

**Managing the Proceeds of Crime:
An Assessment of the Policies of Tanzania, South Africa and Nigeria**

ZAINABU MANGO DIWA

Student No 3368327

Thesis submitted in fulfilment of the requirements for the PhD

in the

Department of Criminal Justice and Procedure

**UNIVERSITY of the
WESTERN CAPE
Faculty of Law**

UNIVERSITY OF THE WESTERN CAPE

Supervisor: Professor RA KOEN

Date: 2016

Declaration

I, **Zainabu Mango Diwa**, declare that **Managing the Proceeds of Crime: An Assessment of the Policies of Tanzania, South Africa and Nigeria** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: ZAINABU MANGO DIWA

Signed:.....

Date:.....

Supervisor: PROFESSOR RA KOEN

Signed:.....

Date:.....



Dedication

This paper is dedicated to the Almighty God as the beholder of my life and destiny, my beloved family and all people working towards achieving a corruption-free Africa.



Acknowledgements

Special gratitude to the Almighty God for blessing me with the energy and capacity to write this thesis. I am very grateful to my supervisor Professor Raymond Koen of the Faculty of Law University at the Western Cape for his dedicated supervision, care and support. His committed guidance and useful comments have contributed immensely to the development and completion of this study. His care and support have made my study period more comfortable than I expected and for these I shall remain ever grateful.

I am indebted to Professor Lovell Fernandez for his valuable comments which contributed much to the development of this study. I am also appreciative to *Deutscher Akademischer Austauschdienst* (DAAD) for the scholarship that enabled me to pursue this course. Without this valuable scholarship it would have been very difficult for me to complete my PhD in South Africa (*Danke schön*). I am thankful to the staff members of the Faculty of Law, University of the Western Cape, especially Professor Bernard Martin, Professor Jamil Mujuzi, Mrs Hazel Jeftha, Mrs Farida Hendricks, Mrs Cheryl Davids and Mrs Caroline Smart for standing by me as a family and making my stay in South Africa “a home away from home”.

I am obliged to the Office of Attorney General in Tanzania for granting me the study leave which enabled me to pursue this course comfortably. Special thanks to the Attorney General, Mr George Mcheche Masaju, Mr Abdulrahman Mdimu and Dr Eliezer Mbuki Feleshi , Judge of High Court of Tanzania, for encouraging me to continue studying and excusing me from work duties graciously. I am also pleased with the support of my boss, Mr Biswalo Kachele Mganga, the Director of Public Prosecutions, and staff members of the Directorate of Public Prosecutions (the National Prosecution Service). Special thanks to Mr Mohamed Mirambo, Mr Thadeo Marko Mwenempazi, Ms Lilian Jonas Itemba, Mr Josephat Mkizungo, Mr Awamu Ahmada Mbagwa, Ms Pamela Monahlisa Shinyambala, Ms Esther Jomanga Cheyo, Mr Malik Mlwati, Mr Mustapha Mushi and Ms Grace George for their continued support and assistance whenever needed.

I am indebted to the Economic and Financial Crimes Commission of Nigeria for sharing valuable materials which assisted much in the development of this thesis.

I also acknowledge the contributions of my fellow researchers at the Transnational Criminal Justice and Crime Prevention Centre, namely, Dr Sosteness Materu, Dr Jean Phillippo, Windell Nortje, Robert Mugagga Muwanguzi, Marshet Tadesse Tessema, Marian Yankson, Fatuma Mninde Silungwe, Thato Toebe and Sagwadi Mabunda. Thank you very much, my colleagues.

I am particularly indebted to my beloved husband, Mr Abdallah Rajab Mkali, and my children (Milphat, Halima and Mansoor) for their tolerance and moral and material support for the entire period of my studies in Cape Town (*Shukran Gazilan, Jazzakumullahu Khairan*).

Special thanks to my parents, Mrs Halima Mohamed Mkali, Mr Thabit Yusuph Mgeng'o, Mr Mango Diwa Mango and Mrs Josephine Lulaka Mango, for their care and support, and for taking good care of my children during my studies at the University of the Western Cape (*BarrakAllahu Feekum*).

Much appreciation to my sister, Maangaza Mango, my brothers, Saidi Mango and Ramadhan Mango, and my friends, Pamela Bazil Lyimo, Mwajuma Ally Mfaume, Tayo Rufai, Chouriya Lougue Kabore and Cassandra Soko, for their support and for keeping in touch with me through phone calls, chats and emails which filled the gaps of loneliness in me and encouraged me to work hard.

Last but not least I am grateful to my friends in Cape Town, especially my brotherly friends, Dr Jimoh Oladejo Tijani, Mr Gharib Mohamed, Mr Isa Lawal, and my sisterly friends, Kasifa Kakai, Suad Ahmed Abdi and Mercy Kileo, for filling my stay in Cape Town with friendship and warmth.

Table of Contents

Acknowledgements.....	iv
Key Words.....	xxi
List of Abbreviations and Acronyms	xxii

Chapter One

Introduction to and Overview of the Study

1.1	Introduction	1
1.2	Problem Statement.....	3
1.3	Significance of the Study.....	6
1.4	Research Questions	7
1.5	Literature Review.....	7
1.6	Research Methodology.....	12
1.7	Outline of the Study.....	14



Chapter Two

Asset Recovery and the Relevance of Asset Management

2.1	Introduction	16
2.2	The Genesis of Asset Recovery	17
2.3	Categorising Asset Recovery as a Punishment	18
2.4	Philosophical Justification of Asset Recovery	22
2.5	Theoretical Framework of the Study	27
2.6	Relevance of Asset Management in Asset Recovery Processes	29
2.7	Stages of Asset Recovery and the Role of Asset Management	30

2.7.1	Tracing and Identification	31
2.7.2	Preservation Stage	31
2.7.2.1	Seizure.....	32
2.7.2.2	Freezing.....	33
2.7.3	Confiscation Stage.....	33
2.7.4	Disposition.....	33
2.8	Philosophical Justification of Asset Management	35
2.9	Basic Features of a Reliable Asset Management System	39
2.9.1	Transparency.....	39
2.9.2	Accountability.....	40
2.9.3	Efficiency	41
2.10	Conclusion.....	42

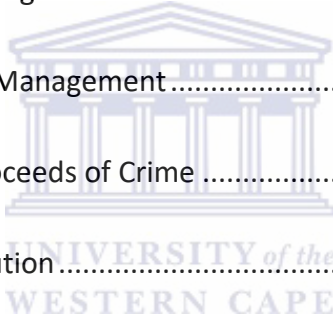


Chapter Three

Managing the Proceeds of Crime in International Perspective

3.1	Introduction	44
3.2	International Instruments on Asset Recovery, Asset Management and Corrective Justice	45
3.2.1	International Conventions.....	47
3.2.1.1	The Vienna Convention.....	47
3.2.1.2	The Palermo Convention	48

3.2.1.3	The International Convention for the Suppression of the Financing of Terrorism.....	50
3.2.1.4	The United Nations Convention against Corruption	51
3.2.2	Regional Integrated Bodies	52
3.2.3	Intergovernmental Bodies with International Endorsement.....	55
3.3	The International Approach to Managing Proceeds of Crime	57
3.3.1	The Structure of the International Approach to Managing Proceeds of Crime	57
3.3.1.1	Domestic Asset Management.....	58
3.3.1.2	International Asset Management	62
3.3.2	The IBPs on Managing Proceeds of Crime	66
3.3.2.1	Management Institution.....	66
3.3.2.2	Control of the Proceeds of Crime	67
3.3.2.3	Pre-control Planning	67
3.3.2.4	Valuation of the Preserved Assets.....	68
3.3.2.5	Record keeping	69
3.3.2.6	Disposition of Preserved Assets.....	69
3.3.2.7	Establishment of a Special Fund	71
3.3.2.8	Investment of Proceeds of Crime	72
3.3.2.9	Reporting and Auditing Requirements	72



3.3.2.10	Liability of the Asset Management Authority.....	73
3.4	Factors Affecting the Value of Preserved Assets.....	73
3.4.1	Plea Bargaining.....	74
3.4.2	Payment of Legal and Living Expenses.....	76
3.4.3	Loan Payments and Business Expenses.....	78
3.5	The Role of the International Community in Managing Confiscated Assets.....	79
3.5.1	Advisory Role.....	80
3.5.2	Supervisory Role.....	82
3.5.3	Co-ordination.....	84
3.6	Conclusion.....	84



Chapter Four

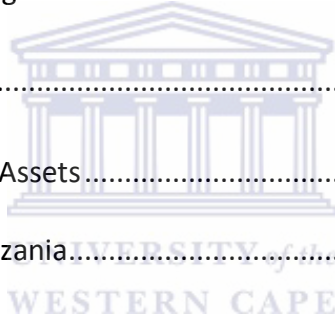
Pre-confiscation Asset Management Policies in Tanzania, South Africa and Nigeria

4.1	Introduction.....	86
4.2	Jurisprudence of Asset Recovery in Tanzania, South Africa and Nigeria.....	87
4.3	Asset Management Policy in Tanzania, South Africa and Nigeria.....	89
4.4	Legal Framework for Managing Preserved Assets.....	90
4.5	Asset Management Institutions (AMIs).....	91
4.5.1	Asset Management Institutions in Tanzania.....	91
4.5.1.1	The Inspector General of Police.....	91
4.5.1.2	The Attorney General.....	92

4.5.1.3	The Court	94
4.5.1.4	The Trustee	96
4.5.2	Asset Management Institutions in South Africa	97
4.5.2.1	The National Director of Public Prosecutions.....	97
4.4.2.2	The Court	98
4.5.2.3	The Police	99
4.5.2.4	The <i>Curator Bonis</i>	100
4.5.3	Asset Management Institutions in Nigeria.....	101
4.5.4	Asset Management Institutions in Comparative Review.....	105
4.6	Control of the Identified Proceeds of Crime.....	106
4.6.1	Control of the Proceeds of Crime in Tanzania	108
4.6.1.1	Seizure.....	108
4.6.1.2	Restraint.....	109
4.6.1.3	Freezing.....	111
4.6.2	Control of the Proceeds of Crime in South Africa	111
4.6.2.1	Restraint Orders.....	111
4.6.2.2	Preservation Orders.....	112
4.6.2.3	Seizure.....	113
4.6.3	Control of the Proceeds of Crime in Nigeria	114



4.6.3.1	Freezing.....	114
4.6.3.2	Seizure.....	115
4.6.3.3	Interim Forfeiture Orders.....	116
4.6.4	Comparative Review	117
4.7	Pre-Control Planning.....	117
4.7.1	Pre-Control Planning in Tanzania.....	118
4.7.2	Pre-Control Planning in South Africa	119
4.7.3	Pre-Control Planning in Nigeria.....	119
4.7.4	Comparative Review	120
4.8	Valuation of the Preserved Assets.....	121
4.8.1	Valuation of Assets in Tanzania.....	121
4.8.2	Valuation of Assets in South Africa	122
4.8.3	Valuation of Assets in Nigeria	123
4.8.4	Comparative Review	123
4.9	Record Keeping	124
4.9.1	Record Keeping in Tanzania	124
4.9.2	Record Keeping in South Africa.....	125
4.9.3	Record Keeping in Nigeria	125
4.9.4	Comparative Review	125

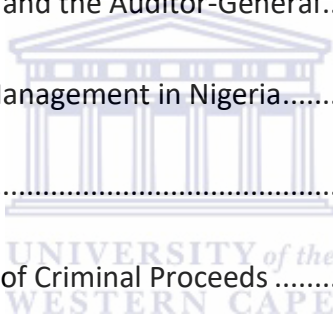


4.10	Reporting and Auditing Requirements	125
4.10.1	Reporting and Auditing in Tanzania.....	126
4.10.2	Reporting and Auditing in South Africa	127
4.10.3	Reporting and Auditing in Nigeria	127
4.10.4	Comparative Review	127
4.11	Advance Disposition of Preserved Assets.....	128
4.11.1	Advance Disposition of Assets in Tanzania.....	128
4.11.2	Advance Disposition of Assets in South Africa	129
4.11.3	Advance Disposition of Assets in Nigeria.....	131
4.11.4	Comparative Review	132
4.12	Special Asset Recovery Fund.....	132
4.12.1	Asset Recovery Fund in Tanzania.....	133
4.12.2	Asset Recovery Fund in South Africa	133
4.12.3	Asset Recovery Fund in Nigeria	134
4.12.4	Comparative Review	134
4.13	Investment of Proceeds of Crime	135
4.14	Liability of the Asset Management Institutions (AMIs)	136
4.14.1	Liability of the AMIs in Tanzania.....	137
4.14.2	Liability of the AMIs in South Africa.....	138
4.14.3	Liability of the AMIs in Nigeria.....	138



4.14.4	Comparative Review	139
4.15	Conclusion.....	139
Chapter Five		
Post-confiscation Asset Management Policies in Tanzania, South Africa and Nigeria		
5.1	Introduction	141
5.2	Post-Confiscation Asset Management Policies.....	142
5.3	Post-Confiscation Asset Management Processes.....	144
5.3.1	Realisation of the Recovered Assets	145
5.3.1.1	Realisation of Assets in Tanzania	145
5.3.1.2	Realisation of Assets in South Africa.....	146
5.3.1.3	Realisation of Assets in Nigeria.....	147
5.3.1.4	Comparative Review	147
5.3.2	Utilisation of Recovered Assets and Realised Funds	148
5.3.2.1	Utilisation of Recovered Assets in Tanzania	148
5.3.2.2	Utilisation of Recovered Assets in South Africa.....	149
5.3.2.3	Utilisation of Recovered Assets in Nigeria	150
5.3.2.4	Comparative Review	150
5.4	Post-Confiscation Asset Management Systems	151
5.4.1	Post-Confiscation Asset Management in Tanzania.....	151
5.4.1.1	The Court	151

5.4.1.2	The Trustee	152
5.4.1.3	The Minister of Legal Affairs and the Attorney General.....	153
5.4.1.4	The Treasury Registrar	156
5.4.2	Post-Confiscation Asset Management in South Africa	157
5.4.2.1	The Court and the <i>Curator Bonis</i>	158
5.4.2.2	The Master of the High Court	159
5.4.2.3	The Criminal Asset Recovery Committee	160
5.4.2.4	Cabinet, Parliament and the Auditor-General.....	161
5.4.3	Post-Confiscation Asset Management in Nigeria.....	162
5.4.4	Comparative Review	164
5.5	Factors Affecting the Value of Criminal Proceeds	165
5.5.1	Non-Conviction Based Asset Recovery and Administrative Asset Recovery	166
5.5.1.1	Non-Conviction Based Asset Recovery in Tanzania.....	167
5.5.1.2	Non-Conviction Based Asset Recovery in South Africa	168
5.5.1.3	Non-Conviction Based Asset Recovery in Nigeria.....	169
5.5.1.4	Comparative Review	171
5.5.2	Plea Bargaining.....	171
5.5.2.1	Plea Bargaining in Tanzania	174
5.5.2.2	Plea Bargaining in South Africa.....	176



5.5.2.3	Plea Bargaining in Nigeria	180
5.5.2.4	Comparative Review	185
5.5.3	Legal, Living and Business Expenses	185
5.5.3.1	The Position in Tanzania	186
5.5.3.2	The Position in South Africa	187
5.5.3.3	The Position in Nigeria	188
5.5.3.4	Comparative Review	189
5.6	Conclusion.....	190

Chapter Six

Managing the Proceeds of Crime in the African Context

6.1	Introduction	191
6.2	Relevance of IBPs	193
6.3	Feasibility of IBPs	195
6.3.1	Transparency.....	195
6.3.1.1	Transparency in Tanzania	196
6.3.1.2	Transparency in South Africa	196
6.3.1.3	Transparency in Nigeria	197
6.3.1.4	Transparency in Comparative Review	198
6.3.2	Accountability.....	199



6.3.2.1	Accountability in Tanzania	199
6.3.2.2	Accountability in South Africa.....	200
6.3.2.3	Accountability in Nigeria.....	201
6.3.2.4	Accountability in Comparative Review.....	201
6.3.3	Efficiency	202
6.4.3.1	Efficiency in Tanzania.....	203
6.3.3.2	Efficiency in South Africa	204
6.3.3.3	Efficiency in Nigeria.....	205
6.3.3.4	Efficiency in Comparative Review.....	205
6.4	Overview of the Feasibility of IBPs	207
6.5	Research Questions Revisited.....	208
6.5.1	Compliance with the IBPs.....	209
6.5.1.1	Compliance in Tanzania	209
6.5.1.2	Compliance in South Africa.....	210
6.5.1.3	Compliance in Nigeria.....	211
6.5.1.4	Compliance in Comparative Review	211
6.5.2	Challenges in Adopting the IBPs.....	213
6.5.2.1	IBPs in Tanzania	213
6.5.2.2	IBPs in South Africa.....	215



6.5.2.3	IBPs in Nigeria	216
6.5.2.4	Adoption of the IBPs in Comparative Review	217
6.5.3	Statutory Amendments to Promote Asset Management	218
 Chapter Seven		
Recommendations and Conclusion		
7.1	Introduction	219
7.2	Policy Reconsideration.....	220
7.2.1	Balancing Policy Objectives	220
7.2.2	Addressing the Victims of Crime	221
7.2.2.1	Funding of Institutions Dealing with Victims.....	222
7.2.2.2	Funding Public Good Projects.....	222
7.2.2.3	Funding Law Enforcement Agencies.....	223
7.3	Enhancing the Tanzanian Asset Management Regime	224
7.3.1	General Coverage of the Law	225
7.3.2	The Functioning of the Asset Managing Institutions	227
7.3.2.1	The Inspector General of Police and the Treasury Registrar	228
7.3.2.2	The Attorney General and the Director of Public Prosecutions	228
7.3.2.3	The Trustee and the Court	229
7.3.3.1	Legal, Business and Living Expenses	229



7.3.3.2	Absence of Non Conviction Based Asset Recovery.....	230
7.4	Conclusion	231
	References.....	233



Abstract

This study assesses the policies for managing recovered proceeds of crime in three countries, namely, Tanzania, South Africa and Nigeria. It considers the role and relevance of asset management in the asset recovery regimes of the three countries. Managing the proceeds of crime divides into two stages: the pre-confiscation stage and the post-confiscation stage. International best practices (IBPs) in asset management have been employed as a yardstick for the assessment.

On the face of it, asset management is complementary to asset recovery policy. The management of preserved and recovered assets maintains their value and enables states to apply the assets to other policy objectives after the finalisation of the recovery process. From this perspective, proper asset management arguably lies at the heart of asset recovery policy.

Asset recovery as a policy is concerned with the pursuit of two objectives, namely, combating crime and correcting the harm caused by crime. These objectives are encapsulated in two prominent principles: the principle that crime should not pay and the principle of corrective justice. Thus, asset management policy, as an element of asset recovery policy, needs to express these two principles and address their corresponding policy objectives.

A number of challenges face the asset management institutions (AMIs) in the three designated states. They fall into two categories: policy challenges and legal challenges. The main policy challenge pertains to unbalanced or skewed policy objectives. Tanzania and Nigeria, in particular, give too much consideration to combating crime and too little to correcting the harm caused by crime to the community. These policy objectives need to be balanced by the states taking seriously the principle of corrective justice as fundamental to asset management policy. In this connection, compensation to victims, funding of institutions dealing with the victims of crime, funding of public good projects and funding of law enforcement agencies are available as ways of addressing the harm caused by the offence and showing commitment to ensuring that nobody suffers loss as a result of crime.

Despite the existence and implementation of a proper asset management regime, certain factors affect the value of the preserved and recovered assets negatively. They include

enforcement of certain rights in favour of the defendant, such as payment of legal, living and business expenses from the preserved assets, and certain asset recovery procedures, such as plea bargaining, non-conviction based asset recovery and administrative asset recovery. Proper legal controls are required in order to reduce the impact of such factors upon the value of preserved and recovered assets.

The study concludes with a focus on the asset management regime of Tanzania. Various recommendations are offered towards the attainment of a Tanzanian regime structured in terms of balanced policy objectives. The recommendations cover three aspects: the general coverage of the law, the functioning of AMIs and the legal control of the factors that were identified as affecting the value of assets during the recovery process.



Key Words

Asset Disposition

Asset Management Institution

Asset Recovery

Confiscation

Corrective Justice

Corruption

Forfeiture

International Best Practice

Instrumentalities of Crime

Management of Assets

Preserved Assets

Proceeds of Crime

Recovered Assets

Retribution



List of Abbreviations and Acronyms

AAR	Administrative Asset Recovery
AFRS	Asset Forfeiture and Recovery Section
AFU	Asset Forfeiture and Recovery Unit
AG	Attorney General
AMI	Asset Management Institution
ARINSA	Asset Recovery Inter-Agency Network for Southern Africa
AU	African Union
CARA	Criminal Assets Recovery Account
CARC	Criminal Assets recovery Committee
CBAR	Conviction Based Asset Recovery
CICAD	Inter-American Drug Abuse Control Commission (<i>Comission Interamericana para el Control del Abuso de Drogas</i>)
DPP	Director of Public Prosecutions
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
ESAAMLG	East and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
G7	Group of Seven Countries
G8	Group of Eight Countries
GIABA	Inter-Governmental Action Group against Money Laundering in West Africa (<i>Groupe Inter-Gouvernemental d' Action Contre le Blanchiment de l'Agent en Afrique</i>)
IBP	International Best Practice

IGP	Inspector General of Police
NCBAR	Non-Conviction Based Asset Recovery
ODPP	Office of the Director of Public Prosecutions
PCCB	Prevention and Combating of Corruption Bureau
POCA (SA)	Prevention of Organised Crime Act (South Africa)
POCA (T)	Proceeds of Crime Act (Tanzania)
SADC	Southern African Development Community
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organised Crime



Chapter One

Introduction to and Overview of the Study

1.1 Introduction

The management of the proceeds of crime encompasses their preservation and confiscation. The international community regards asset recovery, that is, the preservation, confiscation and management of tainted assets as fundamental to its fight against serious crimes¹ such as corruption, drug trafficking, terrorism and money laundering.² Asset recovery by confiscation has been practised for many years. Initially, the objective was restitution to the victims of crime.³ Recently, however, the scope of asset recovery has been widened by the international community to include retribution and corrective justice.

It has been acknowledged generally that one of the best ways of combating crime is to cut down its financing and take away the profits generated by its commission.⁴ The basic aim of asset recovery is the reclamation of what has been lost to crime and its return to the general public.⁵ This aim is justified in terms of the general principle that people should not profit from unlawful activities. Hence, the law must ensure that crime does not pay.⁶ According to this approach, the proceeds of crime are to be returned to the community as compensations to victims⁷ or as a deposit into the fiscal system of the country.

The management of preserved and confiscated assets emerges as a complement to asset recovery policy in that it accomplishes the objectives of the latter. In general, proceeds of crime are the property of society which has been stolen by criminals through corrupt and other illegal transactions. Asset recovery policy will be of no value to society if the confiscated assets are disposed of without transparency and accountability.⁸ Society needs more than to see a

-
- 1 Serious crime in this context refers to transnational economic crimes.
 - 2 Schott (2006: V-15).
 - 3 Eissa & Barber (2011: 1).
 - 4 Bazley & Foster (2004: 293).
 - 5 Young (2009: 1).
 - 6 Stennens (2008: 51).
 - 7 Stennens (2008: 31).
 - 8 Greenberg *et al* (2009: 92).

criminal being deprived of assets which have been obtained illegally or from the profits of criminal transactions. It needs to see also that the confiscated proceeds are applied to correct the harm caused by the crime, by compensating the victims or contributing to social services and other aspects of the country's economy. In other words, confiscation should be directed not only at depriving criminals of peaceful enjoyment of their ill-gotten assets but also at undoing the harm caused by the crime by making such assets available for the benefit of society. It should be noted that, in this context, undoing criminal harm does not mean restoring the victims of the crime to their pre-crime status or mending the relationship between the criminals and the victims of the crime. Such restoration does not accord with the spirit of retribution which forms the theoretical framework of this study. Restorative justice has a wider coverage than retributive justice, and includes the process of making good the sour relationship that exists between the perpetrator and victim of the crime.⁹ It pursues restoration, reconciliation, forgiveness and amelioration of the relationship between victim and perpetrator.¹⁰ Certainly, restorative justice does not aim to punish the offender for the offence committed. Its primary objective is to restore the status of the victims to the position they occupied before the commission of the crime.¹¹ By contrast, retributive justice aims at addressing the harm caused by crime by inflicting a proportional punishment upon the offender. Such proportional punishment is not confined to the corporal and custodial sentences which are considered by opponents of retribution as revenge. It includes also recovery of what the offender has acquired illegally from the crime committed and returning the recovered assets to the victim of crime.¹² Thus, in this context undoing of criminal harm refers to remedying the effects of the crime as far as possible, by using that which has been recovered via the proportional punishment imposed upon the criminals. To ensure that this is achieved, a well-structured, transparent and accountable asset management policy is required.

9 Dancig-Rosenberg & Gal (2012-2013: 2313-2314).

10 See Graves *et al* (2005-2006: 220-221).

11 See Koen (2007: 251).

12 See Knox (1952) para 101-103.

1.2 Problem Statement

The members of United Nations have signed and ratified a number of conventions and other policy instruments in the fight against serious crime.¹³ A major policy measure which is advocated by these instruments is asset recovery, in terms of which criminals not only are prosecuted but the proceeds and instrumentalities of their crimes are confiscated also, with a view to returning the same to the victims of crime and the general public.¹⁴ Asset management is integral to the fulfilment of these aims.

Most international conventions do not provide expressly for any asset management system. They require no more than that states parties adopt measures within their domestic frameworks to provide for the disposition of confiscated proceeds of crime. Only the United Nations Convention against Corruption (UNCAC) has mandated states parties to establish an administrative framework for preserved and recovered assets.¹⁵ This omission in the international instruments undermines the purpose of asset recovery policy and, in some cases, may facilitate corrupt transactions amongst those to whom the assets are entrusted.¹⁶ The Financial Action Task Force (FATF), an intergovernmental body with international endorsement, has sought to address the problem.¹⁷ It has developed a best practices guidance document to assist states in establishing a suitable asset management system.¹⁸ The FATF Guidance has received international acceptance through the United Nations Office on Drugs and Crime (UNODC), which included the best practices in its manual on international co-operation to confiscate proceeds of crime.¹⁹

13 Examples are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (Vienna Convention) of 1988, the United Nations Convention against Transnational Organised Crime and Protocols Thereto of 2004, the International Convention for the Suppression of the Financing of Terrorism of 1999 and the Forty Recommendations of the Financial Action Task Force of 2012.

14 See Article 31 of the United Nations Convention against Corruption of 2003, Article 5 of the Vienna Convention, Article 12 of the United Nations Convention against Transnational Organised Crime of 2003, Article 8 of the International Convention for the Suppression of the Financing of Terrorism of 1999 and Recommendation 3 of the Forty Recommendations of the Financial Action Task Force of 2012.

15 Article 31(2) of UNCAC.

16 This was the case in the Philippines. See Jimu (2009: 12-13).

17 An intergovernmental body formed by G-7 countries. See Schott (2006: III-7).

18 FATF Best Practices Paper (2012).

19 UNODC Manual on International Co-operation for the Purposes of Confiscation of Proceeds of Crime (2012: para 62).

In response to the policy of the international community, most countries have enacted laws which provide for the confiscation of proceeds of crime. Tanzania has enacted the Proceeds of Crime Act (POCA (T)), South Africa has enacted the Prevention of Organised Crime Act (POCA (SA)) and Nigeria has enacted the Economic and Financial Crime Commission (Establishment) Act (EFCC Act). These laws provide for recovery of proceeds and instrumentalities of crime.

The implementation of asset recovery policy in many African states is based on the principle that crime should not pay in its narrow interpretation. That is, criminals should not benefit from the proceeds of their crime, leaving aside the issue of returning the assets to the victims of the crime (corrective justice) and protecting the preserved and recovered assets from untrustworthy officers. The protection of preserved and recovered assets coupled with a reliable mechanism to ensure their return to victims of crime and the general public are the basics of asset management policy. However, subscribing to restrictive interpretation of the idea that crime should not pay, many states, including Tanzania and Nigeria, have not taken particularly seriously the issue of managing the proceeds crime. By contrast, South Africa has done so.

In Tanzania, the fundamental law on confiscation, the Proceeds of Crimes Act (POCA (T)), vests the responsibility for seized property in the Inspector General of Police (IGP).²⁰ It also provides for the appointment of a trustee where the property requires close supervision.²¹ However, the law does not specify how the trustee will be identified, it does not prescribe the court process by which the trustee is to be appointed, and it is silent upon how the trustee is to be remunerated. Further, it does not provide for how the property is to be handled by the IGP and does not identify the mechanisms by which the IGP will be accountable for the entrusted property. This *lacuna* has a negative effect on the enforcement of asset recovery policy in Tanzania. In some cases the government has to pay the damages resulting from

20 Section 35 of POCA (T).

21 Section 38 of POCA (T).

mismanagement of assets subject to recovery.²² This undermines the credibility of the policy in the eyes of the citizenry.

The idea of employing a court-appointed trustee for managing proceeds of crime resembles the South African model. However, the laws of South Africa provide expressly for the all matters pertaining to the trustee or *curator bonis*, including his appointment by the court, the scale of his remuneration and the terms of his accountability.²³ This suggests that, if given proper attention, it is possible to establish a reliable asset management system in Tanzania.

In Nigeria, the management of proceeds of crime and other matters in asset recovery are handled by a dedicated institution, the Economic and Financial Crime Commission (EFCC).²⁴ The Commission is responsible for managing proceeds of crime throughout the recovery process and it is accountable to the people through Parliament.²⁵ Although there are no regulations on asset management, the powers and duties of the Commission are well-structured and include reporting requirements.²⁶ The absence of regulations has negative effects for the proper management of preserved and recovered assets. This has made the management of recovered assets in Nigeria problematic.²⁷ A good asset management system should include features that promote transparency. Having a specialised agency stabilises the regime of asset recovery by allocating accountability over seized and confiscated properties to such agency. However, good laws and institutional arrangements need to be coupled with efficient regulations and implementation for effective results.

The disposition of recovered assets is another area that needs special attention. The practices in Tanzania and Nigeria provide for remission of recovered funds into the government revenue account.²⁸ In this case, the citizenry, which is always in search of tangible results, cannot appreciate easily the contribution of such funds towards its basic needs. It is also very

22 See Visram (2014).

23 Sections 28 and 42 of POCA (SA). See also regulations published in Government Notice No. 850 of 1 September 2000 (Government Gazette No. 21504).

24 Section 6 of the EFCC Act.

25 Section 37 of the EFCC Act.

26 Section 6(j)(v) of the EFCC Act.

27 "EFCC and the Seized Assets" *This Day* 11 October 2013.

28 Section 15 of POCA (T). See also Section 31(2) of the EFCC Act.

difficult to monitor their utilisation, and they may end up being used to pay unnecessary allowances rather than contributing to social services.²⁹ This *lacuna* necessitates the establishment of a proper asset disposition system in respect of confiscated assets in these countries. The South African system may be considered an example of such a proper system of managing recovered assets. The recovered assets and funds accrued from the realisation of confiscated assets are deposited into the Criminal Assets Recovery Account (CARA), a separate account within the National Revenue Fund.³⁰ The utilisation of the monies deposited into the account is controlled well by the Criminal Assets Recovery Committee (CARC) and the Cabinet.³¹ This ensures transparency and accountability in managing the proceeds of crime.

Thus, the Tanzanian and Nigerian asset management policies need an in-depth consideration to address both criminals and the officers entrusted with asset management duties. In addition, the asset management policies of the two states need to reflect the purposes of implementing asset recovery as contained in the international instruments.

1.3 Significance of the Study

Management of the proceeds of crime serves two main purposes: to maintain their integrity and to ensure accountability in relation to them. Maintaining the integrity of the proceeds is vital to protecting the value of the asset to be realised and, in the case of its return to the legitimate owner, to preventing any claim for damages.

A good system of management and disposition of criminal proceeds warrants state accountability for how much was confiscated and how it was utilised. Accountability of this nature builds public confidence in the system and encourages co-operation from the public as regards the identification of assets to be seized as well as the entire process of asset recovery. Commitment to recovering stolen assets is growing rapidly across the world, and it is necessary to have a well-structured asset management and disposition policy to ensure that the rationale of their recovery is attained.

29 Jimu (2009: 9).

30 Section 63 of POCA (SA).

31 Section 69A of POCA (SA).

This study examines the approach taken and the mechanism relied upon by Nigeria, Tanzania and South Africa in managing proceeds of crime. It assesses also their level of compliance with the international best practices (IBPs) for managing preserved and recovered assets and analyses the challenges they face in implementing these standards.

The management of preserved and recovered assets is crucial to the eventual success of any asset recovery regime. Yet, too often it does not receive the attention it deserves. It is hoped that this study will contribute in some small way to putting into perspective the importance of asset management as an element of anti-corruption regimes, including all African anti-corruption regimes.

1.4 Research Questions

This research has sought to engage and answer the following three questions regarding the efficiency of the asset managing institutions (AMIs) in Tanzania, South Africa and Nigeria:

- Do the asset management policies in the three designated countries comply with the IBPs?
- What are the challenges facing the three states in adopting the IBPs?
- Is there a need to amend the existing laws in any of the three countries to provide for a more reliable asset management system?

The three questions were meant to frame the assessment of the asset management policies of the three countries in relation to the IBPs. They were intended also to assist in examining the root causes of non-compliance of the three states with certain elements of asset management as contained in the IBPs and in exploring solutions to the challenges faced by the three states in this regard.

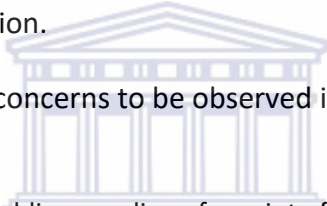
1.5 Literature Review

Despite management of proceeds of crime being vital to the process of asset recovery, there is a remarkable scarcity of literature on the subject. Of course, a lot has been written on how the

proceeds of crime can be recovered and on the objectives of confiscation policy,³² but precious little consideration has been given to what happens to the proceeds during the very delicate period between seizure and confiscation, and to the period after confiscation.

Jimu considers how to manage the repatriation and utilisation of recovered assets.³³ Writing on the experience of Nigeria, Peru, the Philippines and Kazakhstan, he insists on the need for political will, transparency and accountability through internal and external checks and balances. He insists also on having an independent third party to facilitate these arrangements.³⁴ He highlights the need for a pre-arranged plan for asset management. He asserts that, in the case of Nigeria, although the assets recovered from Sani Abacha were utilised to fund pro-poor projects,³⁵ the evaluation of these projects by civil society and the World Bank revealed certain weaknesses in their implementation.³⁶ The weaknesses resulted from lack of good faith and corruption.

Jimu identifies certain basic concerns to be observed in managing proceeds of crime, including:

- 
- (a) the need to have public recording of receipt of the proceeds of crime, and means to safeguard them;
 - (b) public declaration of intended use of recovered assets, period of its availability and entity responsible for its utilisation;
 - (c) public or official reporting of actual expenditures and results achieved;
 - (d) timely auditing of financial statements and results to verify the accuracy of the reports and
 - (e) official response to material weakness.³⁷

Jimu is concerned primarily with the management of repatriated assets. However, the concerns he raises are relevant also to domestically recovered assets. A reliable system of asset management should be established as part of every asset recovery regime. Targeting only international asset recovery might lead to difficulties in handling assets originating from domestic asset recovery proceedings.

32 See, for example, Basley & Foster (2004), Alldridge & Mumford (2005), Lugon-Moulin (2008), Pieth (2008), Ribadu (2008), Stennens (2008), Young (2009), Greenberg *et al* (2009), Brun *et al* (2011) and Eissa & Barber (2011).

33 Jimu (2009).

34 Jimu (2009: 17).

35 Jimu (2009: 7).

36 Jimu (2009: 9).

37 Jimu (2009: 16).

Arguing along the same lines, the Stolen Asset Recovery (StAR) Initiative also views the management of recovered assets as a matter in need of policy consideration.³⁸ It submits that a country should make prior preparations for how repatriated confiscated assets will be handled and utilised.³⁹ Repatriated assets, in most cases, involve large sums of money which attract public interest and which require a pre-arranged plan for their utilisation. However, the need for a comprehensive asset management policy is not dependent upon expectations of assets being repatriated. An asset management policy should be considered already at the time an asset recovery policy is established in a country to ensure reliable administration of recovered proceeds.

Brun *et al* consider the importance of managing proceeds of crime generally.⁴⁰ They explain the requirements of asset management at every stage of confiscation and the need for transparency in handling criminal proceeds.⁴¹ They analyse also common challenges that the AMIs may face in the course of managing specific categories of assets such as businesses, farms, livestock, motor vehicles and others.⁴² Their explanations constitute a skeleton framework of criteria which any state could adopt and follow. Their work, which encompasses the asset management practices of different countries, is useful as it highlights the key practices in the area. However, as they note, each country has to consider its own circumstances.⁴³ There is no single process which is applicable universally but the crucial requirements are transparency and accountability.

Greenberg *et al* write on the practical issues in non-conviction based asset recovery. They identify two requirements regarding managing proceeds of crime: a comprehensive law and an efficient organisational structure to implement the law.⁴⁴ Such an organisational

38 StAR Initiative (2009: 3).

39 StAR Initiative (2009: 37).

40 Brun *et al* (2011).

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

42 Brun *et al* (2011: 95-99).

43 Brun *et al* (2011: 92) .Provides for three alternative asset management mechanisms, which include, establishing a specialised asset management agency, specialised unit within the existing agencies or outsourcing.

44 Greenberg *et al* (2009: 85).

structure should include a system for pre-seizure planning, maintaining and disposing of proceeds of crime in a prompt and efficient manner.⁴⁵

They also consider issues that may affect the value of preserved assets prior to their confiscation. For example, the right of a defendant to use restrained assets to pay for legal and living expenses constitutes a charge against the value of forfeitable assets.⁴⁶ They argue that the extent to which a defendant may use restrained assets for the purposes of contesting the forfeiture action or for living expenses should be specified. They reason that, if a criminal offender is allowed to use the restrained assets to pay for legal and living expenses without limitation, he may use the opportunity to benefit from the restrained assets.⁴⁷ This will negate the objectives of asset forfeiture policy.

The arguments of Greenberg *et al* are useful for countries which allow for payment of legal and living expenses from restrained assets. For example, Tanzania allows for payment of such expenses and sets no limits other than reasonableness.⁴⁸ The reasonableness of the expenses has been left to the determination of the courts on a case-by-case basis. The idea of setting limits may assist in preserving the value of proceeds of crime in Tanzania and other states with a similar provision to POCA (T).

The provisions of the South African law also allow for payment of reasonable legal and living expenses from the restrained properties, subject to two conditions: (a) that the defendant should declare under oath all interest in the restrained property; and (b) that it should be established that the defendant cannot meet such expenses out of his or her unrestrained properties.⁴⁹ However, there is no provision that limits the payment of legal expenses from property proved to be proceeds of crime.⁵⁰

Ndzengu & Von Bonde discuss the effects of the legal expenses provisions in POCA (SA) on the value of restrained assets. They recognise the role of the judiciary in safeguarding the

45 Greenberg *et al* (2009: 85).

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

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

48 Section 38 of POCA (T)

49 Section 26(6) of POCA (SA).

50 Ndzengu & Von Bonde (2011a: 313).

intention of the legislature in this regard. They identify a number of cases which show how the courts in South Africa have played a role in ensuring that crime does not pay. In *NDPP v Mcasa*,⁵¹ a stern warning was sounded that, wherever necessary, strict checks and balances need to be applied in applications for legal expenses.⁵²

Ndzengu & Von Bonde consider also how the South African courts have embraced judicial activism in this area. Here they identify two aspects: firstly, the expansion of the factors to be considered in applications for legal expenses; and, secondly, the setting of time limits for entertaining such applications. With regard to the first aspect, they discuss the considerations noted by the Constitutional Court in the case of *Fraser v Absa Bank*.⁵³ These considerations include the seriousness and complexity of the charges, the conduct of the defendant, the value of his or her properties, the number and amount of creditors and the history of any given claim.⁵⁴ As to the second aspect, they highlight the court's ruling in *Din Agric v NDPP*.⁵⁵ In this case, the court held that the application for legal expenses should be lodged before a final restraint order is made.⁵⁶ The kind of judicial activism practised by the South African courts in order to give expression to the intention of the legislature may be instructive to the courts of Tanzania and Nigeria.

As is evident from the preceding paragraphs, there is no literature on how or whether the asset management systems of Tanzania, Nigeria and South Africa comply with the IBPs. There is also no literature that has addressed the founding principles of the asset recovery and management policies in the trio of states. This study seeks to remedy this omission by assessing the efficiency of the management of criminal proceeds in the three countries, their level of compliance with IBPs and the effectiveness of the founding principles of their asset recovery and management policies.

51 *NDPP v Mcasa* 2000 (1) SACR 287 (TkH).

52 Ndzengu & Von Bonde (2011a: 322).

53 *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC).

54 Ndzengu & Von Bonde (2011a: 322).

55 *Din Agric v NDPP* unreported judgement of the ECD, Case No. 81/ 2008 delivered on 04/12/2008. (quoted in Ndzengu & Von Bonde (2011a: 327).

56 Ndzengu & Von Bonde (2011a: 327).

1.6 Research Methodology

Comparison is the methodological fulcrum of the study. The asset management policies of Tanzania, Nigeria and South Africa are compared and contrasted with a view to assessing their compatibility with IBPs and suggesting improvements where necessary.

The selection of the three countries is based on the level of implementation of their asset recovery policies. Tanzania is in the process of improving its asset recovery and management regime, South Africa ranks foremost in asset recovery and management within the Southern African Development Community (SADC) region, and Nigeria has remarkable experience in international asset recovery and asset management. It is hoped that a comparison of the three countries will yield valuable insights into the criteria for successful asset management regimes in the African context.

Field research across the three countries was not a feasible option as regards both the time and the resources available for the study. The study thus is qualitative in nature and employs a desk-top mode of data collection. Fortunately, this mode of data collection has helped to avoid some of the challenges facing cross-national comparative studies which rely upon quantitative data collection methods. These include problems pertaining to the matching of the samples of respondents, the timing of data collection, the comparability of research instruments, and even the language of data collection.⁵⁷

The desk-top approach used in the study relied on critical analysis of secondary data available in the public domains of the three countries chosen for comparison. It is submitted that the focus on secondary data for comparative analysis did not limit the scope of the study, and neither did it affect the findings and recommendations emerging from the study. The study deals primarily with the policies in terms of which the three countries manage the proceeds of crime. In most cases, such policies are contained in documents in the public domain or may be derived from the provisions of the law on a specific matter. In this study, the policies of the Tanzania, South Africa and Nigeria for managing the proceeds of crime have been extracted from the laws regulating the recovery of proceeds of crime in each country. No doubt, field research would have added value to the study, especially regarding the recommendations for

57 See Gharawi *et al* (2009).

improvements relating to country specific issues. However, absence of the views of criminal justice policy makers and law enforcers from the designated countries on the question of asset management did not devalue the study to any significant extent. Certainly, the fact that the study was qualitative in nature did not impede the development of recommendations drawn from comparing the IBPs with the policies of the three countries.

As noted above, variation in the languages used in the countries to be studied may constitute a challenge to a cross-national comparative study.⁵⁸ Fortunately, the countries involved in this study use English in most of their legal documents, including their statutes and case law. This linguistic uniformity has eliminated the risks attached to translations of documents and the challenges regarding key legal concepts involved in the research. In addition, all the three countries apply common-law legal principles, and thus the nature of their legal frameworks did not pose any challenge to the successful completion of this study.



58 Gharawi *et al* (2009).

1.7 Outline of the Study

This dissertation consists of six more chapters. They are outlined below.

Chapter Two

Asset Recovery and the Relevance of Asset Management

This chapter discusses the objectives and rationale of the existing asset recovery policy as contained in the international instruments. It considers also the relevance of a stable asset management system within an asset recovery regime. In addition, the chapter sets out the theoretical framework of the study and provides a philosophical justification of asset recovery and management.

Chapter Three

Managing Proceeds of Crime in International Perspective

This chapter considers the elements of asset management policy incorporated in the international instruments. It examines also the IBPs for managing proceeds of crime as developed by the FATF and other bodies such as the G8 and the UNODC.

Chapter Four

Pre-Confiscation Asset Management Policies in Tanzania, Nigeria and South Africa

This chapter analyses the asset management mechanisms employed by the three designated countries at different points in the asset recovery process prior to confiscation. It assesses their efficiency and their level of compliance with the IBPs, as well as the challenges which the countries face in implementing the IBPs.

Chapter Five

Post-Confiscation Asset Management Policies in Tanzania, Nigeria and South Africa

This chapter deals with the asset management mechanisms employed by the three countries after the confiscation stage of the asset recovery process. Continuing with the approach taken in chapter four, it assesses the efficiency of these mechanisms and their level of compliance with the IBPs. Again, some attention is given to challenges faced by the designated countries in implementing the IBPs.

Chapter Six

Managing Proceeds of Crime in the African Context

This chapter interrogates the relevance and feasibility of the IBPs in the African context. It also seeks to answer the research questions posed in §1.4 above.

Chapter Seven

Recommendations and Conclusion

This chapter presents the findings of and concludes the study as a whole. As a Tanzanian, the writer does not consider it appropriate to make any comprehensive recommendations regarding asset management in South Africa and Nigeria. Rather, the study of these countries provides the basis for the recommendations on the asset management regime of Tanzania, which constitute the bulk of the chapter.



Chapter Two

Asset Recovery and the Relevance of Asset Management

2.1 Introduction

The early 21st century has been characterised, *inter alia*, by the international community's efforts to combat economic crime. Criminals no longer have safe havens for their illicit property due to such measures as customer due diligence, relaxation of bank secrecy principles and asset recovery. These measures have been introduced at both domestic and international level, aiming to ensure that nobody benefits from crime at the expense of its victims. As one of these measures, asset recovery is regarded as a vital stepping stone in the fight against economic crime.

Asset recovery may be defined as the process, authorised by a judicial or administrative order, through which proceeds of crime may be retrieved.¹ Assets subject to recovery includes any property related to a crime. It may be proceeds of crime or instrumentalities of crime.²

There are two common legal terms which are used to refer to asset recovery in criminal justice, namely, forfeiture and confiscation. The terms have similar meanings. Forfeiture originates from the American system and confiscation from the British system.³ Some countries, such as Tanzania, use the two terms interchangeably, while others use only one or other of the terms. Nigeria uses forfeiture only, while South Africa employs confiscation for conviction based asset recovery (CBAR) and forfeiture for non-conviction based asset recovery (NCBAR).

Asset management is an essential element of asset recovery, assisting the latter to achieve its objectives. It ensures not only the preservation of the assets subject to confiscation but also a transparent disposition of confiscated assets.

This chapter discusses the philosophical justification of asset recovery as a punishment and the relevance of asset management policy to the asset recovery process. It discusses also

1 Article 2(g) of UNCAC. See also Vettori (2006: 1).

2 Article 31(1) of UNCAC.

3 Levi (1997: 228).

the philosophical justification for managing proceeds of crime during the confiscation process. In the course of the discussion, some information on asset recovery policy, especially regarding its genesis and stages, is provided in order to lay a basis for the discussion of the relevance of asset management during all stages of the asset recovery process.

2.2 The Genesis of Asset Recovery

The practice of asset recovery as a punishment traces its origin to ancient societies.⁴ The elements of the current forfeiture laws are contained in the *Quran*,⁵ especially in the punishment for theft, and can be found also in the ancient Jewish criminal justice system. For example, the restitution of stolen property or its value contained in the *Quran*⁶ corresponds to the current forfeiture laws in terms of which stolen assets are recovered, or pecuniary penalties to recover the value of the stolen properties are imposed; the cutting off of limbs upon conviction for theft⁷ tallies with the forfeiture of instrumentalities of crime in the modern forfeiture laws; and civil recovery corresponds to the ancient Jewish practice of punishing animals for causing death or injury to a person without actually penalising the owner.⁸

Though asset recovery has been practised since ancient times, its popularity as a means of combating crime took root only in the 21st century.⁹ Asset recovery emerged as a response to the activities of organised criminal groups which were not affected by ordinary criminal sanctions.¹⁰ The popularity of asset recovery was fuelled by failure of conventional criminal law to deal with these groups and the threat to economic stability that they posed. The financial element of crime was identified as the backbone of the prosperity of the organised criminal groups. The profits from crime are used for both legitimate investment and for corrupting the administration of criminal justice in their favour.¹¹

4 Madinger J (2006: 6).

5 The holy book used by Muslims which is believed to have been revealed in 622 A.D.

6 Bambale (2003: 54).

7 Bambale (2003) 54.

8 Baldwin (2000: 204).

9 Gallant (2005: 1).

10 Gallant (2005: 5). See also Stessens (2000: 6).

11 Gallant (2005: 5).

Terrorist groups also solicit finances in order to raise funds for their attacks. However, the status of the economic element of the crime in terrorism differs from other crimes, in that funds may be collected from both legitimate and illegitimate sources.¹² The accumulated funds become proceeds of crime the moment they are destined to facilitate the commission of the crime.¹³ Hence, depriving criminals of peaceful enjoyment of the fruits of crime and fruits intended for the commission of crime is considered the best way to combat economic crime.

The idea of asset recovery is founded on the principle that crime should not pay, that nobody should benefit from committing crime.¹⁴ This underlying principle takes criminal conduct to be a rational choice, in the sense that criminals commit crimes after making a careful consideration of its consequences and benefits.¹⁵ Rational choice theory may not address adequately the reasons for the commission of all crime but it does suffice for economic crime.

All economic crimes aim at making profit. This might not be evident at the time of commission but the end result of all economic crimes is financial benefit. Crimes such as political corruption do not seem to aim at profit-making at first glance. However, it is through political power that most African leaders manage to loot the economies of their states. Thus, in order to combat economic crime, the criminal justice system should ensure or, at least, attempt to ensure that criminals do not enjoy the benefits which accrue from their unlawful conduct.

The community of states has endorsed the use of asset recovery for combating economic crime by signing and ratifying a number of international instruments providing for its use.¹⁶ What is more, implementation of asset recovery is taken seriously across the world.

2.3 Categorising Asset Recovery as a Punishment

There is a long-standing debate on the status of asset recovery in criminal justice systems. Sometimes asset recovery is referred to as a mere reparatory measure intended to mend

12 Gallant (2005: 5).

13 See Article 8(1) of the International Convention for the Suppression of Financing of Terrorism.

14 Stessens (2000: 51).

15 Klitgaard (1998: 4).

16 See Bacarese (2009: 422).

damage caused by crime and to prevent further crime.¹⁷ However a challenging question arises: does the degree of recovery correspond to the damage caused by crime?

The principal underlying asset recovery provides an answer to this question. The principle that crime should not pay, if analysed according to who should not benefit from crime, requires that nobody should be a criminal beneficiary. However, it is well-established that criminals seek to benefit from economic crime. Thus, the principle is directed towards them. In other words, the principle that crime should not pay literally means that criminals should not benefit from their crimes. This suggests that asset recovery is concerned with the benefits accrued from crime, and not with the damage suffered by the victims.

What is more, the construction of the provisions dealing with asset recovery draws a link between assets subject to recovery and benefits obtained from crime. For example, the international conventions provide for the recovery of stolen assets and any profit accrued from investing the proceeds of crime.¹⁸ No consideration is given to the damage suffered by the victims of the offence in computing the amount to be recovered. This suggests that asset recovery is not primarily a reparatory measure.

Does this signify that asset recovery is a punishment? In the context of this study, punishment, following Grotius, may be defined generally as a justified suffering imposed on an offender which is expected to bring justice to the victim of an offence.¹⁹ Given this perspective on punishment, the recovery of the proceeds of crime might seem to have no punitive impact on the offender, since it means simply depriving him of what was acquired illegally. This perception necessitates a discussion of why asset recovery may be categorised as a punishment.

Punishment need not be physical in order for it to have a punitive impact; even labour-based punishments may be an effective penalty. Grotius is very helpful on this point when he describes the nature of punishment:

17 See Cassella (2004: 348) and Warchol *et al* (1996: 54).

18 See Article 31 of UNCAC and Article 12 of UNTOC.

19 See Grotius Book II Chapter XX para I(2).

For though labour (not pain) may be the sentence of persons as a punishment, yet such labour is considered as it is disagreeable and therefore is a sort of suffering.²⁰

Asset recovery may not be regarded as a punishment that imposes labour due to the technical difficulties of assessing the labour of offenders embedded in their crimes. Criminals do invest their labour into committing crimes and in maintaining the proceeds of crimes. The labour might be physical in offences such as human trafficking, technical in money laundering offences or financial in drugs offences. Moreover, confiscation laws do not give the offender a chance to deduct the costs of running his criminal enterprise. Hence, his labour becomes part of what is recovered.

Another controversy may arise from the nature of assets subject to recovery process. In asset recovery, the assets subject to retrieval are not limited to the proceeds, and include the instrumentalities of crime. Confiscation of instrumentalities of crime does not cause any controversy except when they also form part of the proceeds of crime. Where the instrumentalities of crime do not form part of the proceeds of crime, the status of confiscation as a punishment can be perceived clearly.

With regard to proceeds of crime, the offender cannot claim legal title over them, hence, what he has taken illegally or the benefits that he has acquired illegally have to be returned. This may raise some doubts as to whether asset recovery is categorised correctly as a punishment and not as an alternative measure to deal with crime.

Confiscation of the proceeds of crime is a punishment to the offender as it takes away what he has gained after the commission of an offence. Criminals do not consider the possession of the proceeds of crime to be illegal. Confiscation of the proceeds of crime, to them, amounts to an evil act, as it means taking away what they consider to be their property.

