethiopia in general. However, there have been studies by international organisations such as the World Bank and Transparency International that indicate the level of corruption.<sup>13</sup> In relation to money laundering, its predicate offences such as tax-evasion, drug and human trafficking, fraud, and embezzlement related offences are the most prosecuted crimes.<sup>14</sup> As it is a newly introduced concept, money laundering has been prosecuted rarely in the past

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9 Tu'emay & Cockayne (2012: 16).

10 Tu'emay (2013).

11 Federal Ethics and Anti-Corruption Commission Establishment Proclamation No 235 of 2001. See also the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No 433 of 2005.

12 Annual Performance Report of FEACC (2011).

13 Plummer (2012). See also Transparency International Report on Ethiopia (2013).

14 ESAAMLG Country Report (2012).

seven years. Nevertheless, there are ongoing studies on the impact and level of money laundering.<sup>15</sup>

From the country's history of corruption, one may say that the level of corruption is not similar to other countries which are at the same level of development. According to the sector-based corruption assessment that was conducted by the World Bank in 2012, the level of corruption in Ethiopia was much lower in comparison to other low income countries. However, the study emphasised that there is a high risk of corruption in new sectors such as telecommunications and pharmaceuticals in the Ethiopian context. There are also relatively high risk sectors such as construction, land administration and mining.<sup>16</sup> According to Transparency International, Ethiopia ranked 111 out of 177 countries, and scored 33 out of 100, on its Corruption Perceptions Index of 2013.<sup>17</sup>

As noted above, the level of corruption in Ethiopia is much lower than other countries in similar situations. Nevertheless, there were only 66 countries below her on the 2013 Corruption Perceptions Index.<sup>18</sup> Generally, in the Ethiopian context, it is a given fact that economic crimes such as corruption and money laundering are growing and serious problems that need special attention from the government. Among the measures that should be taken by the government is strengthening the country's legal framework of assets forfeiture, which will have a direct positive impact on combating these crimes.

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15 Annual Report of FDRE Ministry of Justice (2013/2014).

16 Plummer (2012: 2).

17 Transparency International (2013) "The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 - 100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. A country's rank indicates its position relative to the other countries and territories included in the index. This year's index includes 177 countries and territories."

18 Transparency International (2013).

### 1.3 Assets Forfeiture in General

Assets forfeiture, in general, is an act of confiscating property which was involved in criminal activity or obtained from the same activity. It is a widely accepted and practised form of punishment under almost all legal systems of the world.<sup>19</sup> As appears from different international legal instruments, the term forfeiture includes confiscation and the two can be used interchangeably.<sup>20</sup> Forfeiture and confiscation have been defined by international legal instruments such as the Vienna Convention and UNCAC. According to article 1(f) of the Vienna Convention the term confiscation, which includes forfeiture:

“means the permanent deprivation of property by order of a court or other competent authority”.<sup>21</sup>

Article 2(g) of UNCAC has provided the same meaning as the Vienna Convention.<sup>22</sup> According to this definition, the power to confiscate is not given to courts only. Other competent administrative authorities are entitled also to take the same measures.

### 1.4 Assets Forfeiture Procedures

All forfeiture or confiscation of property is always a response to a criminal act. In order to secure the property which was involved in the commission of a crime or which constitutes proceeds of the crime, there are two procedural methods that are acceptable internationally, called civil forfeiture and criminal forfeiture.<sup>23</sup>

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19 Worrall (2008: 3) and Stessens (2000: 30).

20 Article 1(f) of the Vienna Convention and Article 2(g) of UNCAC.

21 Article 1(f) of the Vienna Convention.

22 Article 2(g) of UNCAC.

23 Greenberg *et al* (2009: 13) and Doyle (2007: 6).

### 1.4.1 Criminal Forfeiture

Criminal forfeiture is the act of confiscation of property during the course of criminal proceedings. It is also known as conviction based forfeiture or *in personam* forfeiture. The confiscation will take place only if the defendant is convicted. The confiscation is limited to the offender's personal interest in the property. It does not extend to other properties which are possessed by third parties who have no link to the crime. It is imposed as part of the sanction in the sentencing stage.<sup>24</sup>

### 1.4.2 Civil Forfeiture

As mentioned previously, civil forfeiture is the act of confiscating a property which has a link to or forms proceeds of a crime, by way of civil proceedings only.<sup>25</sup> It is referred to also as non-conviction based forfeiture or *in rem* forfeiture. It covers a wider scope than criminal forfeiture. The case is instituted against the property itself, not the owner of the property. This procedure does not depend on the conviction of the property owner. It is necessary only to prove that the property in question was involved in the commission of crime or constitutes proceeds of the crime.<sup>26</sup> The confiscation can be extended to properties possessed by third parties if they are proved to have a connection with the crime.

Criminal forfeiture by itself is not comprehensive enough to secure all criminal properties which are subject to forfeiture. Together with criminal forfeiture, civil forfeiture will play an essential role to ensure the effective confiscation of all criminal properties. In Ethiopia, a property will be subjected to forfeiture if it is illegal to possess, obtained from criminal

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24 Doyle (2007: 6).

25 Nikolov (2011: 17-8) and Sanbei (2012: 3).

26 Doyle (2007: 6). See also Greenberg *et al* (2009: 13) and Simser (2010: 327).

activities, part of the instrumentalities used in the commission of crime or any other interests of the criminal in relation to the crime.<sup>27</sup> However, as mentioned, both criminal and civil forfeiture are needed to warrant the effective confiscation of all properties liable to forfeiture.

### **1.5 Significance of the Research**

Ethiopia has signed and ratified the United Nations Convention against Corruption, the African Union Convention on Preventing and Combating Corruption, and the United Nations Convention against Transnational Organised Crime. Also, Ethiopia has acceded to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

These conventions, which have become an integral part of the country's legal system as per Article 9(3) of the Constitution, aim to combat corruption and drug trafficking in a variety of ways. Recovery of stolen assets forms a major part of the operation of these conventions, helping to recover proceeds of crimes while, at the same, time helping to discourage the principal crimes.

The above-mentioned conventions encourage states to take measures, to the greatest extent possible, to recover proceeds of crime domestically and internationally by co-operation. Nowadays, with the advancement of technology, the commission of economic and organised crimes has become sophisticated. It has been a challenge for the states to investigate and uncover the sources of such crimes. The act of criminalisation by itself does not suffice to combat these crimes. As a result, states are advised to use all mechanisms to combat these crimes, including assets forfeiture.

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27 Article 98 of the 2005 Criminal Code of Ethiopia.

Of the modes of assets forfeiture available, civil forfeiture has proved to be the most effective. For many reasons, criminals are walking free and benefiting from their wrongdoings. Countries such as the USA, the Philippines and the UK are using civil forfeiture to recover proceeds of crimes and discourage predicate offences. For example, the USA forfeited more money using civil actions than criminal cases in the year 2006.<sup>28</sup> For a country such as Ethiopia, which is one of the developing countries in the world, this mode of forfeiture can be of paramount importance, as the money recovered eventually can help the economy.

Practically, law enforcement agencies are struggling to investigate crimes such as money laundering, corruption and other related offences, and to obtain convictions. What is more, a criminal conviction may not result in forfeiture of all the proceeds of the crimes. For instance, the involvement of third-party properties that cannot be linked directly to the crime might make the forfeiture process incomplete. In this case, lodging a civil case against the property will be desirable.

Incorporating civil or non-conviction based forfeiture laws into the current legal framework of Ethiopia will benefit the country in a substantial way. Ethiopia is losing a significant amount of money through corruption and money laundering.<sup>29</sup> Failure to obtain convictions enables criminals to profit from their wrongful deeds and to commit further crimes. Using civil forfeiture can complement prosecutions and, at the same time, it can be an alternative in the event that the offender cannot be prosecuted, for whatever reasons.

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28 Cassella (2008: 11).

29 Tu'emay (2013).

## 1.6 Research Questions

This research paper aims to illustrate the need for Ethiopia to adopt civil forfeiture as a tool of confiscation. The incorporation of civil forfeiture into the Ethiopian legal framework also might raise questions of constitutionality in relation to the presumption of innocence and the right to property.<sup>30</sup> Thus, the research will provide possible answers as to why it would not be unconstitutional. In addition, the legal obstacles to having a comprehensive civil forfeiture regime in Ethiopia will be identified.

The research will address the problems by analysing the existing assets forfeiture laws of Ethiopia and international instruments on assets forfeiture. It will discuss how the new Anti-Money Laundering and Terrorist Financing Proclamation deals with assets forfeiture in general and civil forfeiture in particular. It will try to clarify whether this Proclamation establishes civil forfeiture and can be a basis for enforcing it.

Although the Proclamation incorporates the idea of civil forfeiture, it does not incorporate procedures to implement civil forfeiture. For matters that are not addressed by the Proclamation, the law refers to the Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation. This latter Proclamation does not provide a legal basis for implementing the new concept that was introduced by the Anti-Money Laundering and Terrorist Financing Proclamation. The implementation of civil forfeiture thus is impracticable. Hence, institutional and legislative changes should be made.

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30 Article 20(3) of the FDRE Constitution.

## 1.7 Literature Survey

There are publications which deal with the concept of civil forfeiture and which explain why it is an essential tool for recovering the proceeds of crime. Most of the publications advocate the incorporation of civil forfeiture into the assets recovery legal framework of countries.

*Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Assets Forfeiture* by Greenberg *et al*, discusses non-conviction based forfeiture as an important tool for assets recovery. Based on the experiences of different countries, the book supports the use of civil forfeiture, especially in cases where the stolen assets are transferred abroad. It provides guidelines for effective assets recovery.<sup>31</sup>

Another example of a work in the area is Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, which deals with a general perspective on civil forfeiture and, by discussing different domestic legal frameworks, shows how it is being used as an effective assets recovery mechanism.<sup>32</sup>

However, these works only deal with the general characteristics of civil forfeiture. There also are research papers which engage with the idea of civil forfeiture but they only deal with country specific situations.<sup>33</sup> When we come to the situation in Ethiopia, there are no publications which deal with the concept of civil forfeiture and its associated problems. This research paper will focus on the need for Ethiopia to incorporate civil forfeiture into her

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31 Greenberg *et al* (2009).

32 Young (ed) (2009).

33 Opedayo (2010) and Makhanu (2012).

legal framework of assets forfeiture. It will point out ways of implementing the recently introduced concept of civil forfeiture in the Ethiopian legal system.