Moreover, economic crimes differ from ordinary theft in which the stolen items may end up being consumed or sold for a minor profit. Economic crimes, in most cases, are characterised by a network of investments. To deprive criminals of peaceful enjoyment of the proceeds of such crime is a great punishment in two ways. Firstly, criminals need the proceeds

20 Grotius Book II Chapter XX para I(1).

of crime for investment purposes. Through money laundering processes the criminals invest the proceeds in lawful business and earn profit. This enables them to strengthen their economic status and their criminal industry. Without the proceeds of crime, all businesses which rely upon the injection of proceeds of crime may collapse. Secondly, confiscation denies them the capacity to live an expensive lifestyle.²¹ Criminals need the proceeds of crime to maintain their lifestyle. Preventing them from having such a lifestyle is a punishment. Hence, asset recovery ensures that criminals do not enjoy what they consider to be their legitimate property after commission of crime, and that is an effective punishment for them.

Unlike other forms of punishment which seek to attain justice by inflicting physical pain on the offender, asset recovery brings tangible justice by retrieving the stolen assets. The criminals are denied peaceful enjoyment of the proceeds of crime and the victims may be compensated. In this regard, UNCAC embraces the return of assets as a fundamental principle.²² It prescribes that states should afford one another the widest measure of co-operation and assistance to ensure the return of assets to the victim country so that they can be returned to their prior legitimate owners or to be used for compensating the victims of the crime.²³ UNCAC devotes an entire chapter to measures aimed at ensuring the successful return of assets.²⁴

Categorisation of asset recovery as a punishment is not an invention of this thesis. The international instruments themselves consider asset recovery to be a form of punishment. Thus, the first international instrument to introduce asset recovery, the Vienna Convention, provides for confiscation of assets amongst the sanctions for the offences it establishes²⁵ UNCAC, which distinguishes its chapters by their contents, provides for asset recovery already in the chapter dealing with criminalisation and law enforcement.²⁶ Had asset recovery been a

21 Cassella (2004: 349).

22 Article 51 of UNCAC.

23 Article 57 of UNCAC.

24 Chapter V of UNCAC.

25 Article 3(3)(a) of the Vienna Convention.

26 Article 31 of Chapter III of UNCAC.

mere preventive measure, UNCAC would have included it in its chapter dealing with the prevention of corruption.²⁷

Some international conventions, such as the African Union Convention on Preventing and Combating of Corruption, define confiscation as a penalty or measure resulting in a final deprivation of property, proceeds or instrumentalities ordered by a court of law,²⁸ thereby drawing a direct connection between the confiscation order and criminal offences.²⁹ This in-built relationship between confiscation orders and the offences committed, renders asset recovery a punishment or, in cases of administrative asset recovery, a punitive measure.

2.4 Philosophical Justification of Asset Recovery

It has been argued above that asset recovery is a punishment or a punitive measure. There are two primary competing schools of thought regarding the objectives of punishment: deontology and teleology. For deontologists punishment is aimed at remedying the injustices which have been committed, hence a person is punished because he has committed a crime.³⁰ The focus is upon the crime as a past event, with the infliction of an equivalent evil upon the offender aimed at striking a balance, to “bring justice”.³¹ In this scenario, the sufferings of the offender are not justified on any ground other than the fact that he deserves it as a person who is responsible for his own actions.³²

Deontology is the philosophical basis of punishment as retribution. According to retributive theory, justice will be achieved only when there is a proportion between the crime and the punishment.³³ Therefore, in order to maintain justice the two variables constituting a criminal episode should be equal. In other words “punishment should fit the crime”.³⁴ The sole purpose of punishment is to make the offender pay for the offence committed. Proportionality

27 Chapter II of UNCAC.

28 Article 1 of the African Union Convention against Corruption (2006).

29 See also Article 19 of the Council of Europe Criminal law Convention on Corruption (2002).

30 Kant (1887: 195).

31 Rabie & Strauss (1985: 19).

32 Gardiner (1958: 119).

33 Williams (1983: 95).

34 Kant (1887: 197).

in punishment is not measured in relation to the damage caused by a crime, but by the gravity of the offence.³⁵

In corruption cases, for example, asset recovery will not consider the damage caused by the corrupt transaction but the extent to which the offender benefitted from the crime. The same applies to other types of crime. For example, in the case of the murder of the sole provider of a family, a death sentence for the offender is not equated to the damage caused by the offence but to the gravity of the offence. Admittedly, it is difficult to strike an exact balance between the punishment and the gravity of the crime. However, equivalence is sufficient to satisfy the justice requirement.³⁶ The international conventions seem to have considered this theory when providing for remedies for crimes. Apart from providing for asset recovery and other forms of punishments, they also have separate provisions for compensation for damages.³⁷

Retribution has been challenged as being revengeful³⁸ and the proportionality principle interpreted to be part of the old principle of an eye for an eye, a tooth for a tooth.³⁹ However, retribution is not about revenge but about agreed and endorsed justice through which the wrong is annulled.⁴⁰ The laws which prescribe punishments are enacted prior to the commission of the offence. In revenge, the injured party does not need a prior endorsed arrangement on how to deal with the person who will cause the injury. Revenge is personal, unlike punishment which is administered by state institutions. Moreover, the pre-existence of the law ensures impartial punishments free from the demands for revenge emanating from anger.⁴¹

The proportionality principle also is not linked to the actual action amounting to a crime but the inherent value within the action. It is not about justifying the commission of another

35 Kant (1887: 198).

36 Kant (1887: 198).

37 See Article 35 of UNCAC.

38 See Grotius Book II Chapter XX para V.

39 The principle of *les talionis* which has its foundations in the Old Testament books of Leviticus 24: 19-20, Exodus 21: 23-25 and Deuteronomy 19:21. However the principle was annulled by the New Testament. See the book of Matthew 5: 38.

40 See Knox (1952) para 103.

41 See Knox (1952) para 103.

offence against the person found guilty of an offence. For example, in the case of robbery, proportionality does not mean that the offender should be robbed. In order to establish proportionality, the offender has to pay the inherent value of the robbery which includes the return of the pillaged property and the estimated “value” of the unpleasant action of robbing. The word value is enclosed in inverted commas because it does not mean monetary value but inherent value. The estimated “value” of a crime normally is measured by the impact of a particular crime on the community.⁴²

The teleological view of punishments for crime is linked intimately to their post-punishments effects. It considers what will be achieved after infliction of a punishment. Unlike retribution, teleology advocates a utilitarian theory of punishment that insists upon benefits being derived from punishments.⁴³ According to this school of thought, the benefits of punishments range from crime deterrence, through restorative justice to treatment of offenders in reformation centres. However, in this study, the discussion of the teleological view of punishment will be limited to crime deterrence.

Deterrence theory holds that punishments should have a dissuasive purpose. That is, in inflicting a punishment one must aim at dissuading the individual offender and the community from committing further crime.⁴⁴ As Plato proclaimed, “no wise man punishes because wrong has been committed but in order that wrong be not done”.⁴⁵ This implies that punishments do not aim at undoing the effects of crime, but at deterring further crime. For Plato, punishment deters crime by reforming the character of the offender and influencing the attitude of others towards crime.⁴⁶ Other notable proponents of punishment as a means of crime deterrence are Beccaria and Hobbes. Among other matters, they discourse on the degree of punishment that can ensure crime deterrence. They assert that, in order to achieve crime deterrence, the effects of punishment should be greater than the benefits that may be accrued from crime.⁴⁷

42 See Knox (1952) para 101.

43 See Bentham (1971) Chapter XIII.

44 Dilulio (1959: 233). See also Byrd (1989: 185-188) and Aquinas *Summa Theologica* Q.63, A. 1.

45 Plato *Protagoras* 324a4.

46 Plato *Dialogues* Book v para 862.

47 Beccaria Chapter 27. See also Hobbes Chapter XXVIII.

From the perspective of teleology, the relationship between the crime and the punishment is not relevant. The most important issue is what is achieved after infliction of punishment, in this case deterrence. The idea that punishment should have a positive effect of preventing crime may appear attractive. However, the teleological view of punishment does not address a number of important questions. The most basic questions concern justice, that is, is it just to punish a person disproportionately, and for no other reason than ensuring deterrence? Is the efficacy of punishment solely determined by its “benefits”? If the answer to the second question is in the affirmative, should states stop inflicting punishments where they do not have “benefits”?

These questions raise some doubts as to whether deterrence or any other post-punishment benefit ought to be the primary aim of punishment. The relationship that exists between the commission of a crime and its punishment does not support that rationale. Nobody can be punished without having committed a crime. The commission of a crime is a pre-condition for inflicting a punishment on the offender, hence the dictum that without a crime there can be no punishment.

The idea of having a punishment that outweighs the benefits of crime contradicts the idea of justice. Everybody needs to be treated fairly and justly. Being a criminal offender does not exclude a person from just treatment. From the deontological perspective, punishment that exceeds the gravity of the offence cannot be justified for the sake of deterrence.⁴⁸ Such punishment would violate the Aristotelian proportionality principle.⁴⁹

Asset recovery seems to be aimed at crime deterrence, especially as regards the confiscation of instrumentalities of crime. However, challenging questions arise: Are the instrumentalities of crime confiscated because of the possibility of their being re-employed in committing future crimes or because they were employed in committing a past crime? Are the proceeds of crime being confiscated because they may facilitate the commission of future offences or because of their relationship with the crime already committed?

48 Williams (1983: 105).

49 Aristotle *Nicomachean Ethics* Book V.

Considering the construction of the provisions on asset recovery in almost all international conventions, the proceeds of crime are confiscated literally because of their relationship to the crime that has been committed.⁵⁰ Nothing is considered as to the possibility of their facilitating further crime. Even in the anti-terrorism provisions, the proceeds may be confiscated by the time they have been destined to commit a crime. In most cases, where the primary stages of terrorism can be established, asset recovery is considered as part and parcel of the punishment of the offender. It is a complement to ordinary criminal sanctions to ensure a proportional punishment for the offenders.

Moreover, the construction of the provisions on asset recovery in international conventions, such as UNCAC, reflects the deontological view of punishment. The provisions suggest that every pain suffered by the community should be redressed by an equal pain to the offender. UNCAC requires that the offender be deprived of the proceeds of his crime and of any benefit accrued in relation to commission of the crime.⁵¹ Even when the proceeds of crime have been invested and have generated a profit, UNCAC mandates states to recover both the proceeds of crime and the profit gained from such investment.⁵²

Thus, asset recovery upholds the proportionality principle of punishment. For example, in conviction based asset recovery, the offender receives an ordinary punishment for the predicate offence and the proceeds of the crime are confiscated as a punishment for the illegal acquisition of assets.

The capacity of asset recovery to remedy crime in situations where the offenders cannot be brought to justice makes it a unique form of punishment. Through non-conviction based asset recovery, stolen assets may be recovered in cases of the death of offenders and in the absence of sufficient evidence to prove the criminal offence. Hence criminals cannot avoid easily receiving their just deserts in the presence of strict asset recovery measures. This supports further the notion of asset recovery as a proportional punishment.

50 See, for example, Article 5 of the Vienna Convention, Article 12 of the Palermo Convention, and Article 31 of UNCAC.

51 Article 31 of UNCAC.

52 Article 31(6) of UNCAC.

The experience of employing asset recovery as a punishment also negates a direct connection between punishment and crime deterrence. The United States of America, which is praised for being the first state to re-introduce asset recovery, has a sad experience in this regard. In its war against drugs, for example, asset recovery has never had a positive effect in deterring the illegal narcotics business.⁵³

In addition, the amount of recovered assets continues to increase over time.⁵⁴ This establishes that asset recovery is being implemented effectively but it also suggests an increase in crime commission running parallel to asset recovery policy. Be that as it may, no state has ever thought of abandoning asset recovery because it does not have a deterrent effect.

Asset recovery cannot be accounted for by way of the teleological view of punishment because its enforcement is not justified by its impact on crime commission. It might have some post-punishment benefits but those may arise only as a consequence of its primary aim to punish. This thesis holds that the primary aim of asset recovery is retribution, to punish criminals for the offences they have committed.⁵⁵ Punishment is a just way of dealing with those who commit crimes and asset recovery is a just way of dealing with those who commit economic crimes.⁵⁶

Deterrence and restoration, though considered amongst the rationales of criminal sentences, are secondary to the primary aim of punishing. In other words, they may be incidental consequences of punishments, and their occurrence or non-occurrence does not invalidate the infliction of the punishment, or negate its primary purpose. Hence, asset recovery may be justified philosophically as retribution for economic crimes.

2.5 Theoretical Framework of the Study

Asset recovery policy traces its origin from corrective justice theory. As propounded by Aristotle, corrective justice theory is about striking a balance between the parties to a

53 Warchol *et al* (1996: 59).

54 Warchol *et al* (1996: 54).

55 Williams (1983: 97).

56 Cassella (2004: 349).

transaction.⁵⁷ The theory provides that nobody should benefit at the expense of another. As argued by Weinrib, corrective justice deals with an equality of quantities, “it focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner”.⁵⁸ Again, this corrective justice should not be misconceived as restorative justice and hence as the antithesis of retribution. As elaborated in the general introduction to this dissertation, the proportional punishment advocated by retribution is not limited to physical punishments. It includes also proportional consideration of the economic effects of the crime. This aspect is discussed well by Hegel when he distinguishes retribution from revenge.⁵⁹

Aristotle’s corrective justice theory refers to justice arising out of voluntary transactions between men. Although the bulk of such transactions may be governed by private law, the nature of some forms of loss and gain that need to be equated suggests that corrective justice may not be applicable solely to private law. The only necessary feature for the application of corrective justice is the existence of harm, the causer and victim of the harm. As Aristotle explains:

‘the law looks only to the difference created by the injury, and treats the men as previously equal, where the one does harm and the other suffers injury or the one has done and the other suffers harm. And so this unjust, being unequal, the judge endeavours to reduce to equality again, because really when one party has been wounded and the other has struck him, or the one kills and the other dies, the suffering and the doing are divided into unequal shares; well the judge tries to restore equality by penalty, thereby taking from the gain.’⁶⁰

Confiscation of the proceeds of crime is about striking a balance between criminals and victims of the criminal transaction. It takes from criminals what they wrongly acquired and returns it to its rightful owner through the state. In most cases, the state acts as an intermediary through which the undoing of harm caused by criminal transactions is effected.

Aristotle’s notion of corrective justice is supported by Kant’s and Hegel’s proportionality principle of punishment. Aristotle pursues justice by creating a mean between the more and

57 Aristotle sidenote 1131a.

58 Weinrib (1991-1992: 408).

59 See Knox (1952) para 101-103.

60 Aristotle sidenote 1132a.

the less,⁶¹ while Kant and Hegel seek justice by way of punishments that are proportional to the gravity of the offences. The proportionality of punishment may be equated to the “mean” referred to by Aristotle because it involves consideration of the harm caused by the offence and the gain acquired by offender. By considering the gravity of the offence, the proportionality principle strikes a balance between the “gain” and “loss” in criminal transactions. The words gain and loss are enclosed in inverted commas because their literal meaning does not seem to fit the context. However, when the harm of a crime has been evaluated, it suffices to refer to loss on the part of the victim and gain on the part of the offender. Moreover, computation of gain and loss in economic offences is simple as the offender gains and the victim loses tangible assets.

The proportionality principle features in the implementation of asset recovery policy. The amount to be recovered is determined by the benefits accrued from crime, which is equivalent to the estimated loss suffered by the victims of the offence.

Proportionality of punishment is the basic element of the retributive theory of punishment which advocates punishment that amounts to a just desert for the offenders. Retributive justice, as read with Aristotelian corrective justice, provides the theoretical framework for this study.

2.6 Relevance of Asset Management in Asset Recovery Processes

Asset management is a subset of asset recovery as it complements the objectives of confiscation policy. While asset recovery policy holds that crime should not pay, asset management policy holds that punishment should not be a burden on the community. Though asset recovery seems to be the best punishment for economic crimes, its implementation may result in a great loss to the community.

Consider the example where a corrupt individual has invested the proceeds of his crime into running a hospital business. In the course of running the business, the entire investment is identified to be proceeds of crime and ordered to be preserved pending the final court order. If the order is implemented without an eye to asset management, the business likely will be

61 See the role of penalty in restoring equality between unequal shares as presented in Aristotle 1131a.

closed. This action is justifiable as part of the asset recovery process. However, it is an action that can result in a great loss to the community. The community will lose access to health services which are very important, the employees of the hospital will be jobless and even the taxes that used to be collected by the government will stop. Moreover, by the time the court grants a final order to confiscate the business, it will not be confiscating the actual criminal proceeds, but the buildings with their diminished value. The worst-case scenario is where no confiscation order is granted. It will be the duty then of the state to compensate the owner of the business for general and specific damages suffered because of the temporary closure of the business. The damages will be paid at the expense of the taxpaying citizenry. Asset recovery then becomes a punishment which generates loss for the citizenry.

This example shows the necessity of developing an asset management policy and a reliable legal framework that will enable its enforcement. An asset management policy will take care of such circumstances and ensure that asset recovery does not become a burden to the community.

Unfortunately, when the international community was establishing the current asset recovery policy it did not give much attention to issues of administration of assets during the recovery processes. UNCAC is the only international convention that considers the danger of mismanagement of assets subject to recovery. It mandates member states to establish a system to administer preserved assets and dispose of confiscated assets.⁶²

The relevance of asset management in every stage of the asset recovery process is discussed in the following paragraphs.

2.7 Stages of Asset Recovery and the Role of Asset Management

Asset recovery processes, whether criminal or civil, are characterised by four prominent stages. They are tracing and identification, preservation, confiscation and disposition. Administration of assets features as an important aspect of each stage. Mismanagement of properties at any stage affects the entire process of asset recovery. The role of asset management at each stage may be analysed as follows.

62 Article 31(3) of UNCAC.

2.7.1 Tracing and Identification

This is the investigative stage, where the assets related to predicate offences are tracked down and identified. The stage involves processes such as conducting database searches, verifying information from the suspicious transactions reports filed by various institutions, and analysing informants' reports.⁶³ It is the basic stage in the asset recovery cycle because without it the entire process becomes redundant.

The success of the stage is dependent crucially on public confidence in the administration of criminal justice, especially the implementation of asset recovery policy. The investigation needs co-operation from the financial and other institutions with regard to the filing of suspicious transaction reports. It needs also co-operation from the general public to facilitate assistance from informants on the existence and location of the proceeds of crime. The most reliable method of ensuring public confidence is to make the recovery process beneficial to society. This requires states to establish a reliable asset management policy which will make the recovery of criminal proceeds appealing to the community.

Asset management at this stage is embodied in the duty of confidentiality. The process of identifying and tracing assets needs to be done with the highest degree of confidentiality. Breach of this duty may prompt transfer of the identified assets which, in turn, may interfere with the recovery process. Criminals are not keen to lose their property and they are always in stand-by mode to protect what they have earned out of crime. If they are tipped-off, they easily can hide the proceeds of their crimes and thereby frustrate the recovery process. Thus, the maintenance of confidentiality is the duty of everybody involved in the process of identifying and tracing the assets that are suspected to be proceeds of crime.

2.7.2 Preservation Stage⁶⁴

When the proceeds of crime have been traced and identified they need to be preserved.⁶⁵ Preservation in asset recovery matters is very different from preservation in ordinary criminal cases. The difference lies in the purpose of preservation. In ordinary criminal cases,

63 Brun *et al* (2011: 5).

64 Article 2(f) of UNCAC.

65 Brun *et al* (2011: 6).

preservation is concerned with the evidential value of the property. In asset recovery, preservation targets the economic value to be recovered.

There are two ways in which proceeds of crime may be preserved, by full physical control or partial control of the identified assets. Many states refer to the aforementioned manners of preservation as seizure and restraint respectively. It is the duty of asset management personnel to choose the better procedure. The choice is affected mainly by the nature of the property and the value intended to be preserved.

2.7.2.1 Seizure⁶⁶

This process involves taking physical possession of the criminal proceeds by the investigative machinery. It can be implemented in two ways, through the investigative authority or through a court order. The process is considered expensive as extra costs are attached to the administration of the assets. The decision to seize an asset may be made where the asset is a threat to the community, or where its seizure is necessary to preserve the value expected to be recovered.

In preservation by seizure, asset management is crucial for the determination of the expected costs of administering the property. Without asset management skills, the authorities might end up seizing liabilities rather than assets. Where the costs that will be involved in managing the asset exceed the anticipated realisable value, the asset is not fit for preservation because it will render the process of asset recovery a burden to the community.

Valuation of the property subject to confiscation should be done to enable computation of expected realisable value before the decision to seize the property is taken. This may be possible only where the asset recovery policy considers asset management important. Mismanagement of properties at this stage may result in loss of realisable value and payment of damages to the property owner in case of an unsuccessful forfeiture application. In other words, it will make asset recovery weigh upon the citizenry.

66 Article 2(f) of UNCAC.

2.7.2.2 Freezing⁶⁷

The process of freezing involves limiting the normal operation of the targeted assets. In this type of preservation, the property may be left under the control of the defendant or any other person in whose possession the property was found. It is effective in preserving the value of the assets administered by reliable parties such as financial institutions.

It might be tempting to rate the relevance of asset management in this type of preservation as negligible. However, the safety of the properties under the control of independent persons needs a reliable system of monitoring and evaluation. Asset management principles provide for such a system, hence its relevance should not be underplayed. Mismanagement in this mode of preservation may allow the entrusted person to benefit from the preserved asset at the expense of the citizenry. It may result also in payment of damages to the defendant.

2.7.3 Confiscation Stage⁶⁸

This is the stage at which the court orders the confiscation of the proceeds and instrumentalities of the crime. After the confiscation order has been made, the title of the property is transferred from the offender to the state.

The role of asset management in this stage is to establish the realisable value of the asset confiscated by deducting the costs of administration from the actual value of the asset at the time of confiscation. Establishing the realisable value of the confiscated property is essential as it determines further steps to be taken by the state in correcting the harm caused by the crime.

2.7.4 Disposition⁶⁹

This is the final stage of asset recovery. There are two types of disposition, international and domestic. Where the recovery resulted from joint international efforts, the proceeds of crime

67 Article 2(f) of UNCAC.

68 Article 2(g) of UNCAC.

69 Article 57 of UNCAC.

need to be repatriated to the victim country.⁷⁰ The purpose of such repatriation of confiscated assets is to enable their return to their legitimate owners or to compensate the victims of the offence.

The international community encourages also the sharing of the recovered assets. This is a form of disposition of assets which needs asset management skills to determine how the asset sharing will be effected. Computation of the contribution of the host country in recovering the assets requires asset management skills rather than legal skills.

In cases of domestic disposition, returning the assets to their legitimate owners should be a priority. In addition, compensation to victims of the offence should be considered. Where the victims cannot be identified, funding of public good projects and the institutions responsible for administration of criminal justice should be considered.⁷¹

Returning the assets to their legitimate owners does not entail any legal or philosophical problem. It is justified under the well-established duty of the state to protect its subjects. Demonstrating this position, actions against criminal offences are always brought by the state, and those directly affected by the offences committed appear as witnesses. This suggests the existence of a social contract between the members of the society, and the state as an entity has been entrusted with ensuring the enforceability of that contract.⁷² Thus, returning what was taken illegally accords with the duty of the state to protect its citizens, which includes the duty to protect communally owned assets.

Compensation to victims of the offence is also a duty of the state, deriving from its duty to ensure the safety of its members. Compensation in this context does not involve paying damages for the harm occasioned by the offence. It involves providing services and activities that will assist to undo the harm caused by the crime.

Moreover, this does not pre-empt those who need to be compensated for specific damages. The international community provides an avenue for seeking damages separately

70 Brun *et al* (2011: 8). See also Article 57 of UNCAC.

71 Article 57(3)(c) of UNCAC.

72 Williams (1983: 97).

from the general consideration of victims in asset recovery.⁷³ Any person who is entitled to specific damages may employ that procedure. Most states allow applications for specific damages suffered as a result of criminal offences.

The funding of public good projects, which is encouraged where the victims of the offence cannot be identified, is justified also under the principle of awarding general damages to victims. The victims in criminal offences are not only the persons who are affected directly by the offence. In some cases the whole of society is affected.⁷⁴ In offences such as embezzlement, it is not easy to identify specific victims. The effects of the looted economy are felt by every member of society. Hence, if the looted monies are recovered, the funding of public good projects suffices as compensation to victims of the offence.

It is the disposition stage that determines the success of asset recovery policy in undoing the effects of crime. Hence, forfeited assets need to be disposed of in a manner beneficial to the community. Mismanagement at this stage has a great impact on public trust and confidence, which are fundamental elements in the implementation of asset recovery. Asset administration policy assists in ensuring proper disposition of the proceeds of crime by monitoring and evaluating the implementation of designated projects.

2.8 Philosophical Justification of Asset Management

Administration of assets during the recovery process may be justified philosophically as a “warrant” for retribution. The nature of retribution in asset recovery involves the return of the stolen assets to the victims of the offences. Matters involving recovery of proceeds of crime normally last a number of years. For example, cases instituted via criminal confiscations will require a much longer period to allow for the disposal of the criminal aspect before a forfeiture application can be entertained.⁷⁵ To ensure retribution, that is, a real recovery and return of the stolen assets, the recovery process needs to be complemented by proper management of the assets subject to confiscation.

73 See Article 35 of UNCAC for damages arising from corruption offences.

74 Williams (1983: 99).

75 Greenberg *et al* (2009: 13-14).

The retributive effect of asset recovery becomes evident during the final stages, especially the confiscation and disposition stages. The first phase of retribution occurs when the “gain” is taken away from the criminal offender. This may be achieved when the court orders the confiscation of the proceeds of crime. A confiscation order gives recognition to the legitimate titleholder of disputed assets, and invalidates the appropriated title held by the offender. The assets are put under the control of the state, and the “gain” is retrieved from the offender to secure retribution.

The second and final phase of retribution happens when the “gain” confiscated from the offender is added to the “loss” suffered by the victims of the offence to create a “mean”, a proportionality. This is done during the disposition stage by returning the assets to their legitimate owners, compensating victims of the offence or funding public good projects. To attain all of these, the assets should be available during the final stages of the recovery process. Availability of realisable assets to effect retribution can be insured only if there exists a system of managing the assets from the initial stages of the recovery process. In other words, retribution in asset recovery depends crucially upon asset management.

Thus, administration of assets features as a necessary enabling tool for asset recovery policy to accomplish its goals because, without proper administration, there can be no proper retribution. In this context, asset management is governed by the principles of deontological ethics, applying right procedures and principles prescribed by the law with no regard to the consequences. By contrast, teleological ethics is concerned primarily with the future impact of an action, giving little or no consideration to the manner of achieving such a consequence.⁷⁶ For teleology, the ethical nature of an action is determined by the number of people who will benefit, not the nature of the action in itself.⁷⁷

Deontology advocates maintaining what is right. When an action is considered to be right, deontology does not deliberate upon how many will be affected by it.⁷⁸ Hence, the

76 Frederickson *et al* (2013: 245).

77 Bentham (1945) Chapter 5.

78 Frederickson *et al* (2013: 245).

utilitarian principle of the greatest good for the greatest number⁷⁹ finds no room in deontological ethics. Instead, ethics are duty-based, compelling people to do the right thing irrespective of its consequences.⁸⁰ Though it may sound ungainly, deontology is counted most suitable for promoting ethics in public sector management,⁸¹ which encompasses management of proceeds of crime. Its ethics are praised for safeguarding the integrity of public sector institutions, ensuring accountability and assisting in implementing public policies.⁸²

Administration of preserved and confiscated assets gives considerable attention to what should be done to such assets as a matter of right. This manifests itself in the initial step of maintaining the assets. The institution responsible for managing the assets will take control of them in terms of a valid order providing for their preservation. In the absence of such an order, the institution will have no mandate to administer the assets. This is a matter of right and it does not consider the possible implications for the assets of a lack of proper administration.

When the assets are put under the control of the designated institution, nothing can be done to or with them to achieve a non-retributive outcome. For example, a preserved motor vehicle cannot be used by the law enforcement personnel before its confiscation and proper disposition. It may have been beneficial for the law enforcement personnel to use preserved assets in matters of public interest, but the principles of asset management do not approve such usage because it is not right. The assets are preserved solely for purposes of guaranteeing retribution. Serving the public interest is not part of such retribution.

Moreover, the maintenance of preserved assets cannot be affected by the possibility that the forfeiture application may fail. The AMI, for example, will not stop overseeing a business under its control when it becomes aware that the forfeiture application pertaining to such business may not be granted. The point is that the AMI should continue doing what is right, despite any consequences that the state may incur thereby.

79 Bentham (1945) Chapter 5.

80 Wood (2002) para 399-401.

81 Frederickson *et al* (2013: 245).

82 Frederickson *et al* (2013: 245).

The same applies to the disposition of the assets. The fact that no confiscation order is granted does not warrant depriving the defendant of the benefits accrued from the assets during preservation period. The defendant is entitled to have his assets back, free of any encumbrances and loss of value. Where a confiscation order is granted, the assets need to be returned to the previous owner. In carrying out this imperative, the AMI considers what is right for the victim of the offence. It does not consider the consequences of having no property to realise and of reimbursing costs incurred during the preservation stage.

Management of preserved and confiscated assets is precisely what guarantees retribution in asset recovery. Retribution assists in undoing the harm caused by a crime.⁸³ As elaborated previously, it is the aspect of correcting the harm caused by the crime that necessitates the co-existence of an asset recovery policy and an asset management system.

The management process maintains and, in some cases, adds to the economic value of the preserved assets. Maintaining the *status quo* of the preserved assets ensures retribution and secures the rights of the defendant in cases where a confiscation order is not granted. It is by reference to deontological ethics that the stolen assets can be managed without consideration as to consequences, even in the absence of a guarantee that the assets will be confiscated and realised to reimburse costs of administration.

Beyond adding value, asset management also ensures the quality of retribution by creating an opportunity for the citizenry to participate in decision-making as to how the recovered “gain” should be added to the “loss”. In a reliable asset management system, the decision on the manner in which the proceeds should be disposed of is made by a special board. The board normally is composed of members from different stakeholders such as civil society, members of parliament and ministers.⁸⁴ This assists to secure indirect citizen participation in deciding on the manner of retribution by involving people enjoying public trust.

Asset management contributes also to a fair retribution by guaranteeing accountability of those entrusted with the management task. This is manifested in accountability measures

83 Knox (1952) para 99-100.

84 See, for example, the composition of the South African Criminal Assets Recovery Committee (CARC) established under Section 65 of POCA (SA).

such as reporting requirements and liability for negligent misconduct. The decisions of the AMI usually form part of the report which is submitted to the institution which represents public interests, such as the parliament.

For example, in South Africa the monies and properties in the Criminal Assets Recovery Account (CARA) can be utilised only on recommendations made by the Criminal Assets Recovery Committee (CARC) and approved by the Parliament.⁸⁵ The utilisation of the resources in the CARA is audited and reported to the executive authority and to the Parliament of the Republic of South Africa. The reporting requirement ensures transparency about what was recovered and how it was disposed of, and gives an opportunity for the citizenry to recommend a better manner of retribution. It also guarantees accountability of those responsible for implementing asset recovery policy to the citizenry.

In an effort to accomplish effective asset management, the international community has highlighted the basic features of a suitable system. These are discussed below.

2.9 Basic Features of a Reliable Asset Management System

Though not contained in a single instrument, the main features of the asset management system approved by the international community encompass transparency, accountability and efficiency.

2.9.1 Transparency

Transparency is the key feature of a reliable system for managing proceeds of crime. It includes elements such as data storage and access to information.⁸⁶ The system needs to have an updated database in which records of all assets, whether recovered or in the process of being recovered will be stored.

The database should include details of the properties, such as the date of their preservation, their value at the time preservation, the costs of their management until confiscation date, their value at confiscation stage, the actual value realised and the manner of

85 See the provisions of Section 69A (3) of POCA (SA).

86 See Para 27(k) of the FATF Best Practices Paper (2012).

their disposition.⁸⁷ Regular record-keeping will assist the system to work in a transparent manner and ensure accurate retribution. Where the system has no proper record-keeping mechanisms, it will be impossible to establish the proportionality of retribution.

The second basic element of transparency in asset management is access to information. The citizenry should have access to information contained in the database.⁸⁸ Victims of the offence in question must know how much was recovered in order to assess proportionality in relation to what they have received as compensation. An opaque system will not secure the citizenry a right to access the information and may create favourable conditions for corruption.

Retribution is about proportionality. Without access to information as to how the recovered properties were dealt with, there will be no assurance of such proportionality. This element introduces another feature of a dependable system of managing proceeds of crime and that is accountability.

2.9.2 Accountability

Accountability forms the backbone of a reliable system of asset management. The AMI holds assets subject to confiscation as a trustee and not as a beneficiary. The beneficiaries of the proceeds of crime are the victims of the offence. After the final order has been made, the beneficiaries must be aware of what transpired with the assets. This may be attained by establishing a reporting mechanism through which the citizenry become informed of the manner in which the proceeds were handled and distributed.

Moreover, the international community requires that there should be put in place an auditing system for the reports and the contents of the database.⁸⁹ Auditing will assist in verifying the contents of the reports and the information available in the database. It will assist also in establishing whether the system is efficient enough to continue with the business of managing assets subject to confiscation. Most importantly, auditing will assist in identifying problems facing the system and suggest solutions. In other words, auditing aims at improving

87 See Para 27(k) of the FATF Best Practices Paper (2012).

88 See G8 Best Practices (2005).

89 See G8 Best Practices (2005).

the performance and efficiency of an asset management system. It acts as a mechanism for monitoring and evaluation in an effort to warrant retribution.

2.9.3 Efficiency

The efficiency of an asset management system may be measured by evaluating its role in achieving the goals of asset recovery. In order to have a successful recovery, the assets should be available to satisfy the requirement of retribution. A court order to confiscate proceeds of crime may not be valuable where the proceeds themselves are no longer in existence. Hence, to determine whether the system is efficient, the capacity of the system to handle assets must be checked.

There are three major elements that determine the capacity of an asset management system: a reliable source of funding,⁹⁰ skilled staff⁹¹ and a sound system of checks and balances.⁹² The sources of funds should be well-established to avoid the need to rely on the preserved assets, which will affect retribution. Government budgetary allocations may be useful in this regard. Where the laws allow, investments from the preserved assets also may be a dependable source of funding the operations of the system.

The system needs also to be staffed by personnel skilled in legal and asset management matters. The staff will assist in making cost-effective decisions during all stages of the asset recovery process. For example, decisions have to be made about which mode of preservation will be suitable for a particular property and which legal procedure ought to be followed. Decisions of this nature need expert opinion in those two fields, as well as a system of monitoring and evaluation in order to establish checks and balances.

In addition, a reliable asset management system is characterised by a reliable enforcement mechanism. To ensure the implementation of these features, an effective legal framework should be in place.⁹³ Law is the most reliable means for enforcing accountability and

90 See Para 27(b) of the FATF Best Practices Paper (2012).

91 Para 27(e) and (f) of the FATF Best Practices Paper (2012).

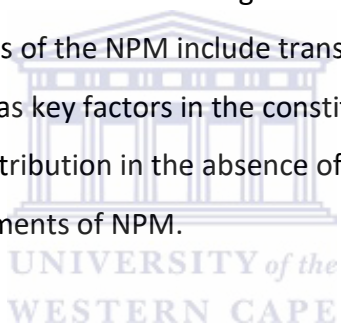
92 See G8 Best Practices (2005).

93 Seidman *et al* (2007: 21).

other matters pertaining to asset recovery. In the absence of legal measures, enforcement of other features is not guaranteed.⁹⁴

The features suggested by the international community correspond to the principles of public asset management. This may be gleaned from the key elements of public asset management which include transparency, accountability, sustainability, efficiency and effectiveness.⁹⁵ Unlike management of assets subject to forfeiture, the aim public asset management is to ensure observance of the core values of good governance.⁹⁶

Good governance in public management is advocated frequently in the public sector modernisation process, popularly referred to as “New Public Management” (NPM). This is a global reform movement consisting of common aspects of public governance that generally supports the view that the public sector can be managed and evaluated in the same manner as private sector.⁹⁷ The basic demands of the NPM include transparency, efficiency and responsiveness which appear also as key factors in the constitution of retribution. This suggests that there might be no effective retribution in the absence of a system to manage assets characterised by the basic requirements of NPM.



2.10 Conclusion

Asset recovery is an essential weapon against economic criminality. Its retributive nature and techniques of undoing the criminal harm assist in combating such criminality in a more sophisticated manner. Managing assets subject to recovery complements asset recovery and makes its retributive effects practicable. The co-existence of the two policies makes asset recovery a reliable means of achieving corrective justice capable of both punishing the offender and compensating the community for the evils caused by the offences. There never can be effective asset recovery in the absence of a reliable asset management policy. Given the fact that asset recovery was introduced by the international community, the next chapter will

94 Seidman *et al* (2007: 2).

95 Grubišić *et al* (2008: 79).

96 Agere (2000: 23).

97 Sa` C *et al* (2013: 105).

discuss how the international instruments address the issue of asset management during the asset recovery process.



Chapter Three

Managing Proceeds of Crime in International Perspective

3.1 Introduction

Asset recovery is embraced worldwide as a tool against economic crime and it is addressed in almost all international instruments dealing with such crime. It is addressed also in non-international instruments dealing with economic crime and which enjoy international endorsement.¹

The main purpose of its advocacy is to ensure retribution for economic offences by way of corrective justice. Retribution in asset recovery is achieved by depriving economic criminals of their loot, thereby maintaining proportionality between the stolen and the recovered assets.² Asset recovery is a route to proportional punishment for economic crimes. Recovering benefits of crime affects only one part of the crime, that is, the criminals. To ensure retribution in the other part of a criminal transaction, the benefits taken from criminals need to be returned to the victims of the offence. In effecting this, retribution takes the form of corrective justice. Corrective justice, as discussed in the previous chapter, maintains equality between two parties to a transaction. Applying the theory to asset recovery will assist to ensure the retributory disposition of the recovered assets. The other party to a “transaction” will receive retributory compensation also. In other words, corrective justice may be regarded as retribution in action during disposition of the recovered assets.

Corrective justice in asset recovery is attained through repatriation of assets to the victim state and return of assets to the victims of crime. The effects of the two processes are similar as they both tend to undo the harm caused by the crime, by using the recovered assets to compensate its victims. While compensation to victims is more direct, the repatriation of assets in international asset recovery takes the requesting state as the primary victim of the

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

2 Stolen assets include also the benefits accrued from investing the proceeds of crime. See Brun *et al* (2011: 109-110).

offence. Hence, returning the confiscated assets to the requesting state amounts to compensating the victims of the offence.

This chapter analyses the provisions for managing the proceeds of crime contained in the international instruments. As postulated in the previous chapter, asset recovery combats economic crime by ensuring retribution and pursuing corrective justice. The latter can be achieved only during the last stages of the recovery process. Hence, proper management of the assets during all stages of their recovery is vital to making certain that they are available for ultimate retributive disposition.

The international community appreciates the necessity of administering assets which are subject to the recovery process. Almost all international instruments on economic crime address the issue of asset management. However, the manner and degree of consideration differ from one instrument to another.

This chapter considers also the international best practices (IBPs) compiled by international bodies, such as the FATF, which act as a complement to the international conventions. In addition, the chapter discusses various factors that may affect the economic value of the preserved assets³ and how the international community addresses them. Further, it examines the role of the international community in ensuring the establishment of reliable asset management systems in the domestic jurisdictions of its member states.

The analysis of the international provisions is intended to lay the basis for the assessment of the asset management systems in individual states. It will be employed in this thesis for assessing the systems that exist in Tanzania, South Africa and Nigeria.

3.2 International Instruments on Asset Recovery, Asset Management and Corrective Justice

All international instruments that provide for asset recovery address in some way the issue of managing recovered assets. The role of asset management is to assist asset recovery policy to achieve its goals. The purpose of asset recovery in the international conventions has been

3 The factors include plea bargaining and payment of legal, living and business expenses from the preserved assets. See Stephenson *et al* (2011: 93).

established in the previous chapter to be retribution and correcting the harm caused by the crime. The purpose of asset management being intimately linked to the purpose of asset recovery policy in all cases, it may be accepted that asset management aims at ensuring retribution via corrective justice.

The role of asset management in securing retribution is not provided for extensively in the international conventions. Most of the conventions consider asset management as an issue to be dealt with domestically. However, UNCAC has changed the international community's perception of asset management. Though it does not provide details as to what should be done with the preserved assets, UNCAC mandates states to establish a system responsible for regulating the administration of such assets by a competent authority.⁴ In this regard, the role of asset management in the international instruments can be discerned by considering the expected end result of asset recovery.

Asset recovery plays an active role in corrective justice by identifying the inequalities caused by the crime and rectifying them. Benefits accrued from crime are gains that offenders enjoy at the expense of their victims. Thus, crime creates inequalities between the offenders and their victims. Asset recovery corrects the inequalities stemming from economic crime by recovering the proceeds of such crime and returning them to the victims.

The actual recovery is the second stage in the pursuit of retribution, the first stage being the identification of the inequalities. The circle of retribution becomes complete at the third stage, which involves returning the recovered assets to the victims of the offence. To ensure that retribution is attained, the assets need to be preserved from the time of identification to the time when they are returned to the victims.⁵ Asset management policy makes such preservation possible.

The two assertions, asset recovery as retribution and asset management as a policy promoting corrective justice to achieve retribution, may be adduced from the provisions

4 See Article 31(3) of UNCAC.

5 See Greenberg *et al* (2009: 87) on the need to preserve the value of assets during the entire process of recovery.

dealing with asset recovery and management that are contained in the international instruments.

3.2.1 International Conventions

The United Nations is in the forefront of combating economic crime. It has facilitated the drafting and endorsement of a number of conventions in this regard. The conventions address asset recovery as retribution for crimes and asset management as a prominent feature of corrective justice in asset recovery. Corrective justice is essentially about the retributive disposition of the recovered assets. This normally is attained by returning confiscated assets to the victims of the crime or by paying compensation to the victims.

3.2.1.1 The Vienna Convention

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁶ popularly referred to as the Vienna Convention, is the first international instrument to provide for asset recovery.⁷ The Convention was a result of the efforts of the United Nations Drug Control Programme to combat drug trafficking and money laundering.⁸ It contains very potent provisions on asset recovery which have influenced many subsequent instruments at all levels.⁹ It considers asset recovery as retribution. This is evident from the proportionality that exists between the benefits accrued from crime and the degree of recovery. The Convention focuses on drug-related crimes,¹⁰ and provides for confiscation of the instrumentalities¹¹ and the proceeds of these crimes.¹² It allows also for the recovery of the value of the proceeds of crime where the actual assets are not available.¹³

The commitment shown by the Convention to the recovery of proceeds of crime establishes clearly the retributive nature of its asset recovery provisions. Corrective justice is reflected in the suggested use of the recovered assets.

6 It was adopted on 19 December 1988 and came into force on 11 November 1990.

7 Kaye (2006: 324).

8 Schott (2006: III-3).

9 Kaye (2006: 324).

10 Kaye (2006: 324).

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

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

13 Article 5(6) of the Vienna Convention.

The Convention requires states to consider contributing the value of the recovered assets to intergovernmental bodies specialising in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances.¹⁴ This may signify the return of assets to the victims of the offence because those bodies are responsible also for the welfare of the victims of drug offences. Return of the recovered assets to the victims of crime may be considered to be a form of corrective justice as it creates equality between the parties to the crime, the offender and the victim. In other words, corrective justice in asset recovery appears as an expression of retribution in action.

Despite being proactive in providing for recovery of the proceeds of crime and their disposition, the Vienna Convention does not address expressly management of the proceeds of crime from preservation to disposition. It may be argued, however, that by providing for recovery and disposition of the recovered proceeds of crime, the Convention by implication requires states to take measures to manage the preserved assets. In addition, the provision on freezing and seizure of the proceeds of crime¹⁵ affirms the desire of the Convention to have the preserved assets administered properly. However, such a construction may lead to difficulties in implementation or even non-implementation of the provisions by the states. International instruments need to have express provisions to enable states to implement them easily.

3.2.1.2 The Palermo Convention

The United Nations Convention against Transnational Organised Crime,¹⁶ also known as the Palermo Convention, is an instrument adopted to promote the fight against international organised crime.¹⁷ It contains a broad range of provisions to combat organised crime and compels member states to implement its provisions through enacting domestic legislation to that effect.¹⁸

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

15 Article 5(2) of the Vienna Convention.

16 It was adopted on 15 November 2000 and came into force on 29 September 2003.

17 Shehu (2005) 223.

18 Schott (2006) III-3.

With regard to asset recovery, the Palermo Convention requires member states to adopt measures that enable confiscation of both the proceeds and instrumentalities of crime.¹⁹ Like the Vienna Convention, it provides for the confiscation of the proceeds of crime²⁰ and of profit derived from assets into which proceeds of crime may have been converted.²¹

The nature of assets subject to recovery and the proportionality that exists between such assets and the benefits accrued from commission of the offence reflect the retributive nature of asset recovery in this Convention. Moreover, the aspiration of corrective justice emerges clearly from the requirement that the recovered funds be utilised to compensate the victims of the offences established by the Convention.²²

Compensation tends to undo the harm caused by the offence to the victims. This, though not its primary target, may be counted as a practical effect of retribution and a basic component of corrective justice. Retribution in asset recovery ensures a proportional recovery of the looted assets. Compensation to victims of economic crimes restores equality between the two parts of the crime. It makes asset recovery achieve its retributive goal regarding the offender and the victim. Thus, the requirement to compensate the victims from the confiscated assets may be conceived as an expected consequence of implementing retribution.

Like the Vienna Convention, the Palermo Convention does not have an express provision for management of assets during the recovery process. However, it contains express provisions on seizure and freezing of the proceeds of crime immediately after identification.²³ Perhaps its drafters presumed that states would appreciate the necessity of administering preserved and confiscated assets in order to achieve proper recovery. However, implied duties are always prone to non-implementation. The international community needs to provide expressly for all basic obligations which the states are required to implement.

19 Article 12(1) of the Palermo Convention.

20 Article 12(3) of the Palermo Convention.

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

22 Article 14(2) of the Palermo Convention.

23 Article 12(2) of the Palermo Convention.

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

The international community perceived the threats of terrorism already prior to the 11 September 2001 attacks in the USA.²⁴ Manifesting its serious concern, the UN adopted the International Convention on the Suppression of the Financing of Terrorism in 1999.²⁵ The Convention establishes acts that constitute terrorism²⁶ and requires states parties to criminalise terrorism in their domestic law.²⁷

With regard to recovery of the proceeds of crime, the Convention obligates each state party to take appropriate measures, in accordance with its domestic legal framework, for the “identification, detection, freezing or seizure and confiscation of any funds used or allocated for the purpose of committing the offences established by the Convention”.²⁸

The retributive nature of asset recovery in this Convention is manifested in the nature of assets subject to recovery and the extent of the recovery. The Convention mandates states to forfeit funds and instrumentalities destined for terrorism. This establishes the nature of assets targeted by the Convention to be those related to the crime. In effecting the recovery, the Convention maintains proportionality between the intended costs of the crime and the recovered assets. This affirms the retributive nature of the asset recovery provisions contained in the Convention. The retributive disposition of the recovered assets includes the use of confiscated funds to compensate the victims of the offence.²⁹

Unfortunately, this Convention, too, lacks express provisions on the management of the preserved assets. As with the conventions discussed previously, the nature of the asset recovery provisions suggests that this Convention implies that states should develop mechanisms to administer assets. This implication is adduced from the requirement that states freeze or seize the suspected proceeds of crime.³⁰ The two orders give responsible state

24 Schott (2006: III-4).

25 The Convention came into force on 12 April 2002.

26 Article 2 of the UN Convention on Terrorism.

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

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

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

30 Article of the UN Convention on Terrorism.

agencies temporary control over the proceeds of crime. Presumably, state agencies will be keen to administer the assets diligently and achieve a desired recovery.

3.2.1.4 The United Nations Convention against Corruption

Corruption is one of the grave offences facing the international community, and it links with other forms of crime, especially organised crime and other economic crime.³¹ Embezzlement is the most popular category of economic crime in Africa. It poses serious problems and threats to the stability of societies by undermining the institutions and values of democracy, ethics and justice. It also jeopardises sustainable development and the rule of law.³² The international community, being concerned about the importance of the problem, adopted the UN Convention against Corruption in 2003.³³

UNCAC is considered to be the most innovative as far as asset recovery is concerned. It obligates states parties to afford one another the widest measure of co-operation in effecting asset recovery.³⁴ It requires each state party to take the measures necessary to enable identification, tracing, freezing or seizure³⁵ and confiscation of the instrumentalities and the proceeds of corruption.³⁶ It also provides for confiscation of income or other benefits derived from proceeds of corruption.³⁷

The retributive nature of the asset recovery provisions in UNCAC is reflected in the nature of the assets subject to recovery, the extent of the recovery and the principle of return of recovered assets. Indeed, the return of the assets is a fundamental principle of the Convention.³⁸ The principle mandates states to ensure that the recovered assets are returned to the victim state. Return of assets is an advance demonstration of the concept of compensation to the victims addressed to the states.

31 Para 2 of the Preamble to UNCAC.

32 Para 1 of the Preamble to UNCAC.

33 It came into force on 14 December 2005.

34 Article 51 of UNCAC.

35 Article 31(2) of UNCAC.

36 Article 31(1) of UNCAC.

37 Article 31(6) of UNCAC.

38 Article 51 of UNCAC.

Prior to ratification of UNCAC, states were not returning recovered assets and considered that they themselves had legal title over the assets rather the victim state.³⁹ UNCAC advocates a retributive disposition of the recovered assets through its return of assets principle, which has affected greatly the practice of international asset recovery. States now are considering repatriation of recovered assets as a matter of course, and even in domestic recovery the return of assets to the victims of the offence is given serious consideration.

As to asset administration, the Convention contains a commendable provision which prescribes that states should ensure proper management of the preserved and confiscated assets. A detailed discussion of the asset administration provision in UNCAC will be undertaken later, when the structure of the international framework for managing proceeds of crime is considered.

3.2.2 Regional Integrated Bodies

The fight against economic crime involves efforts in which countries, within their regional integrated bodies, join forces to pursue the same goal. Tanzania, South Africa and Nigeria all are party to the African Union (AU). South Africa and Tanzania are also members of the Southern African Development Community (SADC), and Nigeria belongs to the Economic Community of West African States (ECOWAS).

In its fight against corruption, the AU adopted the Convention on Preventing and Combating Corruption,⁴⁰ aimed at promoting and strengthening the development of required mechanisms, co-operation amongst states and the harmonisation of the policies and legislation amongst states parties for the prevention, detection, punishment and eradication of corruption on the continent.⁴¹

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

39 The remnants of this attitude still persist in some states. They prefer sharing than repatriating recovered assets. See Stephenson *et al* (2011: 78).

40 The Convention was adopted in Maputo on 11 July 2003.

41 Article 2 of the AU Convention.

administer, freeze or seize and later confiscate proceeds of corruption.⁴² As to the degree of recovery, the Convention takes into account the proportionality between the benefits accrued from the crime and the assets subject to recovery. The value of the proceeds of the crime is the determining factor of proportional recovery, with the Convention allowing confiscation of proceeds of crime or property to the value of such proceeds.⁴³

As regards the management of confiscated assets, the Convention deals with the matter in a very cursory manner. It only provides for the need to administer the seized or frozen proceeds without prescribing what should be considered during such administration. Also, the Convention does not provide guidance on how the proceeds should be disposed of domestically. It leaves everything concerning the preserved assets to be determined by individual states. In cases of international asset recovery, the Convention provides for repatriation of proceeds from the requested state to the victim state.⁴⁴

Being a regional integration and hence having member numbers capable of easy supervision, compared to United Nations, it was to be expected that the AU would formulate effective steps to implement what the international community is preaching. Obliging states to have administration mechanisms without general guidance and a means to ensure the implementation of those obligations may render the whole exercise meaningless.

At the regional level, it would have been useful to provide for practical implementation strategies, such as requiring states to submit reports on the administration of proceeds on a periodic basis to ensure accountability and fair disposition of proceeds, as well as addressing issues of compensation to victims.

Lack of a specific provision on suggested utilisation of the recovered proceeds of crime makes it difficult to analyse the purpose of asset recovery policy in the AU Convention. However, the elements of proportionality between the proceeds of crime and degree of recovery suggest retribution. The aspect of repatriation generally symbolises practical

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

43 Article 16(1)(b) of the AU Convention.

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

implementation of retribution although the option is available, of course, only in international asset recovery.

Unfortunately, the SADC⁴⁵ and ECOWAS⁴⁶ reproduced, *mutatis mutandis*, the provisions of the AU Convention on confiscation in their Protocols against corruption, except for the question of repatriation of assets. These two regional bodies, being very small communities, ought to have had more focus on having provisions on matters of monitoring and evaluation of the strategies set by the international community and developing their own practical strategies that are suitable for their member states, such as suggesting matters to be considered during disposition of assets.

A good example is the response of the Council of Europe in complying with the international community's campaign against economic crime. It developed strategies, such as formulating special guidelines, and a monitoring group to assist member states to achieve the goals of the international community.⁴⁷

It is hard to point out the actual intention of asset recovery provisions contained in the SADC and ECOWAS Protocols. However, the elements of retribution can be detected in the proportionality maintained between the value of the proceeds of crime and the degree of recovery.⁴⁸ The practical implications of retribution do not feature in these two Protocols as they do not contain provisions that allow for the return of recovered assets to the requesting state and compensation to victims. Instead, they provide for sharing of assets recovered through joint efforts.⁴⁹ The Protocols do not make any suggestions regarding the utilisation of confiscated assets.

45 See Article 8 of SADC Protocol against Corruption.

46 See Article 13 of ECOWAS Protocol on the Fight against Corruption.

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

48 See Article 13(1)(b) of ECOWAS Protocol on the Fight against Corruption and Article 8 (1)(a) of SADC Protocol against Corruption.