## CHAPTER TWO

### LEGAL FRAMEWORK OF ASSETS FORFEITURE

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This chapter will deal with the legal framework of assets forfeiture in Ethiopia as well as some of the relevant international instruments. It will deal also with the significance of assets forfeiture laws in combating economic crimes such as corruption and money laundering.

#### 2.1 Legal Framework of Assets Forfeiture in Ethiopia

Ethiopia has incorporated assets forfeiture as an integral part of law enforcement since the introduction of its modern criminal law.<sup>34</sup> It has been playing a significant role in the country's efforts to prevent and combat crimes in general and economic crimes in particular. There are different domestic statutes which deal with the issue.

The FDRE Criminal Code contains general provisions regarding the confiscation of the proceeds of crimes and other property as part of punishment.<sup>35</sup> There are also other laws which regulate the issue of confiscation in relation to specific crimes. These are the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434 of 2005, the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013, the Anti-Terrorism Proclamation No 652 of 2009 and the Customs Proclamation No 622 of 2009.

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34 Article 97 of the 1957 Penal Code of Ethiopia.

35 Article 98 of the 2005 Criminal Code of Ethiopia.

For the purposes of confiscation, the term property is defined variously under the different laws. For instance, Article 2(2) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation defines “property” acquired by the commission of a corruption offence as:

“any property which the offender owns or possesses directly or indirectly as a result of the commission of the corruption offence, and includes any such property or money which has been donated directly or indirectly by the offender, put under someone's custody or hidden somewhere.”

Article 2(1) of the Anti-Terrorism Proclamation defines "property" as:

“any assets whether corporeal or incorporeal or movable or immovable, and includes deeds and instruments evidencing title to or interest in such assets such (*sic*) as bank accounts;”

Article 2(2) of the Anti-Terrorism Proclamation defines "proceeds of terrorism" as:

“any property, including cash, derived or obtained from property traceable to a terrorist act, irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found.”

Article 2(5) of the Anti-Money Laundering and Terrorist Financing Proclamation defines

“property” as:

“any assets whether movable or immovable, or tangible or intangible, including legal instruments in any form evidencing title to or interest in such assets such (*sic*) as bank credits, traveller’s cheques, bank cheques, money orders, shares, bonds and any interest, dividend or other income or value generated by such assets.”

From the above definitions it may be concluded that the properties that could be proceeds of crime are covered comprehensively.

### 2.1.1 Crime Prevention and Criminal Justice Policy

The Crime Prevention and Criminal Justice Policy, which came into force in 2009, aims to ensure the peace and security of society and the state, as well as to guarantee the rule of law by protecting the rights and freedoms of citizens. In relation to forfeiture, the Policy underlines the need to take the profit out of unlawful activities such as organised crime, terrorism, and corruption. It gives emphasis to the criminal justice system being equipped with the means to examine suspicious financial transactions and prevent money laundering.<sup>36</sup> The forfeiture of proceeds and instrumentalities of these crimes will contribute significantly to the efforts taken by the country to prevent and fight crime. It is necessary to freeze or seize property that has links to criminal activity in order effectively to carry out investigations and prosecutions.

The Crime Prevention and Criminal Justice Policy clearly provides for the country's legal system to be in line with international conventions on organised crime, drug trafficking, corruption, and the like. It requires the law enforcement and criminal justice agencies to cooperate with the international community in the fight against money laundering, corruption and the financing of terrorism. It underlines the need to make domestic laws compatible with international instruments. In particular, the Policy stresses the need to fill the legal *lacunae* on the issues of freezing and confiscation of assets, as well as the repatriation and disposition of assets.<sup>37</sup>

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36 Crime Prevention and Criminal Justice Policy (2009: 22).

37 Crime Prevention and Criminal Justice Policy (2009: 22).

The Policy calls for the amendment of the Criminal Procedure Code and other special laws to accommodate the issues of forfeiture and management of frozen or seized assets efficiently and timeously, without compromising the rights of *bona fide* third parties.<sup>38</sup>

### **2.1.2 Criminal Code of Ethiopia**

Modern criminal law in Ethiopia came into existence with Penal Code of 1957. Article 97 of this Code incorporates confiscation of property as one form of punishment after conviction. It gives power to courts to order confiscation of any property which directly or indirectly forms the proceeds of crime. The confiscation may extend even to property of the offender obtained lawfully. Similarly, the new Criminal Code of 2005, which repealed the 1957 Penal Code, has incorporated confiscation as a form of punishment in the event of conviction.

Article 98 of the Criminal Code provides that:

“any property which the criminal has acquired, directly or indirectly, by the commission of the crime for which he was convicted shall be confiscated. An order of confiscation may also apply to any property lawfully acquired by the criminal.”

In addition, Article 100 of the Criminal Code provides that:

“any material benefits given or intended to be given to a criminal to commit a crime shall be forfeited to the State. If they no longer exist in kind the person who received them shall refund their value where the accused is found guilty.”

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38 Crime Prevention and Criminal Justice Policy (2009: 22).

### **2.1.3 Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434 of 2005**

In the event of conviction, article 29 of this Proclamation empowers the courts to order the confiscation of the offender's property equivalent to the proceeds of the crime. Also, the prosecution can apply for a confiscation order if the court fails to order confiscation *meromotu*.<sup>39</sup> The law gives wider room for the confiscation of property that have illicit origins. In terms of article 33 of the Proclamation, the standard of proof to decide on the amount of property that should be confiscated or whether the offender has obtained profit out of his crime is proof on the balance of probabilities. The Proclamation may be criticised for abandoning the criminal standard of proof which is higher than proof on the balance of probabilities, but this shows the stricter stand the government is taking on the matter.

### **2.1.4 Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013**

Despite the efforts by the government of Ethiopia to prevent and combat money laundering and terrorist financing, the incidence of these crimes is increasing.<sup>40</sup> Both crimes are punishable by rigorous imprisonment of ten to fifteen years and a fine not exceeding one hundred thousand Ethiopian birr. The punishment may be increased by rigorous imprisonment of fifteen to twenty-five years and a fine not exceeding one hundred and fifty thousand Ethiopian birr. In addition to the above punishments, fruits of the crimes are subject to confiscation.

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39 Article 31 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434 of 2005.

40 ESAAMLG country report (2012).

Article 35 of this Proclamation deals with the issue of confiscation. In the event of conviction, the proceeds and instrumentalities of financing of terrorism and money laundering, together with its predicate offences, are subject to confiscation. Where the proceeds have been changed or used, property of the offender equivalent to the proceeds will be subject to confiscation. The court may order also the confiscation of other property obtained during the five years prior to the prosecution, if there is a legitimate reason to believe that such property is linked to the crimes and the offender has failed to explain otherwise. In addition, proceeds or instrumentalities of crime that have been transferred to a third party will be subject to confiscation. However, the law recognises the rights of *bona fide* third parties.

In contrast to the criminal confiscation considered above, Article 35 includes three situations where civil forfeiture may be used to confiscate proceeds of crime. This procedure is a new concept in the Ethiopian legal system. Article 35(3) of the Proclamation states:

“In case where an offence involving money laundering or a predicate offence, or financing of terrorism, is established by the court and the perpetrator thereof cannot be convicted because he is unknown, he absconded or died, the court may nevertheless order the confiscation of the seized funds or property if sufficient evidence is adduced that it constitutes proceeds of crime or instrumentalities.”<sup>41</sup>

The above provision establishes a legal ground for civil forfeiture in Ethiopia. However, although the Proclamation incorporates the idea of civil forfeiture, it does not incorporate procedures to implement it. For matters that are not addressed by the Proclamation, the law refers to the Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation with respect to the execution of orders of freezing, seizure, and confiscation

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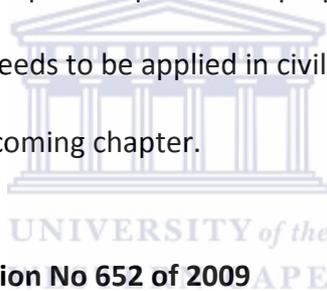
41 Article 35(3) of the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013.

of property.<sup>42</sup> However, the designated Proclamation does not provide a comprehensive legal basis for implementing the new concept that was introduced by Proclamation No 780 of 2013.

In Ethiopia, the standard of proof required for criminal forfeiture<sup>43</sup> is proof on a preponderance of the evidence. Article 33 of Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation provides that:

“The standard of proof required to determine any question arising as to whether a person has benefited from criminal conduct, or the amount to be recovered shall be that applicable in civil proceedings.”<sup>44</sup>

In civil proceedings the standard of proof is proof on a preponderance of the evidence.<sup>45</sup> The required standard of proof that needs to be applied in civil forfeiture and other procedural matters will be addressed in the coming chapter.



### **2.1.5 Anti-Terrorism Proclamation No 652 of 2009**

As terrorism poses a great threat to the social, economic and political situation of the country, the government has been taking measures to prevent and combat it. A comprehensive law that can bring the intended result is among these measures. The Anti-Terrorism Proclamation criminalises acts of terrorism. Other than sanctions of rigorous imprisonment and a fine, property derived from the crime or used to facilitate the commission of the crime is subject to confiscation.<sup>46</sup>

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42 Article 55(1) of the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013.

43 For corruption crimes and for crimes established under the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013.

44 Article 33 of the Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation No 434 of 2005.

45 Article 255(1) of the Civil Procedure Code of Ethiopia.

46 Article 27 of Anti-Terrorism Proclamation No 652 of 2009.

### **2.1.6 Customs Proclamation No 622 of 2009**

The Customs and Revenue Authority has been given a wide range of discretion. It enjoys an inherent power of forfeiture and it does not require authorisation from the courts to exercise this power. Article 104 of the Customs Proclamation provides that:

“any goods or means of transport shall, without further order, be forfeited upon the conviction of a person accused of an offence entailing forfeiture of such goods or means of transport.”

There are also other provisions dealing with the issue of confiscation and provisional measures which are more or less similar to the other confiscation laws of Ethiopia. Crimes in the Proclamation are punishable with imprisonment and forfeiture of the property involved in the crimes.<sup>47</sup>



### **2.2 International Co-operation in Assets Forfeiture under Ethiopian Law**

The Crime Prevention and Criminal Justice Policy of the Ethiopian government recognises the need for the country’s law enforcement agencies to take part actively in international co-operation and perform the duties of the country as member state of different international instruments. In order to confront the challenges posed by crimes such as corruption, money laundering and terrorism, the Policy requires competent authorities to co-operate with other states in the freezing and confiscation of the proceeds of these crimes. In addition, it requires the authorities to extradite the offenders. Such co-operation may be based on bilateral or multilateral agreements. Even in the absence of these agreements, the Policy allows for co-operation in terms of domestic laws.<sup>48</sup>

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47 Customs Proclamation No 622/2009.

48 Crime Prevention and Criminal Justice Policy (2009: 27-8).

The Policy emphasises the need to strengthen the capacity of the law enforcement agencies and the legal framework of the country with a view to engaging in mutual legal assistance and extradition requests efficiently. Other than the Ethiopian diplomatic channels, it calls for the establishment of internal co-ordination within the Ministry of Justice.<sup>49</sup> The stand of the Policy is a clear indication of the Ethiopian government's political commitment to prevent and combat crimes which can affect the economic, social and political situation of a country by co-operating with other countries. Hence, the Policy has been reflected in some laws which came into force after said Policy was ratified by the Ethiopian Parliament.

International co-operation in mutual legal assistance and extradition in relation to offences of money laundering and its predicate offences, which include corruption offences and terrorist financing, are incorporated in the Anti-Money Laundering and Combating of Financing of Terrorism Proclamation. In addition, Ethiopia is a party to the Vienna Convention, UNCAC and the Palermo Convention which obligate states parties to offer one another a wide range of co-operation in mutual legal assistance and extradition. Article 38 of the Proclamation obligates competent authorities to provide wide ranging mutual legal assistance in money laundering and terrorist financing.

Articles 42 and 43 of the Proclamation provide for comprehensive mutual legal assistance in requests for provisional measures, such as freezing and seizure, and confiscation orders. However, it has limitations with regard to co-ordinated provisional measures and confiscation, as the country does not permit the actions to be taken in collaboration with the law enforcement agencies of other countries. In addition, there is a problem in the

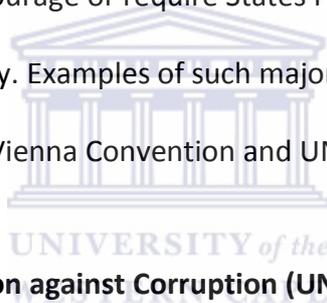
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49 Crime Prevention and Criminal Justice Policy (2009: 27-8).

proper management of assets recovered in that the property usually ends up in being abused or destroyed.<sup>50</sup>

### **2.3 International Legal Instruments on Assets Forfeiture**

There are different international instruments which deal with the issue of assets forfeiture in relation to different crimes. The issue is raised usually in connection with economic and political crimes such as corruption, money laundering and its predicate offences, terrorism and terrorist financing. Due to their impact on the social, economic and political situation of a country, the legal instruments that deal with these crimes incorporate assets forfeiture as an important measure. They encourage or require States Parties to adopt the instruments and implement them domestically. Examples of such major international instruments are UNCAC, the AU Convention, the Vienna Convention and UNCTOC.



#### **2.3.1 United Nations Convention against Corruption (UNCAC)**

Corruption is now a threat to the international community. Due to its transnational effect, domestic or regional measures cannot be adequate to prevent and combat it. Hence, the international community began to globalise the fight against corruption in the 1970s. Before the adoption of UNCAC in 2003, there were regional efforts to internationalise the anti-corruption movement. The OAS Convention, the OECD Convention, the CoE Conventions, the SADC Protocol, the ECOWAS Protocol and the AU Convention played an important role in the process of globalisation.<sup>51</sup>

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50 World Bank and ESAAMLG Ethiopia AML/CFT Assessment (2014).

51 Posadas (2000: 346-8). See also AU Convention (2003), SADC Protocol (2001), and ECOWAS Protocol (2001).

With the adoption of UNCAC in 2003, the globalisation of the crime of corruption finally was achieved. The Convention entered into force after it was ratified by 30 countries in 2005. As provided in the preamble to the Convention, the States Parties were:

“Determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international co-operation in assets recovery.”

Article 1 of the Convention specifies the purposes of the Convention as follows:

“To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

To promote integrity, accountability and proper management of public affairs and public property.”

Chapter V of the Convention is dedicated to the regulation of assets forfeiture. It is established as a fundamental principle of the Convention.<sup>52</sup> Assets forfeiture is a most important element in preventing and combating corruption and other economic crimes. It plays a pivotal role for developing countries in restoring stolen assets which have been moved to other countries.

The Convention emphasises co-operation and assistance among States Parties. It requires them to apply assets forfeiture measures to the greatest extent possible. Due to the lack of co-operation among states, offenders were able to hide the proceeds of their crimes outside the place of commission. There was no way for victim states to retrieve the stolen public assets since there was no effective co-operation and mutual legal assistance among states.

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52 Article 51 of UNCAC.

This situation led the states to agree upon a new international legal framework that establishes responsibility for every state to solve the problem and end the impunity.<sup>53</sup>

#### **Article 52: Prevention and Detection of Transfers of Proceeds of Crime**

This provision obliges financial institutions of States Parties to conduct customer due diligence (CDD) regarding business transactions. States have obligations to stop the transfer of proceeds of crimes into and out of their financial systems. They are required also to establish financial disclosure systems for public officials and to take legal measures in relation to non-compliance.

#### **Article 53: Measures for Direct Recovery of Property**

This provision requires States Parties to facilitate measures for other states to recover illicitly-acquired assets directly in their courts. Said courts are required to accept other States Parties as lawful owners of the property in question and are entitled to order the offenders to pay compensation to the victim State Party.

#### **Article 54: Mechanisms for Recovery of Property through International Co-operation in Confiscation**

States Parties are required to establish jurisdiction for international assets forfeiture. They are required to give power to their courts to make domestic assets forfeiture order and to enforce foreign assets forfeiture order. Where the illegal property is located within their jurisdiction, they are required to take the appropriate legal measures, according to their domestic law, to confiscate the property. In addition they are required to take provisional

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53 Claman (2008: 334-5).

measures such as freezing and seizure, where there is legitimate reason for possible confiscation of the property.

Article 54 provides also for States Parties to use non-conviction based forfeiture in cases where the offender is dead, missing or where prosecution is impossible for other appropriate reasons. However, the Convention does not obligate States Parties to include non-conviction based forfeiture in their confiscation legal regimes. As corruption is committed often by public officials who have power to influence the investigation and prosecution process, it is unlikely that the law enforcement authorities will succeed with criminal proceedings to secure property which has been stolen from the public. Hence, the adoption of non-conviction based forfeiture by States Parties could make the recovery of stolen assets effective.



**Article 55: International Co-operation for Purposes of Confiscation**

Courts of States Parties are required to enforce the power given to them under Article 54 of the Convention. The provision emphasises the need for States Parties to co-operate in order to solve the problems of mutual legal assistance in assets recovery. It sets out procedures that should be followed by a State Party to secure the proceeds of crime, property, equipment or other instrumentalities of crime by its courts or by the courts of the requesting State Party. In addition, it lists requirements that should be fulfilled by the requesting State Party in order to achieve the same result.

## **Article 57: Return and Disposal of Assets**

This provision requires States Parties to return property they confiscate based on the request of the Victim State. It is an important measure in mutual legal assistance that can bring a significant change in fixing the wrongs that were done by the offenders against the citizens of the Victim States.

Notwithstanding the rights of *bona fide* third parties, as per their domestic law and the Convention, States Parties are required to repatriate confiscated property to its lawful owners. However, the Convention allows the requested State Party to deduct reasonable expenses incurred in the course of investigations, prosecutions or judicial proceedings undertaken to confiscate the illicitly acquired assets.

### **2.3.2 United Nations Convention against Transnational Organised Crime (UNTOC)**

This Convention was enacted mainly to prevent and combat transnational organised crime. As the crime of corruption is linked closely to transnational organised crime, it incorporates also provisions which obligate States Parties to criminalise corruption and to adopt measures that prevent and combat it.<sup>54</sup>

Article 12 of the Convention provides for States Parties to incorporate into their domestic law seizure and confiscation of properties which are direct proceeds of transnational organised crime or, where the proceeds are used or changed, other property equivalent to the proceeds. When the proceeds are mixed with clean property, the seizure and confiscation shall be extended to such property up to the value of the mixed proceeds. The

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54 Articles 8-9 of UNTOC.

same is true of the income generated from proceeds of crime. In addition, States Parties are required to seize and confiscate property, equipment or other instrumentalities which were used to facilitate the commission of the crime.

### **2.3.3 African Union Convention on Preventing and Combating Corruption (AU Convention)**

The AU Convention is the result of a regional movement to prevent and combat the corruption which is an important cause of the continent's social, economic and political problems. It was adopted on 11 July 2003 and entered into force on 5 August 2006. The Convention incorporates assets forfeiture as a key measure in preventing and combating crimes of corruption.

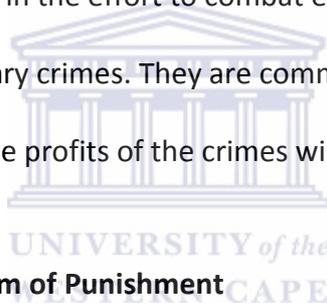


Article 16 of the Convention obligates States Parties to incorporate laws on seizure and confiscation of the proceeds and instrumentalities of corruption into their domestic legal frameworks. It requires States Parties to confiscate proceeds of corruption offences or, when the proceeds are no longer available, property which is equivalent to the proceeds, and fruits of the property or proceeds of the crimes. It also obligates States Parties to repatriate proceeds of corruption to the requesting State Party.

## 2.4 Significance of Assets Forfeiture Laws in Combating Economic Crimes

Most of the developing countries lose their wealth through corrupt public officials. It is estimated that between \$1 trillion and \$ 1.6 trillion worth of public assets are stolen and moved out of these countries every year through different illegal acts.<sup>55</sup> This will result in the deterioration of sectors such as health, education, and other basic services, putting the lives of millions at risk. Countries have been making efforts to reduce and eliminate the impact of such acts. As mentioned earlier, strengthening the legal framework of assets forfeiture is among those efforts.

Assets forfeiture plays a vital role in the effort to combat economic crimes. Such crimes tend to be more profitable than ordinary crimes. They are committed basically for the purpose of gaining profit, and confiscating the profits of the crimes will discourage their commission.



### 2.4.1 Assets Forfeiture as a Form of Punishment

Assets forfeiture usually constitutes a part of punishment. In different criminal jurisdictions, forfeiture of property that is proceeds of crime or property that was used to facilitate the commission of a crime or property which has no link to the crime but is owned by the offender, forms part of criminal punishment.<sup>56</sup> Such confiscation plays a major role in breaking the cycles of impunity in Africa and the rest of the developing world.