49 See Article 13(5) of ECOWAS Protocol on the Fight against Corruption and Article 8(6) of SADC Protocol against Corruption.

3.2.3 Intergovernmental Bodies with International Endorsement

These include policy-making bodies which cannot be categorised as international bodies, but which have influence on the formulation and implementation of international policies. With regard to the fight against economic crime, the Financial Action Task Force (FATF) is the most prominent intergovernmental body. The FATF was formed by the G7 countries⁵⁰ in 1989 for purposes of developing and promoting an international response to money laundering, as the most prevalent economic offence. In October 2001, the FATF expanded its mission to include combating the financing of terrorism, thus becoming a policy-making body which brings together legal, financial and law enforcement experts to foster national legislation and regulate anti-money laundering and counter-terrorism reforms.⁵¹

In 1990, the FATF issued its forty recommendations for combating money laundering and later, in 2004, issued nine recommendations for combating terrorism.⁵² These recommendations function as a working tool of the FATF in its anti-money laundering and anti-terrorism campaign. The FATF revises its recommendations whenever the need arises.⁵³ The current FATF recommendations resulted from a revision in 2012.

The FATF recommendations are not binding on non-member states, but they have been accepted and endorsed by the international community and international organisations as the international standard for combating money laundering and terrorism.⁵⁴ They are regarded now as a mandate for action for countries which want to be viewed by the international community as meeting international standards.⁵⁵ Among the FATF recommendations is confiscation of proceeds of crime in combating money laundering⁵⁶ and financing of terrorism.⁵⁷ They require states to take steps to become party to and implement international instruments such as the Vienna and Palermo Conventions.⁵⁸

50 Schott (2006: III-7).

51 Schott (2006: III-8).

52 Special Recommendations on Terrorist Financing issued on 22 October 2004.

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

54 Damals (2007: 71-72).

55 Schott (2006: III-9).

56 Recommendation 38 of the FATF Recommendations of 2012.

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

58 Recommendation 35 of the FATF Recommendations of 2012.

The FATF has developed a laudable strategy for domestic and international asset management. It has filled the gap in the international instruments by stipulating what should be done with confiscated assets from the preservation to disposition stages. The FATF has formulated best practices to assist states in establishing a reliable way of dealing with proceeds of crime that also suits their domestic structures. Its asset management system forms a major part of the international framework for managing proceeds of crime. A detailed analysis of the system recommended by the FATF for asset recovery and management of the recovered assets is given in §3.3 below. Evidencing the influence of the Vienna and Palermo Conventions, the FATF recommendations on asset recovery are retributive in nature and its recommendations on asset management are formulated in a manner that will facilitate retribution.

Unlike the provisions in other international instruments, the implementation of the FATF recommendations does not depend solely on the political will of states. It is assessed by a monitoring process in two stages: self-assessment and mutual evaluation.⁵⁹ In the self-assessment stage, each member responds to a standard form questionnaire, on an annual basis, regarding its implementation of the recommendations.⁶⁰ Mutual evaluation normally is conducted via a site visit by a team of experts from member states. The team draws up a report on the extent to which the evaluated state has complied with the recommendations and highlights areas in which further progress may be necessary still.⁶¹ For a state which is unwilling to comply with the recommendations, peer pressure is the only means of compulsion.⁶² Actions such as blacklisting, through the name-and-shame mechanism, are useful in making countries compliant.⁶³ For member states, suspension of membership for non-compliance with the recommendations can be employed.⁶⁴

The same methodology and procedure of assessment have been adopted by all other international bodies and organisations⁶⁵ that produce reports based on the FATF

59 Schott (2006: III-9).

60 Schott (2006: III-9).

61 Damals (2007: 76).

62 Schott (2006: III-10).

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

64 Schott (2006: III-10).

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

recommendations in order to ensure global consistency of assessment.⁶⁶ The major organisations in this connection include the World Bank and the International Monetary Fund.⁶⁷ There are also FATF-styled regional bodies such as East and Southern African Anti-Money Laundering Group (ESAAMLG) for East and Southern African states and the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA) for West African states. The bodies function within their regional jurisdictions as the FATF functions internationally.⁶⁸ The FATF recognises the role of these bodies and entrusts them with continued assessment after a state has complied substantially with its recommendations.⁶⁹ With this kind of evaluation, every state is being assessed as to its compliance with the FATF recommendations and the same measures can be taken across the board against countries for non-compliance.

3.3 The International Approach to Managing Proceeds of Crime

As is apparent from the prior discussions of the international instruments catering for asset recovery, the provisions on management of proceeds of crime are scattered. While some instruments give substantial consideration to asset management, others scarcely consider the matter. However, it is possible to delineate the international community's approach to managing the proceeds of crime by employing an in-depth analysis of the provisions found in each instrument. The structure of this approach may be derived from what is contained in different international instruments and the compiled best practices.

3.3.1 The Structure of the International Approach to Managing Proceeds of Crime

The international approach to asset management has evolved on two levels, the domestic and the international, mirroring the two levels of asset recovery policy. In domestic asset management, the international instruments address the manner of handling assets subject to

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

67 Schott (2006: III-12).

68 Schott (2006: IV-1).

69 After establishment of the FATF-like bodies, the FATF monitors only states which do not have structures that allow the implementation of the FATF recommendations. When the state has the recommended structure it is monitored by the FATF-like body operating in the given region. For example, Nigeria is no longer monitored by FATF but by GIABA. Visit www.fatf-gafi.org/countries/ for more information on the status of monitoring of states.

domestic asset recovery, whereas international asset management is concerned with the administration of assets subject to international asset recovery.

3.3.1.1 Domestic Asset Management

The international instruments deal with domestic asset management from the preliminary stages of asset recovery to disposition.⁷⁰ The initial aspects of asset management are addressed in the form of powers to control the identified proceeds of crime. States parties are mandated to adopt measures that are necessary to enable their competent authorities to freeze or seize proceeds of crime for purposes of confiscation.⁷¹

Freezing and seizure are part of asset management processes. When the proceeds of crime are identified and traced they need to be protected to ensure valuable confiscation⁷² for retribution. By mandating states parties to adopt such measures, the international instruments have addressed a very important aspect of asset management. They entrust the preservation of assets subject to confiscation to the care of the state, which is responsible also for ensuring retribution.

The intention of freezing and seizure is to protect the identified proceeds of crime from the machinations of the criminals. The preservation mechanisms allow the state temporarily to prohibit the transfer, disposition or movement of the proceeds.⁷³ In the case of seizure, the state will assume temporary custody of the proceeds.⁷⁴ Put more specifically, in both cases the state will be managing the proceeds of crime during the recovery process.

Most international conventions do not stipulate exactly what should be done with the frozen or seized assets. However, it may be argued that the mere fact that the preservation processes will see control of the identified proceeds put into the hands of the state authorities constitutes a substantial act of asset management. It is expected that the entrusted authorities are aware of the purpose of preserving the assets, and have the capacity and skills to handle the assets through to the confiscation and disposition stages.

70 See Para 27 of the FATF Best Practices Paper (2012).

71 Article 5(2) of the Vienna Convention. See also Article 31(2) of UNCAC.

72 Greenberg *et al* (2009: 87).

73 Greenberg *et al* (2009: 52).

74 Greenberg *et al* (2009: 53).

Significantly, UNCAC seeks to address the gap in other conventions, by way of a concrete solution for managing the proceeds of crime. It does not assume that the two processes, seizure and freezing, will ensure proper management of the proceeds of crime. For UNCAC, taking custody of proceeds of crime is more a stage of asset recovery than a reliable means for managing them as assets. This is evident from the conventional requirement to administer and to regulate the administration of preserved assets.

UNCAC requires that member states adopt, in accordance with their domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated assets.⁷⁵ The provision to establish a system to administer frozen and seized assets is mandatory. This is a precious provision which distinguishes UNCAC from all previous conventions. It shows the serious concern of the international community to ensure the preservation of the proceeds of crime. UNCAC marks the first attempt by the international community to address the issue of asset management expressly by obligating member states to have the proceeds not only seized or frozen, but also administered thereafter by competent authorities within their legal framework.⁷⁶ However, the system suggested by UNCAC, though appealing, is not without challenges.

The system has two shortcomings. Firstly, it is too general in that it lacks clear guidelines as to what should be considered during such administration. It merely advocates regulating the administration of proceeds without providing details as to the focus of such administration. Secondly, the system lacks enforcement measures. There are no punitive or other provisions to ensure that member states comply with their conventional obligations. This makes the implementation of UNCAC's provisions heavily reliant upon the political will of member states. However, these shortcomings do not change the fact that UNCAC's addressing the aspect of asset management is a remarkable step in the move to have the proceeds of crime administered within defined legal limits.⁷⁷

75 Article 31(3) of UNCAC.

76 Article 31(3) of UNCAC. Conventions prior to UNCAC do not address expressly the issue of administration of proceeds of crime.

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

It should be noted here that the efforts of the intergovernmental bodies to establish systems to administer the proceeds of crime trace their roots to the provisions of international conventions, especially UNCAC. The FATF recommendations on asset management, for example, may be considered as an attempt to strengthen UNCAC's system by addressing its shortcomings. The FATF addresses in detail various matters regarding asset management, such as the institutions responsible for handling the assets, how the assets should be handled, what should be considered during administration and disposition, the accountability of the officers responsible for the administration of assets and the means to evaluate the activities of the AMIs.⁷⁸ The FATF recommendations on management of assets contribute much to the composition of the international standards of asset management. They seek to make good the deficiencies of the system established by UNCAC.

The international instruments address the manner of dealing with confiscated proceeds of crime.⁷⁹ However, they cater only for the disposition of such proceeds, leaving aside their management immediately after the final confiscation order. There is no established system of dealing with the recovered assets at this stage, which omission may provide fertile ground for corrupt practices. Presumably, the mechanisms employed during the preservation stage will continue to be used until the assets are ready for disposition. Here, most of the instruments provide that the domestic law and administrative procedures should be followed.⁸⁰ In other words, most conventions leave the duty on the states themselves to decide what should be done with the recovered proceeds of crime.⁸¹

This option was chosen to uphold and respect the sovereignty of states in their domestic affairs.⁸² The question that arises is whether the degree of respect attributed to state sovereignty will assist the international community attain the goal of asset recovery? In most cases, this will depend entirely on the political will of the state in question.⁸³

78 See the FATF Best Practices Paper (2012).

79 See, for example, Article 14 of the Palermo Convention.

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

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

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

83 Lugon-Moulin (2008: 303).

Otherwise, leaving the issue of disposition of proceeds of crime solely to the particular state, without even providing guidelines, operates as a bar to achieving the retributive purpose of asset recovery. It may facilitate the commission of other economic offences, such as embezzlement, by the officers entrusted to administer the proceeds.⁸⁴ This creates a threat of a vicious circle of enforced recovery, with no hope of its breaking. As a result, some financial centres have been reluctant to repatriate confiscated assets, or to co-operate with victim states for fear that the returned assets will be wasted or stolen again because of corruption.⁸⁵

The United Nations Convention against Terrorism proposes a realistic strategy for the disposition of confiscated assets. It requires member states to consider establishing mechanisms whereby the funds derived from forfeitures under its auspices are used to compensate the victims of the offences or their families.⁸⁶ Though the Convention is concerned with victims of terrorist attacks, the idea of compensating the victims may be applied also to victims of economic offences. Compensation to victims of such offences may be counted as a measure to facilitate retributive disposition of the recovered assets.

The idea of victim compensation can be deduced also from the mode of disposing confiscated assets under UNCAC. The Convention's preferred manner of disposing of proceeds of crime is their return to previous legitimate owners.⁸⁷ The notion of returning assets operates similarly to the concept of compensating victims. UNCAC provides for domestic and international return. At the domestic level, return involves giving back the proceeds of crime to their previous legitimate owners.⁸⁸ Where the owner of the assets may be identified, it is justifiable for the recovered assets to be returned to their owner as part of retribution. In case the title to the recovered assets cannot be traced back to any previous owner, UNCAC expects the confiscated assets be used to compensate victims.⁸⁹ Compensation to victims is among the best ways of ensuring corrective justice as the culmination of retribution.

84 Jimu (2009: 12).

85 Smith *et al* (2007: 3).

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

87 Article 57 of UNCAC.

88 See Article 57(3)(c) of UNCAC.

89 See Article 57(3)(c) of UNCAC.

At the international level, the principle of return of assets concerns the duty to repatriate recovered assets to the victim state. A detailed consideration of this mode of disposition of assets will be undertaken in the section below dealing with international asset management.

The manner of disposition suggested by UNCAC and the United Nations Convention against Terrorism may be regarded as the fundamental objectives of asset management mechanisms to be developed by member states. The established priorities to be considered during disposition of confiscated assets constrain the states to consider the aftermath of confiscation policy. They assist in rectifying the long dominant culture of accounting for asset recovery by narration of success stories as to how much was confiscated. The states now have to concentrate on how retribution and corrective justice are to be achieved.

Though not obligatory,⁹⁰ the suggestion to consider compensation to the victims may have a great influence on member states. States will have to contemplate developing efficient asset management mechanisms to facilitate effective confiscation. Concern for victims acts as a red light, bringing to the attention of member states the necessity of achieving retribution by compensating victims of offences. If the idea of compensating victims is implemented holistically the retributive effect of asset recovery will become manifest.

In addition to the preservation and disposition of proceeds of crime, UNCAC addresses the danger of the laundering of criminal proceeds by transferring them from one state to another.⁹¹ It obligates the states to co-operate for purposes of preventing and combating the transfer of proceeds of crime and to promote ways and means of recovering such proceeds.⁹² This assists states to pursue retribution through asset recovery.

3.3.1.2 International Asset Management

Given the transnational nature of most economic crimes, their proceeds may be invested in different countries. Hence, asset recovery policy allows for the transnational confiscation of

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

91 Article 58 of UNCAC.

92 Article 58 of UNCAC.

proceeds of crime.⁹³ In this regard, the international community provides mechanisms that may be employed when the recovery process involves the participation of more than one state. It first requires the host country to preserve the identified proceeds of crime upon receiving a request from the victim state.⁹⁴ The manner of preservation should be consistent with the host state's legal and administrative frameworks.⁹⁵ Freezing and seizure are again encouraged at this level as reliable means of preserving the proceeds of crime for confiscation.⁹⁶

The international community assumes that the established domestic systems of managing preserved and confiscated assets are adequate to the task. Management of recovered assets immediately after the confiscation order but before execution of disposition is not addressed. Presumably, domestic structures responsible for managing the proceeds of crime prior to their confiscation will continue handling them until their disposition.

In respect of their disposition, the international conventions require prior arrangements on how the recovered proceeds will be utilised. They specifically mandate states to facilitate the return of the recovered assets to victim states⁹⁷ and encourage also sharing of the proceeds between the states involved in the recovery process where necessary.⁹⁸ The principle of return of assets to the victim state may be understood as a measure to ensure retribution.

The concept of asset return is considered to be a basic component of international asset recovery, with host states being urged to repatriate confiscated assets to victim states.⁹⁹ Indeed, the return of the confiscated assets to a victim state constitutes a fundamental principle of international asset recovery.¹⁰⁰ When the return of assets to a requesting state is executed, the latter is required to consider returning the assets to legitimate owners or

93 See article 13 of UNTOC.

94 See Article 13(2) of UNTOC.

95 See Article 13(2) of UNTOC.

96 See Article 13 of UNTOC.

97 Article 57 of UNCAC

98 Article 5(5)(b) of the Vienna Convention. See also Article 14(3)(b) of UNTOC. See further Kaye (2006: 324). UNCAC limits sharing of recovered assets to deduction of reasonable expenses incurred in the recovery process. See Article 57(4) of UNCAC.

99 Article 57 of UNCAC.

100 See Article 51 of UNCAC.

compensating the victims.¹⁰¹ The latter process, though addressed at international level, is enforced at domestic level with a view to attaining retribution.

As noted above, the conventions provide also for the sharing of confiscated assets.¹⁰² States parties are encouraged to conclude agreements or have mutually acceptable arrangements on a case-by-case basis for the final disposal of confiscated assets.¹⁰³ Amongst the matters that need to be considered in such agreements are the costs incurred during investigation, prosecution and adjudication of the case. Asset recovery involves several types of costs, including the costs of managing the assets. It was to be expected that management of the assets would be part of the transnational disposition arrangements. The international conventions do not require expressly that states consider management of the assets in this context. However, the international community does allow the requested state to deduct the said costs from the recovered proceeds, even in absence of an agreement to that effect. Deduction of costs is not mandatory.¹⁰⁴

International instruments suggest other utilisation of recovered assets, such as funding intergovernmental bodies which are responsible for law enforcement and contributing to the UN special designated account.¹⁰⁵ To facilitate the funding of transnational law enforcement, the international community encourages states to enter into agreements which will allow the value of the recovered assets to be contributed to the law enforcement bodies.¹⁰⁶ Funding of law enforcements projects may be considered even in cases of domestic asset recovery.

The idea of providing law enforcement agencies with financial assistance can be regarded as part of corrective justice, especially where the funded agency is responsible for the welfare of the victims of the offences. It accords also with retribution in cases of assets

101 Article 57(c) of UNCAC.

102 Article 14(b) of UNTOC

103 Article 57(5) of UNCAC.

104 Article 57(4) of UNCAC.

105 A special UN account established pursuant to General Assembly resolution 2053 A (XX) of December 1965 in which voluntary contributions from member states are deposited for funding activities of the UN. See Article 30(2)(c) of the Palermo Convention for the suggestion to donate part of the recovered assets to the account.

106 Article 5(5)(b)(i) of the Vienna Convention. See also Article 14(3)(a) of the Palermo Convention.

recovered from the so-called “victimless crimes”.¹⁰⁷ However, where the legitimate owner of the assets can be found, funding of law enforcement projects should not override the imperative of corrective justice. It should be considered secondary to the right of retribution for the victims of the offences.

The notion of using confiscated funds to finance law enforcement agencies has been criticised for advancing an additional rationale of confiscation policy, namely, sourcing of funding for the government agencies, which is over and above the punitive intent.¹⁰⁸ This critique, though endorsed to be correct with regard to the experience of certain jurisdictions,¹⁰⁹ cannot be sustained in relation to states which implement asset recovery for retribution and maintain retributory disposition of the recovered assets.

The recommended utilisation of confiscated assets highlights important areas to be taken into account during disposition of proceeds of crime at all levels of asset recovery. However, such disposition can be attained only if the proceeds are managed well and realised with a high degree of accountability and transparency.

The gaps in the international conventions are addressed by the best practice guidelines produced by the intergovernmental organisations with international endorsement, the most popular one being the FATF. In matters to be considered during disposition of confiscated assets, for example, the FATF added areas of public interest, such as health and education, as aspects of the appropriate utilisation of the recovered proceeds.¹¹⁰ The suggested areas in which confiscated funds can be utilised ensure consideration of the public interest and builds up public confidence in the system.

The lacuna regarding asset management in international conventions and the integrated regional groups are dealt with also by recommendations of other intergovernmental bodies such as the G8 states and the Inter-American Drug Abuse Control Commission (CICAD). The

107 Victimless crimes refers to the crimes which do not have victims who are affected directly by the offence, or even when affected, they are not willing to report and have the case pursued against the perpetrator due to the benefits acquired from the criminal transaction. See Zimring & Johnson (2007: 251).

108 Stessens (2000: 56-58).

109 Stessens (2000: 56-58).

110 Recommendation 38 of the FATF Recommendations of 2012.

recommendations of these intergovernmental bodies do not have international endorsement. However, due to their valuable guidelines for managing assets subject to recovery, which were derived from the FATF recommendations and UNODC guidelines, they will be referred to as part of the international best practices (IBPs) of asset management. They identify matters to be considered from the pre-confiscation to post-confiscation stages. They suggest the composition of an asset management system and the means to evaluate it.

3.3.2 The IBPs on Managing Proceeds of Crime

The IBPs consist of a number of elements which aim to ensure reliable mechanisms for administering the assets from the time they are identified to disposition. The best practices highlight the following elements.

3.3.2.1 Management Institution

The international community argues for states to establish asset management institutions (AMIs) which will be responsible for administering the proceeds of crime during the entire process of asset recovery and disposition.¹¹¹ UNCAC specifically describes the nature of the AMI to be administrative and its functions to be regulatory.¹¹² The FATF stipulates that management of proceeds of crime may be entrusted to a single institution or several, a contractor, a court-appointed manager or to any person who holds the asset subject to defined restrictions as to its use and transfer of title.¹¹³

In most states there are established institutions that are responsible for the administration of public assets. However, administration of proceeds of crime is slightly different from administration of ordinary public assets. Proceeds of crime mainly are maintained rather than administered. It is only after confiscation that they can be administered as ordinary public assets.

Moreover, the mode of their disposition is different from the disposition of ordinary public assets. Proceeds of crime are realised and their realised value has to be available for

111 Para 26 of the FATF Best Practices Paper (2012).

112 Article 31(3) of UNCAC requires states to establish a system for regulating the administration of preserved assets.

113 Para 26 of the FATF Best Practices Paper (2012).

corrective justice as a form of retribution. This requires special attention over and above the attention normally given to ordinary public assets. Thus, where a state chooses to use an already existing AMI, a special section dedicated to the administration of proceeds of crime ought to be established.¹¹⁴

3.3.2.2 Control of the Proceeds of Crime

For effective management of the proceeds of crime, states are required to establish mechanisms for controlling them. Control can be physical or mere oversight. The international community favours systems of seizure and freezing as a means of control.¹¹⁵ Freezing and seizure ordinarily are employed for preserving items related to crime as exhibits for evidential purposes. Most countries practise control over instrumentalities of crime by seizure or freezing, thus the systems being advocated are not new.

However, proceeds of crime may not constitute items that need preservation for evidential purposes. Preservation of proceeds of crime tends to be more about maintaining their economic value for realisation than about tendering them as evidence.¹¹⁶ This motif of administering proceeds of crime gives rise to another element of the framework established by the international community, that is, pre-control planning, in which a particular asset, its expected realisable value and the manner of its preservation are considered.

3.3.2.3 Pre-control Planning

The decision by state authorities to take control of the proceeds of crime should be planned properly.¹¹⁷ Planning involves round-table discussions or consultations amongst the officers involved in the recovery process, including asset managers, prosecutors and investigators. Preservation of proceeds of crime needs to be done as quickly as possible,¹¹⁸ hence the deliberations should be expeditious and precise.

114 See Stephenson (2011: 93) on various options of asset management systems that can be established by states.

115 Brun *et al* (2011: 76). See also Recommendation 38 of FATF Recommendations (2012) and notes 11-12 of the FATF Best Practices Paper (2012).

116 Greenberg *et al* (2009: 87).

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

118 Stephenson *et al* (2011: 55).

The planning team will consider the possible means of preserving particular proceeds of crime and their consequences.¹¹⁹ The matters to be taken into account may involve legal, economic and other consequences linked to the chosen mode of preserving the assets. Legal matters encompass a consideration of factors that affect the formulation of a suitable preservation order. Such factors include the nature of a particular asset, the nature of its ownership and attached third party rights, if any. Economic matters to be contemplated include the technicalities involved in preservation and the capacity of the state authority to manage the asset. Where the state authority is incapable of handling a particular asset, the team should examine other avenues, for example, recourse to a contractor or an asset manager who does possess the required capacity.¹²⁰

The team also should have regard to the estimated realisable value of the assets that are intended to be preserved and the estimated costs of their preservation. This will assist the authorities in determining whether the assets are worth preserving. Without such considerations, a state might end up preserving liabilities rather than assets with realisable value.¹²¹ A thorough study of these factors is needed to enable it to settle upon a suitable preservation option.



3.3.2.4 Valuation of the Preserved Assets

A preservation order needs to be executed swiftly. Amongst the necessary execution steps is assumption of control over the preserved assets. In this connection, the responsible institutions need to have certain information, such as the details of the assets and its value. Most details may be obtained easily from the certificate of title of a particular asset. The value of the assets needs to be determined by a competent authority.¹²²

An AMI should not depend on the estimated value relied upon during pre-preservation planning. The international community prefers states to ensure valuation of the preserved

119 Para 27(e) of the FATF Best Practices Paper (2012).

120 See Brun *et al* (2011: 93) for outsourcing of asset managers as an option that may be employed in managing proceeds of crime.

121 G8 Best Practices (2005).

122 G8 Best Practices (2005).

assets by a competent authority.¹²³ Valuation assists with the accountability of the AMIs since the value of the assets will be recorded in an inventory. In case of any mismanagement, it will be easy for said institution to be held accountable.

3.3.2.5 Record keeping

Proper record keeping is a keynote of asset management matters. The international community desires for states to have proper record keeping of proceeds of crime at all levels.¹²⁴ Essential information such as details of the asset and the annexed predicate offence, date of its preservation, mode of preservation, its value at the time of preservation, costs of management, its value at confiscation, realised value and mode of disposition must be kept conscientiously.¹²⁵

States are advised to have an electronic database to ensure accessibility of the information to all responsible institutions and other interested persons.¹²⁶ The database will assist also in managing and tracking any preserved asset.¹²⁷

3.3.2.6 Disposition of Preserved Assets

In addition to the power to control the preserved assets, the responsible institutions need to have power to dispose of the preserved assets in two scenarios: advance and final disposition. Dispositions that take place prior a final determination of a forfeiture application are referred to as advance dispositions.

Usually, disposition of proceeds of crime marks the last stage of the asset recovery process. However, if done to prior the finalisation of the forfeiture application, its status changes from being a stage in the recovery of assets to a manner of enforcing the preservation of proceeds of crime. Not all assets are capable of being preserved in their condition at seizure. Some will need to be disposed of to secure their value for purposes of retribution or their return to the defendant in case of unsuccessful forfeiture. The AMI should have the power to

123 G8 Best Practices (2005).

124 Greenberg *et al* (2009: 87). See also G8 Best Practices (2005).

125 Para 27(d)(iv) and 27(k) of the FATF Best Practices Paper (2012).

126 G8 Best Practices (2005).

127 G8 Best Practices (2005).

effect such dispositions at any time during the recovery process, where circumstances so require.

There are a number of reasons that may necessitate advance disposition of preserved assets. The most common are the nature of the assets and the costs of their preservation.¹²⁸ Where the assets are perishable in nature, it is prudent to realise their value as early as possible. Keeping perishable goods may cause their decay and depreciation.

The costs of managing the assets also might be a reason for advance disposition.¹²⁹ Some assets are very expensive to manage, to the extent of management costs exceeding the realisable value. In such circumstances, it is better to dispose of the assets for value and instead manage the realised value, pending the final determination of the forfeiture application.

The preferred mode of advance disposition is sale of the preserved assets. The international community recommends that courts be empowered to order the sale of the preserved assets.¹³⁰ It insists on transparency and consideration of third party rights during such dispositions.¹³¹ The AMI should consider also the rights of the defendant because he is the owner of the assets subject to the determination of the court. In this context, the most significant right of the defendant is to have the preserved assets disposed of at a fair market value. This will assist also in achieving retribution should the preserved assets be confiscated. At this stage, the title over the preserved assets is still with the defendant. Thus, where circumstances allow, the defendant should be involved in effecting advance disposition of said assets.

Advance dispositions have not escaped criticism. They are opposed on human rights grounds for non-observance of the presumption of innocence. It is argued that allowing for disposal of assets prior to final determination of the forfeiture application treats them as pre-determined proceeds of crime.¹³² However, the facts that such dispositions do not stop

128 CICAD Best Practices Document on Management of Seized and Forfeited Assets (2011: 58).

129 CICAD Best Practices Document (2011: 58).

130 Para 27(g) of the FATF Best Practices Paper (2012).

131 Para 27(k) of the FATF Best Practices Paper (2012).

132 CICAD Best Practices Document (2011: 59).

forfeiture applications or affect their final results negate such criticism. Moreover, involving the defendant during advance dispositions reduces the risk of infringing his rights.

The power to dispose of assets after the issue of a confiscation order constitutes final disposition. This is the usual mode of disposition. It does not attract many challenges, as the status of the preserved assets will have been determined already by the court. The AMIs should have the power to realise the assets and channel the realised value according to the prescribed procedures.¹³³ The international community insists on transparency during realisation of the confiscated assets and the utilisation of the realised value.¹³⁴

3.3.2.7 Establishment of a Special Fund

As a means of securing proper, transparent and accountable utilisation of the realised values of the confiscated assets, the international community urges that states establish a special asset recovery fund.¹³⁵ All or part of the monies obtained from the realisation should be deposited into the fund.¹³⁶

The fund will serve states in a number of ways. Firstly, it will establish an effective mechanism for the safe-keeping of realised values from advance dispositions and confiscated assets. Secondly, it will ensure transparency as to how much was confiscated and deposited into the fund. Thirdly, it will ensure accountability as to how much was taken from the fund and for which purposes. Lastly, the fund will serve as a ready and stable site to receive resources from internationally confiscated and realised assets, as states are encouraged to share recovered assets.¹³⁷

The fund should be administered by an independent board which is composed of members from institutions responsible for the administration of criminal justice and other stakeholders, including civil society.¹³⁸ The board will be responsible, by way of

133 Para 27(d)(iii) and 27(j) of the FATF Best Practices Paper (2012).

134 Article 31(3) of UNCAC.

135 Recommendation 38 of the FATF Forty Recommendations (2012).

136 Recommendation 38 of the FATF Forty Recommendations (2012).

137 See StAR Initiative (2009: 3-5) on the challenges involved in the return of assets, including absence of a reliable depository.

138 Greenberg *et al* (2009: 93).

recommendations, for the proper utilisation of the monies deposited into the fund. The board's recommendations should be approved by the institution responsible for the utilisation of public funds.

The board also will make recommendations on the utilisation of assets which are confiscated but thought prudent to be disposed of without realising their value.¹³⁹ Assets such as buildings, motor vehicles, motorcycles and the like, for the most part, are dealt with in this manner. The board may recommend that the assets be entrusted to any other institutions, depending on circumstances and needs. However, in the course of performing its duties the board should consider the best utilisation of the recovered assets, as hoped for by the international community.¹⁴⁰

3.3.2.8 Investment of Proceeds of Crime

Where the laws of a particular state allow, the international community recommends the investment of preserved assets.¹⁴¹ For example, a special account which generates profit should be opened for the purpose of handling seized cash and monies realised during advance dispositions. This will reduce the risk of holding idle funds and payment of damages in case of unsuccessful forfeiture. It will add value also to the funds and thus contribute to effective corrective justice.

3.3.2.9 Reporting and Auditing Requirements

The international community requires that the system responsible for managing proceeds of crime be subject to constant monitoring and evaluation.¹⁴² Reporting is a way of ensuring indirect monitoring of the operation of the system. The activities of the asset managing authority should aim towards achieving the goals of asset recovery policy. It is only through reporting that it can be established that the asset management system indeed assists to attain these goals.

139 Greenberg *et al* (2009: 93).

140 The idea of best utilisation includes compensation for victims, funding of law enforcement agencies and public good projects.

141 Guideline 9 of CICAD Self-Evaluation Guide for the Forfeiture and Administration of Assets (2013).

142 Para 27(k) of the FATF Best Practices Paper (2012).

The international community insists on the necessity of the reporting requirement. Reporting makes it possible for the state to receive feedback on the enforcement of the policy. It is essential also to ensure accountability of the officers entrusted with the management of the assets.¹⁴³ The reporting requirement is especially significant in cases where the decision-making power regarding the proceeds of crime is entrusted to one person. In such cases the international community requires the entrusted officer to be accountable fully for his decisions to a higher body.¹⁴⁴

In order to ensure the genuineness of the contents of the reports, the international community proposes an auditing requirement.¹⁴⁵ Auditing assists in evaluation of the management activities and verification of the contents of the reports. It assists the state in establishing and assessing the performance level of the system.

3.3.2.10 Liability of the Asset Management Authority

The asset management system should be protected from any form of civil liability for operations conducted by its personnel in the course of the performance of their duties. However, this does not mean that the system should be free to do as it pleases. It is supposed to function according to the established law, regulations and stipulated court conditions. The international community does not condone negligent misconduct in this regard.¹⁴⁶ This threat of liability will assist in controlling systems that conduct business below the required standard and in strengthening accountability on the part of its entrusted officers.

3.4 Factors Affecting the Value of Preserved Assets

The value of assets subject to recovery may be affected by a number of factors. The most prominent ones are plea bargaining and payment of legal and living expenses from the preserved assets. While plea bargaining may affect the actual amount of assets to be recovered, payment of legal and living expenses affects the value of assets preserved for confiscation purposes. The international community addresses the manner in which states

143 G8 Best Practices (2005).

144 G8 Best Practices (2005).

145 G8 Best Practices (2005).

146 G8 Best Practices (2005).

should deal with those factors in order to reduce their effects on the value of assets subject to recovery.

3.4.1 Plea Bargaining

Plea bargaining in asset recovery is linked to UNCAC's advocacy that states be proactive in ensuring the recovery and return of assets to the victim states.¹⁴⁷ It is taken to be a solution to the technicalities involved in asset recovery cases and the high costs of undertaking a full trial. Plea bargaining is an old principle in the administration of criminal justice.¹⁴⁸ It involves discussion of and agreement upon pleading between the prosecution and the defendant. It usually takes place after investigation of the case has been completed. It might occur before or after institution of a criminal case against the defendant.

Plea bargaining is referred to also as negotiated justice because it involves the exchange of a plea of guilty from the defendant and a certain leniency on the part of the law enforcement machinery.¹⁴⁹ Leniency may be evident from actions such as dropping of some charges, agreement on the punishment to be imposed after the plea of guilty is entered, charging the defendant with a lesser offence, and the like, all of which normally are done in cases where the defendant pleads guilty.¹⁵⁰

Though the name "plea bargaining" suggests equivalence between plea bargaining and the practice of bargaining in normal business transactions, its application in criminal justice is slightly different. Perhaps other terminology used to refer to plea bargaining in criminal justice may explain better the difference between the bargain in the usual course of business and the plea bargain in criminal justice system. Terms such as settlements, negotiated justice, and plea agreements after plea discussions reflect better the elements of plea bargaining in criminal justice and distinguish it from normal transactional bargains.¹⁵¹

147 Oduor *et al* (2014: 11-13).

148 Bekker (1996: 170).

149 Bekker (1996: 171).

150 See Bekker (1996: 171).

151 Cohen (1989-1990: 86).

When conducting plea negotiations, both parties to the case are guided by the expected court verdict had the case gone to full trial.¹⁵² They consider the misconduct that has taken place, the crime committed in the course of said misconduct, and the appropriate sanction for the crime.¹⁵³ Plea bargaining assists in properly charging the offender and attaining a proportional punishment for the offence committed. However, all these depend on two issues: firstly, how well-versed with the facts of the case is the prosecution and, secondly, how transparent is the conduct of plea negotiations?

In order to achieve effective plea bargaining, the state should have its case investigated thoroughly. In cases of asset recovery, the state should be able to establish the extent of the expected recovery. Where the state does not know how much ought to be recovered from the offences committed, there never will be a proportional recovery. The offender will dominate the plea discussions and the state will have little choice but to agree to whatever the offender is suggesting. It will be the offender offering the state terms of agreement instead of the state offering terms to the offender.¹⁵⁴ In such circumstances, the issue of proportionality in relation to the recovered assets will not be considered.

Moreover, the conduct of plea bargaining should not be characterised by unnecessary secrecy. Where circumstances allow, the facts of the case, and the nature of and reasons for the plea agreement should be disclosed.¹⁵⁵ Transparency will assist in ensuring proportionality of the punishment agreed upon between the two parties. In asset recovery, it will ensure proportionality between the recovered assets and the benefits that the accused person has generated from the crime committed. The international community confronts this matter and suggests what should be done by the states in order to have effective plea bargaining in asset recovery.

The StAR Initiative, the most prominent body in asset recovery, has published a proposal for states to follow in settlements in asset recovery cases. It requires states pursuing asset

152 Graham (2012: 1580).

153 Cohen (1989-1990: 88).

154 Cohen (1989-1990: 86) defines plea bargaining generally to mean any agreement by the accused to plead guilty in return for the prosecutor agreeing to take or refrain from taking a particular course of action.

155 Oduor *et al* (2014: 4).

recovery by settlement to develop a clear legal framework regulating the conditions and the process of settlement. According to the StAR Initiative, this means that a state:

- When pursuing settlement, should wherever possible, transmit information spontaneously to other affected countries concerning the facts of the case in line with article 46(4) and 56 of the UNCAC
- Should inform other potentially affected countries of the legal avenues available to participate in investigation and/or claim damages as a result of the corruption
- Should consider permitting their courts or other competent authorities to recognise claims of other affected countries when deciding on confiscations in the context of settlement, consistent with article 53(c) of UNCAC
- Should further proactively share information on the concluded settlements with other potentially affected countries. Such information could include the exact terms of settlement, the underlying facts of the case, the contents of any self-disclosure, and any evidence gathered by the investigation.¹⁵⁶

The contents of the StAR Initiative proposal reflect the need for a high standard of co-operation among states to ensure that retribution is attained. The proposal seeks to ensure that assets stolen from any state are returned. The sharing of information enables even the states with weak investigation techniques to recoup their lost assets. This assists in a proportional recovery of stolen assets, regardless of the jurisdiction within which the recovery proceedings are taking place.

If the StAR Initiative proposal on settlements is embraced by the community of states, it will make plea bargaining an effective tool for retribution. It may lead to a certain kind of universal jurisdiction on matters pertaining to asset recovery that are pursued through plea bargaining.

3.4.2 Payment of Legal and Living Expenses

Payment of legal expenses from the preserved assets is linked to then protection of human rights, especially the right to a fair hearing which includes the right to legal representation. Legal representation means more than mere representation. The parties to the case have a right to be represented by counsel of their choice.¹⁵⁷

156 Oduor *et al* (2014: 4).

157 Fine (2013: 62).

Where the defendant's assets have been preserved for purposes of confiscation, he may be allowed, upon application to court, to use the preserved funds to pay legal expenses. Some defendants may choose to abuse this opportunity by extending court proceedings with a view to manipulating the value of assets subject to recovery in their favour. This affects the expected goal of asset recovery because, by the time the assets are confiscated, their value cannot be proportional to the offence committed.¹⁵⁸ In such circumstances, retribution will not be achieved, unless other mechanisms are employed to recover the excess amount which cannot be recovered by the realisation of the preserved assets.

Living expenses basically resort under the right to be presumed innocent. In asset recovery, the presumption of innocence pertains, firstly, to the defendant and, secondly, to the preserved assets. The defendant has to be presumed innocent until he is proved guilty. The preserved assets have to be treated as owned legally by the defendant until they are declared to be proceeds of crime. The defendant is entitled to be given living expenses from the preserved assets until the final decision on the forfeiture application is reached. This opportunity may be abused also by defendants and impede retribution in asset recovery.

The international community is aware of the threats posed to the pursuit of retribution in asset recovery by the defendant's rights. Hence, it requires states to control strictly and, where possible, prohibit payment of legal and living expenses.¹⁵⁹ It has suggested some limitations that may be employed by states to reduce the risk of preserved assets being squandered by dishonest defendants. For example, states may set as a mandatory condition that the defendant prove that he does not have any other assets to rely on for his living expenses. In the case of legal expenses, the availability of publicly funded counsel may be taken as a means of upholding the right to legal representation.¹⁶⁰ However, forcing defendants to make use of publicly paid counsel has been challenged for limiting the right to legal representation, as the right includes the right to be represented by counsel of choice.

158 Stephenson *et al* (2011: 94) identify using restrained funds to pay legal and living expenses as amongst the barriers to effective asset recovery.

159 G8 Best Practices (2005).

160 G8 Best Practices (2005).

This raises a conflict of rights between defendants and victims. As against the rights of the defendant to be presumed innocent and to legal representation, the victims of the offence are entitled to retribution in the form of corrective justice. The enforcement of the defendant's rights always will affect the rights of the victim as the value of the proceeds will be affected. Most economic offences are categorised as victimless crimes. This really means that the entire community may be considered as victim of the offence. Thus, the conflict of rights encompasses the defendant and the community. In resolving conflict of this nature, the arguments of Rousseau are very helpful. He postulates that the rights of the community should prevail over the rights of individual members of the community.¹⁶¹ In this case, the victims' right to retribution trumps the defendant's rights to living expenses and legal representation.

Moreover, the right to counsel of choice is not an absolute right. It is subject to the capacity of the defendant to pay instruction fees to the particular lawyer.¹⁶² In an effort to resolve the conflict gently, the international community argues that, in cases where the defendant is proved to be incapable of meeting his living or legal expenses, the court or any responsible authority may allow reasonable expenditures to be deducted from the preserved assets.¹⁶³



3.4.3 Loan Payments and Business Expenses

In addition to legal and living expenses, the defendant may seek to obtain from the preserved assets business expenses and payments of loans. Such expenditures also threaten the economic value of the preserved assets.¹⁶⁴

The international instruments do not address expressly the threats posed by these expenses. However, they may be considered in relation to the duty to deal with the rights of the defendant and third parties.¹⁶⁵ The provision of loan payments and business expenses is limited to genuineness and reasonableness of said costs.¹⁶⁶ Moreover, before such payments

161 Rousseau Chapter IX.

162 Fine (2013: 62).

163 G8 Best Practices (2005).

164 Stephenson *et al* (2011: 94).

165 Para 27(d)(ii) of the FATF Best Practices Paper (2012).

166 Brun *et al* (2011: 86).

may be allowed, the responsible authority must ensure that the defendant's application passes the following tests. Firstly, the availability of other assets that may be relied on to meet such costs must be assessed. It must be proved that the defendant does not have any other source of income to meet the costs.¹⁶⁷ Secondly, with regard to loan payments, the genuineness of the said loan should be proved. This is intended to avoid paying a disguised loan to the benefit of the defendant. There should be established also a direct connection between the loan and the preserved funds. For example, if the preserved asset is a business, it should be proved that the business was mortgaged to secure the loan. Where it is a bank account, proof of regular loan payments from the account should be established.

With business expenses, the financial trend of the business should be assessed before allowing the costs. Where the business is running at loss, payments of business expenses should not be allowed. This will assist to prevent the laundering of the proceeds of crime. In addition, proof of previous regular use of the preserved assets to meet business expenses should be established.

These measures may assist in achieving a proportional recovery and corrective justice.

3.5 The Role of the International Community in Managing Confiscated Assets

The international community played a significant role in the establishment of asset recovery policy. Given the importance of asset management in asset recovery policy, it is to be expected that the international community will act to ensure that states have in place a reliable system of handling assets subject to recovery, recovered assets and their disposition.

Analysis of the international instruments confirms the international community's desire to ensure proper management of assets. This is evidenced by United Nations efforts such as the adoption and endorsement by the UNODC of the FATF best practices on asset management.

However, the degree of coverage given to asset management by the international instruments¹⁶⁸ compares unfavourably with that given to asset recovery policy. Asset management, especially in cases involving domestic asset recovery, scarcely is addressed, and

167 Brun *et al* (2011: 86).

168 Pieth (2008: 17).

when it is addressed it is taken as an optional issue for states to decide upon individually.¹⁶⁹ Given the doctrine of state sovereignty, in some cases even monitoring and evaluation efforts in relation to managing the confiscated assets are not implemented.¹⁷⁰

The major question is whether the international community has any function in ensuring transparency and accountability in managing the proceeds of crime within a state. Considering its initiatives against economic crime, the international community has played a great role in modifying the legal frameworks of states. This suggests that the international community has a role to play also in modifying the legal frameworks of states as to the management of proceeds of crime by advising, supervising or co-ordinating aspects of the process.

3.5.1 Advisory Role

The most noticeable role of the international community in asset management is advisory, in the sense of suggesting what is important for a state to consider.¹⁷¹ The actual impact of this appears in terms of implementation of the provisions of the international conventions. Mainly, the implementation of what is decided depends crucially upon the political will of the member states. Where there is no political will and there are no means of cross-checking whether implementation is effected or not, the possibility of enforcing resolutions becomes remote.

With regard to asset recovery policy, the international conventions have given more consideration to confiscation of assets than to asset management. For example, states are required to submit their instruments that enable international asset recovery to the UN Secretary General.¹⁷² At least it can be established which states have complied with the requirement and which have not. There are no measures similar to this in respect of instruments that allow state authorities to administer and dispose of the confiscated assets.

Should the establishment of asset recovery policy be taken to cater automatically for management of preserved and confiscated assets? Technically the response to this question will be in the affirmative. However, experience suggests the response to be in the negative.

169 Shehu (2005: 224).

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

171 Gallagher & Karlebach (2007: 23).

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

Although the two policies complement each other, some states scarcely address the aspect of asset management in their asset recovery laws.

In these circumstances, it is not easy to determine whether the preserved assets are managed well and the recovered funds are being utilised on matters of public interest in pursuit of the principle of retribution. This vacuum creates favourable conditions for confiscated assets to be embezzled by officials to whom they have been entrusted.¹⁷³ The international community has perceived the risks posed by this *lacuna* and has taken some steps against them. Thus, for example, the UNODC in partnership with the World Bank Group¹⁷⁴ formed the StAR Initiative which aims at supporting international efforts to end safe havens for corrupt funds. The StAR Initiative offers technical assistance to states on matters pertaining to asset recovery. Upon request, it works closely with states in drafting relevant laws, sharing best practices in asset recovery obtained from other states and handling of asset recovery cases.¹⁷⁵ In general, the activities of the StAR Initiative may assist states which have the political will to establish effective asset recovery policy but lack technical expertise.

Further, the Conference of States Parties to UNCAC¹⁷⁶ has created an interim open-ended intergovernmental working group on asset recovery.¹⁷⁷ The working group is tasked with the duty to assist the Conference of States Parties to develop cumulative knowledge in asset recovery, especially as regards implementation of Articles 52-58 of the Convention.¹⁷⁸ The working group is expected also to perform the following additional tasks: to facilitate exchange of information by identifying and disseminating best practices in asset recovery and anti-corruption measures; and to foster co-operation amongst states by acting as a forum which brings together relevant competent authorities, anti-corruption bodies and practitioners for

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

174 The World Bank group consists of five organisations, namely, the International Bank for Reconstruction and Development (IBDR), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). For more information on the functions of each organisation visit www.worldbank.org/en/about.

175 Visit www.star.worldbank.org/star/ for more information on the activities of StAR Initiative.

176 The Conference of States Parties established by the General Assembly under Article 63 of UNCAC.

177 See Resolution 1/4 of the Conference of States Parties to UNCAC (2006).

178 Para 2(a) of Resolution 1/4 of the Conference of States Parties to UNCAC (2006).

purposes of sharing knowledge and experience in the field of asset recovery.¹⁷⁹ The working group assists the Conference of States Parties to identify capacity building needs of the states in their efforts to comply with international standards in asset recovery.¹⁸⁰ These efforts may aid states in developing reliable asset recovery policy and effective anti-corruption measures.

3.5.2 Supervisory Role

The relevant issue here is whether the international community can exercise a supervisory role in the management of confiscated assets. The answer to this question is in the affirmative on the ground that if the FATF, a “mere” inter-governmental body, can evaluate and take measures against non-compliance with its recommendations,¹⁸¹ why should the international community not do the same to ensure compliance with international instruments? Now that it has endorsed the FATF best practices, it can adopt measures similar to those employed by the FATF in enforcing its recommendations.

In order to ensure compliance with the provisions in international instruments on asset management, the international community can employ a range of measures, including (a) reporting requirements as a mechanism of self-assessment and evaluation, (b) the naming-and-shaming measures employed by inter-governmental bodies, (c) conducting country visits for assessment as a means of external evaluation, and (d) ranking the member states in terms of their level of performance in managing confiscated assets.

However, due to the absence of strict provisions in this regard, no accounting for funds realised after the disposition of confiscated assets is available, except for international confiscations where funds were repatriated with conditions as to its utilisation¹⁸² and in states with high levels of accountability. This makes it difficult to establish whether or not retribution has been attained.

179 Para 2(a-e) of Resolution 1/4 of the Conference of States Parties to UNCAC (2006).

180 Para 2(f) of Resolution 1/4 of the Conference of States Parties to UNCAC (2006).

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

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

In an attempt to resolve this matter, the asset recovery working group of the UNCAC Conference of States Parties launched a pilot voluntary review project through which implementation by states of UNCAC provisions is being evaluated. The evaluation is voluntary, inclusive, non-intrusive and impartial¹⁸³ as per the general principles of review mechanisms developed by the Conference of States Parties.¹⁸⁴ The state under review responds to a standard form questionnaire. The process may be followed by a country visit of the group of experts appointed to conduct the review in the particular state.¹⁸⁵

Despite its good motives,¹⁸⁶ the fact that the entire process is voluntary in nature may allow recalcitrant states to avoid participating in the evaluation process.¹⁸⁷ This will limit the efforts of the Conference of States Parties to ensure implementation of the provisions of the Convention. The degree of confidentiality accorded to the evaluations is an obstacle also in achieving the goals set by the Conference of State Parties. The reports that are produced after evaluations are owned solely by the evaluated state.¹⁸⁸ The state has a choice as to whether to publish the report or not.¹⁸⁹ There is also no kind of ranking that is produced after the review process. These issues pose challenges in assessing the efficacy of the evaluation process because it does not have any enforcement measures for the recommendations made. It limits also the effectiveness of the process, especially as regards ensuring implementation of UNCAC's provisions.

183 See para 3 of the Pilot Review Programme Report presented to the 3rd Session of the Conference of the States Parties to UNCAC (2009).

184 See Para 3 of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption - Basic Mechanism Document (2011).

185 See Para 4 of the Pilot Review Programme Report presented on the 3rd Session of the Conference of the States Parties to UNCAC (2009).

186 The motives include providing opportunities to share good practice and challenges, and complement the existing international and regional review mechanisms. See the goals of the review mechanisms as provided under Para 11 of the Review Mechanism Basic Document (2011)

187 See Para 11 of the Report on the Pilot Review Programme (2009).

188 See Para 37 of the Review Mechanism Basic Document (2011).

189 See Para 38 of the Review Mechanism Basic Document (2011). It should be noted, however, that Para 39 encourages states to share the contents of their evaluation reports upon request.

However, the review mechanism may assist the Conference of States Parties to establish the level of implementation of UNCAC's provisions by the member states which volunteered to take part in the review process and decided to place their reports in the public domain.¹⁹⁰

3.5.3 Co-ordination

The international instruments require parties to agree on the disposition of confiscated assets, and in most cases the repatriated assets are to be utilised in a manner that will ensure corrective justice, such as compensating the victims or returning the assets to the legitimate owners. How can a repatriating state interfere in the domestic affairs of a receiving state when the repatriated funds are not utilised as agreed? Will it not violate the celebrated doctrine of state sovereignty? It is quite easy to enter into such agreements but their enforceability depends completely on the political will of the receiving state.

To cure the situation, a neutral party is required to perform the duty of co-ordination.¹⁹¹ However, there are no such legislative arrangements in the international instruments, and in most cases the states themselves have to find a neutral party to oversee and co-ordinate the utilisation of confiscated funds.¹⁹² Had the international community formulated a pre-arranged system of co-ordination to govern this matter, the parties simply would have employed the mechanism and the sense of accountability to the receiving state would have been maintained easily.

3.6 Conclusion

Though not contained in a single document, when considered collectively, the international instruments do provide for general standards of dealing with the proceeds of crime from their seizure to final disposition. They address the various factors that may affect the value of proceeds of crime in a manner that can assist states in the proper preservation of proceeds of crime during the entire recovery process. They also provide for the handling and disposition of funds realised from recovered assets.

190 For example Tanzania, South Africa and Nigeria have published their evaluation reports.

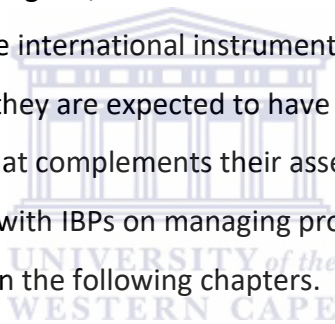
191 For example, the World Bank has been used as a neutral party to guarantee transparent disposition of the proceeds in Nigeria. See Jimu (2009: 8).

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

However, the said standards are in the form of IBPs and they lack enforcement measures. This makes compliance dependent solely on political will of the states. The international community should consider upgrading the best practices to international standards and set enforcement measures to ensure states comply with the standards.

Be that as it may, states which are party to the international instruments are bound in one way or another to comply with all their stipulations. Therefore, at the end of the day, through complying with the provisions of the different international instruments and recommendations from internationally endorsed bodies, states will be capable of establishing a mechanism to ensure management of the proceeds of crime that focuses on achieving the aims of asset recovery policy.

Tanzania, South Africa and Nigeria, as members of the international community, are supposed to have implemented the international instruments and recommendations from those bodies in all respects. Thus, they are expected to have a well-structured mechanism for managing the proceeds of crime that complements their asset recovery policies. The level of compliance of the three countries with IBPs on managing proceeds of crime during the process of asset recovery will be assessed in the following chapters.



Chapter Four

Pre-Confiscation Asset Management Policies in Tanzania, Nigeria and South Africa

4.1 Introduction

In asset recovery, the period before confiscation is crucial. It is during this period that key processes are undertaken, such as tracing, identification, preservation and instituting court action to recover the identified proceeds of crime.¹ These processes determine the nature, degree and the success of the recovery process. Thus, the implementation of asset recovery policy depends critically on the outcome of the pre-confiscation processes.

Asset management is central to the pre-confiscation stage.² As discussed in chapter two, asset management takes different forms in various processes but remains a cornerstone of the success of the recovery process. Against this backdrop, the international community compiled IBPs which states ought to follow in establishing asset management regimes dedicated to the recovery of proceeds of crime. The IBPs on managing proceeds of crime are analysed in chapter three.