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55 Greenberg *et al* (2009: 7).

56 Cassella (2009: 32). See also Alldridge (2003: 60).

### **2.4.2 Assets Forfeiture as a Form of Incapacitation**

One of the purposes of punishment is to incapacitate the criminals from committing further crimes. Incarcerating the offender, by itself, will not achieve the desired purpose fully.

Hence, instruments which were used to facilitate and to commit the crime should be forfeited so they will not be used to commit further crimes. In this case assets forfeiture is being used as incapacitation.<sup>57</sup>

### **2.4.3 Assets Forfeiture as a Form of Compensation to Victims**

Assets forfeiture can be used as a way to compensate victims of crimes. When compared to other funds which can take a long time to become available, it is an easy way of securing compensation for victims.<sup>58</sup> For instance, the Criminal Code of Ethiopia allows for the use of confiscated property to compensate the injured party. It provides:

“Where it appears that compensation will not be paid by the criminal or those liable on his behalf on account of the circumstances of the case or their situation, the Court may order that the proceeds or part of the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or a part of the fine or of the yield of the conversion into work, or confiscated property be paid to the injured party.”<sup>59</sup>

After securing compensation for the victims, the government will have the subrogatory right to the claim of the injured party and may enforce it against the person who caused the damage.<sup>60</sup>

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57 Cassella (2009: 31).

58 Cassella (2009: 31) and Rider (2007: 30).

59 Article 103 of the 2005 Criminal Code of Ethiopia.

60 Article 103 of the 2005 Criminal Code of Ethiopia.

#### 2.4.4 Assets forfeiture as a Form of Deterrence

People tend to commit crimes when they profit from them. Like the deterrence purpose of punishment, confiscating proceeds of crimes can discourage the offender from committing further crimes. It also sends a message to the community that one will not be allowed to profit from one's wrongdoings.<sup>61</sup>



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61 Cassella (2009: 31). See also Alldridge (2003: 46-8) and Gaumer (2007: 29).

## CHAPTER THREE

### ADOPTING CIVIL FORFEITURE

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This chapter will elaborate upon the idea of civil forfeiture, its significance and its drawbacks. The need to adopt civil forfeiture for Ethiopia will be addressed. Issues in civil forfeiture, such as its constitutionality in relation to the presumption of innocence and the right to property, will be discussed. Also, the chapter will highlight the core elements that need to be considered in adopting civil forfeiture legislation.

#### 3.1 General Background of Civil Forfeiture

As discussed in the previous chapters, civil forfeiture is an *in rem* action instituted against the property, without the need for securing a criminal conviction. Since it is a non-conviction based forfeiture procedure, the prosecution only needs to prove the existence of an unlawful activity and its link to the property in question. And in most jurisdictions that practise civil forfeiture, the standard of proof is proof on a preponderance of the evidence.<sup>62</sup> In general, there are two policy rationales for civil forfeiture: the first is that criminals must not enjoy fruits of their crime; and the second is to discourage future crimes.<sup>63</sup>

The USA is the place where civil forfeiture originated.<sup>64</sup> Since 1776, the country has been using it to confiscate property associated with violation of the law. It has been amending its civil forfeiture laws to fit the present situations.<sup>65</sup> Although civil forfeiture has not been

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62 Cassella (2003: 303).

63 Simser (2009: 13).

64 Young (2009: 2).

65 Greenberg *et al* (2009: 18).

accepted yet by the majority of jurisdictions, its use has been expanding in the last two decades.<sup>66</sup>

Civil forfeiture may have different names in different legal systems. It may be referred as civil assets forfeiture, non-conviction based assets forfeiture, or civil recovery. Even if there are no compulsory provisions on the use of civil forfeiture under international assets recovery instruments, they encourage its use.<sup>67</sup> It is amongst the responses of the international community to prevent and combat crimes such as corruption, terrorism and money laundering. In particular, its development is associated with the limitations of criminal forfeiture. Countries such as South Africa (1998), Ireland (1996), the United Kingdom (2002) and Australia (2002) are amongst the countries that have introduced civil forfeiture as a new way to prevent and combat organised and serious crime.<sup>68</sup>

Among the international legal instruments that have incorporated assets forfeiture provisions, UNCAC is the only instrument to include civil forfeiture. It encourages States Parties to provide co-operation to one another based on it. International organisations such as the United Nations (UN), the Financial Action Task Force (FATF) and the European Union (EU) also have recommended that States incorporate civil forfeiture into their assets forfeiture regime.<sup>69</sup> For instance, the FATF recommends that countries consider:

“adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”<sup>70</sup>

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66 Godinho (2009: 322).

67 Young & Stone (2006: 3-4).

68 Young (2009: 1&3). See also Simser (2009: 13-4, 17) and Godinho (2009: 322).

69 Greenberg *et al* (2009: 18-9).

70 FATF Recommendation 4 (2012). See also Interpretive Note to FATF Recommendation 4.

Civil forfeiture is practised predominantly in common law countries. However, nowadays it is being incorporated into both civil and common law legal systems.<sup>71</sup> As noted in the previous chapter, irrespective of the difference in legal tradition, Article 54(1)(c) of UNCAC encourages States Parties to incorporate civil forfeiture into their assets forfeiture regime.

As Greenberg *et al* point out, there are similarities and differences between the civil and common law systems in applying civil forfeiture. The fact that the case is instituted against the property without the need for conviction of the offender is similar in both legal systems. However, there are differences in relation to the standard of proof required to confiscate the property, the court of jurisdiction, and the extent of the prosecutor's discretion in handling the matter. In general, unlike the civil law system, the prosecutor has broad prosecutorial discretion in a common law system. For example, in the common law system, the prosecutor has discretion to decide, based on the economic value at stake, issues such as which property to seize, or based on the available evidence, whether or not to proceed with the prosecution.<sup>72</sup>

In the common law tradition, the standard used to prove whether the property is a result of unlawful conduct is proof on a preponderance of the evidence and the case is instituted in civil bench. In the civil law tradition, the standard of proof is the same as criminal proceedings, that is, proof beyond reasonable doubt and the case will be filed in criminal bench as well. However, not all civil law countries follow this rule.<sup>73</sup>

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71 Sanbei (2012: 12-3).

72 Greenberg *et al* (2009: 17 & 48).

73 Greenberg *et al* (2009: 17).

### 3.2 Relationship between Civil Forfeiture and Criminal Proceedings

As it is always criminal conduct that initiates civil forfeiture proceeding, countries first should decide upon the relationship between civil forfeiture and criminal proceedings when incorporating the former into their assets forfeiture regime. It is necessary to have a rule which regulates the relationship between criminal and civil proceedings. It is up to the country to decide whether civil forfeiture operates parallel to the prosecution or commences after criminal proceedings, when the government has failed to proceed with the prosecution.<sup>74</sup>

Although, it is preferable for the two proceedings to operate in parallel,<sup>75</sup> it may not be necessary always to proceed with civil forfeiture and criminal forfeiture at the same time. Depending on the specific situation or based on the request of either party, a country can design its civil forfeiture law to allow for the adjournment of the civil proceedings until the criminal proceedings have been completed.<sup>76</sup> When the proceedings take place simultaneously, the rights of the offender might be compromised, since the standards of proof used in civil and criminal proceedings are different. The law then should take into consideration that the information compelled out of the offender in the civil proceedings ought not to be used against him in the criminal proceedings. Otherwise, on one hand, the offender might not defend his property in the civil proceedings out of fear or, on the other hand, he may use the information obtained from the civil proceedings to influence the criminal proceedings in his favour.<sup>77</sup> This is an important issue which should be addressed in

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74 Greenberg *et al* (2009: 30-1).

75 Gaumer (2007: 67).

76 Kennedy (2006: 151). See also Greenberg *et al* (2009: 30).

77 Greenberg *et al* (2009: 31). See also Kennedy (2006: 151).

the adoption of a civil forfeiture law. Additional main points to be considered in the adoption of civil forfeiture legislation will be addressed in the coming sections.

To keep all the options open, it is advisable for the prosecution to proceed with both civil forfeiture and criminal proceedings simultaneously or consecutively. In general, it is essential for law enforcement or the legislator to understand the pros and cons of both proceedings before commencing any case or adopting new laws on civil forfeiture.

### **3.3 Comparing Civil Forfeiture and Criminal Forfeiture**

#### **3.3.1 Advantages of Civil Forfeiture**

Firstly, in most jurisdictions that permit the use of civil forfeiture, the prosecution needs to prove only the connection between the property and the crime on a preponderance of the evidence. The same standard of proof is used to prove the commission of the crime that is the basis for the civil forfeiture proceedings.<sup>78</sup> Unlike criminal proceedings, the prosecution is expected to prove the existence of criminal conduct that gave rise to the property in question, and to do so on a preponderance of the evidence.

Secondly, since civil forfeiture does not need the conviction of anyone involved in the crime, as the case will be instituted against the property only.<sup>79</sup> In particular, it will be desirable where the offender has disappeared or when the offender has died before conviction or when there is evidence showing that the property is associated with crime or proceeds of crime but the person involved in the crime has not been identified.<sup>80</sup> In addition, it usually is difficult to convict senior public officials or criminals who are highly organised, as they do

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78 Cassella (2009: 44) and Nikolov (2011: 23 & 25).

79 Sanbei (2012: 4).

80 Cassella (2009: 44). See also Cassella (2008: 12-3).

not commit the crime directly. Rather, they will find others to do it for them. This will complicate the investigation process and identification of the key offender or the master-mind. In this case, it is advisable to use civil forfeiture to secure the proceeds before the offenders find a way to hide or move the property.<sup>81</sup>

What is more, civil forfeiture can be used to forfeit proceeds of crime in a country other than the country where the crime has been prosecuted already. The USA is a good example of using civil forfeiture in such event. For example, in the case of *United States v Union Bank for Savings and Investment (Jordan)*, the court allowed the recovery of property found in the country without the need to prosecute or establish jurisdiction over offenders who were prosecuted in foreign courts.<sup>82</sup>

Thirdly, civil forfeiture is not limited to property related to a particular transaction but will extend to other property which is believed to be derived from illegal activities. Since forfeiture of property in civil proceedings does not depend on criminal conviction, unlike criminal forfeiture in which the forfeiture only extends to property that has links to the particular offence, the prosecution can institute the case against all property which has links or is believed to be proceeds of any criminal conduct.<sup>83</sup>

Fourthly, in criminal forfeiture, only the property under the direct or indirect control of the offender is subject to forfeiture. Property that has a connection to the crime but belongs to a third party will not be the subject of the criminal forfeiture. However, in civil forfeiture, since the case is instituted against the property not the owners, the prosecution can

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81 Cassella (2008: 11) and Brun *et al* (2011: 107).

82 Cassella (2008: 13). See also *United States v Union Bank for Savings and Investment (Jordan)*, 487 F.3d 8 (1st Cir. 2007) and Cassella (2003: 303).

83 Cassella (2009: 45).

proceed against the property owned by non-innocent third parties, if such property has links to the crime or was used to commit the crime. The third parties have a right to defend their property and the law provides protection to those who own the property in good faith.<sup>84</sup>

Fifthly, for instance, in USA in 2006 and 2007, 80 percent of property brought to the court to be forfeited went uncontested by their owners. This gives the advantage of time and cost. The country in fact recovered more proceeds of crime through civil forfeiture than criminal forfeiture. As a result, it was possible to obtain the proceeds of crime in a short period of time without incurring significant costs.<sup>85</sup> However, the USA is a special case and there is no guarantee that the same will be true for all countries.

### **3.3.2 Disadvantages of Civil Forfeiture**

In civil forfeiture proceedings, instead of filing the forfeiture claim together with the criminal proceedings, a separate case will be opened in another bench. This might create a burden on the prosecutor and other staff to do the same work in the civil bench that was presented to the criminal bench.<sup>86</sup>

The forfeiture is limited to property that was gained through illegal activities. The court cannot order the confiscation of other property or money as a replacement for a lost asset.<sup>87</sup> In some jurisdictions, such as the USA, the law allows the property owners to claim attorney's fees and other court fees when the government has failed to establish its case in

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84 Cassella (2009: 45). See also Cassella (2008: 11-2).

85 Cassella (2008: 10-1).

86 Cassella (2009: 46).

87 Cassella (2009: 46).

civil forfeiture proceedings.<sup>88</sup> In addition, as the case is instituted as a civil matter, there might be statute of limitations within which to file the case.<sup>89</sup>

### 3.3.3 Advantages of Criminal Forfeiture

Firstly, in criminal proceedings both the case to prove the offender's guilt and the forfeiture application can take place in the same proceedings, since in most jurisdictions criminal forfeiture constitutes part of the sentencing process.<sup>90</sup>

Secondly, unlike civil proceedings, in criminal proceedings the court can order the forfeiture of other property or money as a substitute for proceeds of crime that have been lost or have disappeared. In addition, the court can order the forfeiture of other legitimate property of the offender as part of the punishment.<sup>91</sup>

Thirdly, there will be no statute of limitations for the institution of criminal forfeiture proceedings.<sup>92</sup> Although there are jurisdictions which put statutory time limits upon instituting charges for some crimes,<sup>93</sup> there still will be sufficient time to file the forfeiture case, since the time limit invariably is much longer than for civil proceedings.

Fourthly, criminal forfeiture is advantageous for the government in relation to attorney's fees and other court fees, since in most jurisdictions third parties are not entitled to claim

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88 Section 4 of Civil Asset Forfeiture Reform Act of 2000 of the USA. See also Cassella (2009: 47).

89 Cassella (2009: 46).

90 Cassella (2009: 47).

91 Cassella (2009: 47) and Nikolov (2011: 23).

92 Cassella (2009: 48).

93 Article 773 of the 2005 Criminal Code of Ethiopia.

such fees, even when the government has failed to establish its case in criminal proceedings.<sup>94</sup>

### 3.3.4 Disadvantages of Criminal Forfeiture

It is the limitations of criminal forfeiture that prompted countries to consider the use of civil forfeiture. Firstly, since criminal forfeiture is part of the sentencing process, it requires a criminal conviction. The prosecution has to prove the guilt of the offender beyond reasonable doubt.<sup>95</sup> In cases where the defendant is dead or has absconded or is unknown, or where prosecution is impossible for any other reasons, proceeds of the crime cannot be confiscated.<sup>96</sup> This will encourage further crimes by sending the wrong message to the community.

Secondly, although there is a conviction, the forfeiture is limited to the offender's property only. Even if the property possessed or owned by third parties is linked to the crime, the forfeiture cannot proceed to such property.<sup>97</sup> Hence, a criminal conviction may not result in forfeiture of all the proceeds of crime. In this case, lodging a civil case against the property will be desirable.

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94 Cassella (2009: 48).

95 Cassella (2009: 49).

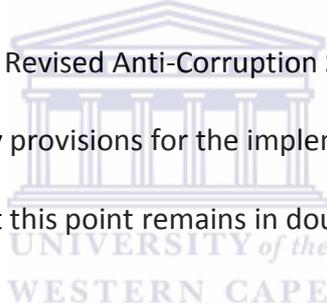
96 Cassella (2008: 11).

97 Cassella (2009: 49). See, for example, Article 35 of the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013 of Ethiopia.

### **3.4 Civil Forfeiture under the Ethiopian Legal Framework**

As mentioned in chapter two, the Anti-Money Laundering and Terrorist Financing Proclamation introduced the concept of civil forfeiture into the Ethiopian assets forfeiture legal framework by implication. The Proclamation permits the use of civil forfeiture to confiscate proceeds of crimes in situations where the offender is unknown, has absconded or has died and conviction becomes unattainable.<sup>98</sup>

This implied creation of civil forfeiture by this Proclamation, however, is not sufficient to establish a comprehensive non-conviction based forfeiture scheme aimed at confiscating the proceeds and instrumentalities of crime, as in the case of criminal forfeiture. Neither this Proclamation nor the related Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation has any provisions for the implementation of civil forfeiture. Therefore, the implementation at this point remains in doubt.



However, though further comprehensive legislation is needed to systematise the use of civil forfeiture, it can be said that the Anti-Money Laundering and Terrorist Financing Proclamation constitutes a foundation for civil forfeiture in Ethiopia. In particular, Article 35(3) of the Proclamation can be taken as a legal ground for civil forfeiture in Ethiopia.

### **3.5 The Need for Ethiopia to Adopt Civil Forfeiture**

Ethiopia's rapid economic development increased her vulnerability to economic crimes such as corruption and money laundering. As mentioned in the previous chapters, though she is a party to different international instruments and has various domestic laws on assets forfeiture, the law enforcement agencies do not have sufficient knowledge and capacity to

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98 Article 35(3) of the Anti-Money Laundering and Terrorist Financing Proclamation No 780 of 2013.

investigate and prosecute the crimes.<sup>99</sup> Hence, since criminal forfeiture requires conviction, the application of the existing criminal assets forfeiture laws will be limited.

Because of the limitations of the criminal assets forfeiture laws, the international community has shifted its attention to the use of civil forfeiture. It has proved to be the most effective where conviction is unattainable for whatever reason.<sup>100</sup> Ethiopia, which is one of the developing countries, can benefit from the use of civil forfeiture as others, including the developed countries, have benefited.

Incorporating civil or non-conviction based forfeiture laws into the current legal framework of Ethiopia will benefit the country in a substantial way. As noted in chapter one, the country is losing a significant amount of money through corruption and money laundering.<sup>101</sup> Failure to convict those offenders who are too powerful to prosecute, dead, or have absconded is enabling them or their successors to profit from their wrongful deeds and to commit further crimes.<sup>102</sup> Using civil forfeiture can complement prosecutions and, at the same time, it can be an alternative in the event that the offender cannot be prosecuted.

### **3.6 Issues in Civil Forfeiture**

Civil forfeiture should not be understood to be a substitute for criminal proceedings. It should be used only when it is impossible to prosecute the offender or as a parallel to criminal proceedings.<sup>103</sup> If civil forfeiture is used as an alternative to prosecution, it will send the wrong message to offenders, as it may encourage them to commit further crimes.

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99 Tu'emay (2013: iv &1).

100 Cassella (2008: 11).

101 Tu'emay (2013).

102 Mezmur & Koen (2011: 231).

103 Brun *et al* (2011: 107).

Although one of the purposes of assets forfeiture is to deter offenders and the community, it cannot achieve its purposes by itself. The effectiveness of the criminal law depends on the proper prosecution and conviction of offenders and on forfeiture of proceeds of crime. Civil forfeiture relates only to the confiscation of the proceeds of crime. It cannot deter the individuals involved in the crime other than by taking the proceeds away. Therefore, it should be used as a complement to the criminal proceedings.<sup>104</sup>

Civil forfeiture aims to prevent crimes by taking the profits away. The focus of civil forfeiture should be on huge illicit assets, hence most of the resources should be devoted to property of great value. Therefore, it is advisable for civil forfeiture law to provide a minimum threshold for the initiation of a civil forfeiture case. However, this should not mean that smaller amounts of illicit assets should not be subject to confiscation also.<sup>105</sup>

### 3.6.1 Retroactive Application of Civil Forfeiture Law

Countries have taken different stands on the retroactivity of civil forfeiture laws. Most jurisdictions chose to apply of civil forfeiture laws retroactively; some of them limit the retroactive application by using period of limitation outside of which the forfeiture of property is prohibited even if it was obtained by criminal conduct.<sup>106</sup> For instance, the UK legislation prohibits the recovery of assets that were obtained through criminal conduct if the proceedings failed to take place within 12 years.<sup>107</sup> A similar limitation on retroactivity exists in Ontarian legislation. It limits the application of civil forfeiture if the proceedings were not commenced within 15 years. Some countries make the limitation period shorter.

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104 Greenberg *et al* (2009: 29).

105 Kennedy (2006: 150).

106 Kennedy (2006: 135-6).

107 Section 288 of Proceeds of Crime Act 2002 of UK.

Others countries, such as Ireland, do not put a limitation on the retroactive application of civil forfeiture.<sup>108</sup> In addition, the Irish courts have guaranteed that the retroactive application of civil forfeiture laws does not violate the constitution of the country, which prohibits the *ex post facto* application of laws.<sup>109</sup>

Civil forfeiture legislation must include provisions that will allow for the retroactive effect of forfeiture. Proceeds of crime that were obtained before the enactment of the law should be subject to forfeiture. Criminals should not be allowed to profit from their wrongful acts in any way. The proceeds must be returned to their rightful owners.<sup>110</sup> Furthermore, if civil forfeiture legislation fails to provide for retrospectivity, the law enforcement authorities and courts will face difficulties in implementing the law. For instance, the South African legislation did not specify whether or not proceeds of crime that were obtained before the commencement of the civil forfeiture legislation would be subject to forfeiture. It was after practical challenges faced by the court that the South African parliament amended the legislation to insert a retrospective element into the law.<sup>111</sup>

The retroactivity of civil forfeiture laws may seem to run contrary to the principle against *ex post facto* laws. However, this principle only affects the retroactivity of criminal laws and none of the measures in civil forfeiture constitute criminal law measures or penalties. The case is instituted only against the property, it has no link to the conviction of the offender, and the only point to be checked here is that the conduct that gave rise to the proceeds was a crime at the time of its commission. Hence, civil forfeiture laws can be implemented

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108 Kennedy (2006: 135-6).