This chapter assesses critically the extent of compliance in Tanzania, South Africa and Nigeria with the endorsed IBPs on managing assets subject to recovery in. The assessment is done by considering the jurisprudence and legal framework of asset recovery in the three states. The section dealing with the jurisprudence of asset recovery in these countries highlights the nature of their asset forfeiture provisions and the manner in which the courts have interpreted them. The main section of the chapter addresses the legal framework of asset recovery in the three states. It contains a critical assessment of these frameworks in relation to asset management during pre-confiscation processes. In this assessment, matters that are considered necessary by the international community to establish a reliable asset management regime will form the principal point of reference. These include a discussion of the responsible

1 Brun *et al* (2011: 5-7).

2 See Brun *et al* (2011: 91) for the importance of asset management in asset recovery.

institutions and matters linked to their operations, such as their responsibilities, the mechanisms that are employed to ensure transparency and accountability, and challenges facing the institutions in complying with the international standards for the management of preserved assets.

4.2 Jurisprudence of Asset Recovery in Tanzania, South Africa and Nigeria

The asset forfeiture laws in Tanzania, South Africa and Nigeria are retributive in nature. They provide for confiscation of proceeds of crime, extending to all benefits acquired from the illicit activity.³ This approach ensures proportionality between the crime in question and its punishment, as required by retribution.

The laws provide also for forfeiture of instrumentalities of crime in compliance with the international conventions.⁴ The international instruments do not set any limit on the confiscation of such instrumentalities of crime.⁵ However, the three states limit forfeiture of instrumentalities in proportion to the crime committed, and consider also the degree of facilitation between instrumentality and crime. In this the three states can be considered to have acted innovatively.

South African courts set three criteria for ensuring proportionality between the forfeiture of instrumentalities of crime and the crime committed.⁶ The criteria include the instrumentality, proportionality and exclusion tests. In relation to instrumentality and proportionality, the courts examine the degree of facilitation⁷ and proportionality between the offence and the asset alleged to be an instrumentality of the offence.⁸

3 See Section 9 of POCA (T), Section 18(2) of POCA (SA) and Sections 21 & 24 of the EFCC Act.

4 See Section 9(1)(a) of POCA (T), Section 38(2)(a) of POCA (SA) and Section 25 of the EFCC Act.

5 The international instruments provide for forfeiture of instrumentalities in general. See, for example, Article 31(1)(b) of UNCAC and Article 12(1)(b) of the Palermo Convention.

6 See Ndzengu & Von Bonde (2011b: 90-104) for a detailed analysis of the criteria.

7 The use of the asset should not be incidental to the commission of the offence. It should be established that the asset was intended to be employed in the commission of the crime. This may be proved by facts such as the asset having special adaptations to facilitate the commission of the crime or the frequency of use of the asset in commission of similar offences. See the reasoning of Supreme Court of Appeal of South Africa regarding facilitation of crime in *NDPP v RO Cook Properties* 2004(2) All SA 491, para 31-32.

8 The proportionality test requires equivalence between the value of asset and the crime committed.

In relation to exclusion, the courts consider the part played by the owner of the asset in the commission of the offence and third party interests attached to the asset subject to forfeiture. Forfeiture of assets affects directly the illegal and untrustworthy owners. It is a sanction intended to punish the criminals for the offences committed. The case of instrumentalities of crime is different. It is not in all cases that the accused is also the owner of the property that facilitated the commission of the offence, and it is not always that the owner has authorised his property to be employed as an instrumentality of crime. Punishment is deserved by those who commit crime. The exclusion criterion examines the extent to which the owner of the asset has authorised his property to be used in the commission of the crime. This criterion may be entertained only when the case involves an “innocent owner” and in the handling of third party interests attached to the assets subject to forfeiture orders.⁹

In order for the property to be forfeited as an instrumentality of crime in South Africa, it must be devoid of any third party interest and forfeiture ultimately should not be disproportionate.¹⁰

Tanzania and Nigeria take into account similar conditions. Despite the fact that the jurisprudence on forfeiture of instrumentalities of crime in these two states has not developed much, there are identifiable limits. Nigeria has included the instrumentality and exclusion criteria into its law,¹¹ but the proportionality criterion does not feature expressly in the provisions of the EFCC Act. However, if applied strictly, the instrumentality and exclusion tests will address the requirements of the proportionality test.

The provisions of POCA (T) on forfeiture of instrumentalities of crime have a construction similar to POCA (SA).¹² The Tanzanian court has interpreted the POCA (T) provisions dealing with confiscation of instrumentalities of crime by referring to decisions made

9 The innocent owner defence is available to the owner who neither knew nor had reasonable grounds to suspect that the property in which the interest is held was employed as an instrumentality of crime. See *NDPP v RO Cook Properties*, para 23-24.

10 See Ndzengu & Von Bonde (2011b: 99).

11 See Section 25(a) of the EFCC Act.

12 Section 3 of POCA (T) defines instrumentality of crime to include any property used in, or in connection with, the commission of the offence. A similar approach is found in Section 1 of POCA (SA).

by courts in other states which have similar statutes.¹³ The instrumentality and exclusion criteria play a major role in determining applications for forfeiture of the instrumentalities of crime in Tanzania.¹⁴ The law also mandates the court to consider the gravity of the offence in granting forfeiture orders.¹⁵ This implies that the court should consider the proportionality between the crime committed and the asset subject to forfeiture. Although the courts have not done so yet, this may be applied also in the context of the forfeiture of instrumentalities of crime.

4.3 Asset Management Policy in Tanzania, South Africa and Nigeria

The policy governing the management of preserved and confiscated assets operates in tandem with asset recovery policy. The aspiration behind asset recovery is that crime should not pay, and that criminals ought to be deprived of the fruits of their crime. The idea that crime should not pay is embodied even in confiscation of instrumentalities of crime. Untrustworthy owners who use their property to commit crimes and expect to benefit therefrom also are being deprived of that property. Deprivation of assets may be reproached for being against property rights; however, the right to property is not absolute and is subject to several legal duties, including the duty of lawful utilisation.¹⁶ Thus, forfeiture of instrumentalities of crime makes crime unprofitable and assists also in enforcing the duties attached to property ownership.

The principle that crime should not pay, if construed narrowly, may seem achievable by mere confiscation of the proceeds of crime. However, when considered broadly, the policy addresses the issue of correcting the inequality caused by the crime between the accused and the victim.¹⁷ This is achieved through retribution at the confiscation stage and retribution in the form of corrective justice at the post-confiscation stage.

13 See *The Attorney General v Muges Anthony and two others* (unreported), Criminal Appeal No 220/2011 Court of Appeal of Tanzania at Mwanza. The court considered the decisions made by the South African court in *NDPP v RO Cook Properties*, and the Australian court in *DPP v Moran* [2002] VSCA 154, Supreme Court of Victoria Court of Appeal.

14 See the arguments of the court in *The Attorney General v Muges* (2011) pages 35-46.

15 Section 14(3)(c) of POCA(T).

16 See Lipton J (2004: 177- 179). See also the arguments of the Supreme Court of Appeal of South Africa in *NDPP v RO Cook Properties* paras 28-29.

17 This is established by suggested utilisation of recovered assets, such as the return of assets under Article 57 of UNCAC.

Managing proceeds of crime also is built on the principle that crime should not pay. During pre-confiscation stage, it preserves the assets and prevents them from being abused by the accused person. The administration of assets subject to forfeiture bars the accused and any other person with ill motive from benefiting criminally. Thus, it ensures that crime does not pay for the accused person and his ilk.

Though there are variations on the level of policy development and practices, Tanzania, South Africa and Nigeria have asset management policies reflected in their laws. Their policies express the principle that crime should not pay. This is substantiated in the legal frameworks established by the three states to administer assets subject to forfeiture orders. They all aim at preventing the accused pocketing the proceeds of his crime.¹⁸ South African asset management policy extends to the second purpose of the policy of asset recovery in that it covers also matters that relate to correction of the harm caused by crime.¹⁹ However, Tanzanian and Nigerian policy give but scarce consideration to corrective justice as may be adduced from the legal framework for managing assets discussed below.

4.4 Legal Framework for Managing Preserved Assets

The introduction of asset recovery policy in Tanzania, South Africa and Nigeria entailed the establishment of legal frameworks for managing preserved and confiscated assets. The frameworks cover the administration of assets from identification to disposition. In this chapter, a critical assessment is made of the asset management frameworks governing the pre-confiscation stage. The post-confiscation frameworks will be assessed in the next chapter.

The assessment here is guided by the IBPs on managing assets subject to forfeiture orders. It examines the AMIs in respect of their roles in administering preserved assets and the challenges they face. It considers also the asset preservation mechanisms employed in the three states and their levels of efficiency, accountability and transparency. The asset preservation mechanisms include pre-control planning and control of proceeds of crime,

18 The legal frameworks for administration of assets subject to forfeiture include mechanisms such as control of assets, valuation and record keeping. A detailed discussion of the mechanisms is undertaken in §4.6 to §4.13 of this chapter.

19 See Section 66A of POCA (SA) on the utilisation of recovered assets.

valuation of the preserved assets, record keeping, reporting and auditing requirements, advance disposition of preserved assets, establishment of a special fund, investment of proceeds of crime and liability of the asset managing authority.

4.5 Asset Management Institutions (AMIs)

The international community requires states to establish institutions responsible for administering preserved assets. The generally accepted practice is for states to employ the services of established competent authorities or vest the duty to administer the assets in several institutions.²⁰ Tanzania, South Africa and Nigeria all have established institutions responsible for managing assets subject to confiscation. The composition and roles of the AMIs in the three countries are assessed below.

4.5.1 Asset Management Institutions in Tanzania

The Tanzanian POCA does not vest the duty of managing assets subject to forfeiture orders in one specific institution. Several institutions with differing roles are involved. The law does not provide expressly for their co-ordination, but the link between them arises naturally through performance of their mandates. The institutions responsible for the management of assets prior to the confiscation stage are the Inspector General of Police, the Attorney General, the Court and the Trustee.

4.5.1.1 The Inspector General of Police

The administration of seized assets under POCA (T) is vested specifically in the Inspector General of Police (IGP).²¹ He is the head of investigations and the preservation of seized assets is his statutory duty.²² Before the enactment of POCA (T), the law enforcement authorities were concerned with seizing criminal assets for evidential purposes. Hence the role of IGP was mainly to safeguard such assets as exhibits rather than to administer them as suspected instrumentalities or proceeds of crime. POCA (T) provides for confiscation of both

20 Despite having competent authorities, states may choose to employ the services of other institutions such as contractors, court appointed asset managers, or any person who holds the assets subject to appropriate restrictions. See the FATF Best Practices Paper (2012) para 26.

21 Section 35 of POCA (T).

22 Section 7 of the Police and Auxiliary Police Act of Tanzania. See also Section 10 of the Criminal Procedure Act of Tanzania (CPA (T)).

instrumentalities of crime and anything derived from the commission of the crime, including profits.²³ This widens the category of assets that can be placed in the custody of the IGP, ranging from instrumentalities of crime to proceeds of crime generally.

Conserving seized assets as exhibits differs from administering them with a view to realisation. In conserving assets as exhibits, consideration is given to their evidential value, whilst in securing them for realisation, their economic value is more important. The latter require personnel skilled in asset management and related competencies that will enable the IGP to administer effectively the assets under his control.

Despite the widening of the responsibilities of the IGP, nothing was done to enhance his capacity to handle seized instrumentalities and proceeds of crime. The law does not regulate the duties of the IGP regarding management of preserved assets. Therefore, the IGP has to consider what should be done to the seized assets on his own initiative. Learning by practice is good but it does not come without challenges. Successful management of preserved assets requires experienced professional personnel guided by good regulations in the performance of their duties. Mistakes invariably entail costs for the government.

Moreover, the law does not provide for a mechanism of accountability for negligent mismanagement. This omission limits the chances of holding responsible the officers involved in managing assets under the IGP when they discharge their duties negligently. Thus, the government has to assume all costs that may result from mismanagement of assets by the office of the IGP.

To ensure accountability, management of assets by the IGP and any other institutions so entrusted must be regulated. These regulations, among other things, should provide for the liability of the officers for negligent performance of their asset management responsibilities.

4.5.1.2 The Attorney General

The Attorney General (AG) in Tanzania is a presidential appointee responsible for advising the government on legal matters.²⁴ The decision to pursue forfeiture of proceeds of crime is vested

23 Proceeds of crime include profits obtained from criminal activity. See Section 3 of POCA (T).

24 Article 59 of the Constitution.

primarily in the Attorney General. Applications for preservation and recovery of assets suspected of being proceeds of crime under POCA (T) have to be brought before the court by the AG. This may attract challenges as the applications for forfeiture orders are criminal in nature, and other laws vest the power to institute asset recovery proceedings in the Director of Public Prosecutions (DPP).²⁵

The DPP is a constitutional office bearer responsible for prosecutions²⁶ and is head of the National Prosecutions Service.²⁷ The DPP is obliged constitutionally to act independently in the discharge of his prosecutorial duties.²⁸ The link between the AG and the DPP is merely administrative in nature. The office of the DPP is administered by the office of the AG, and the National Prosecutions Service is regarded as a directorate within the AG's Chambers.²⁹ Moreover, the Attorney General's (Discharge of Duties) Act empowers the AG to appear in any proceedings.³⁰ The Act also vests general prosecutorial powers in the office of AG,³¹ thus making it possible for the AG to institute criminal applications. However, such powers are subject to the provisions of the Constitution.³² The court has addressed the challenge and resolved that, due to the fusion of powers, the use of the title AG in POCA (T) does not preclude the DPP from exercising the powers vested in the AG, because the DPP forms part of the office of the AG.³³ This is buttressed by the fact that the DPP is vested primarily with prosecutorial powers. The AG's Chambers, through its administrative structure, created a special unit, the Asset Forfeiture and Recovery Section (AFRS), within the office of the DPP to deal with matters pertaining to asset recovery.³⁴

25 See, for example, Sections 38 and 40 of Tanzania's Prevention and Combating of Corruption Act, No 11 of 2007 (PCCA (T)).

26 Article 59B of the Constitution.

27 Section 9 of the National Prosecutions Services Act, No 27 of 2008.

28 Article 59B(4) of the Constitution.

29 Section 11 of the Office of the Attorney General (Discharge of Duties) Act, No 4 of 2005.

30 Section 6(2) of the Office of the Attorney General (Discharge of Duties) Act.

31 Section 8(1)(c) of the Office of the Attorney General (Discharge of Duties) Act.

32 Section 8(1) of the Office of the Attorney General (Discharge of Duties) Act.

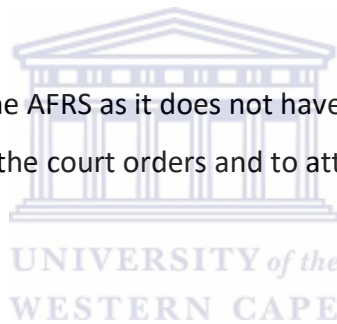
33 See *AG v Mugesu Anthony and two others* (2011), pages 11-19 at 18.

34 See www.agctz.go.tz/department_page.php?id=88

The decision to preserve assets subject to recovery is crucial and is the precursor to asset management procedures.³⁵ It requires legal, regulatory and asset management skills to determine the proper method to employ.³⁶ The AFRS, through the co-ordination of investigation powers vested in the DPP,³⁷ plays a fundamental role at this stage. Though comprised of lawyers, it does consider the consequences of taking control of the assets from both the legal and the asset management perspective.

The AG, being a party to the case in which forfeiture is sought,³⁸ is presumed to be responsible to the court for any damage or mismanagement of the assets under restraint or seizure orders. Though the assets will be administered by the police,³⁹ or placed with a trustee,⁴⁰ everything that is done is performed in execution of court orders granted in favour of the AG. Therefore, he holds a primary responsibility for ensuring proper execution of the orders.⁴¹

This poses a challenge to the AFRS as it does not have skilled asset management officials to oversee the implementation of the court orders and to attend to other matters pertaining to asset management.⁴²



4.5.1.3 The Court

POCA (T) defines a court in relation to its jurisdiction to adjudicate cases.⁴³ It designates an appropriate court to mean the court that convicts a person of a serious offence, other than a primary court.⁴⁴ The exclusion of serious offences that may be adjudicated by primary courts means that the magistrates' courts are courts of first instance with regard to confiscation matters, followed by the High Court and the Court of Appeal. The High Court can act as both a

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

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

37 Section 24 of the National Prosecution Services Act.

38 Sections 38, 40, 46 and 56 of POCA (T).

39 Section 35 of POCA (T).

40 Section 38(2)(b) of POCA (T).

41 Sections 46 and 56 of POCA (T).

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

43 Section 8 of POCA (T).

44 Section 8 of POCA (T).

court of first instance and an appellate court in respect of the cases originating in the magistrates' courts.

The court exercises a wide range of powers in respect of managing the proceeds of crime. It is responsible for the determination of both procedural and substantive matters relevant to applications by the AG or other interested persons.⁴⁵ During the preservation of the instrumentalities and proceeds of crime, the court plays a very active role. The court is responsible for issuing search warrants through which seizure may be effected by the police.⁴⁶ It is responsible also for issuing restraint orders upon application by the police and AG.⁴⁷ Where the seized assets require the services of an asset manager, the court is obliged to appoint a trustee to manage them. The power to appoint a trustee is vested exclusively in the High Court.⁴⁸ The appointed trustee must perform his duties in compliance with the court order and he is accountable to the court.⁴⁹

The powers of the court in managing preserved assets during the pre-confiscation stage are purely supervisory. Immediately after lodgement of the preservation application, the court takes control of the orders to be issued, checks on the execution of the orders and ensures that third party rights are not infringed by the orders. These roles suit a supervisory institution and are vested properly in the judiciary as the organ responsible for the dispensation of justice.⁵⁰

45 See, for example, the powers of the court under Sections 9, 11, 23, 38, and 43 of POCA (T).

46 Section 32(1) of POCA (T).

47 Section 38(1) of POCA (T).

48 Section 3 of POCA (T).

49 Section 43(e)(i) of POCA (T).

50 Article 107A(1) of the Constitution.

4.5.1.4 The Trustee

The powers of the trustee in managing assets subject to forfeiture arise after he has been appointed by the court.⁵¹ The trustee can be appointed only where the restrained assets need special asset management skills or the circumstances so dictate.⁵² After being appointed he becomes responsible to the court.⁵³

The powers of the trustee range from administering the assets pending resolution of the case⁵⁴ to the actual disposition of the assets.⁵⁵ During the pre-confiscation period, the trustee is responsible for administering the assets put under his control. He takes control of the asset and takes charge of anything that may arise in relation to the administration of the asset.⁵⁶

Despite the role of the trustee being a delicate one, the law does not provide for guidelines as to who may become a trustee, nor does it provide for minimum qualifications for a person to be appointed as a trustee. POCA (T) authorises the court to order the accused to furnish the trustee with the restrained assets.⁵⁷ The opportunity to identify a trustee of his own choice is given to the accused in respect of assets subject to a restraint order. If exercised properly and in good faith, this election may reduce the risk of appointing an inefficient trustee to manage the assets. However, it may be challenging if the suspect decides to act *mala fide* in order to benefit from the assets in defiance of a confiscation order to be made. Hence the courts should act with caution when dealing with trustees suggested by accused persons.

In addition, the law does not provide for a procedure for appointment of a trustee in the case where he has not been suggested by the suspect. It also does not provide expressly for the trustee's remuneration. It only provides for the trustee's right to be remunerated, and mandates the minister responsible for legal affairs to make regulations in that respect.⁵⁸ However, the regulations have not been promulgated yet. This *lacuna* suggests that, though the

51 Section 38(5) of POCA (T).

52 Section 38(2)(b) of POCA (T).

53 Section 43(1)(e)(i) of POCA (T).

54 Section 38(5) of POCA (T).

55 Section 44 of POCA (T).

56 Sections 38(5) and 55(6) of POCA (T).

57 Section 43(e)(iii) of POCA (T).

58 Section 50 of POCA (T).

law has been in force for more than twenty years already, its efficiency in terms of application is doubtful.

Despite the above-mentioned limitations with regard to the machinery for the preservation of the proceeds of crime, there are cases in which the funds and assets have been confiscated successfully.⁵⁹

4.5.2 Asset Management Institutions in South Africa

Management of preserved assets in South Africa features amongst the matters provided for in POCA (SA), the law governing the asset recovery policy of the country. The provisions on management of preserved assets do not vest the responsibility in any one institution. Several institutions participate in managing such assets. However, the court acts as a co-ordinating and supervisory institution. There is no express provision regulating these functions of the court, but they can be deduced from the court's powers in different case scenarios. Other institutions vested with asset management responsibilities include the National Director of Public Prosecutions (NDPP), the Police, and the *Curator Bonis*.

4.5.2.1 The National Director of Public Prosecutions

The initial stage in managing assets subject to preservation and confiscation orders is entrusted to the NDPP. POCA (SA) assigns several roles to the NDPP in different provisions of the Act.⁶⁰ In the context of asset recovery, the NDPP denotes the head of the prosecuting authority who has been appointed by the President, as head of the national executive,⁶¹ and includes other directors who may perform the functions of the National Director.⁶²

POCA (SA) empowers the NDPP to make application to court for restraint and preservation orders. Such orders constitute the beginning of asset management as an aspect of the implementation of asset recovery policy. The grant of the orders sought by the NDPP marks

59 In 2010, two motor vehicles were forfeited to the Republic as instrumentalities of crime. In 2012, two motor vehicles were forfeited to the Republic as instrumentalities of crime and a total sum of 15 million Tanzanian Shillings were recovered and restored to the victims of the offence. This information was obtained from AFRS.

60 See Section 1(1) of POCA (SA).

61 See Article 179 (a) of the Constitution of the Republic of South Africa, 1996.

62 See Section 1 of POCA (SA).

the starting point of the recovery process. It is only after the grant of the preservation order that the duties of other institutions emerge.

The powers of the NDPP in asset recovery cases are exercised by a special unit established within the National Prosecution Service, namely, the Asset Forfeiture Unit (AFU).

4.4.2.2 The Court

POCA (SA) does not provide for a general interpretation of the concept of a court. In its definition section it refers only to the High Court which, for purposes of some chapters and sections of chapters, may be interpreted to include any judge of the High Court.⁶³ However, magistrates' courts may perform the duties of the court established under POCA (SA) in cases involving confiscation.⁶⁴ The powers of the court in non-conviction based asset recovery are vested exclusively in the High Court.⁶⁵ The court plays a major role in managing preserved assets. Nothing can be done to the assets believed to be proceeds of crime without the directive or endorsement of the court. This constitutes the court as a co-ordinating and supervisory institution as far as management of preserved assets is concerned.

The court is responsible primarily for the administration of justice. Protection of individual property rights falls among the duties of the courts.⁶⁶ Asset recovery policy may be a threat to property rights. Thus, to have the court as part of institutional framework responsible for managing preserved assets ensures protection of individual property rights and state rights in the case of successful recovery.

The asset management role of the court commences during the initial stages of the preservation process. It is responsible for issuing the relevant preservation orders upon application by the NDPP, and for varying the orders whenever necessary.⁶⁷ It is responsible also

63 See Section 1 of POCA (SA).

64 Section 23(1) of POCA (SA) provides for effects of confiscation orders made by the magistrates' courts and regional courts. This shows that these courts have powers in cases involving confiscations. See also Section 76 of POCA (SA), which provides for penal jurisdiction of regional and magistrates' courts.

65 See the provisions of Chapter 6 of POCA (SA). They specifically refer to the High Court whenever addressing powers to be exercised by the court.

66 The court is responsible for enforcement of human rights as enshrined in the Constitution. See Section 38 of the South African Constitution.

67 See Sections 26, 38 and 42 of POCA (SA).

for the appointment of a *curator bonis* to manage assets which need special attention.⁶⁸ The *curator bonis* functions as a trustee of the preserved assets. Once appointed, the *curator* works under the guidance of court orders and directives. This affirms the prominent role of the court as that of a co-ordinating institution in the management of preserved assets.

4.5.2.3 The Police

The core function of the police in the administration of criminal justice in South Africa, as in many other states, is investigation. This function extends to asset recovery cases.⁶⁹ In performing their duties regarding asset recovery, the police work hand in hand with the AFU. In addition to its investigatory duties, the police have a role to play in managing restrained or preserved assets.

The asset management role of police may be imposed by the court⁷⁰ or may arise *suo motu*. POCA (SA) empowers the court to make any appropriate order to secure the objectives of restraint or preservation and of confiscation orders. Amongst the orders that may be issued by the court is one authorising the police to seize property under restraint and preservation orders.⁷¹ Seizure is categorised as part of procedures that may be applied in preserving suspected proceeds of crime. Thus, the action of police in effecting a court order to seize assets under restraint or preservation places the police amongst the institutions responsible for managing preserved assets.

In addition, the police can act *suo motu* in seizing assets under restraint and preservation orders.⁷² For this to take place, the police must have reasonable grounds to believe that the assets so preserved are at risk of being disposed of or dealt with in a manner that will defeat the ends of justice.⁷³

68 See Section 28 and 42 of POCA (SA).

69 See Chapters 6 and 7 of the South African Police Service Act 68 of 1995.

70 In South African context, restraint and preservation of assets have similar meaning and effects but are distinguished by the procedure employed in the recovery proceedings. Restraint is used in conviction based asset recovery while preservation is used in non-conviction based asset recovery.

71 See Sections 27(1) and 41(1) of POCA (SA).

72 See Sections 27(1) and 41(1) of POCA (SA).

73 See Sections 27(1) and 41(1) of POCA (SA).

Any assets seized by the police will be dealt with in accordance with the directives of the court which made the order to restrain or preserve them.⁷⁴

4.5.2.4 The *Curator Bonis*

The *curator bonis* is the South African version of a trustee in asset management. The *curator* is appointed by the court when the management of preserved assets requires special skills.⁷⁵ The primary role of the *curator* is to administer the preserved assets in a manner that will maintain or increase their economic value.⁷⁶ The manner of administration is subject to the court's directives. POCA (SA) lists a number of functions that the *curator* may perform in administering preserved assets such as taking care of the property, administering it or performing any particular act in relation to restraint or preservation of the property.⁷⁷ If the preserved asset is a business, the *curator* has to run the business with due regard to the laws that govern the conduct of the business.⁷⁸

The appointment and functioning of the *curator* is regulated by POCA (SA). Where there is a *lacuna* in POCA (SA), the provisions of the Administration of Estates Act may be applied.⁷⁹ Despite the *curator* being entrusted with delicate functions in managing preserved assets, the law does not specify any basic qualifications which a person should possess in order to be appointed as a *curator*. It also does not provide for any procedure to be followed in such appointments. This oversight poses challenges in respect of the determination of the competency of the *curator*. It is also a threat to the rights of the accused in his preserved properties should the forfeiture application fail. The effects of this *lacuna* usually are mitigated by the existence of remedial provisions in the Act. The law allows any person affected by the appointment of a *curator* to apply to court, at any time, for variation or rescission of the order, variation of the terms of the appointment of the *curator* or for the discharge of the *curator*.⁸⁰

74 See Sections 27(2) and 41(2) of POCA (SA).

75 See Sections 28 and 42 of POCA (SA).

76 See the functions of *curator bonis* as stipulated in Section 32 of POCA (SA).

77 See Sections 28(1)(a) and 42(1)(a) of POCA (SA).

78 See Sections 28(1)(a)(iv) and 42(1)(a)(iv) of POCA (SA).

79 Administration of Estates Act 66 of 1965. See Section 32(2) of POCA (SA) for the application of Administration of Estates Act in matters concerning the *curator bonis* appointed under Act.

80 Sections 28(2) and 47(2) of POCA (SA).

These provisions assist in remedying negative effects that may result from the appointment and functioning of the *curator*.

4.5.3 Asset Management Institutions in Nigeria

Nigeria is the most experienced African state as regards the implementation of asset recovery policy. It has managed to recover assets of high value through both domestic and international asset recovery processes.⁸¹ This suggests that the country has experience also in managing preserved and confiscated assets. The Nigerian asset recovery statute is the Economic and Financial Crimes Commission (Establishment) Act (the EFCC Act). It addresses the question of managing preserved assets by vesting the duty to do so in the Economic and Financial Crimes Commission (the EFCC).⁸² The EFCC is a special government agency responsible for co-ordinating various institutions involved in the fight against money laundering in Nigeria. It is responsible for the enforcement of all laws dealing with economic and financial crimes in the country.⁸³

The responsibilities of the EFCC traverse all the stages of asset recovery from identification to disposition.⁸⁴ This contradicts, to some extent, the presumptions made in the previous chapter on the management of confiscated assets prior to disposition. It was postulated then that the international community does not provide expressly for management of forfeited assets prior to their disposition because it presumes that the institutions responsible for managing assets at the preservation stage will continue to administer them until they are due for disposition. Nigeria goes against the international trend, and stands out as a state that provides expressly for the administration of forfeited assets prior to their disposition.

The law confers upon the EFCC both investigatory and prosecutorial powers.⁸⁵ This makes the EFCC responsible for managing assets from the time of identification. As an investigatory agency, the EFCC is charged with asset management during the investigation

81 Nigeria managed to recover approximately \$170.8 million. See Odour *et al* (2014:53). Although this does not amount to even a half of the stolen assets, it is an achievement in itself. See Costa (2007).

82 See Sections 26(3) and 6(j)(v) of the EFCC Act.

83 See Section 2(c) of the EFCC Act.

84 See Sections 31(2) & (3) & 6(j)(v) of the EFCC Act.

85 See Section 6(b) & (m) of the EFCC Act.

stage. As a government agency vested with prosecutorial powers, it is accountable for asset management during the prosecution stage. In most cases, merging of investigatory and prosecutorial powers in one institution may endanger administration of criminal justice, especially if the officers of the institution abuse their powers.⁸⁶ The EFCC case is slightly different because it is not vested with general investigatory and prosecutorial powers. Its powers are limited to economic and financial crimes only.⁸⁷ In its efforts to deliver reliable services to the citizenry, the EFCC created special units.⁸⁸ The investigation and prosecution of cases under the EFCC are being conducted by two distinct units.⁸⁹ Notwithstanding these efforts, the EFCC faces certain challenges relating to the abuse of power by some of its officers.⁹⁰ However, a detailed discussion of these challenges is beyond the ambit of this thesis.

The composition of the EFCC facilitates the performance of its duties. Unlike the Tanzanian AFRS and the South African AFU, the Nigerian EFCC is composed of lawyers and other professionals. It comprises members from various institutions including law enforcement, the security services, the Ministries of Finance, Foreign Affairs and Justice and representatives from other institutions.⁹¹

The EFCC works with the court in the discharge of its asset management duties. The court is responsible for issuing various orders that will facilitate proper preservation of the assets. Even when the assets are placed in the custody of the EFCC, it holds them subject to a court order.⁹² The law vests asset management duties exclusively in the EFCC, to the extent that it does not provide for any alternative AMI. The EFCC has established a special unit, the Asset

86 Abuse of power was amongst the reasons that led to separation of investigatory and prosecutorial powers in Tanzania. See Msekwa (1980: 92).

87 See Section 6(b) & (m) of the EFCC Act.

88 See Section 12(1) of the EFCC Act.

89 See Section 13(1) & (2) of the EFCC Act.

90 There cases in which the EFCC has been sued successfully for abuse of powers. See *Barrister Obinna Ezeodili v The EFCC and Another*, Case No FCT/HC/CV/234/2013, High Court of Federal Capital Territory, Abuja Judicial Division, Holden at Maitama Abuja in 2013. See also *Barr Innocent C Onwu v The EFCC and 2 others*, Suit No FCT/HC/M/708/11, High Court of Federal Capital Territory, Abuja Judicial Division, Holden at APO in 2012. The cases are available online at www.fcthighcourt.gov.ng/?wfb_d/=1635.

91 See Section 2 of the EFCC Act.

92 See Section 26(3) of the EFCC Act.

Forfeiture Unit, which is tasked to co-ordinate management of recovered assets and maintain statistics.⁹³

Moreover, the EFCC Act does not address situations where the EFCC lacks capacity to manage the preserved assets. Two questions arise in this regard. Firstly, can the EFCC appoint a different asset manager to administer the preserved assets? If the answer is in the affirmative, how will the EFCC control the performance and provide for the rights of an asset manager who falls outside the ambit of the statute? If the answer is negative, the second question will be which other institution is competent to appoint an alternative asset manager?

The provisions of the EFCC Act answer these questions. It gives a negative response to the first question as it vests the duty to manage preserved assets exclusively in the EFCC.⁹⁴ This means that the EFCC cannot delegate its asset management powers. In other words, the Act presumes that the EFCC is capacitated to manage any preserved asset. The presumption may be defensible, given the composition of the EFCC. However, in practice the EFCC is not capable of administering all seized assets and assets under temporary forfeiture order.⁹⁵ In some instances it is forced to employ the services of other asset managers. There are cases in which the EFCC proceeded independently to appoint asset managers for the seized assets.⁹⁶ The practice is legally dodgy as the law does not empower the EFCC to appoint external asset managers nor does it address the option of employing the services of other asset managers to administer preserved assets. Moreover, there are no guidelines that regulate the manner of appointing asset managers and providing for their rights and responsibilities. This makes the entire process of appointing asset managers a preserve of the EFCC. The EFCC's power to appoint asset managers has been challenged and the court has held that it does not have the

93 See the GIABA Report for Nigeria on Mutual Evaluation Implementation Action Plan, Anti-Money Laundering and Combating of the Financing of Terrorism (2011: 4).

94 Section 26(3) of the EFCC Act.

95 See UNODC Assessment Study (2014: 22). The study found that not only Nigeria but also other West African countries do not have the capacity to handle all preserved assets. The incapacity of the institutions varies from storage facilities to availability of funds.

96 See Soniyi (2013). See also Ogundipe (2013).

power to appoint asset managers for the assets under its control without a court order to that effect.⁹⁷

The law's response to the first question makes it necessary to consider the second question, which asks whether there is any institution vested with powers to appoint asset managers where the EFCC is incapable of handling the preserved assets. Generally, no institution is empowered thus; all preserved assets are taken to be in the custody and care of the EFCC.⁹⁸ However, a close reading of Section 26(3) of the EFCC Act suggests that the court may do so upon application by the EFCC. The section provides:

Properties taken or detained under this section shall be deemed to be in the custody of the Commission, **subject only to an order of a court.**⁹⁹

While the section deems all preserved assets to be in the custody of the EFCC, it does allow for this assumption to be varied by a court order. Although the Act does not acknowledge the role of asset managers outside the EFCC, the court may enforce its duties to secure and protect human rights¹⁰⁰ by granting an order allowing the preserved assets to be handled by a competent manager when the EFCC does not have the requisite resources to do so.

Management of preserved assets, as explained in the previous chapters, aims at maintaining the *status quo* of the assets. It seeks to preserve their economic value for realisation after confiscation or return to the owners should the forfeiture application fail. In all cases, asset management has to do with the property rights of either the victims or the accused. The right to own property is among the human rights listed in the Nigerian constitution.¹⁰¹ Thus, the appointment of asset managers by the court will be counted as a positive initiative to ensure protection of human rights in the country.

Alternatively, Section 26(3) suggests that the EFCC cannot entrust the custody of the preserved assets to anybody unless it seeks and obtains a court order authorising such delegation of powers. This procedure will ensure impartiality in the process of assigning the

97 See Soniyi (2013). See also Ogundipe (2013).

98 Section 26(3) of the EFCC Act.

99 Emphasis added.

100 See Section 46 of the Constitution of the Federal Republic of Nigeria, 1999.

101 See Section 43 of the Constitution.

administration of preserved assets to independent asset managers. However, Nigeria should consider providing expressly for the appointment and regulation of asset managers.¹⁰²

4.5.4 Asset Management Institutions in Comparative Review

In general, the analysis of the arrangements for managing preserved assets in the three countries shows that all of them have designated institutions for such purpose. While South Africa and Tanzania chose to have several institutions with each performing different roles in managing preserved assets, Nigeria chose to have a single institution. Thus, they are all in compliance with the IBPs though their systems are not free of challenges.

The major challenge facing Tanzania and Nigeria is lack of regulatory laws regarding the management of preserved assets. The absence of regulatory laws makes the enforceability of the main legislation difficult. This problem is seen clearly in Tanzania and Nigeria, especially when the preserved assets need to be entrusted to an asset manager different from the ordinary institutions involved in asset recovery processes. The challenges become acute because Tanzania and Nigeria do not have any regulations regarding the management of preserved assets and their laws do not provide extensively for the managing of preserved assets. South Africa is in a better position because its law, POCA (SA), provides extensively for various processes during the preservation of assets subject to recovery.¹⁰³ The law also is backed up by regulations which make its enforcement realistic.¹⁰⁴ Tanzania and Nigeria may do well to reproduce in their own laws the techniques employed in POCA (SA).

102 A wide construction of managing proceeds of crime, such as that contained in Section 38(1) of the Nigerian Corrupt Practices and Other Related Offences Act No 5 of 2000, may be useful. The section empowers the officers of the Independent Corrupt Practices Commission to seize and manage assets subject to forfeiture or place the assets under custody of other authorities. Unfortunately, the EFCC cannot make use of this provision because it is limited to the assets seized under the Corrupt Practices and Other Related Offences Act.

103 In case of a *lacuna*, the Act makes reference to other laws which cover the same matter. See, for example, Section 32(2) of POCA (SA) for the application of the Administration of Estates Act in matters concerning the *curator bonis* appointed under POCA (SA).

104 The relevant regulation at this stage is GNR 416 of 1 April 1999: Prevention of Organised Crime Regulations (Government Gazette No 19914) as amended by Notice 850 of 1 September 2000 (Government Gazette No 21504). The regulation deals with the remuneration of the *curator bonis*.

Moreover, the asset recovery laws of the two states provide an avenue to make regulations.¹⁰⁵ Fortunately, the provisions on regulations are open ended, leaving the entrusted authorities free to make any regulations to ensure the smooth operation of the laws.¹⁰⁶ Tanzania and Nigeria perhaps ought to employ these provisions to ensure that regulations are enacted.

4.6 Control of the Identified Proceeds of Crime

This section analyses the mechanisms that allow the state agencies to take charge of the proceeds of crime with a view to securing their availability for confiscation. In complying with the international community's call to have the criminal proceeds commandeered immediately after identification, the three countries established in their asset recovery laws mechanisms for such administration.

The international instruments categorise preservation orders into two types: seizure and freezing. They define both seizure and freezing to mean orders issued by the courts, or other competent authority, temporarily to limit the accused from dealing normally with the assets and to entrust law enforcement with their custody or control.¹⁰⁷ Seizure enables state agencies to take physical control of the identified proceeds and instrumentalities of crime.¹⁰⁸ The process attracts costs in terms of labour and financial outlays involved in the course of managing the seized assets.

Freezing is considered to be an alternative to seizure.¹⁰⁹ It allows state agencies to have oversight control of assets subject to recovery. Freezing may be regarded as a general term referring to all preservation orders which do not involve physical control of the assets by the responsible government institution.¹¹⁰ The court order may bear different names but its effects

105 See Section 79 of POCA (T) and Section 43 of the EFCC Act.

106 Section 79 of POCA (T) empowers the Minister to make regulations for better implementation of the provisions of the Act. A similar construction is contained in Section 43 of the EFCC Act which empowers the Attorney General to make rules or regulations with respect to the exercise of any of the duties, functions or powers of the Commission under the Act.

107 See Article 2(f) of UNCAC and Article 2(f) of UNTOC.

108 Brun *et al* (2011: 75).

109 See, for example, Article 2(f) of UNCAC, Article 2(f) of UNTOC and Recommendation 4 of the FATF Recommendations (2012).

110 See Forsaith *et al* (2012: 31). See also Brun *et al* (2011: 76).

remain the same, to allow states to exercise oversight control of assets. Freezing is considered to be the cheapest way of preserving assets under forfeiture orders because it does not attract administration costs.

The three countries distinguish between the use of freezing and seizure orders according to the nature of the assets concerned and the circumstances of the case. Freezing, in particular, bears a variety of names. In Tanzania the term “freezing” is used in the PCCA (T), that is, the Prevention and Combating of Corruption Act. By contrast, POCA (T) refers to the orders which do not involve physical control of assets as restraint orders. South Africa refers to freezing as restraint and preservation orders. In Nigeria, the term “freezing” is employed to designate a type of preservation order that may be issued by the court to allow a responsible agency to have temporary control of assets which are operated by trustworthy financial institutions.

With regard to assets subject to confiscation, Tanzania controls the identified proceeds of crime via seizure and restraint orders.¹¹¹ Nigeria has freezing,¹¹² seizure¹¹³ and temporary forfeiture orders.¹¹⁴ South Africa has restraint, preservation and seizure orders. Despite the differences in the names and procedures involved in applications for and execution of the various orders, they all pursue similar consequence in relation to the proceeds of crime, which is to give the state agency temporary custody or control.

Restraint, freezing and preservation orders allow the state agencies to control the assets identified to be proceeds of crime by oversight. The orders involve restricting the persons who hold preserved assets from dealing with them in a manner that will defeat the purpose of asset recovery proceedings.¹¹⁵ They are interlocutory orders, effective only before final determination of the forfeiture proceedings.

111 Part V of POCA (T) provides for the control of assets subject to confiscation.

112 Section 34 of the EFCC Act.

113 Section 26 of the EFCC Act.

114 Section 28 of the EFCC Act.

115 See De Koker & Pretorius (1998: 50).

4.6.1 Control of the Proceeds of Crime in Tanzania

Tanzania has dedicated an entire part of POCA (T) to matters pertaining to control of assets subject to confiscation.¹¹⁶ It preserves identified proceeds of crime via seizure¹¹⁷ and restraint orders.¹¹⁸ The two mechanisms are not new; they are employed ordinarily in all criminal proceedings although their application in other criminal matters is slightly different. Restraint orders are used in both criminal and civil proceedings. There is also freezing; however, this is used mostly in corruption and money laundering offences. The orders are interlocutory in nature. They are intended to maintain the *status quo* of the assets suspected to be proceeds or instrumentalities of crime pending the final court decision on the forfeiture application.

4.6.1.1 Seizure

The power to seize assets subject to confiscation is vested in a police officer.¹¹⁹ POCA (T) defines a police officer to mean any member of the police force of or above the rank of corporal.¹²⁰ However, the powers may be exercised also by other investigation agencies, the officers of which are regarded as police officers when exercising investigation functions.¹²¹

Seizure of tainted assets¹²² in Tanzania can be enforced with¹²³ or without¹²⁴ a court order. In most cases seizure indeed is authorised and regulated by the court.¹²⁵ Nevertheless, during emergency searches, seizure may be enforced without a court order. Seizure allows the state agency to take physical control of the assets. This compels the state to establish a mechanism to administer seized assets. Management of seized assets under POCA (T) is entrusted to the seizing agency, that is, the IGP.¹²⁶

POCA (T) does not address management of tainted assets which have been seized under other laws. The PCCA (T), for example, authorises seizure of proceeds of corruption but it does

116 Part V of POCA (T) provides for the control of assets subject to confiscation.
117 Sections 31-37 of POCA (T) provide for matters pertaining to search and seizure of assets.
118 See Sections 38-57 of POCA (T).
119 Section 31(1) of POCA (T).
120 Section 3 of POCA (T).
121 See Section 8(2)(b) & (c) of the PCCA (T).
122 Section 3 of POCA (T) refers to proceeds and instrumentalities of crime as tainted assets.
123 See Sections 31(2)(b) and 32 of POCA (T).
124 See Sections 31(2)(c) and 34 of POCA (T).
125 See Section 31 of POCA (T).
126 See Section 35 of POCA (T).

not vest responsibility for the seized assets in any officer. Presumably, the Prevention and Combating of Corruption Bureau, as the seizing agency, bears the duty to manage the assets seized under its establishment statute.

Moreover, where seized assets under POCA (T) are of such nature that they require special management skills, the law provides for the option to appoint a trustee to manage them.¹²⁷ The trustee is appointed by the court and performs his duties in accordance with court's order.¹²⁸ This means the IGP is not responsible for seized assets which have been put into the custody of the trustee. This option assists in circumstances where the seizing agency has limited capacity to handle the seized assets.

4.6.1.2 Restraint

Restraint orders in Tanzania may be issued in three situations: after conviction for a serious offence, upon a person being charged or when he is about to be charged with a serious offence.¹²⁹ The court is moved by the AG's application seeking restrictions regarding disposition of or dealing with assets believed to be tainted.

In Tanzania, restraint applications are conducted *inter partes*.¹³⁰ Applications for restraint orders may be entertained *ex parte* only in special cases and a restraint order resulting from an *ex parte* application is valid for a very short period, not exceeding fourteen days after its issuance.¹³¹ Prior to the expiry of such a restraint order, the responsible agency, the Attorney General, is supposed to apply for an extension and notify the owner of the asset or any other person who may have an interest in the property of the existence of such application.¹³²

The grant of a restraint order depends on various grounds linked to the nature of the offence, the stage of the case, and the person against whom the order is sought.¹³³ The law is

127 Section 38(2)(b) of POCA (T).
128 Section 43(1)(e)(i) of POCA (T).
129 Section 38(1) of POCA (T).
130 Section 40 of POCA (T).
131 Section 40(2) of POCA (T).
132 Section 40(3) of POCA (T).
133 See Section 39 of POCA (T).

very strict in cases involving specified offences;¹³⁴ it does not set any preconditions for the granting of restraint orders.¹³⁵ Where the offence concerned is a serious offence which does not fall within the specified offences, the court should consider first whether issuing of the orders will serve the public interest.¹³⁶ In addition, the court must be satisfied that the asset in question is tainted or that the defendant has derived a benefit from the offence committed.¹³⁷ The court may be satisfied and grant a restraint order if the evidence produced establishes reasonable grounds to believe that the assets are tainted.¹³⁸ Thus, the applicant must present before the court facts which constitute reasonable grounds to believe that the assets form part of proceeds of crime or are an instrumentality of crime.

Where the application for a restraint order is lodged before conviction of the defendant, the determining factor for the grant of the order is proof on reasonable grounds that the defendant has committed the offence.¹³⁹ This should be done by affidavit sworn by the police officer who investigated the case.¹⁴⁰ In the case where the order is sought before the institution of charges against the defendant, the court should be satisfied that the defendant will be charged for the alleged offence or a related offence within forty eight hours.¹⁴¹

Restraint orders may be sought also against persons other than the defendant. For the court to grant such orders it must be proved on reasonable grounds¹⁴² that the property is tainted¹⁴³ and that, although the asset is in the custody of that other person, the defendant exercises effective control over it.¹⁴⁴ In all cases the decision to grant a restraint order remains

134 Section 3 of POCA (T) a specified offence to include any serious offence involving narcotic drugs and psychotropic substances, money laundering and any other offence to be gazetted by the Minister of Justice and approved by the National Assembly.

135 See Section 39(1) of POCA (T).

136 Section 39(2) of POCA (T).

137 See Section 39(5) of POCA (T).

138 See Sections 39(3)(b), 39(5)(b), and 39(6)(b). They all set reasonable grounds as determining factors for the court to issue restraint orders. The proof should be made via an affidavit by the police officer in charge of the investigation of the case.

139 Section 39(3) of POCA (T).

140 See Section 39(3)(b) of POCA (T).

141 Section 39(4) of POCA (T).

142 Section 39(6)(b) of POCA (T).

143 Section 39(6)(a)(i) of POCA (T).

144 Section 39(6)(a)(ii) of POCA (T).

entirely at the discretion of the court. This assists in maintaining court impartiality and ensures protection of individual property rights.

4.6.1.3 Freezing

Freezing is not among the preservation orders provided for by POCA (T). It is mostly employed to preserve assets liable for confiscation under the Prevention and Combating of Corruption Act. Tanzania has not harmonised its asset recovery laws. The enactment of POCA (T) did not limit the application of other laws which provide for the confiscation of proceeds and instrumentalities of crime or for the imposition of pecuniary penalties.¹⁴⁵ Thus, asset recovery provisions contained in other statutes are applied simultaneously with the provisions of POCA (T). There are several laws that provide for confiscation of proceeds and instrumentalities of crime, such as the PCCA (T), the Economic and Organised Crime Act and the Fisheries Act.

Freezing as used in the PCCA (T) encompasses the elements of a restraint order. The law provides for the attachment of assets¹⁴⁶ and the prohibition of transfer¹⁴⁷ of assets suspected to be proceeds or instrumentalities of crime. Attachment and prohibition of transfer of assets suit best the restraint orders as discussed above.

4.6.2 Control of the Proceeds of Crime in South Africa

South Africa preserves assets subject to recovery by restraint, preservation and seizure orders. It distinguishes its control mechanisms by the modes of asset recovery practised in the country. Restraint orders¹⁴⁸ are employed in conviction based asset recovery and preservation orders¹⁴⁹ in non-conviction based asset recovery. Seizure may be applied to assets under restraint and preservation orders in special circumstances only.¹⁵⁰

4.6.2.1 Restraint Orders

Restraint in South Africa is a discretionary power of the court. The order may be granted after an application is made by the agency responsible for asset recovery, the AFU. Application for

145 See Section 78(a) of POCA (T).

146 See Section 38(1)(a) of the PCCA (T).

147 See Section 38(1)(b) of the PCCA (T).

148 See Chapter 5, Part 3 of POCA (SA).

149 See Chapter 6, Part 2 of POCA (SA).

150 See Sections 27 and 41 of POCA (SA).

restraint orders in South Africa is basically *ex parte*, with an avenue for the affected persons to challenge it at any time.¹⁵¹ Granting restraint orders *ex parte* has been challenged as favouring the applicants in those applications. However, the Supreme Court of South Africa has held that the purpose of an *ex parte* restraint order is not to favour the applicant with an unopposed application but to preserve the assets from being disposed of or concealed in anticipation of the forfeiture proceedings.¹⁵² Assets put under restraint orders can be dealt with only in accordance with a court order.

The grant of a restraint order in South Africa is subject to the court being satisfied that the asset in issue is an instrumentality or proceeds of crime. The applicable standard of proof is proof on reasonable grounds.¹⁵³ Thus, the applicant must present to the court facts which constitute reasonable grounds to believe that the asset is an instrumentality of crime or forms part of proceeds of crime. The grounds for granting restraint orders are mainly two, namely, the possibility of conviction and the possibility that the accused has benefited from the crime.¹⁵⁴ In all cases the decision to grant a restraint order remains entirely in the discretion of the court. This, as in the case of Tanzania, maintains court impartiality and protects individual property rights from abuse.



4.6.2.2 Preservation Orders

Literally, preservation orders in asset recovery include all orders that may be issued by the court, or any competent authority, conserving assets subject to recovery to prevent their being disposed of or dealt with in a manner that will defeat the ends of justice. In South Africa, preservation orders refer to orders restraining the defendant from disposing of assets which are subject to non-conviction based asset recovery proceedings. They are similar to the restraint order in terms of mode of application, standard of proof and effects upon the identified proceeds of crime. The difference between the two terms in South African jurisprudence lies in the nature of recovery proceedings. Where recovery is pursued through

151 See Section 26(1) and 38(1) of POCA (SA). However, restraint orders granted *ex-parte* are not final and conclusive, they are subject to confirmation by the issuing court. See *NDPP v Rautenbach and Another* [2005] 1 All SA 412 (SCA), para 13.

152 *NDPP v Rautenbach and Another* [2005], para 13.

153 *NDPP v Rautenbach and Another* [2005], para 27.

154 Section 25(1) of POCA (SA). See also the court's reasoning in *NDPP v Basson* [2002] 2 All SA 225, para 19.

conviction based proceedings, the orders will be termed restraint orders,¹⁵⁵ and where it is non-conviction based proceedings, the orders are referred to as preservation orders.¹⁵⁶

4.6.2.3 Seizure

In South Africa, seizure is practised as a complement to restraint and preservation orders. Seizure may be enforced only against already preserved assets and in special cases where there are reasonable grounds to believe that preserved assets are at risk of being dealt with in a manner that will infringe the ends of justice. Seizure may be enforced with¹⁵⁷ or without¹⁵⁸ a court order. However, all assets preserved under seizure are administered in accordance with the orders of the court which issued the restraint or preservation orders, as the case may be.¹⁵⁹

This reliance upon the courts ensures checks and balances among the institutions dealing with the preserved assets. The police may seize assets, but the grounds for seizure will be checked by the court when giving directions as to how the seized assets should be administered.¹⁶⁰ The same is applicable to seizure by court order. The process may be initiated by the NDPP filing an application for a seizure order, the court grants the order, and execution is done by the police. In most cases seized assets are administered by *curator bonis*, who conducts his activities in accordance with a court order. Thus, no single institution holds power to the extent of being capable of abusing it.

155 See Chapter 5, Part 3 of POCA (SA).

156 See Chapter 6, Part 2 of POCA (SA).

157 Sections 26(8) and 38(3) of POCA (SA).

158 Sections 27(1) and 41(1) of POCA (SA).

159 Sections 27(2) and 41(2) of POCA (SA).

160 Seized assets are put under the control of *curator bonis* who functions in accordance with court orders. See Sections 28(1)(a) and 42(1)(a) of POCA (SA).

4.6.3 Control of the Proceeds of Crime in Nigeria

Nigeria employs freezing,¹⁶¹ seizure¹⁶² and interim forfeiture orders¹⁶³ as its mechanisms to ensure availability of the identified proceeds of crime for confiscation. The orders are interlocutory in nature, subject to the final disposition of the cases that led to their preservation.¹⁶⁴

4.6.3.1 Freezing

In Nigeria, freezing is used as a preservation order addressed to banks and other financial institutions.¹⁶⁵ It is thus an order which is employed specifically for preserving bank accounts and other negotiable instruments. The order, as in the case of other preservation orders, restrains the accused from operating the bank accounts and other negotiable instruments pending final determination of the forfeiture application.