109 *McK v D* (2002) IEHC 115.

110 Greenberg *et al* (2006: 44).

111 Kennedy (2006: 137).

retroactively without violating the principle against *ex post facto* laws. The legislation should incorporate these ideas clearly in order to avoid implementation problems.<sup>112</sup>

Courts in both civil and common law systems have ruled in favour of applying civil forfeiture laws retroactively by using the above reasoning.<sup>113</sup> For instance, in the combined cases of *Charles Mescal and Mrs Tayoy*, the Constitutional court of Thailand held that the retroactive application of a civil forfeiture provision incorporated into the Anti-Money Laundering Act of 1999 of Thailand does not infringe the principle of non-retroactivity of criminal laws outlined in the Constitution, since the proceeding is neither a criminal prosecution nor punishment.<sup>114</sup>

Similarly, in *US v Four Tracts of Property on the Waters of Leiper's Creek*, the court decided in favour of applying civil forfeiture laws retroactively. It held that the law does not establish a new crime nor does it have a criminal nature. The crime was established already and one cannot claim to have a legitimate right over property obtained unlawfully.<sup>115</sup>

### 3.6.2 The Standard of Proof in Civil Forfeiture

In cases of civil forfeiture, there are three standards of proof that are used by countries to demonstrate that the property in question is proceeds of crime. These are probable cause or reasonable grounds to believe, proof on the preponderance of the evidence or the balance of probabilities, and proof beyond reasonable doubt. For the first standard of proof, a simple suspicion that the property is tainted is enough; for the second standard of proof,

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112 Greenberg *et al* (2009: 44-8).

113 Greenberg *et al* (2009: 45-6). See also *Assets Recovery Agency Director v Szepietowski & Ors* EWCA Civ 766 (2007).

114 *Charles Mescal and Mrs. Tayoy*, Case Nos 40-41/2546 (2003).

115 *US v Four Tracts of Property on the Waters of Leiper's Creek*, 181 F 3d 104, 1999 WL 357773 (1999). See also *US v Ursery* 135 L Ed 2D549 (1996).

50 plus 1 percent is enough to pass judgment that the property is proceeds of crime; and the last standard needs close to 100 percent proof that the property is proceeds of crime. The preponderance of the evidence standard is used in civil proceedings.<sup>116</sup>

Some countries use a probable cause or reasonable grounds to believe standard to freeze and seize property. The standard of proof is higher for forfeiture, that is, proof on the balance of probabilities, which is generally accepted and practised in countries such as the UK, Australia, South Africa and New Zealand. However, with some exceptions such as Quebec and Ethiopia, civil law countries use proof beyond reasonable doubt even in civil proceedings, including civil forfeiture.<sup>117</sup>

The application of a lower standard of proof for civil forfeiture proceedings is not without objections. For instance, in *Walsh v United Kingdom*, a case that was brought to the European Court of Human Rights (ECHR) with the claimant arguing that the appropriate standard was proof beyond a reasonable doubt as the case was criminal not civil. However, the court rejected the argument and held that:

“the essence of article 6<sup>118</sup> in the criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings *in rem*. They are designed to

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116 Greenberg *et al* (2009: 58-9) and Kennedy (2006: 139).

117 Greenberg *et al* (2009: 59). See also Article 255(1) of the Civil Procedure Code of Ethiopia.

118 Article 6(1) of European Convention on Human Rights states that: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences. The cumulative effect of the application of the tests in *Engel* is to identify these clearly as civil proceedings.”<sup>119</sup>

Similar decisions based on similar reasoning have been rendered by domestic courts of other countries in relation to same issue.<sup>120</sup> For example, the Supreme Court of Ireland in *Gilligan v CAB*, held that civil forfeiture law:

“concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use.”<sup>121</sup>

Although Ethiopia is one of the civil law countries, for the purposes of confiscation the standard of proof to establish the link between a property and a criminal act in criminal proceedings is proof on the balance of probabilities, which is the same as the level of proof required in civil proceedings.<sup>122</sup> There is no clear provision that deals with the standard of proof required to prove the proceeds of crime in civil forfeiture proceedings.

However, as mentioned in chapter two, the Proclamation that establishes civil forfeiture refers to the Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation with respect to the execution of orders for the freezing, seizure, and confiscation of property. The designated Proclamation allows the use of proof on the balance of probabilities to prove the proceeds of crime for the purposes of confiscation in

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119 *Walsh v United Kingdom*, 43384 2005.

120 *Greenberg et al* (2009: 60). See also *Chatterjee v Ontario* (Attorney General), 2009 SCC 19, [2009] 1 S.C.R. 624.

121 *Gilligan v CAB* IESC 2001.

122 Article 33 of the Revised Anti-Corruption Special Procedure Law and Rules of Evidence Proclamation No 434 of 2005 of Ethiopia.

criminal proceedings. On the one hand, based on this law, it can be understood that the standard of proof that applies in criminal forfeiture proceedings applies to civil forfeiture proceedings as well. On the other hand, it can be argued that, if the law permits the use of proof on the balance of probabilities for criminal proceedings, it is rational to allow the same standard of proof in civil forfeiture proceedings, perhaps even a lower standard.

In general, despite the objections against the use of the lower standard of proof, it is logical to use proof on a preponderance of the evidence since civil forfeiture is indeed a civil proceeding. Moreover, it is this lower burden of proof that has made civil forfeiture attractive as a mechanism to fight and prevent corruption and other serious crimes.<sup>123</sup>

### **3.7 Core Elements of Civil Forfeiture Legislation**

In adopting civil forfeiture legislation, there are key concepts that countries are advised to incorporate in order to construct a functional and effective civil forfeiture legal framework.

The following sub-sections will discuss some of the key concepts that need to be considered in the design of a civil forfeiture regime.

#### **3.7.1 Clear Indication of Civil Forfeiture and its Procedure**

Civil forfeiture should be available when criminal prosecution is unavailable or unsuccessful.

In cases where prosecution is not feasible or possible due to death, immunity, or abscondment, civil forfeiture must be indicated clearly as an alternative to secure the property which has links to the crimes committed. The law should provide also for civil forfeiture in cases where criminal prosecution is unsuccessful. Though the offender's conduct is unlawful, the court may not find him guilty for reasons such as lack of sufficient

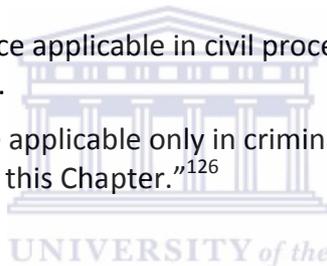
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123 Greenberg *et al* (2009: 60).

evidence or inadmissibility of evidence due to mistakes made by law enforcement, unwillingness of witnesses to testify, or other similar reasons that may let a criminal walk away free.<sup>124</sup>

Although civil forfeiture aims at recovering assets which are proceeds of criminal conduct, it is a civil proceeding and the legislation should provide clearly for this fact. This will clarify implementation problems in respect of court orders.<sup>125</sup> The South African legislation is a good example. It provides that:

- “(1) All proceedings under this Chapter are civil proceedings, and are not criminal proceedings.
- (2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter.
- (3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter.”<sup>126</sup>



The legislation should specify the applicable evidentiary and procedural rules in as detailed a manner as possible. For instance, in order to have a functional civil forfeiture regime it is important to incorporate provisions that will give the relevant authority investigative powers in relation to obtaining search and seizure warrants, compulsory interviews and other and procedural rules. It is also important to have additional administrative rules that are open to amendment, based on the changing needs of the country’s assets forfeiture regime.<sup>127</sup>

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124 Greenberg *et al* (2009: 33).

125 Kennedy (2006: 145).

126 Section 37 of Prevention of Organised Crime Act 1998 of South Africa.

127 Greenberg *et al* (2009: 34-6).

An issue that needs to be determined in detail is judicial discretion. The civil forfeiture laws of some countries give discretionary power to courts not to forfeit proceeds of crime when the interests of justice so require. However, this discretionary power might be abused in its implementation, so the law ought to list, as far as possible, specific situations that carry the risk of injustice.<sup>128</sup>

### **3.7.2. Defining Property and Proceeds Subject to Civil Forfeiture**

Defining proceeds of crimes that will be subject to forfeiture is one of the fundamental issues that need to be addressed in civil forfeiture laws.<sup>129</sup> As Greenberg *et al* suggest, firstly, the civil forfeiture law must be drafted so as to include the forfeiture of proceeds of most crimes. Some countries list those offences which give rise to civil forfeiture exhaustively, some countries subject all crimes to civil forfeiture, and others provide that only proceeds of serious crimes are subject to civil forfeiture. It must be defined broadly. For the purpose of civil forfeiture some countries limit the definition of proceeds of crime to a few crimes. For instance, in New South Wales in Australia, before the introduction of the new approach which made proceeds of all serious crimes subject of civil forfeiture, only proceeds of drug trafficking were so liable.<sup>130</sup> However, subjecting all crimes to civil forfeiture is preferable, as it will be easy to implement and recover all proceeds of crime efficiently.

Secondly, civil forfeiture laws should be drafted in a way that can facilitate the confiscation of all property that has been linked directly or indirectly to the crime. Property which will be subject to forfeiture should be defined broadly to include forms of assets which are not

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128 Kennedy (2006: 150).

129 Kennedy (2006: 132-33) and Greenberg *et al* (2009: 37).

130 Kennedy (2006: 133).

known at the time of drafting but can come into existence in the future. This will prevent the need for frequent amendment of the law.<sup>131</sup> It should enable the confiscation of proceeds of crime, instrumentalities of crime, and mixed property or, where the proceeds have been used or lost, of other property equivalent to the used or lost property. The UK and South African Model Civil Forfeiture legislation provide accordingly.<sup>132</sup> To take the South African example, proceeds of unlawful activities are defined broadly to mean:

“any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”<sup>133</sup>

In addition, the definition should include the forfeiture of proceeds of crime found in the country, even if the crime was committed in another jurisdiction. However, usually the forfeiture is dependent on dual criminality and if the act is not a crime in the country where the proceeds are found, it may not be subject to forfeiture. For instance, the UK model provides for the forfeiture of proceeds of crime if the act that gave rise to the proceeds is a crime and is subject to confiscation under UK laws. The USA model also uses the dual criminality test, with some modifications, to forfeit proceeds derived from crime that was committed outside the country. It limits the applicability to crimes that fall into the lists of foreign crimes indicated as illegal.<sup>134</sup>

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131 Greenberg *et al* (2009: 43).

132 Kennedy (2006: 138).

133 Section 1 of Prevention of Organised Crime Act 1998 of South Africa (as amended by the Prevention of Organised Crime Second Amendment Act 1999).

134 Greenberg *et al* (2009: 38) and Kennedy (2006: 134).

### 3.7.3 Agency Responsible for Implementation of Civil Forfeiture

Civil forfeiture legislation must indicate clearly the body responsible for the implementation of civil forfeiture investigations and prosecutions. Some countries establish a special authority that deals with civil forfeiture as its main task. For example, the UK has established a special agency called the Assets Recovery Agency.<sup>135</sup> Others use an existing body to deal with civil forfeiture tasks, in addition to its other functions. In USA, different law enforcement agencies carry out the investigation and prosecution of civil forfeiture together with other investigations and prosecutions.<sup>136</sup>

To establish an independent agency for implementation of civil forfeiture laws might require a large amount of resources.<sup>137</sup> In particular, for developing countries such as Ethiopia, establishing this kind of body will divert the scarce resources allocated for existing law enforcement tasks, which in turn might result in poor performance of both the existing law enforcement organs and the newly established assets recovery agency.

The legislation must address the issue of compensation for owners of the property when the government has failed to prove its case. The owners must be compensated for disturbance of their right to possess and enjoy the property.<sup>138</sup>

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135 Section 1 of Proceeds of Crime Act 2002 of UK.

136 Kennedy (2006: 147-48).

137 Kennedy (2006: 147-48).

138 Kennedy (2006: 148).

### **3.8 Constitutional Challenges to Civil Forfeiture**

The introduction and practice of civil forfeiture is not without its challenges. It has been challenged mostly on constitutional grounds, in relation to the presumption of innocence and the right to property. Opponents of civil forfeiture strongly argue against its implementation claiming that it violates the fundamental constitutional right of having a fair trial. It is said to violate the right against self-incrimination.<sup>139</sup> The following sub-sections will deal with issues raised in relation to these rights, with reference to the solutions given by the courts of South Africa, the USA, and by the European Court of Human Rights.

#### **3.8.1 The Right to Property**

It is argued that, since it is criminal conduct that will give rise to civil forfeiture, the standards applied in criminal proceedings ought to be applicable also in civil forfeiture proceedings. Civil forfeiture has been considered to violate fundamental rights of individuals by depriving them of private property.<sup>140</sup> In contrast to the standard of proof that ought to be used, jurisdictions which practise civil forfeiture rely upon proof on a balance of probabilities to establish the existence of criminal conduct and its link to the property in question.<sup>141</sup>

#### **South Africa**

The South African Prevention of Organised Crime Act (POCA) of 1998 established a civil forfeiture regime to recover proceeds of crime and confiscate the instrumentalities of

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139 Sanbei (2012: 5 & 6).

140 Godinho (2009: 330-31).

141 Mckeachie & Simser (2009: 162).

offences. Although the concept of civil forfeiture had been introduced in previous Acts,<sup>142</sup> it was POCA that laid a firm ground for civil forfeiture by introducing innovations for its implementation.<sup>143</sup> It allows the prosecution office to take civil measures against property which is proceeds of crime or instrumentalities of crime based on proof on a balance of probabilities.<sup>144</sup> This provision eases the task of law enforcement agencies to prevent and combat organised crime that has been troubling the country. However, the introduction of civil forfeiture has not gone uncontested. It has been challenged as unconstitutional in relation to the presumption of innocence and the right to property.<sup>145</sup>

The case of *Deutschmann NO v Commissioner for the Revenue Service* can be taken as an instance of where the South African government was challenged by the owners of the property for violating their constitutional right by depriving them of their property arbitrarily.<sup>146</sup> The State was being challenged for seizing property believed to be the proceeds of tax fraud and the court rejected the objection made by the owners of the property, as follows:

“The provisions in terms of which the warrant was sought and obtained in both matters do anything but permit arbitrary deprivation of property - these provisions require an application supported by information supplied under oath and the exercise of discretion by a Judge. The Judge who authorises the warrant does not thereby affect the property or the rights to such property vesting in an individual. Any party remains free, in terms of the statute, to establish his entitlement and claim delivery.”<sup>147</sup>

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142 The Drugs and Drug Trafficking Act No 140 of 1992 of South Africa and the Proceeds of Crime Act No 76 of 1996 of South Africa.

143 Keightley (2009: 94-5).

144 Chapter 6 of the Prevention of Organised Crime Act of 1998 of South Africa.

145 Gupta (2002: 160).

146 Section 25(1) of the South African Constitution. See also Gupta (2002: 165).

147 *Deutschmann NO v. Commissioner for the South African Revenue Service*, 2000(2) SA 106, 124 (E). See also Gupta (2002: 165).

From the above decision, it may be concluded that the civil forfeiture proceedings in the Prevention of Organised Crime Act requires the state to make an informed application for a warrant of search and seizure which needs to be authorised by the court, and the law gives a right to the owners to defend their property, making it constitutional. Hence, the court overruled the objection made by the owners and approved the seizure as constitutional since the deprivation occurred lawfully.<sup>148</sup>

## USA

The experience of courts in the USA regarding the constitutionality of deprivation of property in civil forfeiture matters is different from the experience of South Africa. In order to answer the question of the constitutionality of civil forfeiture, the courts categorise the forfeiture into proceeds and instrumentalities. For the purposes of deciding whether forfeiture of these properties constitutes excessive fine, these two categories are divided again into those who acquire the property in good faith and in bad faith.<sup>149</sup>

### Proceeds

Where the property to be forfeited is proceeds of crime, the courts of the USA rationalise the deprivation as constitutional without taking too much trouble to justify it. Since the proceeds are the result of unlawful conduct, the validity of the forfeiture cannot be questioned as no one should be allowed to benefit from his wrongdoings.<sup>150</sup>

“The proceeds of criminal activity are property to which some other individual or society has a higher claim by virtue of the current possessors’ wrongful acquisition.”<sup>151</sup>

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148 Gupta (2002: 166).

149 Gupta (2002: 166).

150 Gupta (2002: 167).

151 Gupta (2002: 167).

Forfeiture of proceeds of crime cannot be taken as a punishment or fine, rather it is an act of restitution to the lawful owners. Therefore, the courts have held that there is no excessive fine that violates the constitution.<sup>152</sup>

### **Instrumentalities**

There are three doctrines that justify the forfeiture of instrumentalities. The first is that their forfeiture is justified because crime cannot be prevented without taking away the facilities that were used to commit the offence, otherwise the property might be used to commit further crimes. Secondly, the forfeiture can be rationalised as the property might have been used as an instrument to commit the crime because of the owner's negligence.

Thirdly, where there are no proceeds of crime to be forfeited, the forfeiture of instrumentalities can be justified as a reasonable substitute for the value of the proceeds.<sup>153</sup>

The above doctrines, however, do not always come in handy for all cases of forfeiture of instrumentalities. In such cases, the courts limit the forfeiture by an excessive fine clause. In the case of *Austin v United States*, the court held that it would be excessive fine and unconstitutional if the instrumentality to be forfeited has far more value than the value of the actual crime committed.<sup>154</sup>

In the case of *Bennis v Michigan*<sup>155</sup> the court justified the constitutionality of forfeiture of instrumentality owned by the wife who was an innocent party. As Gupta suggests, these two rulings contradict each other, because in the *Austin* case forfeiture of instrumentalities

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152 Gupta (2002: 167).

153 Gupta (2002: 168).

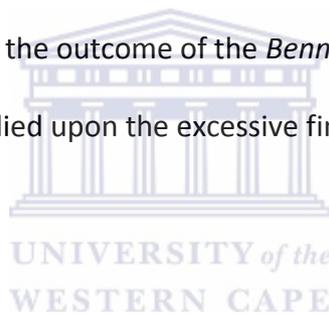
154 *Austin v United States* (1993) 509 US at 622. See also Gupta (2002: 168).

155 *Bennis v Michigan* (1998) 516 US at 453: "A husband had engaged a prostitute using an automobile in which his wife had a community property interest."

is limited by excessive fine whereas in the *Bennis* case forfeiting the instrumentalities owned by an innocent party in civil forfeiture proceeding is constitutional. The contradiction arises as in the latter case forfeiture of property owned by an innocent party can be an excessive fine. However, the court justifies it as constitutional.<sup>156</sup> Justice Stevens, in his *Bennis* dissent, held that:

“the forfeiture of petitioner’s half interest in her car is surely a form of ‘excessive’ punishment. For an individual who merely let her husband use her car to commute to work, even a modest penalty is out of all proportion to her blameworthiness; and when the assessment is confiscation of the entire car, simply because an illicit act took place once in the driver’s seat, the punishment is plainly excessive.”<sup>157</sup>

In the end, Gupta chooses to rationalise the decision of the court rather than accuse it for the contradiction. He argues that the outcome of the *Bennis* case would have been different if the defendant’s counsel had relied upon the excessive fine argument used in the *Austin* case.<sup>158</sup>



### 3.8.2 Presumption of Innocence

The principle of the presumption of innocence protects accused persons against self-incrimination. They have the right to remain silent and to be presumed innocent until proved guilty beyond reasonable doubt.<sup>159</sup> Civil Forfeiture proceedings are criticised for violating this fundamental constitutional right. It is argued that it is unconstitutional to shift the burden of proof to the defendant where the conduct that gave rise to the proceedings is a criminal conduct. The proceedings shift the onus of proof from the government to the owner of the property. The state need only provide 50 plus 1 percent proof that the

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156 Gupta (2002: 169).

157 *Bennis v Michigan* (1998) 516 US at 453. See also Gupta (2002: 169).