Unlike other preservation orders, the power to issue freezing orders is vested in the Commissioner of the EFCC or any other authorised officer.¹⁶⁶ However, the Commissioner cannot act independently in issuing a freezing order; the law requires him to apply to the court for the power to issue the order.¹⁶⁷ This means, technically, that it is the court which issues the order because, if the court does not empower the Commissioner to do so, the latter cannot act on his own.

The Commissioner's application for power to issue a restraint order is made *ex-parte*. However, this does not preclude any person aggrieved by the order from challenging it.

161 Section 34 of the EFCC Act.

162 Section 26 of the EFCC Act.

163 Section 28 of the EFCC Act.

164 See the reasoning of the court on the validity of interlocutory orders in *Esai Dangabar v Federal Republic of Nigeria* (2012) LPELR-19732 (CA), pages 21 & 24, available at lawpavilionpersonal.com/ipad/books/19732.pdf.

See also *Nwude v Chairman EFCC* [2005] All FWLR Part 276, page 740.

165 Section 34(1) of the EFCC Act.

166 Section 34(1) of the EFCC Act.

167 Section 34(1) of the EFCC Act.

4.6.3.2 Seizure

Seizure is the main mode of preserving assets subject to forfeiture in Nigeria. It normally requires a court order to have assets seized for purposes of confiscation¹⁶⁸ but it may be enforced also without a court order.¹⁶⁹ The EFCC is empowered to seize assets suspected to be proceeds of crime in the course of investigation.¹⁷⁰ Where seizure is incidental to an arrest or search and the seized assets are expected to be used for evidential purposes, the court cannot interfere.¹⁷¹ However, where no criminal case has been instituted, the owner of the seized assets is entitled to have the assets released.

Despite the unilateral power of seizure, the court is not involved directly in what happens to the seized assets.¹⁷² All seized assets are controlled by the EFCC.¹⁷³ This limits the idea of checks and balances, used by other states, for managing seized assets. However, it does not mean that the rights of individual citizens are limited thereby. Though there is no express provision in the EFCC Act, any person who has his rights infringed by the EFCC's exercise of power may seek redress from the court.¹⁷⁴

In addition, the law mandates the Commissioner to apply to the court for an interim forfeiture order against the seized assets.¹⁷⁵ This condition, though contained in separate provisions, applies directly to all seized assets under the EFCC Act. The provisions refer specifically to the assets seized under Section 26 of the Act¹⁷⁶ and any other assets seized under other provisions of the Act.¹⁷⁷ It is not certain whether these provisions intend to rectify the danger posed by the unilateral seizure powers vested in the EFCC¹⁷⁸ or to have the court involved in preserving assets subject to confiscation. The wording of Section 29 of the EFCC Act

168 Section 26(1)(b) of the EFCC Act.

169 Section 26(1)(a) of the EFCC Act.

170 Section 26(1)(a) of the EFCC Act.

171 See the reasoning of the court in *Amri Medical Relief Limited and the EFCC* Suit No FCT/HC/CV/54/2010 pages 10-13, High Court of Federal Capital Territory, in Abuja Judicial Division, Holden at Abuja in 2010.

172 The court is involved in issuing interim forfeiture orders only. See Section 29 of the EFCC Act.

173 See Section 26(2&3) of the EFCC Act.

174 See Section 46(1) of the Nigerian Constitution.

175 See Sections 27(4) and 29 of the EFCC Act.

176 Section 29(a) of the EFCC Act covers seized assets of any person arrested for an offence under the Act.

177 See Section 29(b) of the EFCC Act.

178 The section has been described as "a confusion" by Adekunle (2011: 20).

is linked more to assets seized for confiscation purposes than for evidential purposes. This is apparent from the conditions attached to the issue of an interim forfeiture order. The law provides that the court shall make an interim order upon being satisfied that there is *prima facie* evidence that the asset concerned is liable to forfeiture.¹⁷⁹ Interim forfeiture orders under Section 24(4) of the EFCC Act require the court to consider other provisions of the Act pertaining to the issuing of such orders. The main provision that deals with interim forfeiture orders is Section 29(b) of the Act which links the order with anticipated confiscation. Thus, the interim forfeiture order functions as a check upon the seizures executed by the EFCC with intent to confiscate. It does not check seizures executed for evidential purposes although the sections seem to address all seizures effected by the EFCC.

4.6.3.3 Interim Forfeiture Orders

As discussed above, an interim forfeiture order acts as a mechanism to check seizures made under the EFCC Act. It marks a final stage of the preservation of assets subject to confiscation. After the grant of an interim forfeiture order, ownership of the assets concerned will vest temporarily in the Federal Government.¹⁸⁰ The court is moved by an *ex-parte* application made by the Commissioner for an interim order after seizure of assets. The Commissioner must produce *prima facie* evidence that the assets seized are liable to confiscation. This is normally done by affidavit sworn by the EFCC officer who is conversant with the facts of the case.

It is prudent to have court involvement when it comes to actions that affect the rights of an individual. Seizure of assets limits enjoyment of the right to property which is a constitutional right. Unilateral seizure by the EFCC threatens the enjoyment of rights to property in Nigeria. However, the requirement to apply for an interim forfeiture order assists in ensuring that the infringement of the right to property is justifiable at least.

179 See Section 29(b) of the EFCC Act.

180 See Section 29(b) of the EFCC Act.

4.6.4 Comparative Review

The preservation of assets subject to confiscation limits enjoyment of the right to property which is guaranteed constitutionally in the three countries. The infringement needs to be effected by an impartial body which will be in a position to consider justifications for such actions. The fact that the initial procedures in controlling the assets are performed the executive (as represented by investigation and prosecution agencies) while enforcing the laws enacted by the Parliament, suggests that the only body which can be considered impartial is the court.

In this regard, South Africa ensures that all preservation orders are issued by the court and that their execution is strictly in accordance with the court order. The court in Tanzania enjoys such powers when dealing with assets under restraint orders and those administered by the trustee. It does not have much control over assets administered by the IGP. In Nigeria, the powers of the court in managing preserved assets are exercised by implication. They are express only in relation to assets already seized by the EFCC. Thus, it cannot be argued that the courts in Tanzania and Nigeria enjoy powers over the management of preserved assets similar to the courts in South Africa. Given the importance of upholding the right to property, Tanzania and Nigeria should consider empowering their courts to take charge of management of all preserved assets.

With regard to preservation of assets orders, Nigeria should contemplate introducing orders other than for seizure. Seizure may be employed as a complement to other orders, as in South Africa, or in special circumstances, as in Tanzania. Having seizure as the basic asset preservation order attracts costs for the state as all preserved assets will need money for their maintenance.

4.7 Pre-Control Planning

The international community encourages states to establish asset management mechanisms that allow their agencies to conduct pre-control planning immediately after the need to preserve assets arises.¹⁸¹ The rationale of this process is to enable the responsible institutions

181 Para 27(e) of the FATF Best Practices Paper (2012).

to arrive at an informed decision on the mode of preservation appropriate for the particular assets.¹⁸² The laws of the three countries do not provide expressly for pre-control planning. However, the composition of the institutions responsible for asset recovery and the procedures involved in the preservation of assets suggest that planning does take place before the decision to preserve the assets.

4.7.1 Pre-Control Planning in Tanzania

POCA (T) does not provide expressly for pre-control planning. However, the mechanisms involved before the preservation of assets suggest that consultation and planning do take place before preservation orders are sought. Two institutions are involved actively in securing the preservation of assets, namely, the police and the AG through the AFRS. The process starts with the police identifying the assets and continues with the AFRS securing a preservation order from the court.

The police and the AG, although working closely, are distinct institutions. Thus, for the AFRS to have information on the existence of assets that need to be preserved there must be communication between the two institutions. It is expected that such communication contains all necessary information regarding the nature and circumstances involved in the assets that needs to be preserved. The process suggests that the two institutions engage each other to discuss the appropriate preservation order to be sought before the court is approached.

In addition to the interdepartmental negotiations, discussions take place within the AFRS. The AFRS is staffed by a number of attorneys and headed by the assistant director responsible for asset forfeiture and recovery. Before the lodging an application for preservation orders, there has to be some discussion and agreement as to the desired orders. The interdepartmental discussions and the AFRS discussions serve the purpose of pre-control planning as recommended by the international standards.

182 See *Brun* (2011: 79-89).

4.7.2 Pre-Control Planning in South Africa

POCA (SA), like POCA (T), does not provide expressly for pre-control planning. However, the mechanisms applicable prior to the preservation of assets suggest also that consultation and planning do take place before preservation orders are sought. Preservation of proceeds of crime in South Africa, as in Tanzania, involves primarily two institutions, namely, the police and the AFU.

The tracing and identification process is conducted by the police. Thereafter, the AFU enters the fray as the institution responsible for filing the application for the preservation of the identified assets. This procedure suggests that the two institutions consult each other on the nature of the assets that need preservation and a suitable mode of preservation before the AFU approaches the court.

In addition, it suggests also that there is pre-control planning done within the AFU. Preservation of assets concerns legal and asset management experts. South Africa does not practice seizure as an independent order for preservation of assets.¹⁸³ It uses restraint¹⁸⁴ and preservation¹⁸⁵ orders, depending on the type of recovery process to be pursued. The two orders do not involve physical control of assets. This makes the pre-control stage a concern of lawyers rather than of asset managers. The AFU comprises legal practitioners (attorneys), and their having discussions on what should be the procedure for the recovery of assets is eminently feasible and likely. Such consultations and discussions may be considered pre-control planning as they intend to secure a proper preservation order for the assets concerned.

4.7.3 Pre-Control Planning in Nigeria

In Nigeria, the EFCC Act does not contain express provisions on pre-control planning. However, unlike South Africa and Tanzania, the composition of the EFCC entails the possibility of pre-control planning. The units established under the EFCC include the General and Asset

183 Seizure in South Africa can be enforced only against assets under preservation or restraint orders. See Sections 27 and 41 of POCA (SA).

184 See Section 26 of POCA (SA).

185 See Section 38 of POCA (SA).

Investigation Unit and the Legal and Prosecution Unit.¹⁸⁶ These two units assist each other in the performance of their duties.¹⁸⁷ Being units of the same commission, co-operation between them is more than likely a norm. Thus, it would appear that Nigeria has a more active and effective pre-control planning regime than South Africa and Tanzania.

Pre-control planning in Nigeria may be considered to exist in the form of assistance between the EFCC units. The EFCC Act provides expressly that the Legal and Prosecution Unit is responsible for supporting the General and Asset Investigation Unit by providing it with legal advice and assistance whenever required.¹⁸⁸ Preservation of assets in Nigeria is a two-stage process. It starts with seizure of assets by the EFCC followed by an application for interim forfeiture orders. Seizure is executed during investigations.¹⁸⁹ It thus is executed by the General and Asset Investigation Unit guided by the advice of the Legal and Prosecution Unit. This suggests that fairly structured pre-seizure planning is conducted.

4.7.4 Comparative Review

The analysis of pre-control planning in the three states shows that the process is not given much overt consideration. It is presumed to be an automatic process attained during interdepartmental consultations and discussions within the institution responsible for preservation of the proceeds and instrumentalities of crime. Thus, states generally do not consider it necessary to provide for pre-control planning in their laws or regulations. However, control of assets, if not planned properly, may affect the value of the preserved assets and frustrate the purpose of confiscation proceedings. To allow such a crucial process to be done spontaneously as in the case of Tanzania, South Africa and Nigeria may affect negatively the implementation of the asset recovery policy. Given the importance of pre-control planning it would have been both sensible and appropriate for the states to provide expressly for the process in their laws or regulations.

186 Section 12(1) of the EFCC Act.

187 See Section 13(2)(b) of the EFCC Act.

188 Section 13(2)(b) of the EFCC Act.

189 Section 26(1) of the EFCC Act.

4.8 Valuation of the Preserved Assets

The international community encourages states to appraise preserved assets in order to advance efficiency and accountability in the preservation process.¹⁹⁰ The asset recovery laws of Tanzania, South Africa and Nigeria do not provide expressly for valuation of assets prior to and after preservation. However, the three states do value the assets in the course of preservation proceedings. This is done in practise via the fulfilment of other legal requirements of preservation.

When lodging applications to restrain assets, the responsible authorities in the three states have to establish reasonable grounds that the assets in question form part of the proceeds of crime.¹⁹¹ Here a connection is drawn between the disputed assets and a criminal transaction from which the accused is alleged to have benefited. The connection between the crime and the assets may be drawn in terms of time and of value. The timing of a criminal transaction must be linked to the acquisition of the asset alleged to form part of the proceeds of crime. The value of the said asset must tally also with the estimated benefits of the alleged criminal transaction. The responsible authorities value the assets subject to recovery in order to fulfil these legal requirements.

UNIVERSITY of the
WESTERN CAPE

4.8.1 Valuation of Assets in Tanzania

As mentioned above, POCA (T) does not provide for valuation of assets within the meaning and intent of the IBPs. However, aside from valuations conducted for evidential purposes, Tanzania conducts appraisals in the course of estimating damages to be paid by the state in the case of mismanagement of the preserved assets. The law requires the AG to guarantee payment of damages to the accused in such cases.¹⁹² In order to establish the amount of damages to be paid, the assets subject to preservation orders must be valued.

190 Para 27(k) of the FATF Best Practices Paper (2012).

191 See Section 39(5) of POCA (T), Sections 25(1)(a)(ii) and 25(1)(b)(ii) of POCA (SA) and Section 29(b) of the EFCC Act.

192 See Section 39(9) of POCA (T).

Valuation is conducted also on the assets preserved for confiscation under the Economic and Organised Crime Control Act of Tanzania (EOCCA (T)).¹⁹³ The purpose of appraisal of assets seized under the Act is to ascertain their value at the time of seizure.¹⁹⁴ This is intended to secure the rights of the defendant and ensure accountability of the seizing agency. However, this provision can be applied only to assets seized under the EOCCA (T).

4.8.2 Valuation of Assets in South Africa

Valuation of preserved assets does not feature in POCA (SA). Notwithstanding this omission, preserved assets are valued in South Africa in two ways, by the court and by the appointed *curator bonis*. The court conducts valuation of assets subject to restraint orders.¹⁹⁵ It assesses the expected value of the confiscation order and the estimated value of the assets identified to be proceeds of crime. The purpose of this valuation is to ensure that a restraint order is issued only against assets with value equivalent to the expected confiscation order. Striking a balance of value between restrained assets and the expected confiscation order protects the right to property as it prevents the restraining of additional assets. It also ensures satisfaction of a confiscation order which could have been affected by restraining assets of little value.

Valuation of preserved assets is conducted also on the assets which are managed by a *curator bonis*. This is regulated by the provisions of the Administration of Estates Act.¹⁹⁶ The Act requires the *curator bonis* to submit an inventory of assets under his control to the Master of the High Court within thirty days after his appointment.¹⁹⁷ The inventory is in standard form and it requires a description of the assets and their values.¹⁹⁸ Valuation is conducted by appraisers who are appointed by the Minister of Justice.¹⁹⁹ The purpose of valuation at this stage is to establish the value of assets at the time of preservation. This process assists in establishing accountability for the *curator bonis* and liability in cases of mismanagement. It is thus in compliance with the IBPs.

193 Section 22(3) of the EOCCA (T).

194 See Section 22(3)(i) of the EOCCA (T).

195 See *NDPP v Rautenbach and Another* [2005], para 62.

196 Section 78 of the Administration of Estates Act.

197 Section 78(1) of the Administration of Estates Act.

198 For the standard form of the inventory visit www.justice.gov.za/master/m_forms/J243pdf.

199 Section 6 of the Administration of Estates Act.

4.8.3 Valuation of Assets in Nigeria

The EFCC Act also is silent on the appraisal of preserved assets. However, elements of valuation can be identified in its provisions on the preservation of assets. The law mandates the EFCC to apply for interim forfeiture orders after it has seized assets subject to confiscation. The court grants interim forfeitures orders only when it has been established to its satisfaction that the assets are liable to forfeiture. The Act defines assets liable to forfeiture to include any asset that represents the “gross receipt” which a person obtains from the crime.²⁰⁰ This suggests that in order to ascertain that the assets subject to interim forfeiture orders fall within the ambit of assets liable to forfeiture, the value of the assets and the proceeds of crime should be established. However, the appraisal does not conform to the IBPs as it is not done for preservation of the value of the assets under interim forfeiture orders.

4.8.4 Comparative Review

The above analysis establishes that the purpose of valuation conducted in the three states differs from the purpose of valuation advocated by the international community. Although there are instances in which valuation is conducted as part of the asset administration process, such appraisal is limited to a certain category of assets only. In Tanzania, it covers assets seized under the EOCCA (T) and in South Africa it applies to assets put into the custody of a *curator bonis*. Despite the differences regarding its purpose, valuation of preserved assets does assist the states to ensure accountability of the officers involved in managing the assets after the grant of the preservation orders.

However, in order to safeguard the purpose of the asset recovery policy, the three states should consider providing expressly for the valuation of proceeds of crime in conformity with the international standards.

200 Section 24(a) of the EFCC Act.

4.9 Record Keeping

Record keeping is pivotal to ensuring transparency and accountability. It is an essential element of the management of preserved and confiscated assets.²⁰¹ Without proper record keeping there never can be accurate reporting by and accountability for the officers entrusted with managing the proceeds of crime.

The asset recovery laws of the three states do not contain record keeping requirements. Nevertheless, records of the preserved and forfeited assets are kept in the course of government meeting its accountability to its citizens. The agencies involved in managing preserved and confiscated assets are basically government agencies. Their managing the proceeds of crime entails accountability, and they have developed a culture of keeping records for accountability purposes.

4.9.1 Record Keeping in Tanzania

In Tanzania, special registers are used to record particulars of preserved and confiscated assets.²⁰² Registers maintained at police stations contain particulars such as the type of asset seized, the name of the owner, the date of seizure, the underlying offence, the estimated value of the asset and the details of the case instituted in relation to the offence. The registers maintained at the AG's offices contain more detail regarding the court proceedings, such as the name of the prosecuting attorney, the presiding judge or magistrate and the progress of the case, in addition to particulars contained in the police register.

The Office of the Director of Public Prosecutions is in the process of installing an electronic data management system known as Case Docket Management .The database will allow the office to achieve integration of data countrywide. The project is funded by the Strengthening Tanzania Anti-Corruption Action (STACA) project.²⁰³

201 See Para 27(d)(iv) of the FATF Best Practices Paper (2012).

202 Information obtained from the AFRS, ODPP, Headquarters, Dar es Salaam, Tanzania.

203 See the Report of the Directorate of Public Prosecutions on Development Projects (2014: 7-9) for detailed information concerning the Case Docket Management project.

4.9.2 Record Keeping in South Africa

In South Africa, a record of restrained and preserved assets is kept by the Master of the High Court. The records are kept in a web portal known as Master of the High Court's Integrated Case Management System (ICMS) Web Portal.²⁰⁴ The ICMS web portal makes available information held by the Master's Office from the year 2008.²⁰⁵ Preserved assets and their values are amongst the information handled by the Master of the High Court which is stored in the web portal.

4.9.3 Record Keeping in Nigeria

Nigeria has established a special Directorate which is responsible for planning, policy and statistics.²⁰⁶ The Directorate is entrusted with maintaining data, statistics and reports on proceeds, properties, documents and other items involved in economic crimes.²⁰⁷

The data-keeping process under the EFCC is not integrated, but the EFCC is working towards constructing an integrated data system with the assistance of the UNODC.²⁰⁸

4.9.4 Comparative Review

The analysis of the systems of record keeping in Tanzania, South Africa and Nigeria shows commitment by these states to comply with the IBPs. Although the systems in Tanzania and Nigeria do not allow for integration of data, the ongoing projects to install electronic databases will assist in improving their data management systems.

4.10 Reporting and Auditing Requirements

Reporting and auditing work as tools for assessing the efficiency of asset management during forfeiture processes. Reporting provides the citizens with feed-back on what is being done regarding the implementation of asset recovery policy. It is a means through which the

204 The web portal can be accessed through <https://icmsweb.justice.gov.za/mastersinformation>.

205 For more information on records kept by the Master of the High Court, visit www.justice.gov.za/master/m_main.htm.

206 Visit <https://efccnigeria.org/efcc/index.php/statistics> for information on the establishment and functions of the Directorate of Planning, Policy and Statistics.

207 See Section 6(v)-(vi) of the EFCC Act. The Directorate is entrusted to perform functions listed in these paragraphs, in addition to other functions.

208 Visit <https://efccnigeria.org/efcc/index.php/external-cooperation/eu-unodc-project-1> for information on the EU/UNODC project in Nigeria.

government accounts for its activities to the citizen. Auditing concerns the accountability of the AMIs. It is a process which monitors the activities of these institutions and the reports they produce. Through auditing, the efficiency of the AMIs may be established.

There are no specific provisions in the asset recovery laws of the three states that require the responsible institutions to produce reports on the management of preserved and forfeited assets. This default has its roots in the structure of institutions responsible for managing the proceeds of crime. In Tanzania and South Africa such management involves a number of institutions. In Nigeria the management function is vested in a single institution, but that institution performs other activities as well. In all cases, having a report containing detailed information on the management of the proceeds of crime is not feasible unless there is a special stipulation in the relevant laws or regulations. Given the necessity of managing proceeds of crime in asset recovery policy, states ought to have included such a stipulation in their legal frameworks.

The institutions responsible for asset recovery do report on their activities generally and management of the proceeds of crime forms part of the reports produced. However, due to the large number of activities covered in the reports, details of the management process are not given. In most cases, the reports contain information on successful confiscations and pending forfeiture applications. Such information intimates that assets subject to confiscation are being managed, but the efficiency of such management cannot be established from the reports.

4.10.1 Reporting and Auditing in Tanzania

In Tanzania, the reports on the activities of AFRS are submitted to the DPP and form part of the latter's report to the AG. They form part also of the AG's report to the Minister of Justice and hence of the Minister's report to Parliament. The Minister's report to Parliament takes the form of a speech and may be accessed by the general public through the website of the Ministry of Justice and Constitutional Affairs.²⁰⁹ For example, the 2013/2014 report states that the AFRS managed to recover a total of 223 million Tanzanian shillings.²¹⁰ The activities of the AFRS are

209 www.sheria.go.tz/index.php/.

210 See Para 33 of the Minister's speech to Parliament for the financial year 2013/2014.

audited internally and externally. However, these auditing reports do not form part of the report which is submitted to Parliament.

4.10.2 Reporting and Auditing in South Africa

In South Africa, the reports on the activities of the AFU are submitted to Parliament annually. The reports of the AFU form part of the annual reports of the National Prosecution Services and the Department of Justice. All reports are made available in the public domain.²¹¹ The AFU reports are more detailed compared to AFRS reports, as they contain information on the confiscated funds and their utilisation. Also, the reports are audited by the Auditor-General. The auditing report forms part of the published reports.²¹²

4.10.3 Reporting and Auditing in Nigeria

Nigeria has the same reporting mechanism as South Africa.²¹³ The law requires the reports to be audited before being submitted to Parliament. In addition, the EFCC produces special reports on successful confiscations on an annual basis. These reports are published on the EFCC's website for public consumption.²¹⁴ Although they are not audited, they make the general public aware of how much was confiscated. Moreover, the reports likely are not worth auditing because they contain only case statistics showing successful forfeiture applications. They do not contain any accounting information or information on all instituted applications and their progress through the courts.

4.10.4 Comparative Review

In general the reports produced by the three states, except for the minor but valuable consideration in the South African AFU's report, do not provide detailed information on asset management. A report on the management of the proceeds of crime needs to contain information such as the value of asset at the time of preservation, how the asset was

211 For reports on the activities of the AFU and other departments under the Ministry of Justice, visit www.justice.gov.za.

212 See, for example, pages 104-106 of the 2014 Ministry of Justice Report.

213 See the EFCC's duty to report on its activities annually, as envisaged in Section 37 of the EFCC Act.

214 For the convictions report, visit <http://efccnigeria.org/efcc/index.php/convictions>.

preserved, the costs of management during preservation, the mode of disposition, the value after realisation, and the utilisation of the realised value.

This calls for the states to establish a mechanism through which reports on the management of proceeds of crime will be produced. Although they may not be submitted to Parliament, publication of such documents will assist with the accountability and transparency of the AMIs.

4.11 Advance Disposition of Preserved Assets

The disposition of the proceeds of crime normally marks the final stages of asset recovery. The advance disposition of preserved assets differs from final disposition in their consequences. As discussed in the previous chapter, this type of disposition is a mode of preserving the proceeds of crime during recovery proceedings.²¹⁵ In this mode, the value of the suspected proceeds is realised and preserved. It does not affect the final determination of the forfeiture application.

The asset recovery laws of Tanzania, South Africa and Nigeria do not provide expressly for advance disposition of suspected proceeds of crime. However, asset recovery laws are not applied in isolation of other laws. The agencies involved in enforcing asset recovery policy may invoke the provisions of other laws that allow advance disposition of assets.

4.11.1 Advance Disposition of Assets in Tanzania

In Tanzania, asset recovery proceedings are criminal in nature and there is no special procedural law governing asset recovery cases. Thus, asset forfeiture proceedings are conducted by employing the procedures established by the Criminal Procedure Act (CPA (T)).²¹⁶ The CPA (T) empowers the court to order advance disposition of seized assets.²¹⁷ The only reason for such disposition lies in the nature of the seized assets. Advance disposition can be ordered only when the seized assets are perishable or are dangerous to retain.²¹⁸ The construction of this provision is narrow and it cannot accommodate other reasons for advance

215 See §3.3.2.6 of Chapter Three.

216 The Criminal Procedure Act [CAP 20 RE 2002].

217 Section 353(2) of the CPA (T).

218 Section 353(2) of the CPA (T).

disposition in asset recovery cases, especially disposition intended to reduce costs involved in managing the asset.

Moreover, as regards assets preserved under the EOCCA (T), advance disposition may be opted to preserve those assets which are perishable.²¹⁹ The law empowers the IGP or the court to order advance disposition of assets subject to speedy decay. The section that allows for such advance disposition has a wide construction capable of authorising any mode of disposition. It empowers the IGP or the court to order that the property be destroyed, disposed of or dealt with in any manner to be specified. However the application of this provision is limited to assets preserved under the EOCCA (T).

4.11.2 Advance Disposition of Assets in South Africa

POCA (SA) does not provide expressly for advance disposition of preserved assets. However, such disposition has developed into a standard practice of the court.²²⁰ The court has pronounced the provisions of Section 28 of POCA (SA) to be wide enough to allow it to order anything with regard to the administration of preserved assets, including the sale of the assets.²²¹ The relevant parts of Section 28 read:

Where a High Court has made a restraint order that court may at any time:-
(a) appoint a *curator bonis* to do, subject to the directions of that court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely:
(i) to perform any particular act in respect of any of or all the property to which the restraint order relates.²²²

The court interpreted the words “any particular act” to include the power to authorise anything necessary to ensure the preservation of the assets, including their sale where circumstances so require.²²³ This interpretation was challenged as going against the spirit of POCA (SA).²²⁴ It was argued that confiscation orders under POCA (SA) do not deprive the defendant of his assets

219 See Section 23(1) of the EOCCA (T) on the reasons for such disposition, the institution responsible for effecting the disposition and the attached conditions.
220 See *Ex parte Hullet* 1968(4) SA 172(D) at 175D-176C. See also *Ex parte Thompson* 1983 (4) SA 392(E) at 393E-G.
221 See *Mngomezulu v NDPP* [2007] SCA 11 (RSA) at para 10.
222 Section 28(1)(a) of POCA (SA).
223 See *Mngomezulu's case* [2007] at para 10.
224 See *Mngomezulu's case* [2007] at para 10.

automatically. A confiscation order simply requires the defendant to pay to the government a certain amount of money that will be determined by the court as the benefit which the defendant derived from the offence. The court may order realisation of the preserved assets to satisfy the confiscation order only where the defendant has failed to pay the money from other sources. Selling of preserved assets tends to alienate the assets and infringe the defendant's right to property.

Despite the criticism, in general selling of preserved assets is amongst the mechanisms of advance disposition aimed at protecting the value of the assets for satisfaction of the expected confiscation order.²²⁵ It does not matter whether the confiscation order is in the form of civil debt or not. In all cases there is a need to insure that the confiscation order will be fulfilled, and selling of assets which cannot be administered easily acts as insurance for such payments.

Being influenced by a similar view, the court held that there are circumstances in which selling is necessary to preserve the value of the assets under restraint order. According to the court, selling may be invoked for a number of reasons in this regard, including meeting the administration costs of assets under restraint order. Thus the court may authorise the *curator bonis* to sell some of the restrained assets in order to meet the expenses of maintaining other assets under the same restraint order.²²⁶ Selling may be used also when the value of assets under restraint depreciate quickly.²²⁷ These are a few scenarios in which advance disposition of preserved assets may be authorised in South Africa. However, the interpretation of the provisions of POCA (SA) adopted by the court encompasses virtually any scenario that may arise.

The court found the power of the *curator bonis* to undertake advance disposition to be justified also under the Administration of Estates Act. This Act allows the *curator bonis* to alienate assets under curatorship subject to authorisation of the court or the Master of the

225 See *Mngomezulu's case* [2007] at para 14.

226 The court interpreted the words "such orders" in Section 28(3)(c) to include the power to alienate assets under restraint order to meet costs of expenditure to be incurred by the *curator bonis*. See *Mngomezulu's case* [2007] at para 11-13.

227 See *Mngomezulu's case* [2007] at para 14.

High Court.²²⁸ The application of the Administration of Estates Act in asset recovery cases is provided for by POCA (SA).²²⁹

4.11.3 Advance Disposition of Assets in Nigeria

Asset forfeiture proceedings in Nigeria are also criminal in nature and the EFCC Act does not stipulate any special procedure. The *lacuna* in the EFCC Act may be addressed by reference to the provisions of the Criminal Procedure Act of Nigeria (CPA (N)).²³⁰ However, the provision that allows for advance disposition in the CPA (N) has a narrow construction, similar to the provision in Tanzania.²³¹ Thus, the difficulties regarding advance disposition identified in the laws of Tanzania apply also to Nigeria. To have effective advance disposition, asset recovery laws should provide expressly for its scope and procedure.

A good example of laws which contain detailed provisions on advance disposition of assets is the Corrupt Practices and Related Offences Act No 5 of 2000 of Nigeria (CPROA (N)).²³² The Act provides for temporary return of assets to the person from whom they were seized.²³³ Such return is subject to conditions that will secure the value and availability of the asset.²³⁴ It provides also for advance disposition where the seized assets are liable to decay or deterioration, where the assets cannot be maintained without difficulties and where it is not practicable for the assets to be maintained or dealt with by a temporary return of asset order.²³⁵ In such circumstances the asset may be sold pending final determination of the proceedings instituted under the Act.

228 Section 80(1) of the Administration of Estates Act.

229 See Section 32(2) of POCA (SA).

230 The Criminal Procedure Act, Chapter 80 of the Laws of the Federation of Nigeria, 1990 (CPA (N)).

231 Section 114 of the CPA (N).

232 See, for example, the provisions of Section 38(3) & (7) of the CPROA (N).

233 See Section 38(3)(a) & (b) of the CPROA (N).

234 See Section 38(3)(a) & (b) of the CPROA (N).

235 See Section 38(7) of the CPROA (N).

4.11.4 Comparative Review

The value of preserved assets is the backbone of confiscation orders. The states need to preserve the value of the assets by all possible mechanisms because without the assets the purpose of the confiscation orders will be frustrated. Advance disposition of preserved assets is vital in assuring the availability of funds to settle the expected confiscation order.

Regrettably, the importance of advance disposition in preserving the value of assets subject to confiscation orders is not reflected in the asset recovery laws of Tanzania, South Africa and Nigeria. The provisions of POCA (T) and the EFCC Act do not address advance disposition at all. Tanzania and Nigeria rely on their Criminal Procedure Act to deal with cases involving advance disposition of preserved assets. POCA (SA) was served well by the court's reliance on constructive interpretation of its provisions on administration of assets by a *curator bonis*. Had the court applied a plain meaning to the relevant provisions, the situation in South Africa would have been worse than that in Tanzania and Nigeria.

Given the relevance of advance disposition of preserved assets in maintaining the status of confiscation orders, there is a need to have express provisions regarding the process. Thus, the laws of Tanzania, South Africa and Nigeria need to provide for this power in a more precise manner. In enacting provisions on the advance disposition of preserved assets, the legislatures of the three countries should have regard to the contents of the EOCCA (T), the CPROA (N) and the generous interpretation given by the court to the provisions of POCA (SA).

4.12 Special Asset Recovery Fund

The international community recommends that states establish a special fund in which to lodge recovered assets.²³⁶ Depositing such assets into a special fund assists in ensuring that the realised values are utilised in a manner that upholds the purposes of asset recovery policy. The fund assists also in promoting accountability and transparency of the agencies involved in disposition of forfeited assets.

236 G8 Best Practices for the Administration of Seized Assets.

4.12.1 Asset Recovery Fund in Tanzania

Tanzania does not have a special fund for the deposit of assets recovered under POCA (T). The recovered assets and the funds realised from forfeited assets form part of the general revenue of the country.²³⁷ After confiscation, the assets are put under the control of the Treasury Registrar who disposes of them as ordinary state properties.²³⁸ In cases involving realisation, the funds are treated in the same way as funds from other sources.

However, some laws which provide for confiscation of assets provide also for special funds in which recovered assets may be deposited. Although these funds are not specifically intended to be depositories for confiscated assets, the laws allow for such assets to be deposited therein.²³⁹

4.12.2 Asset Recovery Fund in South Africa

In compliance with the IBPs, South Africa established a special account for forfeited funds known as the Criminal Assets Recovery Account (CARA).²⁴⁰ CARA contains mainly funds obtained from the realisation of recovered assets and the ordinary budgetary allocations.²⁴¹ The AFU is not responsible for the funds deposited into CARA. The account is managed by an independent committee known as the Criminal Assets Recovery Committee, which is composed of the Minister of Justice, the Minister of Safety and Security, the Minister of Finance, the National Director of Public Prosecutions and two other persons who may be designated by the Minister of Justice if necessary.²⁴² The Committee is responsible, *inter alia*, to make recommendations on the utilisation of the funds in CARA and the realisation of other forfeited assets.²⁴³ The allocation of funds from CARA is done by the Cabinet after consideration of the

237 Section 25 of POCA (T).

238 Sections 15(3) and 21(1) of POCA (T).

239 See, for example, the Tanzania Wildlife Protection Fund established under Section 91(1) of the Wildlife Conservation Act No 5 of 2009. Section 91(3)(b) of the Act provides for sources of funds to include 25% of assets forfeited under provisions of the Act. See also Sections 79(1) and 79(2)(d) of the Forest Act No 10 of 2002 regarding the Tanzania Forest Fund established under it and recovered assets as part of the monetary sums to be deposited in it.

240 Section 63 of POCA (SA).

241 Section 64 of POCA (SA).

242 See Section 65(1) & (2) of POCA (SA).

243 Section 69 of POCA (SA).

recommendations made by the Criminal Assets Recovery Committee.²⁴⁴ The allocation made by the Cabinet is subject to the approval of Parliament.²⁴⁵ This procedure is abided by strictly.²⁴⁶ This ensures that the funds are allocated and utilised in accordance with the purposes of POCA (SA).

4.12.3 Asset Recovery Fund in Nigeria

Nigeria also does not have a special fund for the deposit of recovered assets. The recovered assets and the funds realised from forfeited assets form part of the general revenue of the country, and they are deposited into the Consolidated Fund of the Federation.²⁴⁷ After confiscation, the assets are put under the control of the treasury authorities which dispose of them as ordinary state properties. In cases involving realisation, the funds are treated like other funds from different sources. The effects of this system, such as lack of accountability regarding the utilisation of funds, may not be appreciated at this stage of asset recovery because the dominant principle that crime should not pay may seem to have been achieved.

4.12.4 Comparative Review

The necessity of establishing a special asset recovery fund depends on the spirit of the asset recovery policy in a particular state. The international standards advocate the establishment of a special fund for recovered assets as a mechanism to ensure that confiscated funds are utilised in a manner that upholds the spirit of the asset recovery policy of the country. Where the asset recovery policy of the state is built on the single principle that crime should not pay, there is no necessity for establishing a special fund.

The principle that crime should not pay may be accomplished by depriving the criminals of the proceeds of crime and not by utilisation of recovered assets.²⁴⁸ In such circumstances, it is the confiscation of the proceeds of crime that matters and not how the assets are utilised

244 Section 69A(1) of POCA (SA).

245 Section 69A(3)(a) of POCA (SA).

246 See the reasoning of the court regarding the power to allocate recovered assets in *NDPP In Re Rubber Duck with Registration DTP 988; Boat Trailer with Registration DNT 118 EC*, Case No 1466/07, High Court of South Africa, Eastern Cape Division.

247 Section 31(2) & (3) of the EFCC Act and Section 25 of POCA (T).

248 When narrow interpretation of the principle “crime should not pay” is applied.

thereafter. The importance of establishing special funds is relevant only where asset recovery policy is built on two principles, firstly, that crime should not pay and, secondly, that corrective justice should prevail (as is the case in South Africa). With corrective justice as the second pillar of asset recovery policy, states will need to remedy the harm caused by crime by using confiscated assets to this end. Hence, the need to have a special fund will arise.

Tanzania and Nigeria should consider having corrective justice as a second principle of their asset recovery policies. They should consider also establishing a special asset recovery fund to cater for said principle.

4.13 Investment of Proceeds of Crime

The IBPs encourage states to invest preserved assets.²⁴⁹ This is challenging in developing countries because investment needs a stable economy. In addition, preserved assets need to be available for disposition immediately after the final determination of the forfeiture application. The challenges will be minimal in cases of successful forfeiture applications as the assets will vest in the state, which can wait for the investment to mature. However, when the victim needs to be compensated, investing preserved assets may act as a bar to corrective justice by delaying the process. In cases of unsuccessful forfeiture applications, investment of preserved assets may infringe the rights of innocent defendants to access their assets. Given the challenges involved in investing preserved assets, most states refrain from engaging in such transactions.

Tanzania, South Africa and Nigeria are among the states that do not allow for investment of the proceeds of crime. They do manage the preserved assets, and when the assets need investment, they use asset managers to administer or preserve them in a manner that will allow control by oversight.²⁵⁰ With regard to the risks attached to investments, the safest investment may be operating a profit generating account with a reliable financial institution. However, operating such account may not be an investment necessarily.²⁵¹

249 See Guideline 9 of the CICAD Self-Evaluation Guide for the Forfeiture and Administration of Assets (2013).

250 The use of asset managers in Tanzania and *curator bonis* in South Africa are intended to handle assets of that nature.

251 See the practice in Nigeria. The bank accounts are used for mere safe keeping of the funds and not as investment accounts.

According to the IBPs, investing preserved assets is optional. Therefore, it cannot be argued that the three states are not compliant with the international recommendations. Investment of assets of this nature need stable economies and reliable investment opportunities. States need to consider investing preserved proceeds of crime when the circumstances are appropriate.

4.14 Liability of the Asset Management Institutions (AMIs)

The difference between conserving seized assets as exhibits and administering them as proceeds of crime subject to realisation can be seen in the consequences of mismanagement. When assets are conserved only for evidential purposes (exhibits), their mismanagement may reduce their evidential value. The loss of evidential value may result in failure to prove a particular case and other incidental expenses, such as costs incurred by the government in retaining attorneys, investigators and witnesses engaged in the case, and failure to fulfil the legitimate expectations of the citizenry, especially the victims of the offence.

Mismanagement of assets subject to realisation usually causes direct and indirect costs to the state. Direct costs may be incurred when the asset is not forfeited, and its economic value has depreciated beyond normal wear and tear. In such circumstances, the return of the asset to the person from whose possession it was seized becomes difficult. The right to property being a constitutionally guaranteed right,²⁵² the persons who may be aggrieved by mismanagement of their assets are at liberty to sue the government for damages. Most of the aggrieved persons do not sue. However, the few who are aware of their constitutional rights, and who are capable and courageous enough, may sue.

The right to damages for mismanagement of preserved assets may arise also in the case of successful forfeiture applications. In this scenario, the victims of the offence who also have the right to have their assets returned may sue for damages. The right to property extends to the right to have an individual's private property protected.²⁵³ The return of recovered assets

252 Article 24 of the Tanzanian Constitution, Section 25 of South African Constitution and Section 43 of the Nigerian Constitution.

253 For example, Article 24(1) of the Constitution of Tanzania provides expressly for the right to property and protection of the property which is owned in accordance with the laws of the country.

to the victims of the offence is amongst the mechanisms that may be employed by the state to guarantee its citizenry the right to private property. Failure to return forfeited assets to victims amounts to an infringement of the right to property.

In addition to damages payable to crime victims, direct costs arising from mismanagement of preserved assets include costs which government has incurred during the seizure and the failed management.

Indirect costs to the government due to mismanagement may arise when the asset is forfeited while having no economic value to be realised. This cannot be established directly as a loss for the government since nothing was gained and lost. Moreover, if the asset forfeited was expected to be realised and contribute to the state's revenue, then the failure to preserve the realisable value amounts to loss.

Asset management authorities enjoy a wide range of immunity from liability arising from discharging their duties in managing preserved proceeds of crime. The international community argues for liability in cases of negligence on the part of the officers involved in the management process.²⁵⁴



4.14.1 Liability of the AMIs in Tanzania

POCA (T) protects the trustee, who is the asset manager in Tanzania, from personal liability in cases of loss or damage to the assets in his custody.²⁵⁵ It protects the trustee also against any tax²⁵⁶ and costs of proceedings involving the assets in his custody.²⁵⁷ However, the Act provides expressly for the liability of the trustee for negligent conduct. Where the trustee acts negligently, the court may hold him responsible for the payment of damages resulting from his negligence.²⁵⁸

254 G8 Best Practices (2005).

255 See Section 49(1)(a) of POCA (T).

256 See Section 49(2) of POCA (T).

257 See Section 49(1)(b) of POCA (T).

258 See Section 49(1)(a) of POCA (T).

4.14.2 Liability of the AMIs in South Africa

In South Africa, the *curator bonis* may be held liable for misconduct in the discharge of his duties. The liability of the curator is basically civil in nature. POCA (SA) empowers the Master of the High Court to vary the fees payable to the *curator bonis*.²⁵⁹ This implies that the court takes into account the performance of the curator when determining the fees payable for his services. Where he fails to discharge his duties as required, the Master of the High Court may disallow the curatorship fees.²⁶⁰ Disallowance of fees acts as a way of enforcing liability against the curator for the unprofessional discharge of his duties.

In addition to the actions that may be taken against unsatisfactory performance by the curator, POCA (SA) protects the property vested in the *curator bonis* from damages. It requires the curator to furnish security for the assets under his control.²⁶¹ Although the costs of finding security are paid from the income derived from the preserved asset,²⁶² in the case of default in performance by the curator, the court may enforce the security and recover from the curator and/or the sureties the damages occasioned to the asset under curatorship.²⁶³ These mechanisms ensure *bona fides* in the discharge of the curator's duties and in the preservation of the assets under curatorship.

UNIVERSITY of the
WESTERN CAPE

4.14.3 Liability of the AMIs in Nigeria

In Nigeria, the EFCC Act does not establish any liability for the EFCC in cases of mismanagement of the assets that are seized and put under its control. However, it requires that the seized assets be returned to the owner in cases of unsuccessful forfeiture applications.²⁶⁴ This suggests that the government will bear the costs of mismanagement without holding responsible the officers entrusted to manage the assets, even where the mismanagement is a result of their negligence. Nigeria should consider enhancing its system of managing preserved and confiscated assets by establishing liability for the AMIs, especially for negligence that may occur in discharge of their duties.

259 Regulation 2(2)(a) of GN No19914 as amended by GN No 21504 of 1 September 2000.

260 Regulation 2(2)(b) of GN No19914 as amended by GN No 21504 of 1 September 2000.

261 Section 77(1) of the Administration of Estates Act.

262 Section 77(4) of the Administration of Estates Act.

263 Section 77(5) of the Administration of Estates Act.

264 Section 33(3) of the EFCC Act.

4.14.4 Comparative Review

Liability of the AMIs is essential for maintaining a sense of responsibility and accountability on the part of the institution. However, the AMIs need protection from certain types of liabilities in order to operate smoothly. Thus, states must establish a balance between protection and liability of the AMIs.

The system adopted by South Africa regarding liability and protection of the AMIs provides a good example of such equilibrium. The *curator bonis* is protected from personal liability to the extent of being allowed to sell some of the preserved assets in order to pay administration fees and necessary taxes for the assets in his custody. With regard to liability, the curator needs to deposit security for the assets in his custody and in some cases his remuneration may be denied or reduced due to his performance.

Tanzania ought to consider introducing the practice of requiring security from the trustee for assets under his control in order to enhance their protection. Nigeria should contemplate establishing liability for and protection of the AMIs. It should take into consideration also the idea of securing the value of the preserved assets, as is done in South Africa.



4.15 Conclusion

The assessment of the pre-confiscation legal frameworks for managing proceeds of crime in Tanzania, Nigeria and South Africa establishes that the three states comply with the IBPs. The level of compliance differs in some respects. However, in general each state is trying to comply with the established practices.

All have established AMIs dedicated to manage preserved proceeds of crime. The laws allow the AMIs to have control of the preserved assets and to establish special mechanisms that promote transparency and accountability for the institutions. The mechanisms contribute to the efficiency of the AMIs.

Although problematic in a number of respects, the legal frameworks have enabled the three states to recover proceeds of crime and to meet the requirements of the principle that crime should not pay. Moreover, the challenges are not debilitating and may be addressed

without too much difficulty in order to enhance the efficiency of the asset management systems in the three countries.



Chapter Five

Post-Confiscation Asset Management Policies in Tanzania, Nigeria and South Africa

5.1 Introduction

The post-confiscation period is the most fragile stage in the management of proceeds of crime. At this stage, the preserved assets already have been declared to be proceeds of crime and forfeited to the state. Many states, influenced by ordinary criminal sanctions and a limited concern with socio-economic rights, may be satisfied with nothing more than a final confiscation order. This attitude is evident from the manner in which they present their achievements in implementing asset recovery policy, accounting for their success in terms of the number of confiscations and the value of the recovered assets. Little and sometimes no regard is given to the disposal of the recovered assets.¹ However, victims of economic crime and the citizenry in general are eager to hear what becomes of the confiscated assets.² For them, the final forfeiture order actually marks the beginning of a stage of asset recovery which they await with anticipation.

This chapter examines how Tanzania, South Africa and Nigeria manage confiscated assets and scrutinises the procedures regulating their disposition. It discusses also various factors affecting the economic value of the assets during the recovery process. The chapter is divided into two parts. The first part assesses critically the post-confiscation asset management policies of the three countries. It covers the policies immediately after confiscation and during the disposition, and considers their institutional implementation. The benchmark for the assessment of the asset management policies are the IBPs on managing confiscated assets.

-
- 1 In Tanzania and Nigeria, for example, despite the direct court orders for victim compensation and assets from private fraud cases in which the recovered assets are returned to their previous owners, no account of utilisation of forfeited assets is done. Success in implementing asset recovery policy linked to the amount recovered only. For such accounts, see para 33 of the speech of the Minister of Justice of Tanzania delivered before the Parliament for the financial year 2013/2014. See also the report on EFCC convictions for the case of Nigeria, available at <http://efccnigeria.org/efcc/index.php/convictions>.
 - 2 South Africa accounts for the utilisation of recovered funds in the public domain. See, for example, the Criminal Assets Recovery Account utilisation report for the year 2013/2014.

The second part of the chapter deals with the factors that affect the economic value of the proceeds of crime throughout the process of recovery. These factors may be divided in two categories. The first category includes asset recovery procedures which affect directly the value of assets to be recovered, such as plea bargaining. The second category pertains to factors that affect the value of assets preserved for confiscation. These include payment of legal, living and business expenses from the preserved assets. Previous chapters dealt with these factors and addressed how the international community expects the states to deal with them. This chapter analyses the mechanisms employed by Tanzania, South Africa and Nigeria in addressing them and assesses the level of conformity by these countries with the IBPs.

5.2 Post-Confiscation Asset Management Policies

The post-confiscation asset management policy of a state depends significantly upon the intended end result of its asset recovery policy. If the purpose of asset recovery is merely to ensure that crime does not pay, the final order confiscating the proceeds of crime accomplishes that purpose. Even when asset recovery is regarded as a means of crime deterrence, the purpose may be attained by simply confiscating the proceeds of crime. In such circumstances, post-confiscation asset management policies are irrelevant.

However, asset recovery aims at more than just making crime unprofitable.³ It is intended to act also as a means of retribution for the harm caused by the crime through corrective justice. This is evident from the manner of disposition of confiscated assets encouraged most by the international instruments. They argue for repatriation of assets to the victim state,⁴ return of assets to their previous owners,⁵ compensation to victims⁶ and funding of public good projects⁷ as the best ways of disposing of confiscated assets. All these are directed at correcting the harm caused by the crime.

During the post-confiscation stage, management of assets ensures their availability for a retributive disposition. In this case, retribution is attained through corrective justice which

3 See Ndzengu & Von Bonde (2011a: 310).

4 See Article 57(3)(a) of UNCAC.

5 See Article 57(3)(c) of UNCAC.

6 See Article 57(3)(c) of UNCAC. See also Article 14(2) of UNTOC.

7 See Para 20 of the FATF Best Practices Paper (2012).

endorses return of the confiscated assets to the victims of the crime. The return of assets may take different forms, as analysed in Chapter Three. It may involve returning the assets to the previous owner, compensating the victims or funding public good projects.⁸ In whatever form, the disposition of confiscated assets should aim at correcting the harm caused by the crime. This can be accomplished only if managing the preserved assets is guided by the principle that crime should not pay as expressed in the doctrine of corrective justice.

Tanzania, South Africa and Nigeria all have post-confiscation asset management policies. Whereas the South African policy does reflect the corrective purpose of asset recovery, the policies in Tanzania and Nigeria do not. They do capture the idea of ensuring that crime does not pay, in the sense that the proceeds of crime are not returned to the criminals but are forfeited to the state.⁹ However, the return of the confiscated assets to the victims of the offence, which is the corrective part of asset recovery, does not feature expressly in the asset recovery regimes of Tanzania and Nigeria.¹⁰ By contrast, South Africa has provided to some extent for a post-confiscation policy which aims at corrective justice.

The manner of disposition of confiscated assets in the three countries, especially the utilisation of the funds after realisation, is analysed in §5.3.2 below. In summary, the laws of Tanzania and Nigeria do not provide expressly for using the recovered proceeds to rectify the harm caused by the crime. The South African asset recovery policy does consider the victims of crime. It requires some funds obtained from the realisation of recovered proceeds to be injected into the organisations which deal with victims of crime.¹¹ Such an option suggests that South Africa aspires to correct the harm caused by the crime.

Tanzania and Nigeria do not provide specifically for the utilisation of recovered criminal proceeds. This omission means that the post-confiscation policies in the two countries are grounded only in the principle that crime should not pay. Since the corrective aspect of asset

8 See, for example, Article 51 of UNCAC and Paras 20 and 21 of the FATF Best Practices Paper (2012).

9 See Section 15 of POCA (T) and Sections 21 and 22(1) of the EFCC Act.

10 The asset recovery laws of Tanzania and Nigeria do not provide expressly for compensation to victims although in some cases compensation may be awarded by the court. See, for example, the report on the EFCC convictions, which records that the court in some cases ordered compensation to the victims of the offence. Visit <http://efccnigeria.org/efcc/index.php/convictions> to access the reports.

11 Section 68(c) of POCA (SA).

recovery is bypassed, the question of having a different post-confiscation policy is not a consideration. This means that the recovered assets can be utilised as ordinary state assets and, when monetary sums are involved, they can be treated similarly to general revenue collected by the state.

The position in Tanzania and Nigeria is at odds with the tenets of corrective justice.¹² Their asset recovery policies are partial, ensuring retribution in relation to the defendant only. The victims of the offence are not entitled to a retributory disposition from the recovered assets, and thus may not feel the impact of the asset recovery policy. In turn, this may reduce their confidence in the implementation of such policy in their countries.¹³

5.3 Post-Confiscation Asset Management Processes

The basic issue during the post-confiscation stage is the disposition of the recovered assets. Disposition implies two processes, namely, realisation of the recovered assets and utilisation of the assets or their realised values. These processes begin after the finalisation of other legal requirements, such as waiting for the grace period to end. The grace period refers to the fixed time frame for appeals or enforcement of other legal remedies available to the defendant.¹⁴

The period between the final confiscation order and its execution varies according to the domestic legal system of each state. The international instruments require the proceeds of crime to be administered from their identification to their disposition.¹⁵ In complying with this requirement, Tanzania, South Africa and Nigeria administer the assets during the entire recovery process. The relevant asset management processes at the post-confiscation stage are considered below.

12 Corrective justice advocates maintaining equality between the two parties to a transaction. See *The Ethics of Aristotle* sidenote 1131a. In a criminal transaction the two parties are the accused and the victim.

13 See para 27 of StAR (2009: 8).

14 See Section 44 (3) of POCA (T) which includes a proviso containing preconditions of disposition of confiscated assets. In South Africa, Section 30 of POCA (SA) sets the limits. The Nigerian EFCC Act does not set any limits. However, Section 31 of the EFCC Act makes reference to the court's final forfeiture order, which means the order is not subject to an appeal or any legal remedy sought by the defendant..

15 See Article 31(3) of UNCAC.

5.3.1 Realisation of the Recovered Assets

In this process, the recovered assets are sold or otherwise disposed of and their realised values deposited in accordance with the laws of each state. The post-confiscation asset management systems of Tanzania, Nigeria and South Africa allow for the realisation of the recovered assets after confiscation.