158 Gupta (2002: 169).

159 Article 20(3) of the FDRE Constitution.

property is linked to unlawful activity. According to the opponents of civil forfeiture, this lower burden of proof violates the right to a fair trial. And based on this proof, expecting the owner to explain the legality of his property infringes the presumption of innocence, which entails the danger of self incrimination.<sup>160</sup>

The application of the presumption of innocence is limited to criminal proceedings where there is an accused.<sup>161</sup> The International Convention on Civil and Political Rights (ICCPR) provides also that: “Every one charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law”.<sup>162</sup> Furthermore, the South African court has held that the rights of accused persons contained in the constitution are available only to those who are under criminal prosecution.<sup>163</sup> A similar decision has been made by the European Court of Human Rights in the case of *Phillips v UK*. As discussed in the previous chapters, civil forfeiture runs as a civil proceeding. The owner of the property in civil proceedings is not an accused, as in criminal proceedings. As there is no criminal charge, his involvement has no effect on the person’s criminal record.<sup>164</sup>

Moreover, the aim of civil forfeiture proceedings is to restore property which was obtained through unlawful activities to its rightful owners. It has no punitive or deterrent purpose initially.<sup>165</sup> However, at the end, it might give lessons to the offenders and to the community in general that crime does not pay. Therefore, civil forfeiture proceedings cannot be considered to violate the right to be presumed innocent.

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160 Godinho (2009: 331) and Sanbei (2012: 11).

161 Godinho (2009: 332). See also Article 20(3) of the FDRE Constitution.

162 Article 14(2) of the ICCPR.

163 Gupta (2002: 170).

164 Godinho (2009: 332).

165 Sanbei (2012: 8).

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

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#### 4.1 Conclusion

Asset recovery is amongst the mechanisms used to fight and prevent economic crimes domestically and internationally. It plays a significant role in restoring stolen funds to their rightful owners. By taking the profit out of the crime, it deters the commission of further crimes. It sends the message to the community that crime does not pay. Criminals value proceeds of crime the most, and taking it away from them teaches them a hard lesson.

Different international legal instruments on corruption and other economic crimes include assets forfeiture provisions and obligate States Parties to incorporate them in their domestic legal frameworks.



Until recently, criminal forfeiture was the most common route to recover proceeds and instrumentalities of crime. The recovery of the proceeds, however, is conditional upon the conviction of the criminal. Due to this pre-condition, countries were unable to confiscate all the proceeds of unlawful activities. Criminals ought not to profit from their crimes; rather the proceeds of their crimes ought to be forfeited fully and used to compensate the society which the crimes have harmed. Hence, the international community resorted to the establishment and adoption civil forfeiture, a regime that does not require the conviction of criminals.

Ethiopia has been showing substantial and impressive economic development over the last decade. The increase in business transactions, combined with the geographical location of the country has made it prone to corruption and other economic crimes, such as money laundering and terrorist financing. There have been efforts to combat and prevent these crimes. The establishment of institutions such as the Federal Ethics and Anti-Corruption Commission, and the amendment of existing laws and adoption of new laws in order to make them compatible with international legal instruments are part of these efforts. The country has adequate laws for criminal forfeiture. However, because of the limitations of criminal forfeiture, it does not have the capacity effectively to recover all proceeds of crimes.



Civil forfeiture has been introduced into the country's assets forfeiture legal framework by implication by the new Anti-Money Laundering and Terrorist Financing Proclamation. The absence of implementation provisions for this form of forfeiture, however, has negated their use.

Civil forfeiture has many advantages over criminal forfeiture. The facts that it is non-conviction based and has a lower burden of proof make it attractive. However, it is alleged to violate fundamental constitutional rights such as the right to property and the presumption of innocence. Due to these allegations there is no consensus as to the use of civil forfeiture internationally. Hence, international assets recovery instruments do not obligate States Parties to adopt it into their legal frameworks.

In the absence of universal consensus, civil forfeiture operates primarily within a domestic context. Its incorporation into the domestic legal frameworks of countries, however, has not

been without its difficulties. As discussed in chapter three, courts of countries such as the UK, the USA and South Africa have managed to solve the question of the constitutionality of civil forfeiture proceedings. In general, they have held that it is a civil proceeding and constitutional principles that are applicable to criminal proceedings do not apply to them. Further, it has been held that the right to property cannot be infringed by civil forfeiture proceedings so long as the claimant has been given the opportunity to contest the suit against his property.

The full incorporation of civil forfeiture into the Ethiopian assets recovery legal framework might raise a question of constitutionality in relation to the presumption of innocence and the right to property. According to the Constitution of the country, accused persons have the right to be presumed innocent until proved guilty.<sup>166</sup> However, as noted in the case of civil forfeiture, the owner of the property is not an accused person as in the criminal cases. Rather he or she is a claimant who has rights to be present before courts and prove the integrity of the property in question. Similarly, in relation to the right to property, which is also a protected right under the Constitution,<sup>167</sup> the owner is not left without legal remedies. Civil forfeiture proceedings are instituted only against the property, not against the owner and there will not be any criminal punishment. Thus, one cannot say that the adoption of civil forfeiture into the legal framework of assets recovery would be unconstitutional.

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166 Article 20(3) of the Constitution of the FDRE.

167 Article 40 of the Constitution of the FDRE.

## 4.2 Recommendations

Civil forfeiture has played an important role in combating corruption and other crimes in a number of countries. The main recommendation of this paper rests on the adoption of a new assets forfeiture law that includes civil forfeiture expressly. As discussed in chapter two, the Ethiopian domestic laws of recovery are scattered across different Proclamations. The country has no independent legislation that deals with the issue of forfeiture in general. In order to have a uniform application of assets forfeiture measures, the country needs to have a special and comprehensive law of assets forfeiture.

As mentioned in chapter two, the Crime Prevention and Criminal Justice Policy underlines the need to make domestic laws compatible with international instruments. In particular, the Policy stresses the need to fill the legal *lacunae* on the issues related to assets recovery. Hence, a new law, consistent with international instruments, that facilitates the confiscation of all proceeds of crimes will meet the demands of the Policy.

### 4.2.1 Adopting a Comprehensive Civil Forfeiture Law

As discussed in the previous chapters, criminal forfeiture by itself will not result in the confiscation of all proceeds of crimes. In order to meet the aspirations of the Policy, it is necessary to allow for the use of civil forfeiture. The implied inclusion of civil forfeiture in the Anti-Money Laundering and Terrorist Financing Proclamation is not sufficient. Although, the provision applies to all proceeds of predicate offences of money laundering, including corruption, it cannot be applied in a situation where the proceeds are not laundered. Further, it limits the use of civil forfeiture to specific situations. It permits the use of civil forfeiture only in cases where the defendant is dead, has absconded or is unknown.

Therefore, in order to benefit from the full advantages of civil forfeiture, the country needs to adopt a comprehensive legal framework that allows for the confiscation of all proceeds of crimes.

In adopting civil forfeiture legislation, the core elements mentioned in chapter three, such as the availability of civil forfeiture when criminal prosecution is unavailable or unsuccessful and the retroactive application of the law, should be provided for clearly. Laws of other countries such as South Africa and the USA, including their court decisions, need to be studied.

#### **4.2.2 Establishing a Special Assets Recovery Unit**

Having a comprehensive civil forfeiture law does not by itself guarantee the confiscation of all proceeds of crimes. The law needs to be implemented properly so that it can achieve the intended result. Therefore, an organ responsible for the implementation of the law must be established. In general, it is important to have a special body assigned to work on assets recovery issues.

In Ethiopia, the Federal Ethics and Anti-Corruption Commission (FEACC) is the only authority that has a special team assigned to deal with the issues of assets recovery in relation to corruption crimes. It is one of five teams established under the Corruption Investigation and Prosecution Directorate.<sup>168</sup> However, as there is no provision that allows for the use of civil forfeiture in the absence of conviction under the anti-corruption legal framework, the unit's work is limited to criminal forfeiture of the proceeds and instrumentalities of corruption crimes.

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168 Official Website of FEACC.

The experiences of countries that have introduced civil forfeiture into their assets recovery regime are instructive. Some of them have established a special authority responsible for the implementation of civil forfeiture laws and others assign the task to the existing law enforcement agencies. As noted, establishing a special agency for Ethiopia might be challenging economically. Therefore, it is suggested that a special team responsible for the investigation and prosecution of civil forfeiture cases be established under the existing directorates of the Ministry of Justice, Federal Ethics and Anti-Corruption Commission and regional Justice Offices and regional Ethics and Anti-Corruption Commissions.

#### **4.2.3 Awareness Creation**

Updating the law enforcement authorities about the developments in civil forfeiture laws and about experiences of countries is essential to the proper implementation of civil forfeiture laws in Ethiopia. Judges and prosecutors need to be trained on matters of assets recovery. It is necessary to familiarise them with the decisions of foreign courts in relation to arguments raised against the use of civil forfeiture.

Crimes these days are committed with the help of sophisticated technology and the proceeds are moved from one country to another in the blink of an eye. Therefore, there has to be special training that can help the law enforcement agencies to detect and seize proceeds of crime as soon as possible. Furthermore, as discussed, the Crime Prevention and Criminal Justice Policy of the country requires that the law enforcement and criminal justice agencies work together with other countries in the fight against money laundering, corruption and the financing of terrorism. Thus, these organs have to be well informed

about issues in assets forfeiture in general and civil forfeiture in particular so that they can be on par with the rest of the world.

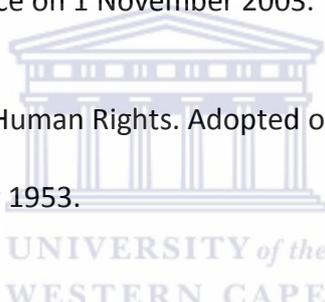


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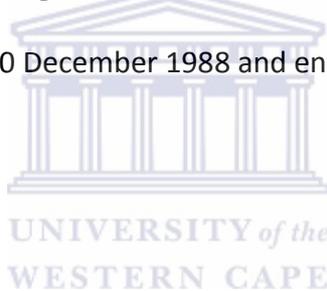
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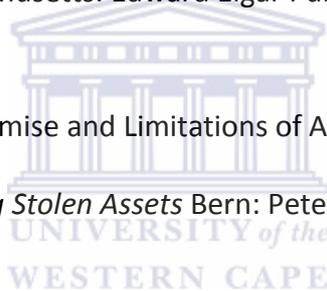
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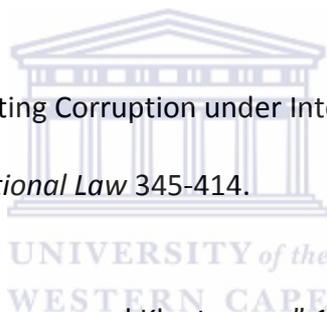


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