5.3.1.1 Realisation of Assets in Tanzania

In Tanzania, realisation of the recovered assets is administered by the Minister of Legal Affairs¹⁶ and the court when pecuniary penalties are involved.¹⁷ The law provides expressly for realisation by empowering state agencies to “dispose of” confiscated assets.¹⁸ The phrase “dispose of” includes all methods of dealing with the assets after the final confiscation order. Realisation is one such method of disposition. The choice of method is vested in the Minister of Legal Affairs. The law allows the Minister to employ the provisions of any enactment in dealing with the confiscated assets.¹⁹ In executing the duties vested in him, the Minister is guided by the rule that all confiscated assets vest in the Treasury Registrar.²⁰ Thus, in directing the disposition of such assets, the Minister must ensure that the proceeds of the disposition are lodged with the Treasury Registrar.

With regard to pecuniary penalties, the monies assessed to be the value of the benefits of crime also are paid over to the Treasury Registrar.²¹ Although the role of the Treasury Registrar as curator of confiscated assets remains questionable,²² transfer of such assets to it means literally that they are deposited with the government. Thus, the established system of realisation of recovered assets in Tanzania makes the realised funds part of the general revenue of the state.

16 Section 25(3), 25(4)(b) and 25(5) of POCA (T).

17 See Sections 44(1) & (2), 57(1)(c) and 57(2) of POCA (T).

18 See Section 25(4)(b) of POCA(T) which empowers the Minister of Legal Affairs to dispose of or deal otherwise with the confiscate assets.

19 See Section 25(5) of POCA (T).

20 Section 25(2) of POCA (T).

21 Section 21(1) of POCA (T)

22 The Treasury Registrar in the Ministry of Finance is not a custodian of government assets or funds. The agency is responsible for public corporations. This makes entrusting it with recovered assets controversial. See Section 8(1) of the Treasury Registrar (Powers and Functions) Act [CAP 370 RE 2002].

This system is contrary to the IBPs which require the realised funds to be deposited into special accounts.²³ The purpose of having special asset recovery accounts or of establishing a special fund for recovered assets is to monitor their utilisation. In the absence of such an account or fund, monitoring becomes difficult and in most cases impossible.

5.3.1.2 Realisation of Assets in South Africa

In South Africa, realisation of recovered assets is entrusted to the court,²⁴ a *curator bonis*²⁵ and the Criminal Assets Recovery Committee (CARC).²⁶ The court may be regarded as the main controller of the realisation process because it is the organ responsible for its timing and the manner of its execution. The *curator bonis* works as the main executor of the court orders and the directions of CARC.²⁷ Whereas CARC is not involved directly in the realisation process, it may recommend that specific actions be taken during the process. The functions of CARC relate more to policy making than execution.²⁸

POCA (SA) uses two terms in addressing realisation of assets. On the one hand, it refers to realisation in satisfaction of a confiscation order.²⁹ On the other hand, when it deals with forfeiture orders, it uses the term “disposition of assets”.³⁰ Modes of disposition vary, including selling the forfeited assets or depositing them into the Criminal Assets Recovery Account (CARA).³¹

The power to realise the forfeited assets is vested in the *curator bonis*³² under the guidance of the court. The realised funds are deposited into CARA.³³ The funds so deposited

23 See Para 1 of the FATF interpretive Note to Recommendation 38 (2013). See also the G8 Best Practices (2005).

24 See Section 30 of POCA (SA).

25 See Sections 30(2)(b), 56 and 57(1) of POCA (SA).

26 See Sections 57(1), 68 and 69 of POCA (SA).

27 See Sections 30(2)(b) and 57(1) of POCA (SA).

28 See Section 69(a) of POCA (SA).

29 See Section 30 of POCA (SA).

30 See Section 57(1)(c) of POCA (SA). Confiscation and forfeitures orders in South Africa, though they have a similar impact on the proceeds of crime, result from different types of asset recovery proceedings. Confiscation is a recovery order obtained through CBAR while a forfeiture order is obtained through NCBAR. See Sections 18 and 50 of POCA (SA).

31 See Section 57(1)(b) of POCA (SA).

32 See Section 57 of POCA (SA).

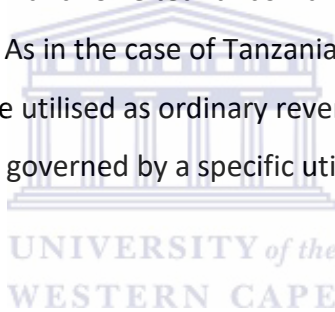
33 See Sections 57(1)(c) 64(a) of POCA (SA).

may be utilised for specific purposes as stipulated by the law.³⁴ Such utilisation is monitored by the Auditor-General.³⁵ This is in conformity with the IBPs. More information on the utilisation of the recovered assets in South Africa is provided in §5.3.2.2 below.

5.3.1.3 Realisation of Assets in Nigeria

The realisation of recovered assets in Nigeria is entrusted to the EFCC and the Attorney General of the Federation.³⁶ The Attorney General is empowered to make rules or regulations regarding realisation of the confiscated assets while the EFCC is responsible for actual realisation of the assets. Unfortunately, the Attorney General has never exercised the powers vested in him. Thus, the EFCC relies only on the EFCC Act when dealing with confiscated assets.

The law provides for the sale of the confiscated assets. The monetary sums obtained from realisation of forfeited assets³⁷ and forfeited funds³⁸ are deposited into the Consolidated Revenue Fund of the Federation.³⁹ As in the case of Tanzania, the monies deposited into the Consolidated Revenue Fund may be utilised as ordinary revenue of the government. Thus, recovered assets in Nigeria are not governed by a specific utilisation policy, nor are they subject to special accounting guidelines.



5.3.1.4 Comparative Review

Realisation of assets needs to be regulated well to ensure that it is done in a way that reflects the aims of asset recovery policy. Haphazard realisation may result in embezzlement of the recovered assets and generate a vicious circle of recovery and loss that can last indefinitely. It will undermine also the primary principle behind asset recovery policy because those who embezzle the recovered assets will benefit from crime. The principle that crime should not pay does not address criminals only; it requires also that nobody should benefit from crime. States should make sure that measures are put in place to ensure a reliable realisation process.

34 See Section 69A of POCA (SA).
35 See Section 69A(8) of POCA (SA).
36 Section 31(2) of the EFCC Act.
37 Section 31(2) of the EFCC Act.
38 Section 31(3) of the EFCC Act.
39 Section 31(2) & (3) of the EFCC Act.

The realisation process in South Africa has such measures as referred to above. The systems in Tanzania and Nigeria are not administered well. In Nigeria, no regulations are in place at all. In Tanzania, the law vests all recovered assets in the Treasury Registrar yet it allows the responsible institutions to employ the provisions of other laws which provide for realisation of assets. Some laws require a certain percentage of the value of the realised assets to be deposited into the funds established under them.⁴⁰ In such circumstances there is a manifest need to have rules that govern the realisation process. Tanzania and Nigeria should consider establishing a properly regulated realisation system.

5.3.2 Utilisation of Recovered Assets and Realised Funds

Utilisation of recovered assets or their realised values marks the final stage in the implementation of asset recovery policy. Despite being the last stage, its importance cannot be downplayed. Utilisation of recovered assets accounts for three important issues regarding the implementation of asset recovery policy. Firstly, it demonstrates the efficacy of the recovery process, that is, everything was done successfully and the assets are now available for re-use. Secondly, it gives the states an opportunity to achieve the second purpose of asset recovery policy, which is correcting the harm caused by the crime. Thirdly, it builds the trust of the citizenry in the asset recovery policy. The success of the policy depends crucially upon the level of co-operation given by the citizenry. Law enforcement needs information regarding crimes and their proceeds in order to institute recovery proceedings. Such information has to be obtained from the citizenry. For that reason, lack of trust may render the enforcement of the asset recovery policy futile. All these factors signify the importance of the utilisation stage in the asset recovery process.

5.3.2.1 Utilisation of Recovered Assets in Tanzania

As discussed in the previous section, forfeited assets in Tanzania are considered simply to be government assets. Where realisation is effected, the funds obtained also are regarded to be ordinary government revenue. POCA (T) does not provide for priority areas to which the

40 See, for example, Section 79(2)(d) of the Forest Act No 10 of 2002 which requires any sum realised from the sale of any forest produce confiscated under the Act to be deposited in the Tanzania Forest Fund.

realised funds are to be assigned. This omission allows the government to use the assets as it would any other state property.

Funds which are not accounted for independently cannot be allocated specifically as an aspect of the recovery process. In this situation it may not be easy to ensure transparency regarding their utilisation and accountability of the officers involved in their disposition. This obstructs the pursuit of the purposes of asset recovery policy since the recovered assets may be allocated to projects that do not promote these purposes.

What is more, the law does not provide for rectification of the harm caused by the crime. This aggravates the danger of citizen mistrust regarding implementation of the policy. Tanzania ought to consider establishing a special fund for the recovered assets and identifying priority areas in which realised funds may be utilised. Such a fund will assist in allocating the confiscated assets to projects that will accomplish the goals of asset recovery policy.

5.3.2.2 Utilisation of Recovered Assets in South Africa

In South Africa, utilisation of the monies deposited into CARA is structured so as to avoid misuse. POCA (SA) identifies two broad areas in which the monies may be utilised. These are the funding of law enforcement agencies and of any other institutions established to assist the victims of crime.⁴¹ When assets or monies from the account are allocated to any of the designated agencies or institutions, the specific purpose of such allocation is given, and the agency which receives the allocation must account for its utilisation of the funds separately from funds received from other sources.⁴² This arrangement limits the chances of misuse of the funds emanating from CARA.

The procedure for the allocation of funds from CARA is structured by mechanisms that allow for checks and balances.⁴³ In the initial stage, CARC makes recommendations to Cabinet which, after considering said recommendations, may allocate funds to specific institutions for

41 See Section 69A(1) of POCA (SA).

42 Section 69A(7) of POCA (SA).

43 Section 69A of POCA (SA).

special purposes. Cabinet allocations need the approval of Parliament.⁴⁴ After Parliament has given its approval, the funds may be utilised by the receiving agencies in accordance with the identified purpose of their allocation.⁴⁵ The agencies account for the utilisation of funds allocated to them, and their accounts are audited by the Auditor-General.⁴⁶ These mechanisms ensure transparency and accountability in relation to both the allocating institutions and the agencies which receive the allocations.

5.3.2.3 Utilisation of Recovered Assets in Nigeria

Nigeria has a system similar to Tanzania's. The funds deposited into the Consolidated Revenue Fund of the Federation may be utilised for any purpose approved by the responsible agencies. There is no mechanism to ensure that recovered assets are utilised in a manner that will promote and maintain the purposes of asset recovery policy. This reduces the Nigerian policy to a single leg, as it ensures only that crime does not pay, leaving aside the issue of correcting the harm caused by crime. Thus, the risks which Tanzania faces apply to Nigeria also.

5.3.2.4 Comparative Review

Asset recovery policy is built on two legs: firstly, to ensure that crime does not pay and, secondly, to achieve corrective justice by undoing the harm caused by crime. The pre-confiscation stage is centred on the principle that crime should not pay, while the post-confiscation stage is intended to ensure that the harm caused by the crime is required. More specifically, the utilisation stage is the proper stage at which correction of the harm may be attained.

States should consider introducing firm measures that will facilitate this corrective purpose. Undoing the harm caused by crime should be the principal focus during disposition because, if crime should not pay, then nobody should suffer loss from crime. Although returning victims to their pre-crime position cannot be attained fully, focusing the utilisation of recovered assets on them, means that something will be seen to have been done about their sufferings.

44 Section 69A(3)(a)(ii) of POCA (SA).

45 Such utilisation is limited to the specified purpose of the allocation. See Section 69A(3)(b) of POCA (SA).

46 See Section 69A(8) of POCA (SA).

In this connection, South Africa should prioritise funding of institutions dealing with victims of the crime. Tanzania and Nigeria ought to introduce provisions that will cater for correcting the harm caused by the crime.

5.4 Post-Confiscation Asset Management Systems

As elaborated previously, disposition involves processes that will allow for the re-use of the confiscated assets or their realised value. The processes depend on the domestic arrangements of the state. In South Africa, for example, they extend to the utilisation of the confiscated assets or their realised values, whereas in Tanzania and Nigeria they are limited to the realisation of the recovered assets.

5.4.1 Post-Confiscation Asset Management in Tanzania

The post-confiscation asset management system of Tanzania comprises five institutions: the court, a trustee, the Attorney General, the Minister of Legal Affairs and the Treasury Registrar. Each institution has its own duties regarding the disposition of the confiscated assets. As in the pre-confiscation stage, no component of the asset management authority occupies a primary role in the disposition of assets. Co-ordination across the responsible institutions at this stage arises naturally in the course of their performing their duties. However, the powers of the court in the disposition process make it function as a supervisory institution.

5.4.1.1 The Court

The powers of the court during post-confiscation begin at the granting of the forfeiture order. The court is responsible for ensuring that third party rights are not affected by the order.⁴⁷ In doing so, the court entertains applications from third parties who have been affected by the forfeiture order and, if satisfied that their claims are valid, may exclude their interests from the ambit of the order.⁴⁸ This may be done within six months after the granting of the forfeiture order⁴⁹ or at any later time if good grounds for a delayed application are adduced.⁵⁰

47 Section 14(6) of POCA (T).

48 Section 16(2) of POCA (T).

49 Section 16(7) of POCA (T).

50 Section 16(8) of POCA (T).

The court is responsible also for ensuring that the forfeiture order is executed. In some instances it may direct its officers to do whatever is necessary and reasonable to ensure transfer of title over the confiscated assets to the government.⁵¹ Such transfer is a necessary aspect of the disposition process if the defendant is to be deprived of any claim to the assets.

The court's duty to ensure execution of forfeiture orders encompasses pecuniary penalty orders. This is most likely where the disputed property has been preserved in custody of a trustee. The court may order the trustee to sell or otherwise dispose of the assets in order to discharge the pecuniary penalty.⁵²

In general, the powers of the Court during disposition of confiscated assets are aimed at protecting the rights of the parties to the case and of third parties who may be affected by the forfeiture order.

5.4.1.2 The Trustee

POCA (T) does not create a general role for the trustee after an ordinary confiscation order. This oversight raises the question as to who will be managing the assets which were put under the control of the trustee in the pre-confiscation stage. Does it mean that the role of the trustee ends upon the making of the final order to confiscate or release the assets? The law does not provide an answer to this question. However, the fact that the granting or rejection of a forfeiture application is not an automatic process, suggests that the trustee will continue to hold and administer the assets under his control until their disposition or release.

A trustee who has been charged with the management of assets during the pre-confiscation stage may be encumbered with a duty in the case of pecuniary penalty orders. The trustee may be required to dispose of some or all of the assets in order to discharge a pecuniary penalty imposed by the court.⁵³ The manner of disposition of the assets, whether it be a sale or

51 Section 16(5) of POCA (T).

52 Section 44(1) & (2) of POCA (T).

53 Sections 44(1) and 57(1)(c) of POCA (T).

any other mode, is determined by order of court.⁵⁴ The court may authorise the trustee also to execute any deed on behalf of the defendant.⁵⁵

5.4.1.3 The Minister of Legal Affairs and the Attorney General

These two offices perform delicate roles in managing confiscated assets. They are involved intimately in the realisation of the confiscated assets. The Minister of Legal Affairs plays a role when title to the recovered assets requires registration. The law requires the Minister to ensure that such transfer of title is affected.⁵⁶ The powers vested in the Minister include authority to execute deeds that are necessary for the transfer of title from the defendant to the Treasury Registrar.⁵⁷

The Minister is responsible also for making decisions on the manner of disposition of recovered assets.⁵⁸ He or his delegate may determine the mode of disposition of a particular asset after the end of the grace period for appeals or enforcement of any other legal remedy available to the defendant.⁵⁹

The Attorney General (AG) performs roles similar to those of the Minister of Legal Affairs in the disposition of property under a foreign forfeiture order.⁶⁰ Like the Minister, the AG is responsible for determining the manner in which such property is to be disposed of or otherwise administered. He can delegate his powers in writing to any other person.⁶¹ No conditions are stipulated regarding the qualifications of the person who may be appointed by the Minister or the AG to perform their duties. It is presumed, of course, that the Minister and the AG will delegate their powers rationally and diligently. However, to be safe, setting limitations even of a general nature on delegation will go far to constrain the exercise of this power by the Minister and the AG.⁶²

54 Sections 44(2) and 57(2)(a) of POCA (T).

55 Sections 44(2) and 57(2)(b) of POCA (T).

56 Sections 15(3) and 25(3) of POCA (T).

57 Sections 15(3) and 25(3) of POCA (T).

58 Sections 25(4)(b) and 25(5) of POCA (T).

59 Section 25(4)(b) of POCA (T).

60 Section 18(1) of POCA (T).

61 Section 18(1) of POCA (T).

62 Words such as "any qualified person" may assist in ring fencing people who may be appointed.

In addition to being responsible for disposition of assets in successful forfeiture orders, the Minister of Legal Affairs and the AG are accountable for disposition of assets when convictions are quashed⁶³ and when forfeiture orders are discharged.⁶⁴ The Minister has to deal with confiscated assets in cases of quashed convictions. Tanzania practises conviction based asset recovery. There are no express provisions which provide for non-conviction based asset recovery.⁶⁵ Thus, the quashing of a conviction entails the release of the confiscated assets. In this case, the Minister is responsible for ensuring that the property which was forfeited to the state is transferred back to the person who held the title to it before the forfeiture order.⁶⁶

The process of returning property to those who had an interest in it before confiscation is not automatic. It is initiated by the AG notifying the persons he believes to have held such a pre-confiscation interest.⁶⁷ The notice should be published in the Gazette for the period set by the court.⁶⁸ Upon receiving notice regarding the quashing of a conviction, any person with an interest in the asset which was confiscated in relation to the quashed conviction may apply in writing to the Minister for his interest to be restored to him. The Minister then should honour the application by transferring the asset to the claimant.⁶⁹ Where the asset, for whatever reason, cannot be returned, the Minister should make arrangements for the claimant to be paid an amount of money equivalent to his interest in the asset.⁷⁰

A similar procedure is established for the discharge of forfeiture orders. In such cases, the AG is responsible for returning the forfeited assets.⁷¹ Discharge of a forfeiture order may result from a successful appeal or from the quashing of a conviction. Here, those claiming an

63 Section 27 of POCA (T).

64 Section 17 of POCA (T).

65 There are some provisions which contain certain elements of non-conviction based asset recovery. See, for example, Section 12 of POCA (T) which provides for a confiscation order when the accused has absconded.

66 Section 27(3) of POCA (T).

67 Sections 17(2) & (3) and 27(1) & (2) of POCA (T).

68 Sections 17(2)(b) and 27(1)(b) of POCA (T).

69 Section 27(3) of POCA (T).

70 Section 27(3)(b) of POCA (T). The first option is to have the interest returned, as stipulated in Section 27(3)(a) of POCA.

71 Section 17 of POCA (T).

interest in the forfeited assets have to apply to the AG before the latter can process the return of the assets or arrange for payment of their money equivalent.⁷²

The fact that the assets or their estimated value may be returned upon the quashing of a conviction may sound attractive. However, the procedure involved is somewhat bureaucratic and rather challenging. In most cases the forfeited assets initially are removed from the custody of the defendant after it has been established that they are, in one way or another, part of the proceeds of crime. The ownership of the assets is determined at the time of the confiscation proceedings when the link between the crime and the property is established. This means that the identity of the owner of the assets and their mode of acquisition are known when the forfeiture order is issued. The quashing of the order does not change the pre-confiscation title over the asset. It affects only the current title, which vests in the state by virtue of the forfeiture order. Thus, quashing the forfeiture order implies returning the asset to its pre-confiscation status.

This being the case, to subject the person whose asset has been forfeited incorrectly to a bureaucratic requirement of having to file a recovery application is to limit his right to property. Such a procedure makes sense where there are a number of people who assert an interest in the property. It may be employed also in cases where title over the asset cannot be established easily. In such circumstances it is prudent for every claimant to secure his interest directly by way of an application. However, where the asset belongs to a single person, it is hardly rational to demand that he undergo the process of application after being separated from his property for some time. The quashing of the forfeiture order may mean also that the asset does not form part of the proceeds of crime, which may mean, in turn, that the defendant owned the asset legally. In such cases, the state should consider returning the assets to the previous legitimate owners without subjecting them to unnecessary bureaucratic procedures.

The major challenge inscribed in the return of assets is linked to the quashing of convictions. This is influenced by the asset recovery procedure practised in Tanzania. It is essentially a conviction based procedure which requires the defendant to be charged with and

72 See Section 17(4) of POCA (T).

convicted of a criminal offence before forfeiture of the fruits of his crime can be considered. Thus, the expression “no conviction, no forfeiture” means that the quashing of a conviction affects directly any forfeiture order which has been issued on the strength of that conviction. The challenge here derives from the quashing of the conviction on the basis of technicalities rather than on the merits of the case. In such circumstances the defendant likely will benefit from his crime at the expense of his victims. In this regard, the state should consider identifying other factors which have to be considered before returning assets because of a quashed conviction. In other words, where a conviction has been quashed on technical grounds, the return of assets should not be an unqualified option. Here, Tanzania should think of introducing non-conviction based asset recovery in order to capacitate its institutions to deal with situations of this nature. However, in the case of a conviction being quashed on merits, the defendant ought to enjoy an unqualified right to have his assets returned.

5.4.1.4 The Treasury Registrar

The established role of the Treasury Registrar is to act as a depository for confiscated assets and their realised values.⁷³ In fulfilment of this role, confiscated assets which have not been realised and all realised funds are given into the custody of the Treasury Registrar. Assets that need registration of title will be registered in the name of the Treasury Registrar.⁷⁴ The processes involving the Treasury Registrar mark the end of criminal asset recovery in Tanzania.

However, the role played by the Treasury Registrar is not unproblematic. The challenges pertain especially to accountability for the funds entrusted to the Treasury Registrar and to the corrective purpose of asset recovery policy. To begin with, the office of the Treasury Registrar is not required to account separately for recovered funds deposited into its custody. This peculiarity stems from a lack of specified areas for the utilisation of realised assets. The law treats the realised funds as general revenue of the state. When the confiscated assets are deposited with the Treasury Registrar, no special conditions are stipulated regarding their utilisation. Thus, the Treasury Registrar deals with the assets as ordinary assets belonging to the

73 Section 25(2) & (3) of POCA (T). See also Section 21(1) of POCA (T) in respect of monies paid to fulfil pecuniary penalty orders.

74 Section 15(3) of POCA (T).

government. Its accounting for the assets also is done generally, in the course of accounting for government funds. No special form of accountability is attached to the utilisation of the recovered funds. In arrangements of this nature it is difficult to implement the corrective purpose of asset recovery.

In addition, following the reforms that have taken place within the Ministry of Finance and its agencies, the Treasury Registrar no longer deals with public funds and nor is he a custodian of public assets. The Treasury Registrar is entrusted with the duty of advising the government on issues pertaining to the establishment and running of public or statutory corporations.⁷⁵ Although the law that establishes the functions of the office of the Treasury Registrar does not limit them to those enumerated by it,⁷⁶ continuing to entrusting said office with recovered proceeds of crime will not be proper.

Tanzania ought to use this opportunity to establish a special asset recovery fund instead of continuing to treat confiscated assets as general revenue collected by the government.

5.4.2 Post-Confiscation Asset Management in South Africa

Post-confiscation asset management is taken more seriously in South Africa than in Tanzania. The institutions involved in managing assets at this stage divide into those responsible for realisation and those responsible for utilisation of the realised values. The former include the court, the *curator bonis*, and the Master of the High Court. Their main duty is to ensure a fair and just realisation of the forfeited assets. After realisation, the responsibility for managing the realised values and unrealised assets is entrusted to the Criminal Asset Recovery Committee (CARC), the Cabinet, Parliament and the Auditor-General. Management of confiscated assets involves utilisation of the funds obtained from realisation and the allocation of assets which could not be realised.

75 See the core functions of the office of the Treasury Registrar as listed in the Office of Treasury Registrar Client Service Charter (2015: 13). See also the provisions of Section 8(1) of the Treasury Registrar (Powers and Functions) Act [CAP 370 RE 2002].

76 See Section 8(3) of CAP 370 RE 2002.

5.4.2.1 The Court and the *Curator Bonis*

The court is responsible for ensuring the proper administration of confiscated assets before realisation. In this regard, the court may appoint a curator to manage the assets, if they were not under the control of a curator during the pre-confiscation stage.⁷⁷ The court is responsible also for stipulating the manner in which the assets should be realised.⁷⁸

Further, the court has an obligation to ensure the just and equitable realisation of the forfeited assets. In fulfilling this duty, the court has to secure the rights of those whose interests might be affected by the process of realisation.⁷⁹ The duty is very challenging as it requires the court to consider people who had an interest in the assets before their forfeiture and to take into account the victims of the offence. With regard to those claiming an interest in the forfeited assets, the court entertains their representations before the realisation of the assets.⁸⁰

As to the victims of the offence, that is, persons who have suffered damages as a result of the crime committed by the defendant, their rights are subject to other conditions. Their representations should establish that they have instituted civil proceedings and obtained judgement against the defendant.⁸¹ It suffices also if the victim intends to institute civil proceedings within a reasonable time. In this scenario, the court will refrain from realising the forfeited assets until judgement in the civil suit has been delivered.⁸² The intention here is to ensure that realisation of the assets takes into consideration the damages to be awarded.

The fact that the damages should be settled prior to any other utilisation of the realised funds establishes correction of the harm caused by the crime as the primary goal of the post-confiscation stage of asset recovery in South Africa. However, the procedure covers directly only those victims who have instituted court proceedings against the defendant. If the victim has not instituted suit, and he is not intending to do so within a reasonable time, he will not receive the benefits of corrective justice for the damages which he has suffered.

77 Section 30(2)(a) of POCA (SA).

78 Section 30(2)(b) of POCA (SA).

79 Section 30(3)-(5) of POCA (SA).

80 Section 30(3) of POCA (SA).

81 Section 30(5) of POCA (SA).

82 See the proviso to Section 30(5) of POCA (SA).

The curator, like the trustee in Tanzania, is responsible for handling of the assets after confiscation to realisation. However, unlike the trustee in Tanzania, the duties of the curator are provided directly by the law.⁸³ According to the wording of the Section 30(2) of POCA (SA), the curator may be the same one already appointed in terms of an earlier restraint order or may be newly appointed. The section empowers the court to appoint a new curator if the assets were not under the control of a curator prior to their forfeiture.⁸⁴ This means that if the assets were preserved under curatorship, the same curator could continue to hold them until realisation. The curator is responsible for the realisation of the assets in accordance with the court order. He deposits the realised funds into CARA.⁸⁵ The process is monitored by the Master of the High Court.

5.4.2.2 The Master of the High Court

The court may manage preserved and forfeited assets by entrusting them to the Master of the High Court.⁸⁶ The Master forms part of the judiciary,⁸⁷ and he is responsible, among other things, for the administration of assets under curatorship⁸⁸ and the management of immovable preserved assets.⁸⁹ Thus, when forfeited assets are put under the care of the Master, it will mean technically that the court is managing said assets through the agency of one of its semi-independent units.

Although the Master is part of the court, his functions with regard to the management of confiscated assets are slightly different from the ordinary court functions. The Master is responsible for the execution of court orders authorising the confiscation of assets. He monitors the functioning of the curators and determines the amount of their remuneration.⁹⁰ He may deny even payment if he is not satisfied with the manner in which the curator has

83 Section 32 of POCA (SA).

84 Section 30(2)(a) of POCA (SA).

85 See Section 57(1) of POCA (SA)

86 See Section 43(2)(c)(i) of POCA (SA).

87 See Sections 2(1) and 3 of the Administration of Estates Act.

88 See Section 4(2) of the Administration of Estates Act.

89 See Section 43(2)(c)(i).

90 See Regulation 2 of the Prevention of Organised Crime Regulations of 1999.

executed the relevant court order.⁹¹ Thus, the Master operates as a watchdog regarding the execution of the court order for the realisation of the forfeited assets.

5.4.2.3 The Criminal Asset Recovery Committee

The Criminal Asset Recovery Committee (CARC) is established under Section 65 of POCA (SA) in direct relation to the creation of CARA under Section 63 of the same statute. It is composed of the Minister of Justice, the Minister of Safety and Security, the Minister of Finance, the National Director of Public Prosecutions, and two other members designated by the Minister of Justice where necessary.⁹² CARC is responsible, among other things, for recommending to Cabinet policy governing asset forfeiture and the realisation and utilisation of funds deposited into CARA.⁹³

CARC, as a custodian of the asset forfeiture regime, is empowered to make recommendations regarding the asset recovery policy to be adopted by South Africa.⁹⁴ More precisely, CARC is responsible for proposing asset forfeiture policy that will facilitate POCA (SA) achieve its objectives. The Committee's recommendations are presented to Cabinet for consideration and decision.

CARC makes recommendations to Cabinet regarding the realisation and transfer of forfeited assets to CARA.⁹⁵ With regard to utilisation, CARC is entrusted with the duty of suggesting the preferred usage of the funds available in CARA. It formulates proposals on the allocation of assets from CARA to law enforcement agencies or to any other institution as prescribed by POCA (SA).⁹⁶ The statute does identify preferred areas in which forfeited funds may be utilised, but these may differ with time and circumstances. CARC considers the most suitable areas for utilisation of the funds and makes recommendations to Cabinet. The recommendations prescribe specifically the projects to which the funds allocated ought to be allocated.

91 See Regulation 2(2) of the Prevention of Organised Crime Regulations of 1999.

92 Section 65(2) of POCA (SA).

93 Sections 68 and 69 of POCA (SA).

94 See Section 69(a) of POCA (SA).

95 This does not include forfeited monetary sums. See Section 69(a) of POCA (SA).

96 See Section 69(b) of POCA (SA).

5.4.2.4 Cabinet, Parliament and the Auditor-General

Cabinet is tasked with allocating and with monitoring of the utilisation of funds allocated to different government institutions.⁹⁷ Parliament is responsible for approving the allocations done by Cabinet and the Auditor-General is charged with the auditing the utilisation of the allocated funds.⁹⁸

The functions of the three institutions are interrelated as regards allocation of funds from CARA and they follow the work performed by CARC. Cabinet needs to consider the recommendations made by CARC and allocate the funds to the specified institutions.⁹⁹ The law does not provide for what should be done in the event that Cabinet does not agree with CARC. This *lacuna* suggests that Cabinet is bound to follow the recommendations of CARC.¹⁰⁰

In giving effect to the allocations, Cabinet needs to indicate specifically the purpose for which the assets or monies have to be utilised¹⁰¹ and to table such suggestions before Parliament.¹⁰² The law does not specify the powers of Parliament in relation to allocations brought before it. However, it is well established that Parliament, as the representative of the citizenry, is responsible for approving the allocations subject to any changes it may deem necessary.

The functions of the Auditor-General commence after transfer of the funds from CARA to the designated recipients. He is tasked with the duty of monitoring the utilisation of the allocated funds by said recipients. In another words, he audits the utilisation of the funds.¹⁰³ In doing so, he checks whether the funds were deployed for the purpose indicated during the allocation, and the manner of their utilisation. The Auditor-General draws up an audit report

97 See Section 6 of the Public Finance Management Act 1 of 1999.

98 See Section 188 of the South African Constitution.

99 See Section 69A of POCA (SA).

100 See the arguments of the Court (per Goosen AJ) regarding the exclusive powers of CARC in allocation of forfeited assets and the procedure to be followed in such allocations in *NDPP In Re Rubber Duck with registration DTPN988; Boat Trailer with registration DNT 118EC*, In the High Court of South Africa, Eastern Cape Division, Case No 1466/07 at paras 12-18.

101 Section 69A(3)(a)(i) of POCA (SA)

102 Section 69A(3)(a)(ii) of POCA (SA).

103 Section 69A(8) of POCA (SA).

and submits it to CARC.¹⁰⁴ The audit report forms part also of the National Prosecuting Authority's annual report to Parliament. The annual report is made available in the public domain for easy access by the citizenry.¹⁰⁵

Notably, POCA (SA) does not provide for a penalty for recipients who do not utilise the allocated funds in accordance with their stipulated purpose. This suggests that ordinary accounting strategies will be applied in such cases.¹⁰⁶

5.4.3 Post-Confiscation Asset Management in Nigeria

In Nigeria, post-confiscation asset management activities are entrusted to the EFCC, the Attorney General of the Federation, the President, the Minister of Finance and the National Assembly. The EFCC is responsible for realisation of the forfeited assets and for ensuring that the assets or their realised values are deposited into the Consolidated Revenue Fund of the Federation.¹⁰⁷ To make this possible, the law vests in the EFCC powers to dispose of the confiscated assets by way of sale or any other mode of disposition.¹⁰⁸ It also empowers the EFCC to have monies in a forfeited account paid into its account for onward transfer to the Consolidated Revenue Fund.¹⁰⁹

The law does not provide specifically for how assets which cannot be disposed of by sale should be dealt with by the EFCC. Instead, it empowers the Attorney General of the Federation to make rules or regulations for the disposition of forfeited assets. As pointed out in the previous sections of this chapter,¹¹⁰ the Attorney General has not made any rules or regulations yet regarding this matter. However, the construction of the relevant provision is wide enough to accommodate other means of disposition. The relevant section provides:

Upon receipt of a final order pursuant to this section, the secretary to the Commission shall take steps to dispose of the property concerned by **sale or**

104 Section 69A(9) of POCA (SA).

105 Visit www.npa.gov.za for the annual reports which include the report of the Auditor-General.

106 Visit https://www.aqsa.co.za/Portals/0/Audit101/The_role_of_the_Auditor_General.pdf for more information regarding audit outcomes and measures that may be taken.

107 See Section 31(2) & (3) of the EFCC Act.

108 Section 31(2) of the EFCC Act.

109 Section 31(3) of the EFCC Act.

110 See §5.3.1.3 above.

*otherwise*¹¹¹ and where the property is sold, the proceeds thereof shall be paid into the Consolidated Revenue Fund of the Federation.¹¹²

The use of the words “sale or otherwise” in this section allows the secretary of the Commission to dispose of the confiscated assets by any mode of disposition other than sale. Such alternative mode of disposition may include dealing with the confiscated assets by transferring their ownership to the Federal Government. This will allow utilisation of said assets as ordinary government assets. The IBPs require transparency and accountability in the utilisation of confiscated assets.¹¹³ In this connection, it may be desirable to formulate of a statutory provision to govern scenarios in which the sale of confiscated assets may not take place. The Attorney General should consider exercising the powers vested in him to make rules that will regulate the disposition of forfeited assets expressly.

The President, the Minister of Finance and the National Assembly are responsible for monitoring the allocation of the funds deposited into the Consolidated Revenue Fund. While the President and the Minister of Finance exercise general control over the allocation of funds from the Consolidated Revenue Fund,¹¹⁴ the National Assembly is accountable for legislative control of the assets in the Fund.¹¹⁵ This means that the National Assembly has to approve the estimated expenditure from the Consolidated Revenue Fund. This is done when the estimated expenditure is tabled before the House of the National Assembly. These duties apply to all funds in the Consolidated Revenue Fund, not only to those funds obtained from the realisation of confiscated assets.

As in Tanzania, there is no special fund for the confiscated assets. Thus, there is no special accounting for the utilisation of funds generated from the realisation of confiscated assets. However, the Finance (Control and Management) Act provides for a number of special funds that have been established in Nigeria, such as the Armed Forces Benefit Fund, the

111 Emphasis added.

112 Section 31(2) of the EFCC Act. Emphasis added.

113 See Para 21 of the FATF Best Practices Paper (2012).

114 See Section 5 of the Finance (Control and Management) Act, 1958.

115 See Section 13 of the Finance (Control and Management) Act, 1958.

University College Endowment Fund and the Stock Transfer Stamp Duty Fund.¹¹⁶ The existence of these funds signifies the possibility of creating a dedicated asset recovery fund which will assist with the control of confiscated assets in accordance with the international standards.

5.4.4 Comparative Review

The analysis of the post-confiscation asset management institutions shows that, on the whole, they are well placed and constituted in relation to their functions. The major challenge facing the institutions in Tanzania and Nigeria is the lack of regulations regarding the disposition and utilisation of assets. Such regulations have been identified as an effective tool for ensuring that the asset recovery policy achieves its goals. They assist also in controlling the conduct of the AMIs and in enhancing their level of accountability.

In addition, the powers of the relevant institutions in Tanzania and Nigeria do not extend to the utilisation of assets. This limitation is rooted in the principle which governs asset recovery policy in the two states. Tanzania and Nigeria have centred their asset recovery policies on the principle that crime should not pay. Thus, their principal focus is to have the proceeds of crime confiscated. The utilisation of the confiscated assets is not given the same attention as their confiscation. This limitation impedes the overall success of asset recovery policy in these countries, especially as regards correcting the harm caused by crime.

Ultimately, it is the utilisation of confiscated assets that establishes whether crime does or does not pay. Although the underlying processes of asset recovery in Tanzania and Nigeria suggest that the principle that crime should not pay is guaranteed, their systems do not provide the citizenry with the assurance that this indeed is so. The problem here is that whereas crime may not pay for the criminals from whom assets are confiscated, it may bring benefits to those involved in the utilisation of such confiscated assets. The system should ensure that crime does not pay for all and sundry, regardless of their position. The absence of regulations on the utilisation of confiscated assets is a serious obstacle in this regard.

116 See the list of special funds in the First and Second Schedules to the Finance (Control and Management) Act, 1958.

Moreover, when there is no proper accounting for the utilisation of confiscated assets, as is the case in Tanzania and Nigeria, the citizenry will never experience the full impact of the asset recovery policy. This may lead to enforcement deficit, as the success of the policy depends centrally upon the level of co-operation from the citizenry. Tanzania and Nigeria should consider empowering their AMIs to participate in the utilisation of confiscated assets, as is done in South Africa. In giving effect to this, the two states may wish to change the status of their treasury departments from being mere depositories of confiscated assets to becoming part of the active asset management regime. Also, it makes sense for them to adopt a system of accountability for the utilisation of confiscated assets similar to that which exists in South Africa.

5.5 Factors Affecting the Value of Criminal Proceeds

Notwithstanding the existence of good asset management policies, certain factors may have a negative effect on the value of the assets to be recovered. These include particular procedures involved in the recovery process and the enforcement of particular rights in favour of the defendant during the recovery process.

Procedures such as non-conviction based asset recovery, administrative asset recovery and plea bargaining in conviction based asset recovery affect the extent of the recovery process. It is well established that asset recovery follows the principle that crime should not pay¹¹⁷ and, in achieving this ideal, proportionality is maintained between the value of the benefits that the defendant has received from the crime and the value of the recovered assets.¹¹⁸ However, the three procedures mentioned above sometimes result in state agencies failing to maintain proportionality between the value of actual proceeds of crime and the recovered assets. They facilitate the recovery merely of a certain percentage of the proceeds of crime. This may happen indirectly, where there are no means of identifying all the proceeds of crime, or directly where the value of the actual proceeds is established but the amount to be recovered is reduced due to certain agreements.

117 See Vettori (2006: 2-3).

118 See the provisions of international instruments regarding proceeds of crime to be recovered, for example, Article 31(1)(a) and 31(5) of UNCAC.

5.5.1 Non-Conviction Based Asset Recovery and Administrative Asset Recovery

Non-conviction based asset recovery (NCBAR) and administrative asset recovery (AAR) affect indirectly the value of the proceeds of crime to be recovered. These procedures target the assets which have been identified to be proceeds of crime, as opposed to the actual benefits which the defendant has reaped from the crime. This approach is rooted in the nature of the two procedures. Both focus on tangible benefits. With the exception of instances where NCBAR follows unsuccessful conviction based asset recovery (CBAR), the procedures do not involve investigating all the benefits that the defendant has acquired from the crime.

NCBAR is an *in rem* procedure in which conviction is not a precondition for the recovery of criminal proceeds.¹¹⁹ Court proceedings are instituted against assets believed to be the proceeds of crime. Hence, the defendant in the asset recovery application is the asset itself as opposed to the person claiming ownership of the asset.¹²⁰ A link needs to be established between the asset and the alleged criminal transaction on “a balance of probabilities”.¹²¹ Upon such proof, the asset may be forfeited to the state. NCBAR limits the recovery process to those assets identified as proceeds of crime. Even when the investigation finds that the criminal transaction has generated more benefits than the value of the identified assets, nothing can be done to ensure a proportional recovery.

AAR deals with the instrumentalities and objects of crime.¹²² As its name indicates, it is employed by the executive organs of the state through administrative procedures and no court process is involved.¹²³ As with NCBAR, no assessment of the actual proceeds of crime is done in AAR. The procedure deals only with those assets that have been identified to be proceeds or instrumentalities of crime. This affects the degree of recovery because the identified assets may not reflect the actual value of the criminal proceeds.¹²⁴

119 See Greenberg *et al* (2009: 14).

120 See Greenberg *et al* (2009: 14).

121 See Key Note 14 in Greenberg *et al* (2009: 58).

122 See Brun *et al* (2011: 15).

123 Brun *et al* (2011: 15).

124 It might be less or more than the amount supposed to be recovered, and thus go against the proportionality principle.

Despite the weaknesses inscribed in NCBAR and AAR, states likely will continue to rely upon them. Indeed, the international community advocates the introduction of NCBAR and strengthening of its application where it already has been introduced.¹²⁵ Evidently, although NCBAR and AAR do not ensure proportionality between the benefits of crime and the recovered asset, there are a number of good reasons for continuing to employ them.¹²⁶

A detailed discussion of the reasons for adopting NCBAR and for practising AAR is beyond the ambit of this dissertation. However, the most important attraction of these procedures is that they supplement the ordinary asset recovery procedure, that is, conviction based asset recovery (CBAR). In circumstances where CBAR is not feasible, NCBAR and AAR, especially the former, can work effectively.¹²⁷ Thus, it is necessary for the states to practise them as a means of augmenting CBAR.¹²⁸

5.5.1.1 Non-Conviction Based Asset Recovery in Tanzania

Tanzania does not practise NCBAR although some provisions of POCA (T) contain elements of the procedure.¹²⁹ Said provisions allow for confiscation of the proceeds of crime by way of a constructive conviction where the accused is not available to continue with the case against him.¹³⁰ In such circumstances, the court may forfeit the identified criminal proceeds. The prosecutor will be required to prove on a balance of probabilities that the assets form part of the proceeds of crime.¹³¹ Upon such proof, the court may proceed to confiscate the assets. Although confiscation of assets without conviction is a core element of NCBAR, its application in Tanzania is linked intimately to the conviction of the defendant. This is apparent from the fact that, even when the defendant is not available for the criminal trial, the court has to consider him convicted before recovery of the proceeds of the crime may be pursued.

125 Lack of NCBAR is identified to be among barriers in implementation of asset recovery policy. See Stephenson *et al* (2011: 67). See also Article 54(c) of UNCAC.

126 See Greenberg *et al* (2009: 14-15) on the benefits of NCBAR over CBAR.

127 See Greenberg *et al* (2009: 14-15). See also Brun *et al* (2011: 15).

128 States are urged not to practise NCBAR as a replacement for CBAR. See Greenberg *et al* (2009: 29).

129 See Sections 12 and 13(3) of POCA (T).

130 See Section 12 of POCA (T).

131 See Sections 12 and 75 of POCA (T).

Some elements of NCBAR are found also in the PCCA (T). The anti-corruption bureau is empowered to recover secret gifts given in contravention of the provisions of the PCCA (T). The recovery is conducted by way of civil proceedings and the value of the gift is treated as a civil debt.¹³² The law provides clearly that acquittal or conviction of the person charged with the offence shall not operate as a bar to civil proceedings intended to recover the gift or its value.¹³³ However, the existence of these provisions does not mean Tanzania practises NCBAR. It does not have an express NCBAR regime. The state needs to consider the deliberate introduction of NCBAR to supplement CBAR.

5.5.1.2 Non-Conviction Based Asset Recovery in South Africa

South Africa has dedicated an entire chapter of its POCA to the application of NCBAR.¹³⁴ The main target of NCBAR is the recovery of instrumentalities of crime but it may be applied also to the recovery of proceeds of crime.¹³⁵ Of course, POCA (SA) provides also for CBAR which is enforced parallel to NCBAR.¹³⁶ The proceedings in both CBAR and NCBAR are civil in nature¹³⁷ and the standard of proof is proof on a balance of probabilities.¹³⁸

The courts in South Africa have interpreted the provisions of NCBAR with a view to preventing violation of human rights, especially the right to property, and to ensuring retribution to the defendant. They have set three major criteria to be considered before issuing forfeiture orders against the instrumentalities of crime. The criteria in question are the instrumentality test, exclusion and the proportionality test.

132 See Section 44 of the PCCA (T).

133 Section 44(1) of the PCCA (T).

134 Chapter Six of POCA (SA).

135 See Keightley (2009: 93-124) at 99.

136 POCA (SA) does not provide for limits upon the application of CBAR and NCBAR. This suggests that the prosecutor may choose to pursue recovery of proceeds of crime through either of the two. With regard to instrumentalities of crime, the law expressly stipulates that their recovery is to be pursued by way of NCBAR. See Section 38(2)(a) of POCA (SA).

137 See Sections 13(1) and 37(1) of POCA (SA).

138 See Section 13(5) of POCA (SA).

In assessing instrumentality and proportionality, the courts examine the degree of facilitation afforded by the asset alleged to be an instrumentality of crime¹³⁹ and the proportionality between the offence committed and said asset.¹⁴⁰ In dealing with exclusion, the courts consider the part played by the owner of the asset in the commission of the offence and third party interests attached to the asset subject to forfeiture. They examine the extent to which the owner of the asset has authorised his property to be used in the commission of the crime. This criterion may be entertained only when the case involves an "innocent owner" and in respect of third party interests attached to the assets subject to forfeiture.¹⁴¹

The criteria assist greatly in ensuring retributive recovery of instrumentalities of crime. Without such standards the state may recover either more or less. Such random recovery is intolerable when retribution is the basic principle of punishment in a country.

5.5.1.3 Non-Conviction Based Asset Recovery in Nigeria

Nigeria practises NCBAR in relation to the recovery of the proceeds of corruption. The law empowers the Independent Corrupt Practices and Related Offences Commission (ICPC) to recover assets without securing the conviction of the accused person. The forfeiture of the proceeds of crime may be effected with or without prosecution. If prosecution is pursued, the conviction of the accused person is not a condition for the forfeiture of the criminal proceeds. The law allows for the forfeiture of assets even when the accused is not convicted of the offences charged.¹⁴² If the court is satisfied that the accused is not the lawful owner of the assets¹⁴³ and there is no other person who owns the assets legally,¹⁴⁴ it will order their forfeiture to the state.

139 The use of the asset should not be incidental to the commission of the offence. It should be established that the asset was intended to be employed in the commission of the crime. This may be proved by facts such as the asset having special adaptations to facilitate the commission of the crime or the frequency use of the asset in commission of similar offences. See the reasoning of South African court regarding facilitation of crime in *NDPP v R O Cook Properties* 2004(2) All SA 491, para 31-32.

140 The proportionality test requires equivalence between the value of asset and the crime committed.

141 The innocent owner defence is available to the owner who neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of crime. See *NDPP v R O Cook Properties*, para 23-24.

142 See Section 47(1)(b) of the CPROA (N).

143 See Section 47(1)(b)(i) of the CPROA (N).

144 See Section 47(1)(b)(ii) of the CPROA (N).

Forfeiture of assets in the absence of prosecution requires proof that the assets have been obtained from the commission of crimes established under the ICPROA (N) or have been used as an instrumentality of crime.¹⁴⁵ The process is initiated by an application from the chairman of the ICPC to the court.¹⁴⁶ The application should be lodged within twelve months of the seizure of the assets in issue.¹⁴⁷ Upon proof that the assets form part of the proceeds of crime or constitute an instrumentality of crime, the court can order their forfeiture to the Federal Republic.

The law ensures that forfeiture without conviction observes the right to property. This is done by mandating the chairman of the ICPC to publish the forfeiture application in at least two different newspapers circulating in Nigeria.¹⁴⁸ Such publication is intended to secure the rights of those who legally own the targeted asset.

The EFCC Act does not provide for NCBAR. It does provide for administrative settlement of cases. However, the construction of the relevant section does not reflect intent to accommodate AAR. The law empowers the EFCC to consolidate charges in exchange for payment of money without approaching the court. The condition attached to the application of this procedure pertains to the amount of money that should be paid. The law requires that it should exceed the amount payable in the case of an ordinary conviction for the offence. This suggests that the provision is intended to be applied in offences carrying penalties which include payment of a fine as an alternative to imprisonment. This is a typical procedure for administrative case settlements.

However, asset recovery is not an alternative punishment to imprisonment. It is a complement to ordinary punishments, to achieve proportional sanctioning for economic crimes. Thus, the provision cannot be employed to settle asset recovery cases by way of an AAR procedure. The EFCC employs this particular provision to pursue cases involving plea

145 See Section 48(3) of the CPROA (N).

146 See Section 48(1) of the CPROA (N).

147 See Section 48(1) of the CPROA (N).

148 See Section 48(2) of the CPROA (N).

bargaining.¹⁴⁹ More discussion regarding the application of this section to plea bargaining can be found in §5.5.2.3 below.

5.5.1.4 Comparative Review

NCBAR is very important for recovering assets in situations where conviction may not be secured. Despite its limited capacity for achieving proportional recovery, at least some of the proceeds of crime can be recouped. Moreover, states can enhance their investigative techniques in cases to be pursued through NCBAR. This will enable them to increase the degree of recovery and, in some cases, to recover proportionally. Tanzania and Nigeria should consider of providing expressly for NCBAR in all cases involving the retrieval of stolen assets.

5.5.2 Plea Bargaining

Plea bargaining is a mechanism that may affect directly the extent of asset forfeiture. The arrangement may be resorted to in conviction based regimes where, in exchange for a guilty plea, the prosecutor agrees to some lenience for the defendant. Typically this would entail dropping some charges or reducing a sentence.¹⁵⁰ The practice may be comprehended as a form of alternative dispute resolution in criminal cases. It is common to have alternative dispute resolution in civil disputes in which parties sit together, discuss their dispute and reach a settlement which later is endorsed by the court.¹⁵¹

The same procedure is followed in plea bargaining. After investigation of the case, when it is ready to proceed to court, the prosecutor consults with the defendant and his lawyer to craft an agreement on the charges to be pursued and sentence to be imposed.¹⁵² They later approach the court for endorsement of their settlement. However, the court is not bound by the settlement negotiated by the parties. It has the discretion to refuse to endorse where it is not satisfied that the settlement is just.¹⁵³

149 See Obla (2014).

150 See Heumann (1978: 1).

151 See UNODC Alternative Dispute Resolution Manual: Court Users Guide.

152 See Bekker (2001: 313-314).

153 This depends on the powers vested in the court by the domestic laws of a particular state.

There are a number of reasons for the development of the practice of plea bargaining. The most common is case backlog.¹⁵⁴ It is said that the procedure can dispose easily and quickly of a number of cases in a quite sophisticated manner. Plea bargaining is praised also for saving time as no full trial is conducted, for being cost sensitive as the expenses of conducting a full trial are saved, and for delivering timely justice to both the perpetrator and the victim of the offence.¹⁵⁵

It bears noting, however, that the process of plea bargaining appears to have little to do in reality with the elimination of case backlogs. Matters are not routed to plea bargaining for the sake of speedy disposition. The prosecution takes into consideration the need to do justice before deciding to pursue a case through plea bargaining. In addition, the prosecutor's decision in this regard is not final. It operates merely as an offer which needs consent from the accused person. This suggests that the reduction of case backlogs might be one of the positive effects of plea bargaining but it is not a major reason for its introduction. The fact that not all cases can be dealt with through the procedure cements the hypothesis that plea bargaining is not intended to be a tool to cope with high case backlogs.

The practice of plea bargaining in contemporary African states may be traced back to ancient African societies which dealt with criminal disputes by way of traditional dispute resolution in which peace between the two parties to the offence was vital. Unlike conventional curial resolutions, in traditional dispute resolution the parties to the case emerge from the dispute as friends and not as enemies.¹⁵⁶ This was made possible by the constitution of traditional dispute resolution: nobody takes all, each party to the case receives some relief, which leads to a peaceful settlement.¹⁵⁷

A similar approach is evident in modern plea bargaining. The prosecutor secures a conviction without having to go through the full court process and the defendant receives relief in the form of charge abatement or sentence reduction. In plea bargaining, as in traditional dispute resolution, the parties settle their dispute in a manner that leaves all of them satisfied.

154 See Blumberg (1967: 2).

155 Blumberg (1967: 25).

156 See the analysis of traditional dispute resolution in Pauly & Elbern (2012: 237-241).

157 See Bekker (2001: 314).

Thus, plea bargaining may be taken as a modified form of traditional dispute resolution or may be considered as a mode of alternative dispute resolution in criminal matters. However, this argument is valid only if the practice of plea bargaining is attributed to the pursuit of justice rather than the speedy disposition of cases.

Plea bargaining in criminal matters extends also to asset recovery cases in which the parties may agree on the conviction of the defendant on curtailed charges and the return of stolen assets.¹⁵⁸ As part of such a settlement, the prosecutor may agree to recover only some of the stolen assets, thereby affecting the proportionality requirement of a just retributory punishment. However, plea bargaining in the field of asset recovery serves a unique purpose, that is, recovery of the proceeds of crime without jurisdictional limitations. Unlike ordinary criminal cases, plea bargaining in asset recovery is not limited to the territorial jurisdiction of courts. States are encouraged to consider the rights of other states which have been affected by the offences committed by the defendant, without any limitation.¹⁵⁹ The states are encouraged further to share information obtained from their investigations and allow the affected states to take part in the negotiations leading to the settlement of the case. The proposed international standards in plea bargaining make it possible for every state to participate either actively or passively through investigations conducted by other states.¹⁶⁰ Given the transnational nature of economic crimes, this arrangement will be very beneficial to the fight against them.

The universal nature of plea bargaining in asset recovery implies that no state dissociates itself from the practice. However, not all states have given formal recognition to plea bargaining. This means that those states cannot participate in the crafting of settlements but they can be beneficiaries of plea bargains negotiated by other states.

158 See Bekker (2001: 314).

159 See Odour *et al* (2014: 4).

160 See the proposed international standards of plea bargaining in asset recovery cases in Odour *et al* (2014: 4).

5.5.2.1 Plea Bargaining in Tanzania

Tanzania does not have any formal plea bargaining processes. However, this does not mean that plea bargaining is not practised in the courts. Plea bargaining in Tanzania may be equated to an informal agreement between the prosecutor and the defence concluded with the expectation that the court will be lenient when sentencing the accused.

The practice takes advantage of the summary procedure provided in cases where the accused pleads guilty to an offence. The law empowers the court to convict the accused person on his guilty plea without conducting a full trial.¹⁶¹ However, the court has to ascertain whether the accused has pleaded guilty correctly. In this regard, the court considers whether the facts of the case establish the offence with which the accused is charged. Then it may enter a plea of guilty against the accused, convict him and proceed with sentencing. No full trial will be conducted.

The guilty plea may act as a mitigating factor in the sentencing process. In most cases the accused will agree to plead guilty if the prosecutor offers to reduce the charge.¹⁶² The process, though not referred to as such, has some similarity to plea bargaining and some judges do consider it to be a form of plea bargaining.¹⁶³ The accused is barred from appealing against a conviction based on his guilty plea. He may appeal only against the sentence.¹⁶⁴

In addition to not being formalised, the Tanzanian process does not consider the rights of the victims of the offence. In most cases the prosecutor does not consult the victims when he is considering reducing the charge against the accused. The victims do not have any opportunity to change what has been offered by the prosecutor and agreed to by the accused. Even the accused is not involved directly in the discussions. He merely is informed of the offer by his attorney, and has to accept or reject it. If he rejects the offer, the case has to go to full

161 See Sections 228(2) and 282 of the CPA (T).

162 Not all guilty pleas are preceded by reduction of charges by prosecutors. There are instances where the accused pleads guilty to the charges as drawn up by the prosecutor. In some cases the accused may confess during the investigation stage, and have his confession recorded before the police or a justice of peace. See Section 57(2) of the CPA (T). See also Sections 27 and 28 of the Evidence Act of Tanzania [Cap 6 RE 2002] regarding the evidential value of such confessions during the adjudication of the case.

163 See Massati JA in *Sylvester Lucas V Republic*, Criminal Appeal No 67/2014 (unreported), Court of Appeal of Tanzania, at Dodoma (para 1 page 1).

164 Section 360 of the CPA (T).

trial. To be sure, in Tanzania the prosecution of cases is guided by stern principles against the abuse of the legal process.¹⁶⁵ However, there is a clear need for specific regulations to govern plea bargaining. Such regulations ought to cater for the rights of the accused, the victim and any other person who may be affected by the plea bargaining process. They should provide also for the powers and responsibilities of the institutions involved in plea bargaining.

Some efforts are being made to introduce plea bargaining formally into the administration of criminal justice.¹⁶⁶ However, these developments are linked directly to the hopes of the judiciary to eliminate the courts' high case backlog. This is evident from the statement of the Chief Justice of Tanzania declaring the country's desire to introduce plea bargaining.¹⁶⁷ No doubt, it is good idea to pursue solutions to the problem of high case backlogs and their effects. However, case backlogs should not be the driving force for the introduction of plea bargaining in Tanzania. The need to ensure timely justice should be the prime motivation for plea bargaining. This will make the system eschew settlements made merely to achieve a speedy disposition of cases.

Tanzania does not apply plea bargaining in asset recovery cases. However, the country has benefitted from settlements resulting from plea bargaining. For example, in a settlement agreement between the British Serious Fraud Office and the BAE Systems plc, Tanzania received an *ex gratia* payment of £30 million.¹⁶⁸ It is high time for Tanzania to introduce plea bargaining, not only to address the problem of case backlogs but also to ensure timely justice for all. In addition, if it has plea bargaining, Tanzania may be able to investigate and settle asset recovery cases that serve the interests of other states.

165 See Article 59B (4) of the Tanzanian Constitution and the Prosecution General Instructions for State Attorneys and Prosecutors (2011).

166 See the speech of the Hon Chief Justice of Tanzania, Mohamed Chande Othman, delivered on the law day of Tanzania, 3 February 2014, at page 23.

167 Othman (2014: 24).

168 See Settlement deed between the British Serious Fraud Office and BAE Systems Plc (2010). See also Oduor *et al* (2014: 94-95).

5.5.2.2 Plea Bargaining in South Africa

Unlike Tanzania, the plea bargaining process in South Africa is regulated well. South Africa initially experienced the spontaneous development of informal and unregulated plea bargaining between prosecutors and defence lawyers.¹⁶⁹ In response, it decided to formalise the plea bargaining process, making statutory provision for it as an alternative mechanism for dealing with criminal offences.

The formalisation of plea bargaining was achieved by inserting section 105A into the CPA (SA).¹⁷⁰ The section provides for the procedure to be followed in plea bargaining matters. It stipulates the qualifications of prosecutors and accused persons who may take part in plea bargaining. It provides also for the participation of investigation officers, victims and any other interested parties. Further, the section identifies the main issues to be considered during the plea bargaining process and elucidates the powers of the court in settlements.¹⁷¹

5.5.2.2.1 Prosecutor and Accused

The law establishes the attributes of the prosecutor and the accused person who may enter into a plea agreement. The prosecutor should be authorised in writing by the National Director of Public Prosecutions to participate in plea bargaining.¹⁷² The NDPP has authorised different categories of prosecutors in this regard.¹⁷³ The prosecutors so designated include the District Prosecutor with salary level LP4, the Regional Prosecutor with salary level LP6, and the Senior State Advocate with salary level LP9.¹⁷⁴ The authorised prosecutors do not enter into plea agreements independently, but are required to consult their supervisors before doing so.¹⁷⁵ This procedure limits the chances of their concluding agreements corruptly.

169 See Murdoch (2006: 224). See also Bennun (2007: 17), Bekker (2001: 316) and Steyn (2007: 206).

170 See Steyn (2007: 207).

171 See Section 105A of the CPA (SA).

172 See Section 105A(1)(a) of the CPA (SA).

173 See NDPP's Authorisation, issued in terms of Section 105A (1)(a) of the CPA (SA), dated 20 July 2011.

174 See the NDPP's Authorisation (2011).

175 See para (a) and (b) of the NDPP's Authorisation (2011).

The law limits the application of plea agreement to those accused persons who have legal representation.¹⁷⁶ This limitation may appear to be discriminatory as it precludes all unrepresented accused. However, the complexities of plea bargaining need the accused person to be represented by a person who has sound legal knowledge. Thus, allowing accused to participate in plea bargaining unrepresented well may be unfair and in violation of the right to a just determination of the case. Moreover, the right to legal representation in South Africa tends to be observed, and in most asset recovery cases the accused likely will have legal representation.¹⁷⁷

5.5.2.2 Investigating Officer and Victims

Investigators and victims of the offence participate also in plea negotiations. The law requires the prosecutor to consult the investigating officer or his supervisor before concluding any plea and sentence agreement with the accused.¹⁷⁸ However, the value of such consultation is unclear because the law does not indicate how influential the recommendations of the investigation officer are to be in the negotiations. It merely requires the court to satisfy itself that the consultation has occurred.¹⁷⁹ Furthermore, the prosecutor is allowed to forgo consultation with the investigating officer if such consultation would delay the proceedings.¹⁸⁰ This indulgence may reduce consultation with the investigating officer to an optional element in plea and sentencing negotiations.

The victims of the crime are afforded an opportunity to take part in the negotiations between the prosecutor and the accused.¹⁸¹ However, the opportunity is not an absolute one. It is subject to the reasonableness of the victim's participating, the nature and circumstances of

176 See Section 105A(1)(a) of the CPA (SA).

177 See the arguments of the court in *Fraser v ABSA Bank Limited* (66/05)[2006] ZACC 24 at para 68, regarding the provision of legal and living expenses from preserved assets. The court is of the view that provision of those expenses is what makes enforcement of asset recovery policy survive constitutionality tests.

178 See Section 105A(1)(b)(i) of the CPA (SA).

179 See Section 105A(4)(a)(ii) of the CPA(SA).

180 Section 105A(1)(c)(i) & (ii) of the CPA (SA) describes the nature of the delay that may cause the prosecutor to dispense consulting the investigating officer to include scenarios where the consultation may cause substantial prejudice to the prosecution, accused or victims of the offence, and where it may affect the administration of justice adversely.

181 Section 105A(1)(b)(iii) of the CPA (SA).

the offence and the interests of the victim.¹⁸² If all these conditions are assessed positively by the prosecutor, the victim may be allowed to make representations regarding the contents of the agreement and other matters such as inclusion of a compensation order.¹⁸³ Like the consultation with the investigating officer, the representations by the victims are not given any express significance. The law does not require the prosecutor to take into consideration the suggestions made by the victims. However, the CPA (SA) does require the court to satisfy itself as to both consultation with the investigating officer and the victims making representations regarding the plea negotiations.¹⁸⁴

The South African court has taken an expansive approach to the provisions regarding investigating officers and victims.¹⁸⁵ In particular, it considers consultation with victims to be the most important measure of a just plea agreement. It is of the view that participation of victims in the plea bargaining process gives it legitimacy and credibility.¹⁸⁶ Hence, the court has emphasised victim participation by assessing prosecutorial compliance earnestly before endorsing plea and sentencing agreements.¹⁸⁷

With regard to recovery of assets, the law requires the prosecutor to consult the AFU officials. As in the case of the victims and investigators, the law does not provide for any remedy in cases of non-compliance with this requirement. It also does not provide how far the prosecutor is bound by the recommendations made during the consultation. This omission may cause non-compliance with the recommendations from the relevant authority.

The fact that there is no need to prove that consultations occurred increases the risk of compromising them. In such circumstances, there is a possibility for the accused to benefit from the proceeds of his crime. The law should provide expressly for the need to prove the consultations before the court and for remedies for non-compliance with the requirement.

182 Section 105A(1)(b)(iii) of the CPA(SA).

183 Section 105A(1)(b)(iii)(aa) & (bb) of the CPA (SA).

184 See Section 105A(4)(a)(ii) of the CPA(SA).

185 The court is required to consider the participation of the victims and the consultation with the investigating officer before endorsing the plea agreement presented to it. See Section 105A(4)(a)(ii) of the CPA (SA).

186 See *S v Saasin and Others* (84/02) [2003] ZNCHC 44(20 October 2003) at para 11.4.

187 See *S v Saasin and Others* at para 11.5.

5.5.2.2.4 Powers of the Court regarding Plea Agreements

Plea bargaining in South Africa is not about trading in justice. The plea and sentence agreement reached between the prosecutor and the accused person is assessed by the court before it is endorsed as a judgment.¹⁸⁸

The court checks into a number of issues in order to ascertain whether the agreement as negotiated is just or not. It is empowered to examine how the agreement was reached, that is, the legality of the entire process,¹⁸⁹ and the fairness of the agreed sentence.¹⁹⁰ To do a full assessment, the court checks the capacity of the parties who engaged in the plea agreement, the voluntariness of the accused person consenting to the agreement, whether the admitted facts of the case establish the offence alleged to have been committed by the accused person,¹⁹¹ the availability of a reliable defence against the crime,¹⁹² and, lastly, the justness of the agreed sentence.¹⁹³

The court is not bound by the agreement reached between the parties. Where it is of the opinion that there has been non-compliance with the prescribed procedures, it may direct the parties to rectify any irregularities.¹⁹⁴ If the court does not agree with the proposed sentence, it will inform the parties what, in its opinion, is a just sentence for the offence committed.¹⁹⁵ When this happens, the parties will be at liberty to agree with the court or have their case tried *de novo* before a different court.¹⁹⁶

The powers vested in the court in plea bargaining matters are very useful for ensuring the impartiality of the procedure, protecting the rights of the accused persons and victims, and limiting the chances of corruption. Moreover, it is established that the court does consider the

188 See Section 105A(4)-(9) of the CPA (SA).

189 Section 105A(4)(a) of the CPA (SA). This sub-section may be employed to remedy any deficiency that occurred during the bargaining process.

190 Sections 105A(8) and 105A(9)(a) of the CPA (SA).

191 Section 105A(4)(a) of the CPA (SA).

192 Section 105A(6)(b)(ii) of the CPA (SA).

193 Section 105A (8) of the CPA (SA).

194 Section 105A(4)(b) of the CPA (SA).

195 Section 105A(9)(a) of the CPA(SA). In case of failure of the court to inform the parties of any discrepancy between the sentence to be issued by the court and the agreed sentence during plea bargaining, the parties will have the right to have their case tried *de novo*. See *Jansen v The State* 20043/14 [2015] ZASCA 151 (2 October 2015).

196 Sections 105A(9)(b)(ii) and 105A(9)(b) of the CPA (SA).

facts of the case in assessing the justness of the agreement. This suggests that it may take into consideration, for example, the need to have the proceeds of crime confiscated as part of the plea bargaining process. In summary, South Africa has retained the role of the court in the adjudication of criminal matters even when such matters are pursued through plea bargaining. The powers of the court put it in a position to remedy all identified *lacunae* in plea and sentence agreements before they are formalised as judgments.

5.5.2.3 Plea Bargaining in Nigeria

Although plea bargaining is widely employed in the disposition of economic crimes cases in the Federal Republic of Nigeria, there is no federal law that expressly provides for its application in the administration of criminal justice.¹⁹⁷ The application of plea bargaining in Nigeria is said to have justifications under the Criminal Procedure Act (CPA (N)) and the EFCC Act.¹⁹⁸ However, a perusal of these statutes shows that they do not provide expressly for plea bargaining.

5.5.2.3.1 The Criminal Procedure Act

The CPA (N), which is the primary law regulating the criminal process, does not countenance plea bargaining. It merely provides for the withdrawal of charges in certain circumstances. The relevant section reads:

When more charges than one are made against a person and a conviction has been had on one or more of them the prosecutor may, with the consent of the court, withdraw the remaining charge or charges or the court, of its own motion, may stay the trial of such charge or charges.¹⁹⁹

The section provides further that the effect of such withdrawal of charges is similar to an acquittal.²⁰⁰ However, if the conviction is set aside, the prosecutor may request the court to proceed with the trial on the withdrawn or stayed charges, as the case may be.²⁰¹

Withdrawal of charges does not amount to settling a criminal case through plea bargaining. As observed earlier, plea bargaining involves negotiations between the accused

197 See Ospitan & Odusote (2014: 77). See also Iyang (2012).

198 Section 180 of the CPA (N) and Section 14(2) of the EFCC Act. See Obla (2014). See also Ospitan & Odusote (2014: 77).

199 Section 180(1) of the CPA (N).

200 Section 180(2) of the CPA (N).

201 Section 180(2) of the CPA (N).

person, his counsel and the prosecutor. Although withdrawal of some charges may be part of the agreement reached during the negotiations, the accused person need not be convicted before the charges are withdrawn. The bargaining process is conducted by the prosecutor and the defence counsel, and what is presented to the court is the settlement deed for endorsement. Before endorsing the settlement deed, the court, depending on the powers vested in it, will consider whether it is just and proper.

The withdrawal of charges envisaged in Section 180 of the CPA (N) does not involve any agreement between the prosecutor and the defence counsel or the accused person. It is more in the nature of an agreement between the court and the prosecutor. This may be ascertained from the fact that, when the conviction is challenged and set aside by another court, the prosecutor may approach the court *a quo* again, seeking a trial on the withdrawn or stayed charges.²⁰² In such a scenario, it is hard to construe the provisions of this section as justifying the practice of plea bargaining.

5.5.2.3.2 The EFCC Act

The EFCC Act is considered also to be a source of plea bargaining in Nigeria. Section 14(2) empowers the EFCC to settle a punishable offence in exchange for payment by the accused of an amount exceeding the maximum that he would have been required to pay had he been convicted of the offence. The section reads:

Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relate to the powers of the Attorney of the Federation to institute, continue, takeover, or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.²⁰³

The EFCC has employed this section to conclude a number of asset recovery cases. However, it has not compounded the offences as the law allows but has opted instead for plea agreements in which it dropped some of the charges in exchange for a lesser sentence and the return of the stolen assets.

202 Section 180(2) of the CPA (N).

203 Section 14(2) of the EFCC Act.

Section 14(2) of the EFCC Act contains four necessary elements. Firstly, the accused must be responsible for an offence punishable under the EFCC Act. Secondly, the offence must attract payment by the accused of a certain amount of money upon conviction. The third element is the compounding of the offence. The existence of the first two elements is a precondition for the Commission's power to compound the offence. There is a fourth condition that needs to be considered during the compounding stage. The law requires the compounding of the offence to be effected by payment of an amount of money that is "just"²⁰⁴ and exceeds the amount that would have been due by the accused under an ordinary conviction for that offence.

In the light of the foregoing, Section 14(2) may be considered as providing for a certain kind of negotiated justice which may be categorised as "sentence bargaining".²⁰⁵ However, the process does not accord with the general practice of sentence bargaining. Usually, as the name implies, this part of the plea bargaining process involves reduction of a sentence. Contrary to this general practice, the EFCC Act provides for an option of increasing the sentence, by making the compounding of the offence dependent on the accused paying more than he would have owed had he been convicted in a trial.

"Sentence bargaining"²⁰⁶ in Nigeria is unique. It may be considered even as "hybrid plea bargaining" because it does not involve dropping of charges, aiming for compounding the offence instead. It also does not favour leniency in sentencing, as the compounding demands that the accused pay more than an ordinary conviction would have entailed. These "deviations" go against the retributive principle of punishment.

Section 14(2) does not provide for plea bargaining but for settlement of cases without conviction.²⁰⁷ This is evident from the fact that the compounding of offences by payment of

204 See section 14(2) of the EFCC Act.

205 See Bekker (2001: 313-314).

206 The section does not provide expressly for the issue of bargaining, though having a sentence without conviction entails that the parties to the case must reach had some kind of agreement.

207 See the UN Report on the Review of the Implementations of the UNCAC in Nigeria (2014: 5). The report lists the provisions of Section 14(2) of the EFCC Act as among those that allow the Commission to settle charges without conviction.

monetary sums does not require a court process. It is more of an administrative mechanism for case disposition than plea and sentence bargaining.

5.5.2.3.3 Application of Section 14(2) of the EFCC Act

Despite the fact that Nigeria does not have express statutory provisions on plea bargaining, the country has disposed successfully of a number of financial crimes cases via plea bargaining. As indicated above, the EFCC employs the provisions of Section 14(2) regarding compounding of offences to enter into plea arrangements with accused persons. The courts become involved in the process by endorsing the agreements between the EFCC and the accused as court judgements.²⁰⁸

The practice of plea bargaining in Nigeria has been challenged as an abuse of legal process.²⁰⁹ This challenge is grounded in the lack of regulatory law. The EFCC Act provides for substantive law regarding what is alleged to be plea bargaining pursued by way of compounding of offences. However, it does not provide for the procedure to be followed in this regard. It also does not provide for what should be factored into the decision to compound. In practice, the EFCC does consider such factors as the part played by the accused in the crime, the public interest, the magnitude of the offence and the level of co-operation of the accused with the law enforcement machinery.²¹⁰ However, the lack of procedural law continues to make plea bargaining in Nigeria prone to abuse.

Such abuse is apparent from some of the cases that have been disposed of by compounding. Although they allegedly were settled in terms of Section 14(2) of the EFCC Act, the manner of their disposition does not conform to the requirements of the section. For example, cases supposedly concluded under the section include those against popular figures Tafa Balogun,²¹¹ Diepre Alamiyeseigha,²¹² Lucky Igbinedion²¹³ and Cecilia Ibru.²¹⁴ It is true that

208 This is the norm in any plea bargaining process. The involvement of the court depends on the domestic legal framework of the particular state. However, the case of Nigeria is different. Although the EFCC employs the provisions of Section 14(2) of the EFCC Act for plea bargaining and involves the court, the section refer to the court. The matters which are dealt with through the section are supposed to be finalised by the Commission itself, without approaching the court.

209 See, for example, Adekunle (2013: 14).

210 See UN Report on the Review of Implementation of UNCAC in Nigeria (2014: 5).

211 Former Inspector General of Police of the Federal Republic of Nigeria.

all these cases involve offences punishable under the EFCC Act. However, they lack the second requirement that the punishment should be payment of a certain amount of money.

The above mentioned cases involved the recovery of the proceeds of crime. Asset recovery is not a punishment that requires payment of money, although the assets to be recovered may be converted into monetary sums. It is only when a pecuniary penalty is sought that asset recovery may be equated with a punishment that involves payment of money. In this regard, the cases catalogued above were not suitable for disposition under Section 14(2) of the EFCC Act. The section is suitable for those offences which carry punishments that involve payment of monetary sums only or as an alternative to imprisonment.

What is more, Section 14(2) requires compounding of the offence, which does not seem to have been done in any of the abovementioned cases. In all of them, the Commission, instead of compounding the offences, dropped some of the charges. In some cases it dropped a significant number of charges.²¹⁵ The dropping of charges tends to affect the sentence to be imposed.²¹⁶ In some of the cases, it is alleged that the defendants did not return all the proceeds of their crime. They merely forfeited some of the benefits they had acquired from the crime.²¹⁷ In other words, dropping of charges went hand in hand with lessening of the sentence. The law requires that the amount of money to be paid should be just and should exceed the amount which would have been paid in case of ordinary conviction. Thus, dropping of charges and lessening of the sentence are out of keeping with the spirit of Section 14(2) of the EFCC Act.²¹⁸

The abuse of plea bargaining in Nigeria is linked to the positions of those who have benefited from the procedure.²¹⁹ Most of the beneficiaries of plea bargaining in Nigeria are

212 Former Governor of Bayelsa state in Nigeria.

213 Former Governor of Edo state in Nigeria.

214 Former Managing Director and Chief Executive Officer of Oceanic Bank in Nigeria.

215 In the case of Cecilia Ibru, the 191 count charge was reduced to a one count charge. See Adekunle (2013: 15).

216 Adekunle (2013: 15).

217 Adekunle (2013: 16).

218 See Igbinedion (2014: 167).

219 See the arguments of Justice Musdafaer, Chief Justice of the Supreme Court of Nigeria, regarding the practice of plea bargaining in Nigeria, as quoted by Tope (2012).

popular politicians.²²⁰ This reduces the status of plea bargaining to a shield employed by those officials to escape the reach of justice. The best way to deal with this problem is for Nigeria to establish a well-regulated procedure for plea bargaining that will encompass all criminal offences and ensure just sentences for accused persons.

5.5.2.4 Comparative Review

Plea bargaining is very important in the administration of criminal justice as it simplifies the adjudication of cases. It assists also in accelerating the speed of the adjudication of cases and in guaranteeing timely justice. However, it should not be taken as a mechanism for disposing of cases which have not been investigated properly. A case to be settled by way of plea bargaining should be investigated as well as any other. The prosecutor should be ready for trial before plea bargaining commences. Thorough investigation of cases prior plea negotiations assists in achieving a just agreement.

To avoid unjust agreements, plea bargaining should be legislated expressly and regulated well. The provisions on plea bargaining in the CPA (SA) and the regulations made under it provide good examples of how plea bargaining should be implemented. Tanzania may consider borrowing the South African plea bargaining provisions in pursuing its efforts to introduce the procedure into its criminal justice system. Nigeria, too, could take its cue from the structure of plea bargaining in South Africa to improve its own practices.

5.5.3 Legal, Living and Business Expenses

The payment of the legal, living and business expenses of a defendant affect the value of proceeds of crime directly. Such payments are made from the assets preserved for recovery. Thus, as time goes on, the value of the preserved assets is reduced by payments in favour of the defendant. The purpose of confiscation policy is retribution to ensure that crime does not pay.²²¹ In relation to such a purpose, to authorise payment of even legitimate expenses is akin to allowing criminals to benefit from the fruits of their crimes.

220 See Adeleke (2012: 63).

221 De Koker (1998: 278-279).

The IBPs encourage states to find means to gainsay the payment of such expenses out of the preserved assets and to ensure that, if payment is necessary, it is subject to strict conditions.²²² As discussed in previous chapters, the rights of the suspect to be presumed innocent and to legal representation are to be subject to the right of retribution for the victims of the crime. Payment of legal, living and other expenses out of the preserved assets affects directly the rights of the victims of the offence and may negate the purpose of asset recovery policy. Thus, imposing limitation on the provision of legal, living and other expenses from the preserved assets strikes a balance between the rights of defendants and victims.

5.5.3.1 The Position in Tanzania

POCA (T) allows a person to draw upon restrained assets to pay legal expenses, living expenses and a specified debt which has been incurred in good faith.²²³ The provision pertaining to living expenses includes the living expenses of said person's dependants and reasonable business expenses.²²⁴ With the exception of the debt, which is subject to measurable conditions such as the amount owed, the legal and living expenses do not have any limitation. They are required only to be reasonable.²²⁵ This kind of construction may be utilised as a loophole for criminals to benefit from the proceeds of their crimes. It may create an opportunity for criminals to use techniques, such as endless applications against the forfeiture orders, to allow them to continue to benefit from the crimes which they had committed.

The process of allowing criminal suspects to pay legal expenses from the restrained assets has been held to be improper, and may affect the psychology of society regarding the real purpose of confiscations.²²⁶ However, non-payment of such expenses brings into consideration the person's constitutional rights, such as the right to be presumed innocent,²²⁷ the right to property²²⁸ and the right to legal representation to ensure a fair trial.²²⁹ At the

222 See G8 Best Practices (2005).

223 Section 38 of POCA (T).

224 Section 38(3)(a) of POCA (T).

225 Section 38(3)(a) & (b) of POCA (T).

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

227 Article 13(6)(b) of the Tanzanian Constitution.

228 Article 24 of the Tanzanian Constitution.

229 Article 13(6)(a) of the Tanzanian Constitution.

preservation stage, the assets have not been declared proceeds of crime yet, nor has the suspect been found guilty of any offence. In such circumstances, a refusal to allow for legitimate expenses will mean placing the burden of proof on the suspect,²³⁰ and a refusal to allow for legal expenses would be to flout the established rights of the suspect.²³¹

Setting a maximum for such payments may be the only neutral way to resolve the issue. Tanzania should contemplate setting measurable limits to charging allowable expenses from the preserved assets.

5.5.3.2 The Position in South Africa

POCA (SA) provides for an avenue for the suspect in asset recovery cases to be allowed to pay legal and living expenses from preserved assets.²³² In its efforts to limit the effects of such payments, South Africa allows their deduction from preserved assets only when the person does not have capacity to meet the expenses from other assets which are not subject to the recovery process.²³³ To obtain an informed assessment of the person's capacity to meet these expenses without incursion into preserved assets, the law requires such a person to make a sworn disclosure of his interests in the preserved assets and serve the court with a sworn full statement of his other assets and liabilities.²³⁴ Failure to make a clear declaration of interest in the restrained assets may lead to the court's refusing to grant the payment of legal and living expenses.²³⁵ When the court is satisfied that the suspect does not have any other source of funds and has made an honest declaration of his rights over the restrained assets, it may allow payment of his legitimate expenses from the preserved assets.

Moreover, the law requires that such payments be reasonable, and constrains the reasonableness of legal expenses by the maximum amount that may be payable for a comparable legal service.²³⁶ This option does not limit the suspect's right to counsel of his

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

231 Ndzengu & Von Bonde (2011a: 331).

232 Section 44(1) of POCA (SA).

233 See Section 44(2)(a) of POCA(SA).

234 Section 44(2)(b) of POCA (SA).

235 See the arguments of the constitutional court of South Africa (per Jafta J) in *NDPP and Meir Elran*, Case No CCT 56/12 [2013] ZACC 2, at para 26.

236 See Section 45(1) of POCA (SA).

choice. It limits only the provision of legal expenses from the preserved assets. In other words, he may have counsel of his choice on the understanding that said counsel is entitled to charge for his services an amount exceeding the set maximum, and to recover the difference from the suspect.²³⁷

There are other options which the suspect might pursue in ensuring legal representation, such as employing state paid legal counsel. This option has been considered to be useful in promoting the spirit of POCA (SA).²³⁸ However, POCA does not contain any provisions pertaining to this option.

5.5.3.3 The Position in Nigeria

Nigeria, unlike Tanzania and South Africa, does not provide for payment of legal, living and business expenses out of assets under temporary forfeiture orders.²³⁹ This assists the EFCC in protecting the preserved assets from devaluation at the hands of suspects. The Nigerian position is derived from the nature of its preservation orders. The assets subject to forfeiture in Nigeria are not preserved as in Tanzania and South Africa. They are placed under an interim forfeiture order.²⁴⁰ Although the order is not final, its effects are different from the ordinary preservation orders employed in Tanzania and South Africa. An interim forfeiture order in Nigeria transfers the ownership of the assets from the suspect to the state temporarily,²⁴¹ whereas preservation orders in Tanzania and South Africa give the state agencies temporary control over the assets subject to forfeiture. Where the ownership of assets is transferred to the state, it is easy to limit the suspect's access to them because they are not his, temporarily at least. However, such denial of access to the assets suggests that the law presumes the suspect to be guilty of an offence before adjudication of the case. A presumption of guilt limits the right to a fair trial.

237 See Section 45(2) of POCA (SA).

238 Ndzengu (2011a: 314).

239 Similar legal positions are found in states such as Ghana, Botswana and Zambia.

240 See Sections 28 and 29(b) of the EFCC Act.

241 See Section 29 of the EFCC Act.

Be that as it may, non-payment of legal, living and other expenses from the preserved assets is in compliance with the established IBPs.²⁴² Thus, Nigeria cannot be castigated for imposing such limitations. However, those affected by the limitations may petition to have their rights observed because the international standards do not demand that states stop providing legal and living expenses from the preserved assets. They are encouraged to do so only if the constitutional rights of suspects are not violated.²⁴³

5.5.3.4 Comparative Review

The presumption of innocence is a *grundnorm* of criminal justice. It makes criminal trials a reality. However, its enforcement should not be pursued blindly as it may prejudice the rights of other parties to the criminal case. Such effects appear clearly in cases involving asset recovery. By presuming the defendant to be innocent, POCA (SA) allows payment of reasonable legal and living expenses. POCA (T) goes further, to allow payment of business expenses in addition to legal and living expenses. Enforcement of these rights occurs at the expense of the victim's right to a retributive disposition of the assets in cases of successful forfeiture applications.

To reduce the negative effects of enforcing the rights of suspects, the criteria developed by the South African courts may be of great assistance. The option of employing government-paid attorneys may be appropriate also in striking a balance between the rights of the parties to the case. Regarding living and business expenses, strict reasonable and measurable conditions should be employed.

The Nigerian option may be desirable as the assets are prevented from falling into the wrong hands. It also is compatible with the IBPs. However, if it is analysed from a human rights perspective, it cannot be implemented easily. In this connection, Nigeria should consider ways of addressing the accused's rights to legal and living expenses.

242 See G8 Best Practices (2005).

243 G8 Best Practices (2005).

5.6 Conclusion

Post-confiscation asset management policy is affected fundamentally by the principle behind the introduction of asset recovery policy in a particular state. Most states consider asset recovery as a policy solely intended to make crime unprofitable, leaving aside its corrective purpose in relation to the harm caused by the crime. The post-confiscation asset management policies in Nigeria and Tanzania are unbalanced in this way. Unlike South Africa, their asset recovery laws do not mention any rights of the victims of the offence. However, the fact that in these states some recovered assets have been returned to their previous owners after being forfeited anticipates the possibility that they may be able to address the rights of the victims of economic crimes with a view to achieving the second purpose of asset recovery.

The factors that affect the value of proceeds of crime to be recovered also disturb the equilibrium between the principle that crime should not pay and the need for corrective justice. Some factors may not be controllable easily because they offer a solution to the existing problem. For example, non-conviction based and administrative asset recovery, although affecting the value of the proceeds of crime to be recovered, also act as remedies for the failure of conviction based asset recovery. The best way of controlling non-conviction based asset recovery is to resort to it only in cases where conviction based asset recovery cannot succeed.

With regard to plea bargaining, proper regulations, as seen in South Africa, may be useful in reducing its impact upon the value of the assets to be recovered. Plea bargaining should not be taken as trading in justice but as a means of securing timely justice for all. Let it be considered as equivalent to the alternative dispute resolutions that are taking place in the civil arena. The powers of the court should not be eroded in the name of plea bargaining. The court should continue to act as a watch dog to ensure that justice is done.

Payment of legal, living, business and other expenses from the preserved assets also threatens the value of assets to be recovered. Non-payment is one option. Setting a maximum payment is another. Alternative legal aid schemes may assist also in the provision of legal services and reduce the risk attached to paying for such services from the preserved assets. With regard to other expenses, strict measurable limitations should be imposed in order to safeguard the purpose of asset recovery policy.

Chapter Six

Managing Proceeds of Crime in the African Context

6.1 Introduction

The bodies which have taken the matter of management of proceeds of crime most seriously are the intergovernmental bodies from developed countries.¹ The most prominent amongst them is the FATF, which has devoted itself to developing a reliable system for managing proceeds of crime. To this end, the FATF has formulated best practices to assist states in designing asset management regimes for their domestic jurisdictions.²

As discussed in previous chapters, the FATF best practices on confiscation and management of confiscated assets form the basic component of the generally accepted approach to managing preserved and recovered assets. They have been endorsed also by the UNODC.³ Although states are not bound to follow these best practices, the influence of the intergovernmental bodies⁴ tends to persuade states to adopt them in their domestic frameworks.⁵

This chapter seeks to answer the research questions posed in Chapter One. To this end it assesses whether the bundle of the international best practices (IBPs) for managing preserved and confiscated assets are fitting for African states. The main motivation for conducting this assessment is the fact that the IBPs have been extrapolated from the experiences of the developed countries whereas most of African states are developing, at best.⁶ Besides the level of development, there are other factors that differentiate the developed states from

1 See G8 Best Practices (2005) and the FATF Best Practices Paper (2012).

2 See the FATF Best Practices Paper (2012).

3 See the UNODC Manual on International Co-operation for Purposes of Confiscation of Proceeds of Crime (2012: 61-62).

4 Non-compliance with the FATF recommendations may cause a state to be black-listed. See Shams (2004: 220-227) for enforcement measures by FATF.

5 The FATF best practices act as a tool to assist states in complying with Recommendations 4 and 38. See the requirements of the two Recommendations in the FATF interpretive notes.

6 The G8 best practices declare clearly their origin in the usages of the G8 states. Nothing is said about the origin of the FATF best practices although they are classified as IBPs. See Para 2 of the FATF Best Practices Paper (2012).

developing states. These include political instability⁷ and the effects of corruption⁸ and other transnational economic crimes.

Many African states are faced with political instability, which creates favourable conditions for economic crimes such as corruption, smuggling, money laundering and the like. This has made African states easy targets for economic looting.⁹ Invariably, the assets looted from Africa are deposited into the financial institutions of developed countries. This may be adduced from the recent record of successful international asset recovery cases. This record shows clearly that the recovered assets were looted from developing states and were recovered in the developed states.¹⁰

African states are among the developing states that have benefited from international asset recovery.¹¹ Thus, the developed states have to act effectively in respect of the recovery of the proceeds of crime while the developing states have to do so in respect of both the recovery and the disposition of recovered assets.¹² This difference suggests that a feasible asset management policy for African states might have to be different from that advocated by the current IBPs.

The assessment undertaken here is centred on the dual issue of the relevance and feasibility of the IBPs in the African context. Relevance refers to the effectiveness of the core principles of the IBPs in addressing the challenges created by transnational economic crimes in Africa. The question is whether these principles make sense as the organising principles of African asset recovery and asset management regimes.

7 See Fosu (1992: 830-831) for a theorisation of the relationship between political stability and development.

8 On the effects of corruption in Africa, see Snider & Kidane (2007: 692).

9 Africa is estimated to have lost in excess of a trillion US dollars over the past fifty years. See Mbeki Report on Illicit Financial Flows (2014: 13). See also Ribadu (2008: 29) and the Organisation for Economic Co-operation and Development (OECD) Report (2011: 11).

10 Between 2010 and June 2012, eighty percent of frozen assets had been looted from developing states. See Gray *et al* (2014: 26).

11 Tanzania, South Africa and Nigeria are among the developing states which had some of their stolen assets recovered. See Gray *et al* (2014: 23-26).

12 In most cases the disposition of recovered assets concerns the victim state. However, the requested state may be involved for purposes of increasing the level of accountability in the utilisation of the assets. For example, the World Bank's monitoring of the utilisation of the assets recovered from Abacha's embezzlement in Nigeria is part of the agreement between Nigeria and Switzerland. See Jimu (2009: 7).

In relation to the issue of feasibility, the assessment focuses on the basic elements of the asset management institution as proposed by the IBPs. These include transparency, accountability and efficiency.¹³ The trio of states are located in markedly different geographical positions on the continent. Tanzania is in the eastern part of Africa, South Africa in the southern part and Nigeria in the western part. These states are also at different levels of economic development.¹⁴ An assessment of their efforts in adopting the IBPs may assist in generating a general view regarding the feasibility of these practices for African states.

6.2 Relevance of IBPs

As intimated above, the issue of relevance of the IBPs on asset management may be assessed by examining their underlying principles in relation to the challenges of economic crime in Africa. The IBPs address two fundamental and interrelated principles. The first is that crime should not pay. The second is the pursuit of corrective justice.

The principle that crime should not pay may be discerned in the requirements that criminals be deprived of their ill-gotten benefits and that preserved and recovered assets be managed properly.¹⁵ The major aims of this principle are to combat crime and to make it unprofitable. The principle has been endorsed by almost all states which have adopted and pursue an asset recovery policy. However, the mode of its enforcement varies from one state to another. Some states, such as Tanzania and Nigeria, consider the principle to be directed only at criminals. Hence they direct the bulk of their efforts at trying to ensure that criminals do not benefit from their crimes. However, the international community does not impose such limits on the principle. In the international context, the principle that crime should not pay encompasses the notions that nobody should benefit from crime and that nobody should suffer loss from crime.

13 The FATF Best Practices and the G8 Principles in Administration of Seized Assets are centred on the need to have transparency, accountability and integrity in dealing with preserved and recovered assets.

14 According to the 2014 IMF World Economic Outlook, which ranked states according to their Gross Domestic Product, Nigeria, South Africa and Tanzania placed 20th, 27th and 72nd respectively. For a full list of the states in the GDP ranking data visit http://databank.worldbank.org/data/download/GDP_PPP.pdf.

15 All pre-confiscation asset management processes aim at barring the criminals from accessing the proceeds of their crime until the finalisation of the asset recovery proceedings.

With regard to criminal benefits, the principle seeks primarily to ensure confiscation of the proceeds and instrumentalities of crime.¹⁶ However, it also addresses everybody involved in the recovery process by advocating proper management of preserved and confiscated assets with a view to ensuring that nobody gains personal advantage from the recovered assets.¹⁷ This ideal is emphasised by the IBPs in their promotion of a transparent and accountable asset management system.¹⁸

The question of criminal damage is addressed by the Aristotelian principle of corrective justice. Corrective justice, although it appears as something incidental to the principle that crime should not pay, is intrinsic to the idea of returning stolen assets¹⁹ and to the requirement of utilising recovered assets properly.²⁰ The international community champions the repatriation of recovered assets so that they may be returned to their legitimate owners.²¹ Such repatriation may be regarded as a means of remedying the harm caused by crime. The IBPs promote the proper utilisation of recovered assets, emphasising the funding of public good projects.²² Although the international instruments and the IBPs do not address expressly the issue of correcting criminal damage, it is embedded in the axiom that recovered assets be utilised properly.

Combating economic crime and ensuring proper utilisation of recovered assets are both indisputably relevant to Africa. Indeed, they may be more relevant to Africa than to the developed world. As mentioned in the introductory part of this chapter, the major challenge facing African states is asset stripping caused by transnational economic crime. This challenge is addressed by the principle that crime should not pay, which assists African states to recover their looted assets. As noted above, whereas the IBPs do not confront specifically the issue of remedying the harm caused by the crime, the need to have the recovered assets utilised

16 See Article 31(1) of UNCAC.

17 See Article 31(3) of UNCAC.

18 See Para 27 of the FATF Best Practices Paper (2012) and G8 Best Practices (2005).

19 This is described as a fundamental principle in Article 51 of UNCAC.

20 The FATF insists on proper utilisation of recovered assets to the extent of listing examples of proper utilisation, which include funding law enforcement, education and education services. See Para 21 of the FATF Best Practices Paper (2012) and Para 1 of the Interpretive Note to Recommendation 38.

21 See Chapter V of UNCAC which is dedicated to ensuring the repatriation of assets.

22 See Para 21 of the FATF Best Practices Paper (2012).

properly captures this aspect. Utilisation of recovered assets may be determined fairly only by the state itself. South Africa is an example of a state which addresses the question of criminal harm during the utilisation process.²³ It is advisable that all African states foreground the principle of corrective justice in their asset recovery and management regimes.

The core principles underlying the IBPs may be said to have become generalised and to have transcended context. In other words, they make good sense outside the ambit of the developed world from which they originated and matter for all countries which have lost assets to economic crime. This perspective leads to the conclusion that the IBPs indeed are relevant in the African context.

6.3 Feasibility of IBPs

This section presents a general assessment of the asset management regimes of the three designated states. The discussion covers three basic elements of asset management as proposed by the IBPs, namely, transparency, accountability and efficiency. The idea is to assess their feasibility in the African context.

6.3.1 Transparency

Transparency concerns the transmission of information to the citizenry for awareness purposes. The demand for transparency is motivated by the right to information.²⁴ The citizenry needs to be informed about what is happening within their institutions.²⁵ This is a form of accountability of state agencies to the people. Transparency regarding the activities of the agencies involved in asset recovery assists in limiting the chances of corruption and building the confidence of the populace in the implementation of the policy.

The assessment of the level of transparency in the asset management frameworks of the three countries is guided by the manner in which each deals with preserved and confiscated

23 Recovered assets in South Africa may be used to fund institutions dealing with victims of crime. See Section 69(1)(b) of POCA (SA).

24 The right to information is a constitutional right in Tanzania, South Africa and Nigeria. See Article 18(b) & (d) of the Tanzanian Constitution, Section 16(1)(b) of the South African Constitution and Article 39 of the Nigerian Constitution.

25 See Musa (2014) for a call to have recovered assets administered transparently, accountably and with multi-stakeholder oversight.

assets. The processes involved in managing these assets have been analysed in Chapter Four and Chapter Five above. The assessment undertaken here concerns proper record keeping and reporting as elements of transparency. In general, there is transparency in the manner of dealing with the proceeds of crime in the three states, but the level of transparency differs according to the structures available for managing assets.

6.3.1.1 Transparency in Tanzania

Transparency requires that the citizenry be kept informed of the activities of the AMI. Tanzania does not have a system of giving feedback to its citizens in this regard. Although the activities of the asset recovery and asset management institutions are not confidential, the reports on their activities are not published.²⁶ As usual, when there is some form of publication, it covers the success stories of how much has been recovered without accounting for how the recovered assets have been utilised.²⁷

For the citizens of Tanzania to obtain information on the activities of their asset recovery agencies, they need physically to visit the offices of these agencies. Moreover, such visits would provide information only on the activities of the specific office visited because of non-integration of data. The country does not have an electronic database for record keeping and integration of data. This deficiency definitely limits the level of transparency in respect of asset recovery and asset management in Tanzania.

6.3.1.2 Transparency in South Africa

South Africa observes the need for transparency regarding its asset recovery and management institutions. The online publication of annual reports on the activities of the AFU and expenditures from CARA allow its citizens to be informed about what is done by these agencies.²⁸ The reports contain information on the value of the recovered assets and their utilisation.²⁹

26 The AFRS does not upload its reports onto the Attorney General's Chambers website.

27 See the press briefing by the DPP (T), dated 28 January 2016, on the importance of asset recovery in the fight against corruption and other financial crimes.

28 See, for example, the 2014/2015 Report, available at <https://www.npa.gov.za/node/32>.

29 See, for example, the NPA Annual Report 2014/2015 at pages 100-103 on the value recovered for the financial year 2014/2015 and its utilisation.

In addition, the existence of an electronic database makes the system of keeping data in South Africa relatively reliable and sophisticated.³⁰ The database is open to the public, although, for proper access, the enquirer would need to have certain details, such as the name of the curator, the date of his appointment and so on. Be that as it may, the principle of public access makes it possible for South Africans to be aware of developments around asset preservation, recovery and management. It is possible also for the citizenry to contribute to the improvement of the system because they are aware of almost everything that is being done by the asset management institution.

6.3.1.3 Transparency in Nigeria

Nigeria does not have a reliable system of data keeping and reporting. The country does not have an electronic database for the keeping and integration of data. This impedes the transmission of information to the citizenry.

The EFCC does report some of its activities and publishes its reports on its website.³¹ However, such publication does not include information regarding the management of preserved assets and the value of recovered assets.³² Further, publication of the audited reports and other information on asset management tends to be done in special circumstances, such as responding to public queries.³³ Citizens may obtain full access to the information regarding asset management by visiting the EFCC offices. However, this is a condition which operates to limit access to information and which affects negatively the level of transparency of the EFCC in Nigeria.

30 Information on all assets put under curatorship are available on the Masters Office Web Portal at <https://icmsweb.justice.gov.za/mastersinformation>.

31 <https://efccnigeria.org/efcc/>.

32 The EFCC website contains mostly articles regarding the arraignment of different people for crimes that fall under the ambit of the EFCC Act.

33 See, for example, the information uploaded recently on the EFCC website titled "Setting the Records Straight", available at <https://efccnigeria.org/efcc/index.php/setting-the-record-straight>. Annexures to the article contain annual audited reports of the EFCC, information on the existence of a bank account in which the EFCC deposits preserved funds during the forfeiture proceedings and other valuable information regarding management of seized and forfeited assets by the EFCC.

6.3.1.4 Transparency in Comparative Review

The discussion above shows that South Africa observes transparency requirements as advocated by the IBPs. However, the level of transparency in Tanzania and Nigeria is low. The question is whether this low level of transparency in the two states is due in some way to the unsuitability of the IBPs in asset management. Transparency is a core value of these IBPs. What is more, they tie the achievement of transparency to proper record keeping and reporting mechanisms.³⁴ With regard to record keeping, the IBPs encourage states to have electronic databases in order to facilitate record keeping and simplify the integration of data.³⁵ It is submitted that these requirements are feasible for Tanzania and Nigeria.

The only challenge facing the two states is the lack of electronic databases to allow integration of data. However, they are in the process of establishing such databases. After the installation of the electronic databases, integration of data ought to be possible. Moreover, lack of electronic databases does not mean that there never can be proper record keeping. States had been able to keep proper records well before the invention of computers. The electronic database assists mostly with accessibility, integration, transmission and reliable storage of data. It is not a precondition for proper record keeping. Thus, AMIs may not cite the lack of an electronic database as a reason for not publishing reports on their activities. Given the fact that Tanzania and Nigeria have established websites on which their AMIs may publish their reports, it is prudent for them to do so, for the benefit of the citizenry.

This proves that the elements of transparency contained in the IBPs are feasible in Tanzania and in Nigeria because their non-compliance is grounded only in choice. The two states seem to have opted not to publish their reports on asset recovery and management.

34 See Para 27(k) of the FATF Best Practices Paper (2012).

35 See G8 Best Practices (2005).

This argument is supported by the existence of websites on which the reports may be published and the fact that the responsible institutions have information regarding their activities which merit publication.³⁶ The feasibility of the transparency requirements of the IBPs in the African context is demonstrated also by South Africa, an African state which has managed to comply with all suggested requirements. Thus, it can be argued that the IBPs regarding transparency are feasible in African context.

6.3.2 Accountability

Accountability may be assessed in terms of the liability of the AMIs and their observance of the rights of crime victims. Reporting is also a form of accountability but it will not be assessed under this heading as it has been discussed already in §6.2.1 above. The level of accountability in the three designated countries is considered below.

6.3.2.1 Accountability in Tanzania

The system of managing proceeds of crime in Tanzania allows for accountability of the AMIs, especially the trustee. The trustee is liable for damage to assets resulting from negligence in the course of discharging of his duties.³⁷ However, when the assets are not put into the custody of the trustee, the law does not provide for any accountability for their management. This means that nobody can be held accountable for any loss of value in the preserved assets. A good example of non-accountability of the institutions, other than the trustee, entrusted with managing preserved assets is the *Hsu Chin Tai* case.³⁸ The instrumentality of the crime in this case was a ship used for illegal fishing. The government did not benefit from the confiscation of the ship as, by the time the order was granted, it reportedly was sinking.³⁹ Despite the fact that the sinking was publicised by the media, no rescue was attempted and the ship, which had the

36 For example, the contents of the DPP (T) press release on the importance of asset recovery policy have been published on the StAR Initiative website at https://star.worldbank.org/star/getting_asset_recovery_moving_tanzania.

The press release was not celebrated much in Tanzania, with only few newspapers publishing articles regarding it. The same scenario is seen in Nigeria, where valuable information on asset recovery and management has been compressed as annexures to an article published in response to public queries, and referred to as additional information for those who wish for more. Visit <https://efccnigeria.org/efcc/index.php/setting-the-record-straight> for the article and annexures.

37 See Section 49(1) of POCA (T).

38 Criminal Sessions Case No38 of 2009, High Court of Tanzania.

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

capacity to fish on the high seas, sank.⁴⁰ Nobody has been held accountable for the loss to the government. Had the ship been under the control of a trustee, the government would have been able to recover damages resulting from the loss.

With regard to recovered assets, there is no separate accountability because depositing the recovered assets with the Treasury Registrar marks the end of the asset recovery process in Tanzania. Nobody is responsible for what becomes of the recovered assets thereafter.

Moreover, the law does not consider victims, except those affected directly by the crime committed in a particular case.⁴¹ This has a negative impact on accountability in the asset management process in Tanzania.

6.3.2.2 Accountability in South Africa

Accountability is a crucial aspect of asset management in South Africa. The most active asset manager in the country, the *curator bonis*, is accountable for unsatisfactory discharge of his functions and for resulting damages.⁴² There is also a system of checks across other institutions involved in managing assets subject to recovery. For example, the police's power regarding seizure of assets under restraint and preservation orders is subject to directions issued by the court.⁴³ Further, court orders restraining or preserving assets are not absolute. They can be varied or rescinded by the court which issued them.⁴⁴ The checks that exist assist in maintaining and promoting accountability.

The law also protects the rights of the victims of crime.⁴⁵ The disposition and utilisation of the forfeited assets are regulated well,⁴⁶ thereby enhancing the system of accountability applicable to asset management in South Africa.

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

41 By contrast, the system in South Africa provides that recovered assets may be used to fund institutions that deal with victims of crime generally. See Section 69A(b) of POCA (SA).

42 See Regulation 2 of GN No 19914 and Section 77 of the Administration of Estates Act.

43 See Sections 27 and 41 of POCA (SA).

44 See Sections 26(4)(b) and 39(3) of POCA (SA).

45 The victims receive court ordered compensation and some recovered funds are injected into the institutions that deal with victims. For the year 2014/2015 a total of R1.658 billion from recovered assets was paid to victims as compensation. See NPA Annual Report (2014/2015: 101).

46 See Section 69(A) of POCA (SA).

6.3.2.3 Accountability in Nigeria

The level of accountability of the EFCC for its management of preserved assets in Nigeria is low. The law does not establish any kind of liability for the EFCC for mismanagement of assets under temporary forfeiture order. Victims of the offence can be considered for compensation only by the court.⁴⁷ Such consideration covers only those directly affected by the crime. This restricts the level of accountability of the EFCC for managing seized assets and assets under temporary forfeiture orders.

With regard to recovered assets, no separate accountability is provided for the funds after they have been deposited into the Consolidated Revenue Fund of the Federation. As with the practice in Tanzania, nobody is required to account for what has been done with the recovered funds. Needless to say, this reduces seriously the level of accountability for the management of recovered assets.

6.3.2.4 Accountability in Comparative Review

Accountability is a basic criterion for every government institution. Lack of accountability never should be tolerated. The IBPs encourage asset management institutions to be accountable. In order to enhance the level of accountability, they suggest liability for the AMI in cases of negligence.⁴⁸ The assessment shows that South Africa has a considerably higher level of accountability in this area than Tanzania and Nigeria.

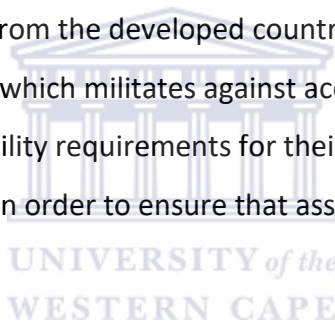
The accountability requirements are feasible for the three states because they are not new. Accountability is part and parcel of the conduct of government institutions. Most states do regulate the conduct of government officials and provide for their accountability. What the IBPs suggest is the broadening of accountability to encompass liability for the damages caused by negligent misconduct. The state should put into place a system which will allow for the disciplining of the officials dealing with management of preserved assets and recovery of the value of assets. This may be achieved by incorporating a section on liability for the AMIs in the

47 See the list of EFCC convictions available at <https://efccnigeria.org/index.php/convictions>. The convictions show court ordered compensations to victims. There is no report showing recovered funds being channelled to compensating victims.

48 See G8 Best Practices (2005). See also Para 27(d)(v) of the FATF Best Practice Paper (2012).

laws dealing with the management of the preserved assets. South Africa did this successfully by imposing liability on the *curator bonis*. Tanzania practises partial accountability as it imposes liability on the trustee only. Nigeria does not impose any liability. These states ought to consider inclusive liability for their AMIs regarding derelictions.

With regard to recovered assets, the IBPs propose the establishment of special funds and the control of the utilisation of assets and realised values deposited into the fund. They encourage states to identify the areas in which the funds may be utilised. In order to ensure proper utilisation, the IBPs require special accounting for the allocated funds and auditing of the relevant accounts. The establishment and running of an asset recovery fund is feasible in both Tanzania and Nigeria. This is proved by the existence of other special funds within these states.⁴⁹ The point is that it cannot be argued that non-accountability derives from non-feasibility of transferring the IBPs from the developed countries to Africa. There is nothing peculiar about the African context which militates against accountability. Hence, Tanzania and Nigeria should establish accountability requirements for their institutions involved in managing preserved and confiscated assets, in order to ensure that asset recovery policy achieves its goals.



6.3.3 Efficiency

The efficiency of any system may be assessed by its capacity to perform the functions entrusted to it and the level of performance it achieves. In turn, the efficiency of a system of asset management may be evaluated against its capacity to manage the assets properly during the entirety of the forfeiture proceedings. The capacity of a system to manage assets is determined, *inter alia*, by its legal mandate, the accountability of responsible officials and the availability of resources. These are discussed below.⁵⁰

49 See, for example, the Judiciary Fund established under Section 52(1) of the Judiciary Administration Act No 4 of 2011 of Tanzania. In Nigeria there are funds such as the Armed Forces Benefit Fund, the University College Endowment Fund and the Stock Transfer Stamp Duty Fund. See the First and Second Schedules to the Finance (Control and Management) Act, 1958.

50 Skill and experience also form elements of capacity but will not be discussed here because the IBPs do not restrict asset management responsibilities to a single institution. They allow for the use of asset managers and contractors as backup mechanisms for the systems that exist in the three states. See also Para 26 of the FATF Best Practices Paper (2012).

6.4.3.1 Efficiency in Tanzania

The system in Tanzania may be classified as partially efficient. POCA (T) protects sufficiently the assets put under the control of a trustee.⁵¹ By contrast, assets which are seized and left in the hands of the institutions that seized them do not enjoy such protection. Disciplinary action may be taken against irresponsible officers for mismanagement of assets.⁵² However, there is no mechanism by which the lost value of a mismanaged asset may be recovered from those officers. In most cases, the state will bear the burden of damage caused by official's mismanagement. This undermines the efficiency of the asset management system in maintaining the value of the preserved assets.

The mandate of the AMIs is limited to administration of the preserved assets only. The recovered assets deposited with the Treasury Registrar are treated and accounted for as government assets generally. The law does not prescribe specific utilisation for the recovered funds and the system does not provide for special accounting and auditing requirements. This weakens the efficiency of the asset management system in achieving the goals of asset recovery policy.

The asset managing system in Tanzania does not receive sufficient funding from the government.⁵³ The IBPs require the institutions dealing with management of assets to be funded adequately. Inadequate funding may be attributed to the level of the economy of the country and priority areas to be handled by the state. Economic crimes are not the sole challenge facing Tanzania. The country faces other serious challenges such as health,⁵⁴ poverty and other socio-economic problems.⁵⁵ They all require funding from the state. In such circumstances it is not easy to direct the bulk of available funds to tackling one challenge,

51 The trustee may be liable for damages caused by his negligent conduct. See Section 49(1)(a) of POCA (T).

52 See Rules F 26 & 27 of the Standing Orders for Public Servants (2009), made under Section 35(5) of the Public Service Act of Tanzania [Cap 298 RE 2002].

53 For example, by April 2016 (two months before the end of 2015/2016 financial year) the Ministry of Justice and Constitutional Affairs had received only 60% of its allocated budget. The budgets of the Office of the DPP, Attorney General's Chamber and the Court reside under this ministry. See Para 36 and 37 of the Budget Speech by HON. Mwakymbe HG (MP), the Minister of Justice and Constitutional Affairs for the year 2016/2017.

54 See Kwesigabo *et al* (2012).

55 See The World Bank, Tanzania Country Overview (2015).

leaving others unattended. The funding requirements of the IBPs thus are partially feasible in Tanzania.

6.3.3.2 Efficiency in South Africa

Of the three country systems, the South African may be considered the most efficient. It preserves the assets by restraint⁵⁶ and preservation orders⁵⁷ in which responsibility for the management of assets is that of the person who was in possession of them at the time of the making of the orders.⁵⁸ The mechanisms are cheap both in terms of labour power and financial costs because the control of assets under preservation or restraint is done by monitoring.

Where the restrained or preserved assets are under threat of being disposed of or dealt with contrary to the court orders, the system allows for their seizure.⁵⁹ The seized assets are put under the control of a court appointed trustee, the *curator bonis*.⁶⁰ The *curator bonis* is subject to a number of conditions aimed at ensuring that the value of the assets in his custody is maintained.⁶¹

The mandate of the AMIs extends to the entire asset recovery process. During the post-confiscation stage, transactions with the assets are regulated well. CARC proposes the manner of disposition and utilisation of the recovered assets deposited in CARA,⁶² the Cabinet allocates the recovered assets in accordance with the CARC proposals,⁶³ Parliament approves the allocations,⁶⁴ and the Auditor-General audits the utilisation of the allocated funds and assets.⁶⁵ All these processes make the South African system of managing the preserved and recovered assets efficient.

56 See Section 26 of POCA (SA).

57 See Section 38 of POCA (SA).

58 Restraint orders are employed also in Tanzania for assets involved in serious offences, as defined by the Act (see Sections 38(1) and 39 of POCA (T)), while in South Africa they are the main way of preserving assets for confiscation purposes.

59 See Sections 27(1) and 41(1) of POCA (SA).

60 See Sections 28(1) and 42(1) of POCA (SA).

61 The conditions include variation of curator fees, disallowance of fees and furnishing security for the assets under curatorship. See Regulation 2(2) of GN No 19914 as amended by GN No 21504 of 1 September 2000. See also Section 77(1) of the Administration of Estates Act.

62 See Section 69 of POCA (SA).

63 See Section 69A(1) of POCA (SA).

64 See Section 69A(3)(a)(ii) of POCA (SA).

65 See Section 69A(8) of POCA (SA).

The available reports do not state anything regarding scarcity of resources. This raises a presumption that the AMIs in South Africa receive sufficient resources for their activities.

6.3.3.3 Efficiency in Nigeria

The asset management system of Nigeria has been described as generally weak.⁶⁶ Seizure is the basic procedure for preserving the assets for forfeiture purposes.⁶⁷ All seized assets are put under the control of the EFCC.⁶⁸ Despite the fragile role entrusted to the EFCC, the law does not provide for any liability for damage caused to the preserved assets. This means that the state will have to bear all costs resulting from negligence of its officials. This *lacuna* impairs the efficiency of the EFCC as regards the maintenance of the value of the assets under its control.

The mandate of the AMIs is limited to administration of the preserved assets, as in Tanzania. The assets deposited into the Consolidated Fund of the Federation are treated and accounted for as ordinary government assets. The system does not provide for special accounting and auditing requirements. This weakens the efficiency of the asset management system in controlling the utilisation of the recovered assets for projects that promote the implementation of asset recovery policy. It may affect also the capacity of the state to achieve the goals of asset recovery.

The EFCC also does not receive adequate funding. The funding challenges are linked to the level of economic development and other impediments facing the country. The challenges include poverty, health, extremist groups (for example, Boko Haram) and undeveloped infrastructures.⁶⁹ All these areas affect the welfare of Nigerian citizens and they need to be addressed along with economic crimes. Thus, the state cannot be blamed readily for funding the EFCC inadequately.

6.3.3.4 Efficiency in Comparative Review

Efficiency in managing the proceeds of crime is vital to the implementation of asset recovery policy. Inefficiency renders said policy worthless. States need to ensure the proper functioning

66 See Shehu (2014: 199).

67 See Section 26(1) of the EFCC Act.

68 See Section 26(3) of the EFCC Act.

69 See Ofoche (2012: 7-13).

of their AMIs in order to implement asset recovery policy effectively. Although the systems of Tanzania, South Africa and Nigeria are capable of administering preserved assets during the recovery process, the efficiency of the Tanzanian and Nigerian systems is low compared to the system in South Africa. The low efficiency level in the two states is caused mainly by lack of accountability of the institutions involved in managing preserved assets.

When the asset management system is composed of a number of institutions, as in Tanzania, the creation of a system of checks and balances for their functioning is important. In this way, the actions of one institution will be checked and balanced by another institution. Such an approach may assist in controlling the abuse of powers by the institutions involved in managing preserved and recovered assets. The effectiveness of checks and balances in promoting efficiency of the asset management regime is demonstrated by the South African system.

States should think also of imposing liability on the AMIs, especially for negligent misconduct. The liability to be imposed should be centred on recovering the damages occasioned by negligent misconduct rather than on punishing the irresponsible officers for their errant. This will assist in promoting the efficiency of the asset management system and in upholding the values of the asset recovery policy. South Africa again sets a good example in protecting the value of preserved assets by imposing liability on the *curator bonis*.

Accountability requirements contained in the IBPs have been assessed in the previous section and found to be feasible in the African context. Thus, Tanzania and Nigeria should enhance accountability in their systems in order to increase their efficiency levels.

The main challenge facing the efficiency of the systems in Tanzania and Nigeria is insufficient funding. The inadequate funding of the asset recovery and management institutions in the two states is linked to the socio-economic challenges facing them. The two states need to address all their serious challenges and the need to allocate state funds to do so. Hence they cannot be blamed summarily for not funding fully the asset recovery and management institutions. Indeed, the multiplicity of serious challenges might be the “real” challenge facing African states. Problems of health, education, unemployment and poverty in Tanzania and

Nigeria invariably have a stronger claim on state funds than the AMIs. Thus, compliance with the funding requirements of the IBPs is only partially feasible.

6.4 Overview of the Feasibility of IBPs

The general assessment undertaken above suggests a positive response to the issue of feasibility of the IBPs in the African context, except for the funding requirement which appears to be only partially feasible. The IBPs insist on transparency, accountability and efficiency in the management of preserved and recovered assets. They do not push the states to establish new structures; instead, they encourage them to employ the available structures. New elements are introduced with hortatory language, for example, the installation of an electronic database appears as a suggestion.⁷⁰

The flexible nature of the IBPs allows them to be implemented without serious difficulties. This is proved by South Africa which emerged as the most compliant of the three states. The efforts of Tanzania and Nigeria to comply with the IBPs also show their feasibility. The main challenge here is the funding requirement which tends to undermine the efficiency of the systems in Tanzania and Nigeria. However, the challenge is not entirely debilitating because the AMIs do receive funding. The problem is that the allocated funds do not match their operational requirements. The AMIs thus have to attempt to meet their obligations in fairly trying financial conditions.

Another challenge in implementing the IBPs in Africa is their flexible structural criteria. The IBPs do not insist on the establishment of a primary, dedicated AMI. The effects of this discretionary approach may be seen in states which have chosen to assign several institutions to managing assets. Good examples of such states are Tanzania and South Africa. The AMIs in these two states lack clear co-ordination as no single agency is vested with primary responsibility for asset management.

The negative effects of this challenge are mitigated somewhat by the commitment of the responsible institutions to performance of their duties. However, in some instances they do

70 The relevant G8 Principle reads: "States should consider the use of information technology (IT) systems for the administration of seized property."

become evident. For example, Tanzania and South Africa do not have a special institution which is responsible for assets subject to recovery. It is presumed that the AG in Tanzania and the NDPP in South Africa are accountable for the preserved assets because the court orders to restrain or preserve the assets are issued in their favour. However, the validity of this presumption is questionable, as there is no legal basis for it. The point is that establishing a primary AMI is crucial for ensuring the efficiency of the system as it means vesting responsibility in one agency which may be monitored and called to account easily. Of course, other institutions may be involved in managing the assets, but under the auspices and co-ordination of the designated institution.

Thus, it may be accepted that the IBPs, although originating from the practices of developed states, are feasible overall in the African context. However, African states should find their own ways of addressing the issue of funding and should consider also having primary AMIs for purposes of co-ordinating and monitoring asset management processes. A primary institution does not have to be created specifically. It may be any of the existing institutions that take part in managing assets. The law simply needs to vest primary responsibility in any of them with a view to enhancing the accountability and efficiency of the asset management system.

6.5 Research Questions Revisited

This section foregrounds the key objective of this chapter which is to attempt to answer the three research questions formulated in Chapter One. They are:

- Do the asset management policies in the three designated countries comply with the IBPs?
- What are the challenges facing the three states in adopting the IBPs?
- Is there a need to amend the existing laws in any of the three countries to provide for a more reliable asset management system?

Some response to these questions has been given already in the course of the analysis of the pre- and post-confiscation asset management policies of the three countries. However, this part seeks to provide a more comprehensive set of answers.

6.5.1 Compliance with the IBPs

Tanzania, South Africa and Nigeria all have shown some political will to implement asset recovery policy⁷¹ and adopt the IBPs on managing preserved and recovered assets. Political will is vital to implementing asset recovery policy.⁷² Although there is no standard measure of political will, it can be established from the commitment of political actors, state actors and civil servants to ensuring that asset recovery policy is implemented effectively.⁷³

6.5.1.1 Compliance in Tanzania

Asset recovery policy in Tanzania, although not new, is still in its preliminary stages of development. Not much has been done with regard to other policies, including asset management policy, which complements asset recovery policy. In other words, the country does not have a well-developed policy for managing preserved and recovered assets.

The analysis conducted in Chapters Three and Four, and the general assessment in this chapter, show that Tanzania may be rated as being in partial compliance with the IBPs in respect of the management of preserved and recovered assets. This imperfect compliance is due mainly to the country's slanted post-confiscation policy. The Tanzanian pre- and post-confiscation asset management policy is premised solely on the principle that crime should not pay. No regard is given to the principle of corrective justice. The asset management policy ought to give proper attention to remedying the harm caused by the crime. The fact that the IBPs do not deal expressly with corrective justice does not mean that states should be tardy about confronting the harm caused by the crime.

71 See the statement of the DPP (T) on the importance of asset recovery policy in the fight against financial crime given during a press conference on 28 January 2016. He said that the Tanzanian government identified asset recovery as "a core priority for the criminal justice system in the fight against crime" since 1990. See also the address by the Hon JH Jeffery, MP, the Deputy Minister of Justice and Constitutional Development, in which he describes asset recovery policy as a means of taking profit out of crime, a means of targeting criminals where they feel it most and a means of taking from the perpetrator and giving back to the victim of crime, available at www.justice.gov.za/m_speeches/2014/20141001_AFU.html. In Nigeria implementation of asset recovery policy is incorporated into the EFCC mission statement which aims: "To rid Nigeria of economic and financial crimes and effectively co-ordinate the domestic effort of the global fight against money laundering and terrorist financing", available at <https://efccnigeria.org/efcc/>.

72 Stephenson (2011: 24-25) identifies lack of political will as one of the barriers to implementing asset recovery policy.

73 See Gray *et al* (2014: 33).

Further, Tanzania lacks some of elements of reliable AMIs, such as transparency and accountability. Aspects of accountability exist, but the system lacks comprehensive accountability as there is no established mechanism that enables the state to recover the value of preserved assets lost as a result of mismanagement.

The efficiency of the AMIs is affected negatively by inadequate funding and the absence of a primary AMI. This means that the alignment between the Tanzanian asset management system and IBPs is partial at best.

6.5.1.2 Compliance in South Africa

The jurisprudence of asset recovery policy in South Africa is well-developed. Also, the management of preserved and recovered assets is guided by a well-structured policy which addresses combating crime and rectifying the harm caused by the crime. In its pre-confiscation stage, the South African asset management policy seeks to ensure that crime does not pay by preserving criminal proceeds for later confiscated by the state. During the post-confiscation stage, the asset management policy ensures that recovered assets are utilised in a manner that will assist to remedy the harm caused by the offence. South Africa takes seriously the issue of utilising the recovered assets to cater for victims of the offence. The law provides for direct compensation to the victims of the offence, the return of recovered assets to identifiable lawful owners, and the funding institutions dealing with victims of crime. All these show the commitment of the state to ensuring that corrective justice is achieved. The post-confiscation policy enables the state to address both retribution and corrective justice.

In addition to the balanced policies on asset recovery, the country has complied with almost all elements recommended for a reliable asset management system which is characterised by transparency and accountability. The system is also efficient, though its efficiency is affected by lack of a primary AMI for assets under restraint and preservation orders. With recovered asset the law vests the management powers in CARC. No institution is vested expressly with powers to monitor and co-ordinate the management of assets under restraint and preservation orders. However, establishing primary AMIs is not among the

requirements of the IBPs. Thus, the South African asset management system conforms to the IBPs.

6.5.1.3 Compliance in Nigeria

Nigeria is considered the most experienced state in Africa when it comes to implementing asset recovery policy. Nevertheless, Nigeria does not have a well-developed asset management policy. As with the situation in Tanzania, the Nigerian asset management policy is concerned only with the principle that crime should not pay. The country does not take seriously the issue of correcting the harm caused by the crime. In the absence of direct victims, no attention is given to criminal damage.

The country also lacks important elements recommended for an asset management system, such as transparency and accountability which lack, in turn, affects the efficiency of the system. Although everything falls under the umbrella of one institution, the EFCC, there is no well-established mechanism of asset management. The efficiency of the system is undercut also by inadequate funding. As a result, the Nigerian asset management system conforms only partially to the IBPs.

6.5.1.4 Compliance in Comparative Review

The structure of asset recovery is derived from the IBPs. An analysis of the IBPs shows that their basic objective is to combat crime. Asset management, as a complement to asset recovery, should have its primary aim linked to the purposes of the latter. The crucial issue, therefore, is whether asset recovery, as the source of asset management, is centred upon combating crime.

As a general rule, it may be accepted that asset recovery policy is implemented mostly to combat crime. It has been established that economic crimes threaten the international economy by eroding fair competition in world markets, damaging the image of financial institutions and destabilising the economic development of the states.⁷⁴ Moreover, terrorism, which is threatening the world's peace, is linked intimately to funds which constitute proceeds

74 See Greenberg *et al* (2010: xiii).

of transnational economic crimes.⁷⁵ Thus, combating crime is vital for the world's economic and political stability. Asset recovery is regarded as a means through which financing of crime may be eliminated and organised criminal groups may be disempowered.⁷⁶ Thus, asset recovery is articulated more as a tool to render crime unprofitable than to correct the harm caused by crime.

However, the international instruments, especially UNCAC, provide for two purposes of asset recovery: combating crime and remedying the harm produced by crime.⁷⁷ Asset recovery is different from ordinary punishment because it involves taking away the benefits accrued from crime. As a means of rectifying the inequalities generated by the crime, it has to follow the rules of corrective justice. Criminals benefit at the expense of the victims, and in order to eliminate the disparity arising from crime, the recovered assets have to be returned to the victims. This is reflected in UNCAC's principle that recovered assets be repatriated.⁷⁸ UNCAC advocates not only the recovery of proceeds and instrumentalities of crime, but also the return of recovered assets to the victim states.⁷⁹

Implementation of asset recovery with the intention of achieving both goals is very important to Africa. Most African states are victims of looting, hence asset recovery emerges as a means of retrieving their stolen assets and utilising them for economic and social development. Thus, African states, including Tanzania and Nigeria, should focus on having asset management policies that aim at remedying the harm caused by crime. At the international level, UNCAC has dedicated itself to addressing the return of assets to the victim states as a means of making good the damage occasioned by the crimes committed in those states. Correspondingly, at the domestic level, states should consider returning recovered assets to the victims of the crime as a way of remedying the detrimental effects of the crime. South Africa stands as a good example of a state that considers employing recovered assets to redress the harm caused by crime, although the option is not taken to be the core purpose of asset

75 See Johnson & Cornell (2007: 72)].

76 See Vettori (2006: 2].

77 See Article 31 and 57 of UNCAC.

78 See Article 51 of UNCAC.

79 See Article 57 of UNCAC.

recovery policy in the country.⁸⁰ The deployment of recovered assets to make good criminal harm should appear as an integrated purpose of asset recovery, not as something incidental.

6.5.2 Challenges in Adopting the IBPs

Implementing a system which is not tailor-made for a particular state always brings challenges. There is no system that can be proclaimed universal in its mode of implementation. After all, no one shoe can fit all. Each state has to find its own ways of adapting the IBPs to fit its domestic legal framework. The most promising feature of the IBPs is their flexibility. The elements contained in them are capable of being adapted to accord with the domestic legal system of any state. Still, some states continue to face challenges in adopting the IBPs.

6.5.2.1 IBPs in Tanzania

Tanzania has shown political will to adopt the IBPs on managing preserved and recovered proceeds of crime. However, it still has to contend with legal, technical and financial challenges.

The main legal challenge is the lack of regulations on asset management. Regulations assist in the smooth operation of the law. They are important as it is not possible to provide categorically for everything in the main legislation. The provisions of POCA (T) on managing preserved and recovered assets are very narrow. They merely mention the managing of the assets and entrust the duty to the IGP and the trustee without attempting to regulate the asset management process.⁸¹ Regulations are needed to enhance the operation of the asset management system.

Tanzania lacks experts in the field of asset recovery, especially for managing preserved and confiscated assets.⁸² Although the law that provides for asset recovery has been in force for more than two decades, the country has not yet equipped its responsible officers with the skills

80 Allocation of funds for the organisation that deals with the victims of crime is secondary to the funding law enforcement agencies. See Section 69A (1) of POCA (SA).

81 See Section 38 of POCA (T). The section specifically addresses seized assets - not all preserved assets.

82 The AFRS, which is responsible for matters pertaining to asset recovery, is composed of a few state attorneys operating from the ODPP Headquarters.

needed for the proper management of assets.⁸³ This is a major implementation challenge facing Tanzania, since asset recovery without proper asset management is largely worthless.

Another impediment to the establishment of a proper asset management regime in Tanzania is the lack of funds. Asset management is akin to an investment. It requires funds to be available to pay for asset administration costs. There are also costs linked to the establishment and running of the AMI. Asset management, whether done by a specialised institution or by several institutions, requires skilled staff and reliable working tools. For these to be available, financial support is mandatory.

The problem of funding is connected to the lack of regulations on asset management. An appropriate regulatory framework would have made provision for the funding needed for asset management. Significantly, the trend emerging in the Tanzanian budget suggests that the state will be capable of providing the funds needed by the AMI.⁸⁴

Tanzania already has started to address these challenges by using both its domestic means and assistance received from international institutions. The country is in the process of developing regulations for the management of preserved and confiscated assets. The regulations are expected to address all *lacunae* identified in this work. Regarding the funding of the asset forfeiture section, its activities are part of the activities of the Directorate of Public Prosecutions in Tanzania. Thus, its financial needs have been incorporated into the general budget of the Directorate of Public Prosecutions.

On the technical side, the AFRS has been receiving support from the StAR Initiative. This technical support includes capacity-building and other matters which will assist in developing an efficient asset recovery and management system.⁸⁵ Tanzania is also a member of the Asset

83 The AFRS does not have personnel with asset management skills.

84 The Tanzanian government is working towards increasing revenue collection and reducing dependency on foreign aid. Such dependency has declined by a promising rate. It was 24 percent in 2004/2005, 17 percent in 2010/2011 and 6.4 percent in 2015/2016. See para 19 of the 2014/2015 budget speech delivered before the National Assembly by the Minister of Finance, the Hon Saada Mkuya Salum (MP).

85 See Miron (2016).

Recovery Inter-Agency Network for Southern Africa (ARINSA). Hence the AFRS benefits from the capacity-building programmes of ARINSA.⁸⁶

If these efforts continue, Tanzania will develop an efficient asset recovery regime with an appealing asset management system.

6.5.2.2 IBPs in South Africa

South Africa has adopted almost all the elements identified as necessary for managing preserved and recovered assets. The country has domesticated the IBPs in a manner that has made them compatible with its legal system. The South African system of managing preserved assets is cost effective. It allows the identified proceeds and instrumentalities of crime to be subject to restraint and preservation orders which do not involve physical control. Taking physical control of assets suspected to be proceeds or instrumentalities of crime occurs only where control by supervision is not feasible. This makes the South African system a model system for African states with developing economies.

Generally, the system of managing assets in South Africa seems to face no particular challenges.⁸⁷ However, POCA (SA) does not have a clear provision that allows for advance disposition of preserved assets. Although the Criminal Procedure Act⁸⁸ does provide for such disposition, its provisions cannot be applied in asset recovery cases under POCA (SA) because the law categorises asset recovery proceedings as being civil in nature.⁸⁹ The courts have interpreted the provision on the administration of assets to include advance disposition of assets.⁹⁰ However, the courts do not apply the literal interpretation of the section. They have resorted to judicial activism to uphold the spirit of POCA (SA). To make advance disposition of assets a clear option in the management of preserved assets, South Africa needs to have a

86 ARINSA conducts placement programmes for prosecutors and investigators as a means to capacitate its members on matters pertaining to asset recovery. For more information on ARINSA and the placement programme visit new.arinsa.org.

87 See Items 104 and 105 of the Country Review Report of South Africa on the Implementation of Chapter III and IV of the UNCAC (2010-2015 Review circle). The report identified no challenge regarding the administration of assets in South Africa.

88 See Section 30 of the CPA (SA).

89 See Sections 13 and 37 of POCA (SA).

90 See the court's interpretation of Section 28(3)(c) of POCA (SA) in *Mngomezulu's* case [2007] at para 11-14.

statutory provision which creates the option expressly. The provision should capture all reasons that may prompt such a disposition.

In addition, South Africa does not have special rules to regulate asset recovery proceedings. POCA (SA) provides for the enactment of such rules.⁹¹ However, said rules are not yet in place. Although the Act provides for alternative rules to be applied in the absence of the special rules, the alternative rules are subject to necessary changes to suit the proceedings under Chapters Five and Six of POCA (SA).⁹² Rules are very important in the enforcement of the substantive law. South Africa should consider making proper procedural rules for its asset recovery proceedings.

6.5.2.3 IBPs in Nigeria

Nigeria also has shown political will to adopt the IBPs. However, in its efforts to domesticate these practices, the country faces a number of challenges which may be categorised as legal, technical and financial.

The country does not have a well-established legal framework for managing seized assets and assets under temporary forfeiture orders. The law does not address preservation of those assets although it vests custody of them in the EFCC.⁹³ The EFCC also has not made any regulations yet for the handling of the assets in its custody. This *lacuna* in the Nigerian legal system affects negatively the administration of seized assets and assets under temporary forfeiture orders.

In addition to the challenges regarding the existing legal framework, Nigeria is facing technical challenges such as a lack of adequate skills in the asset recovery and management arenas. It needs also on-site assistance to improve its asset recovery regime.⁹⁴

Budgetary constraints invariably affect the development of a reliable system to manage assets. The EFCC does not receive budget allocations that match its needs. In some cases, even

91 See Section 62(1) of POCA (SA).

92 See Section 62(2) of POCA (SA).

93 See Section 26(2) of the EFCC Act.

94 See Para 2.4 of the UN Conference of States Parties, Implementation Review Group Report on the Review of the implementation of UNCAC Provisions Chapters III and IV in Nigeria.

the budgetary estimates of the EFCC are not met.⁹⁵ In such circumstances, it is not practicable for the EFCC to fund specialised training for its officials or establish a new department for the administration of assets, because both activities need funding.

However, the country already has begun to engage some of these challenges. The EFCC has established a training institute, the EFCC Academy, in which its officials receive training in different fields, including managing proceeds of crime.⁹⁶ The country also is receiving technical assistance from the UNODC and the StAR Initiative. With the help of the UNODC, it is in the process of establishing an electronic data base for record keeping and integration of data.⁹⁷ Nigeria is busy also amending its EFCC Act to provide for matters regarding asset management, which may enhance the asset recovery policy in the country.⁹⁸ If these challenges are addressed as planned, Nigeria will craft an efficient system to manage its preserved assets.

6.5.2.4 Adoption of the IBPs in Comparative Review

Challenges are part and parcel of implementing any system, whether within an institution or the state. The challenges identified in the AMIs of the three states are not insurmountable. They are capable of being addressed successfully. The states have made some noticeable attempts to deal with the challenges. Such efforts signify, it is to be hoped, that the identified challenges will be overcome. The assistance from prominent institutions dealing with the recovery of proceeds of crime, such as the StAR Initiative and the UNODC, makes it possible for the targets of the three states to be attained at a quicker pace.

95 See Lar (2012).

96 Managing proceeds of crime is amongst the courses which are offered. Visit <http://efccnigeria.org/efcc/index.php-about-efcc/efcc-academy>.

97 See, for example, the project on database installation. Visit <https://efccnigeria.org/efcc/index.php/external-cooperation/eu-unodc-project-1> for more information on the project.

98 See the 2014 EFCC Amendment Bill. Though the bill does not provide expressly for asset management, it is said that there is another bill on confiscation of assets which provides extensively for matters of confiscation of proceeds of crime and their management. See GIABA Report of 2011.

6.5.3 Statutory Amendments to Promote Asset Management

The question as to whether there is a need to amend existing laws to provide for a more reliable asset management system has to be answered in affirmative. There are several gaps in the existing asset recovery legal frameworks of the designated states, especially Tanzania and Nigeria. Effective laws have been identified as crucial mechanisms for improving the performance of asset recovery institutions within states.⁹⁹ South Africa employed this tool in improving its asset recovery law and it has worked relatively well.¹⁰⁰ Tanzania and Nigeria already have embarked on this route to address some of their challenges. The contents of the draft regulations for asset management in Tanzania and the draft bill on the confiscation of assets are not yet in the public domain. Thus nothing can be said at this juncture regarding their capacity to address the identified challenges.

The recommendations provided in the comparative review sections may assist South Africa and Nigeria in addressing some of the challenges facing their systems. However, this study is concerned to make detailed recommendations regarding the Tanzanian asset management regulations and other areas of the legal framework that need improvement. The relevant recommendations are contained in Chapter Seven.

99 For the importance of good laws in asset recovery processes, see OECD *Tracking Anti-Corruption and Asset Recovery Commitment: A Progress Report and Recommendations for Action* (2011: 36- 40). See also Brun *et al* (2011:91).

100 South Africa has repealed its Proceeds of Crime Act 76 of 1996 and replaced it with the Prevention of Organised Crime Act 121 of 1998.

Chapter Seven

Recommendations and Conclusion

7.1 Introduction

This study has assessed the policies that are employed in managing proceeds and instrumentalities of crime during the asset recovery processes in Tanzania, South Africa and Nigeria. This chapter highlights the findings of the study and recommends possible solutions to the challenges identified, with a focus on the situation in Tanzania. It also concludes the study.

The assessment undertaken in the previous chapters was concerned with the relevance and the feasibility of the IBPs in the African context. As to relevance, the study found that, despite having their origins in the conditions of the developed world, the IBPs were not context specific and were crucial also to successful asset management in Africa. As to feasibility, the study found the IBPs to be adoptable by African states, albeit with some technical and financial challenges. The biggest challenge, however, lies in the compatibility of the structural focus of the IBPs with African socio-economic conditions. The IBPs emphasise combating economic crime and do not pay noticeable explicit attention to addressing the harm caused by such crime. However, the socio-economic conditions of African states require equal emphasis to be given to combating economic crime and to correcting its harmful effects. This latter aspect corresponds to the Aristotelian principle of corrective justice¹ which forms part of the conceptual framework of this study.

As stated in the previous chapters, if crime should not pay then, likewise, nobody should suffer loss because of crime. The efforts of states to combat crime must include the pursuit of corrective justice. Each aspect of the crime must form an element of an overall ratio, the accused must be punished proportionally and the harm caused by the crime must be remedied. On this basis, the study recommends policy reconsideration and the amendment of the laws to support the new policy objectives.

1 See elaborations on the Aristotle's principle of corrective justice in Weinrib (2002).

7.2 Policy Reconsideration

The main concern of this study was to assess critically the policies that govern the management of the preserved and recovered proceeds of crime in Tanzania, South Africa and Nigeria. Asset management cannot stand independently policy-wise. Instead, it operates to accomplish the policy objectives of asset recovery. These policy objectives affect the nature and functioning of all other elements intended to support their actualisation. In other words, the policy founding asset recovery affects the legal framework built to support it, including the structure and functions of the AMIs.

The analysis of the pre- and post-confiscation asset management policies in the three designated states revealed that they are built primarily on the goal of combating crime. This is also the most prominent aim of asset recovery at the international level. However, combating crime should not be the sole purpose of asset recovery policy in Africa. Whereas combating crime indisputably is the primary purpose of enforcing asset recovery policy, there is a need for African states to pursue asset recovery with policy objectives that suit their socio-economic conditions. These conditions require that correcting the harm caused by crime be embraced as a policy objective of asset recovery.

UNIVERSITY of the
WESTERN CAPE

7.2.1 Balancing Policy Objectives

For the most part Africa is a victim continent in the context of economic crime. Most African states face challenges of looted economies.² Thus, when African states pursue asset recovery, they should comprehend it both as a tool to combat economic crime and as a means to rectify the harm caused by such crime. The idea of asset recovery as a mechanism of corrective justice has its justification in the primary principle of asset recovery policy, namely, that crime should not pay. If economic crime should not pay, then, conversely, nobody should suffer loss as a result of economic crime. In other words, African states need to balance the policy objectives of asset recovery between combating crime and remedying the damage it causes. This principle of

2 Africa is estimated to have lost in excess of USD 1 trillion over the past fifty years. See Mbeki Report on Illicit Financial Flows (2014: 13). See also Ribadu (2008: 29) and OECD *Tracking Anti-Corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action* (2011: 11).

corrective justice in asset recovery policy may be accomplished by addressing the following matters.

7.2.2 Addressing the Victims of Crime

In many states, crime is treated solely as a wrong against the state.³ Thus, enforcement of the prescribed penalty against the perpetrator is considered a satisfactory measure for disposing of the crime.⁴ However, this approach does not reflect the reality of crime and its consequences. Crime has primary victims other than the state.⁵ Generally, the victims of crime may be categorised into two groups, those directly affected by the crime and others who are not directly affected. Addressing the victims of the crime may assist in undoing the harm caused by the crime, thereby contributing to the target that “nobody should suffer loss because of crime”. As elaborated in the introductory chapter, undoing the harm caused by crime does not mean restoring the victims to their pre-crime status. Rather, the process refers to remedying the harm as far as is possible. It is easy to address the victims of crime who have suffered direct damages by way of restitution. For example, in the case of stolen assets, undoing the criminal harm will include the return of the recovered assets to their legitimate owners. This category of victims has been attended to properly in all three states considered.

The second category of victims comprises those who have not been affected directly by the crime. They are usually constituted as victims by crimes such as corruption, especially grand corruption. In such cases, an entire community might be affected, although nobody can establish individual damages inflicted by the crime. Thus, a different technique needs to be employed in addressing these victims. There are two preferred mechanisms for dealing with victims of this nature: funding institutions that deal with victims and funding public good projects.

3 See UNODC *Handbook on Justice for Victims: On the Use and Application of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999: 1).

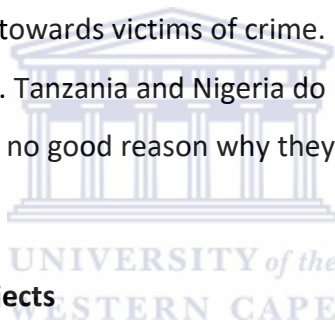
4 Lugakingira & Peter (2008: 292).

5 See the definition of a victim as constructed by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985 :para 1).

7.2.2.1 Funding of Institutions Dealing with Victims

The funding of institutions that deal with victims of crime is linked to the perception of victims held by a particular state. Where a state considers those affected by crime as victims rather than as mere witnesses in the prosecution of the case, this option may work properly. A good example of a state that has pursued this mechanism is South Africa, in which some funds from CARA may be used to fund institutions that deal with the victims of crimes.⁶

This option was incorporated into the law because South Africa has a positive perception of victims of crime. It has stopped considering crime solely as a wrong against the state. The country also takes victims of the crime seriously. Through the Victims' Charter, which traces its roots to the spirit of the South African Constitution,⁷ the victims of crime enjoy several rights, including the right to compensation and restitution.⁸ The funds from CARA contribute to the fulfilment of the state's duties towards victims of crime. In other words, they assist in undoing the harm caused by crime. Tanzania and Nigeria do not have such a mechanism for the victims of crime. However, there is no good reason why they should not make use of a similar mechanism in their jurisdictions.



7.2.2.2 Funding Public Good Projects

The funding of public good projects has been endorsed internationally as mechanism for the proper utilisation of recovered assets.⁹ Indeed, this study recommends such funding as one of the best ways of rectifying the harm caused by crime which affects an entire community. Grand corruption, for example, may have several effects, including the decline or even the elimination of reliable social services within a state.¹⁰ Using recovered assets to improve social services in the most neglected areas of the country would go far towards rectifying the harm caused by the crime. In point of fact, the money which was diverted by the crime well may have been intended to improve social services in the state. The crime would have subverted this intention and prevented any improvement in these services. Allocating recovered assets to address the

6 See Section 69A(b) of POCA (SA).

7 Section 234 of the South African Constitution. It is also in compliance with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).

8 See Paras 1 to 7 of the Service Charter for Victims of Crime in South Africa.

9 See Para 20 of the FATF Best Practices Paper (2012).

10 See Ribadu (2008: 29) and Snider & Kidane (2007: 692) for the effects of corruption.

development gap in social services caused by the crime actualises the principle of corrective justice.

7.2.2.3 Funding Law Enforcement Agencies

The funding of law enforcement agencies also is endorsed by the international community for utilisation of recovered assets.¹¹ This option has been challenged for changing the purpose of asset recovery from combating crime to sourcing funds for law enforcement agencies.¹²

However, the validity of such an allegation depends crucially upon the procedures involved in the allocation process and the factors that are considered during the process. If the system of allocation of recovered funds is transparent and accountable, the allegation likely will be baseless.

This study supports the funding of law enforcement agencies from recovered assets as a means of correcting the harm caused by economic crime. Investigation and prosecution of economic crimes is different from ordinary crimes as it involves a number of technical issues.¹³ When recovery of proceeds of crime is pursued, investigators need to conduct parallel investigations, one on the evidence that establishes the ordinary offence and the other on the available proceeds of crime. The same scenario may face the prosecutors conducting ordinary criminal trials while also instituting applications for the recovery of the proceeds of crime.

The state has to cover all expenses required by its law enforcement agencies. This imperative may contribute to limiting the allocation of funds to other projects which might also be important to the state. However, using the recovered assets to fund the law enforcement agencies may assist in saving costs which otherwise would have been incurred by the state in providing for law enforcement. The option is more useful in cases of international asset recovery involving law enforcement agencies of other states. Such circumstances may require the requesting state to contribute to costs incurred by the law enforcement agencies of the requested state. Instead of the requesting state defraying such costs from its budget, it may

11 See Article 14(3)(c) of the Palermo Convention. See also Para 20 of the FATF Best Practices Paper (2012).

12 Stennes (2000: 56-58).

13 See StAR Initiative (2011: 12-13).

enter into an agreement to share the recovered assets.¹⁴ Such an agreement will lessen the burden of costs on the requesting state.

It needs to be noted, however, that injecting too large a portion of recovered assets into the funding of law enforcement agencies may send a negative signal to the citizenry.¹⁵ In this regard, it may be appropriate, especially in cases of domestic asset recovery, to consider the funding of law enforcement agencies as a last resort, after the funding of institutions dealing with victims and the funding of public good projects. This ranking of funding options will assist the states to avoid negative perceptions that may arise against the implementation of asset recovery policy.

It is to be hoped that the suggestions offered above may contribute to African states pursuing asset recovery with balanced policy objectives which encompass both combating economic crime and correcting the harm caused by such crime.

7.3 Enhancing the Tanzanian Asset Management Regime

The assessment undertaken hitherto shows that asset recovery policy in Tanzania does not have balanced policy objectives. It aims mainly at combating crime by making it unprofitable. The country's approach to managing the proceeds of crime, as a complement to asset recovery policy, seeks to accomplish the same goal. It is argued that Tanzania should consider crime to be more than a wrong committed against the state. The country should address also the harm caused by crime to the citizenry. To achieve this, Tanzania should consider reformulating its asset recovery regime in terms of balanced policy objectives. Specifically, amendments to the following aspects of the legal framework governing asset management are suggested:

- the general coverage of the law on issues pertaining to asset management;
- the functioning of the AMIs;
- the legal control of factors affecting the value of preserved and recovered assets.

14 See Kaye (2006: 324). See also Article 5(5)(b) of the Vienna Convention and Article 14(3)(b) of the Palermo Convention.

15 It may be perceived that the policy is implemented for the benefit of the law enforcement agencies, not the citizenry.

7.3.1 General Coverage of the Law

A major challenge in need of addressing is the lack of regulations for managing preserved and recovered assets. Asset management needs to be regulated well. POCA (T) empowers the Minister to make regulations to ensure the smooth operation of the law.¹⁶ It also provides for the management of proceeds of crime during the recovery process¹⁷ but the relevant provision is too narrow. The provision does not cater for matters considered to be necessary during such management. Essentially, regulations for managing preserved and recovered assets are required. The regulations should address the manner of handling those assets in general. They can include matters such as the valuation of assets, proper record keeping, reporting requirements and the auditing of the asset management process.¹⁸

As to the valuation of assets, it makes sense that the assets intended to be preserved for confiscation be valued before applications are made to the court for preservation orders. At the latest, it ought to be done immediately after court proceedings have been initiated but before the granting of the preservation order. The value of the assets should be assessed against liabilities, if any, attached to it. This will help the law enforcement machinery to ensure that valuable assets, rather than liabilities, are preserved for confiscation.¹⁹ An early valuation will establish whether the assets in question have any realisable value. The services of the government valuator can be employed for the fair valuation of the assets.

For record keeping, the use of information technology is necessary²⁰ to facilitate asset tracking and integration of data from across the country. The recorded information should include particulars of the asset, such as its nature, its value and mode of preservation, the cost of managing the asset, the mode of disposition and its realised value after disposition. With all this information, the AMI will be in a position to account for its activities. Now that the

16 See Section 79 of POCA (T).

17 See Section 35 of POCA (T).

18 See Para 27(k) of the FATF Best Practices Paper (2012).

19 See G8 Best Practices (2005).

20 See G8 Best Practices (2005).

Directorate of Public Prosecutions is in the process of installing an electronic database in all regional offices,²¹ the challenges regarding record keeping might be overcome substantially.

The regulations enacted to govern asset management should include reporting obligations for the AMIs. Regular reporting will increase the level of accountability of the AMIs. It is also a commendable way of giving feedback to the citizens, which feedback is very important in the implementation of asset recovery policy. To start with, annual reports may be useful. However, the regulations should make provision for reporting whenever necessary. To make reporting meaningful, the regulations should make the publication of the reports mandatory. Such publication should be done in a manner that will allow the citizenry to access the reports. It may include regular online publication.

In addition to the enactment of regulations, the primary law itself, that is, POCA (T) needs to be amended in certain respects. To begin with, the law should entrust the AMIs with the power to dispose of the assets under their control. This power must be wide enough to cover advance disposition of the preserved assets²² and final disposition of the recovered assets. The grounds for advance disposition should include the need to preserve the value of the assets where efforts to preserve the assets itself will cause deterioration of its value. It should include also the costs of managing the assets where such costs will exceed their realisable value and any other reason that will necessitate advance disposition of the assets. Advance disposition should be subjected to special controls, such as court consideration and approval. Such controls will interpose checks and balances between the institutions dealing with the management of proceeds of crime, which are important for safeguarding the rights of defendants and victims.

The law should be amended also to establish categorically how the funds realised from advance dispositions ought to be handled. In this regard, the creation and administration of a profit-generating account with a trustworthy financial institution is the most sensible option.

21 See the Report of the Directorate of Public Prosecutions on Development Projects (2014: 7-9) for detailed information concerning the Case Docket Management project.

22 See Para 27(g) & (h) of the FATF Best Practices Paper (2012).

Such an account will assist in maintaining the realised values and, when the values are invested for a long enough period, will assist in adding value to the preserved assets.

With regard to funds obtained after final disposition of assets, Tanzania ought to consider the establishment of an asset forfeiture fund within the treasury. This fund will act as a reliable depository for all confiscated assets. The asset recovery fund should be run by an independent board or committee that should have, amongst its members, representatives from parliament and civil society organisations to ensure public participation in managing the proceeds of crime. It should have also members from the law enforcement agencies and from the Executive. The functions of the board or committee should include considering and suggesting expenditures from the fund, subject to the approval of Parliament. The board or committee should be responsible also for advising the administrators of the fund on matters regarding the implementation of asset recovery policy in general.

The law should be amended further to provide for preferred areas for utilisation of the values deposited into the fund. Here it is recommended that expenditures from the fund should focus on compensating victims of crime and funding projects that will promote the public good, including institutions that deal with victims of crime. Where necessary, some funds may be injected into the law enforcement agencies.

There should be special accounting and auditing arrangements to ensure proper utilisation of monies allocated from the fund. The services of the Auditor General may be employed in this respect. The report of such auditing should be made available to the public to ensure accountability and build public trust, which are of the utmost importance to the legitimacy of asset recovery policy.

7.3.2 The Functioning of the Asset Managing Institutions

The first area that needs improvement as regards the functioning of the AMIs is co-ordination. The law needs to provide for clear co-ordination across the institutions dealing with the management of preserved and confiscated assets by establishing which institution will have the primary role. This prioritisation is needed to increase the level of accountability of the asset

management regime. In addition, the following changes are recommended for the AMIs in Tanzania.

7.3.2.1 The Inspector General of Police and the Treasury Registrar

The responsibility of the IGP in relation to the administration of seized assets should be extended to all preserved assets. This will include the duty to inspect the assets under restraint to ensure that they are preserved in accordance with the court orders. Such extension of the IGP's duties will vest in him primary responsibility for managing the proceeds of crime until the establishment of a special agency for asset management. The law should allow the IGP's powers in this regard to be exercised by the heads of other investigative agencies such as the Prevention and Combating of Corruption Bureau (PCCB). This arrangement will assist in ensuring that the assets are managed by the institution that seized them or, if circumstances so require, by a court appointed trustee.²³

With regard to the functions of the Treasury Registrar, two recommendations are made. Firstly, the treasury office should act as a steward of the recovered assets rather than a mere depository, which would be the mooted asset forfeiture fund. Secondly, if the establishment of said fund is not to be considered immediately, the responsibility entrusted to the Treasury Registrar should be given to the department or agency dealing with management of government assets. This change is necessary as the Treasury Registrar is not directly charged with the management of government assets.²⁴ This option will ensure proper management of recovered assets.

7.3.2.2 The Attorney General and the Director of Public Prosecutions

The role of the AG should be extended to include powers of co-ordination in respect of the management of preserved and confiscated assets. This will require the establishment of a special unit within the AFRS with responsibility for co-ordinating and overseeing the asset management process. The proposed unit should be staffed by personnel with asset

23 The powers and functions of the trustee under POCA (T) should remain intact.

24 The Treasury Registrar is responsible for investments and public corporations. See Section 8(1) of The Treasury Registrar (Powers and Functions) Act [Cap 370 RE 2002].

management skills rather than by lawyers only. It will be useful also in advising the law enforcement agencies, including the AFRS, on matters pertaining to asset management.

In addition, when considered appropriate, the functions of the AG in relation to asset recovery should be vested in the DPP, as is the practice in other states, such as South Africa.²⁵ Vesting said functions in the DPP will ensure his direct involvement as head of the prosecution services rather than indirectly overseeing the execution of the functions of his superior, the AG.

7.3.2.3 The Trustee and the Court

The role of the trustee in relation to preserved assets entrusted to him should not be disturbed. However, his basic qualifications, manner of identification, mode of appointment and remuneration should be stipulated in the law or regulations to be made by the minister. The powers of the court pertaining to the management of preserved and confiscated assets should remain intact also.

7.3.3 Factors Affecting the Value of Assets

During the analysis of the post-confiscation asset management policy of Tanzania, a number of factors affecting the economic value of the preserved assets were identified. These include payment of legal, business and living expenses from the preserved assets, the absence of NCBAR and the lack of plea bargaining provisions. These matters are considered below.

7.3.3.1 Legal, Business and Living Expenses

The law should deal with the payment of legitimate expenses from preserved assets in terms of a more precise criterion than just the current test of reasonableness. It is very difficult to assess what is reasonable in different scenarios. Instead, the amount of business expenses can be limited easily to what the books of accounts of a particular business provide. Similarly, the amount of living expenses, except where medical and educational fees are concerned, could be limited to, for example, the salary rates of medium-ranking public servants. And legal expenses could be determined according to the provisions of the Advocates' Act,²⁶ and orders made

25 See Parts 2 and 3 of POCA (SA).

26 [Cap 341 RE 2002].

under the Act.²⁷ In addition, payment of legal and living expenses from preserved assets should be allowed only when the accused does not have other source of income. These specific limits, coupled with the reasonableness test, will ensure proper preservation of the assets.

7.3.3.2 Absence of Non Conviction Based Asset Recovery

NCBAR and plea bargaining indirectly affect the value of assets to be recovered. They might appear to be beyond the ambit of asset management because they are merely procedural aspects of the recovery process. However, the fact that they affect the value of assets makes them worthy of discussion.

The absence of NCBAR from the Tanzanian legal landscape means that conviction based asset recovery is the only procedure available for recovering the proceeds of crime. Thus, failure to secure a conviction on a criminal charge automatically entails failure to recover the proceeds of crime. Even when the acquittal of the accused person is based on technicalities, nothing can be done to recover the proceeds of crime. This affects negatively the strength of asset recovery policy in recovering criminal proceeds and in attaining corrective justice. Moreover, in cases where the government has incurred costs in preserving an asset, no reimbursement can be effected as there will be no asset to realise as a means of recovering those costs.

The consequences of not allowing NCBAR are unfavourable and Tanzania should consider seriously including the procedure in its law. Of course, NCBAR should be employed only in cases where CBAR cannot be pursued. And the state should intensify its investigation techniques to ensure proportional recovery in cases where NCBAR is used.

7.3.3.3 Lack of Plea Bargaining Provisions

The availability of plea bargaining , assists in ensuring that the citizenry has access to timely justice. In the recovery of proceeds of crime, the plea bargaining procedures help to reduce litigation costs and time. Asset management favours short litigation periods as they tend to minimise the costs involved in managing the preserved assets. Timely recovery of assets also

27 Section 49 of the Act provides for the power to make general orders as to the remuneration of advocates.

ensures the recovery of maximum value, as in most cases the value of the assets deteriorates over time. In this regard, it is perhaps time for Tanzania to include plea bargaining provisions in its laws.

If it decides to allow plea bargaining, Tanzania should take into consideration the need to have the procedure regulated well and to ensure international co-operation. Here Tanzania may look to the regulation of plea bargaining in South Africa²⁸ as an example. For international co-operation in plea bargaining, the StAR Initiative proposal could be of great assistance.²⁹

7.4 Conclusion

Asset management complements asset recovery policy. This relationship derives from the fact that asset recovery targets the economic element of criminal conduct. In its final stage, asset recovery expects to attain the realisation and, thereafter, the disposition of recovered assets. However, a valuable realisation and disposition demands effective management of preserved and recovered assets.

Asset recovery policy is informed by the dual objectives of combating of crime and of correcting the harm it causes. Asset management policy, as complementary asset recovery policy, needs to address these two policy objectives also.

The international community has elaborated IBPs to assist states in developing their domestic frameworks for managing preserved and recovered assets. However, the IBPs do not express equal observance of the two objectives of the asset recovery policy. They put too much emphasis on combating crime as opposed to correcting the harm caused by crime. The IBPs also lack enforcement mechanisms because of their status as desirable practices. A re-evaluation of the IBPs is required in order to make them address retribution and corrective justice effectively. They should be upgraded also to enforceable international standards.

This study has assessed the asset management policies of Tanzania, South Africa and Nigeria. It was found that these policies do not have balanced objectives. As with the IBPs, the lop-sided policy objectives of the three states result from giving more attention to combating

28 Section 105A of CPA (SA).

29 See Odour *et al* (2014: 4).

crime than to addressing the harm caused by crime. All three states require balanced policy objectives which will enable them to address both the crime and the effects of the crime upon the community. Here compensating crime victims, funding institutions dealing with the victims, funding public good projects and funding law enforcement agencies emerge as ways of addressing the damage caused by the offence and of showing commitment to the principle of corrective justice. Herein lies the possibility of developing an asset recovery and management regime appropriate to the socio-economic realities of the African continent.

The study provides detailed recommendations regarding the asset management legal framework of Tanzania. If these recommendations were to be taken seriously, Tanzania may be able to formulate an asset recovery and management policy that will be cherished by its citizenry for addressing effectively the challenges with which economic and financial crimes have saddled the country.



References

Primary Sources

International Instruments

African Union Convention on Preventing and Combating Corruption, adopted on 11 July 2003, entered into force on 5 August 2006.

ECOWAS Protocol on the Fight against Corruption, Adopted in 21 December 2001, (not yet in force).

International Convention for the Suppression of Financing of Terrorism, adopted on 9 December 1999, entered into force on 10 April 2002.

International Standards on Combating Money Laundering, Financing of Terrorism and Proliferation: Financial Action Task Force Recommendations (2012), available at [www.fmu.gov.pk/docs/FATF_RECOMMENDATIONS_2012_\(REVUSED\)/FATF_40_Recommendations.pdf](http://www.fmu.gov.pk/docs/FATF_RECOMMENDATIONS_2012_(REVUSED)/FATF_40_Recommendations.pdf) (accessed 13 August 2013).

Southern African Development Community Protocol against Corruption, adopted on 14 December 2001, entered into force on 6 July 2005.

United Nations Convention against Corruption, adopted on 31 October 2003, entered into force on 14 December 2005.

United Nations Convention Against illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention), adopted on 19 December 1988, entered into force on 11 November 1990.

United Nations Convention against Transnational Organised Crime of 2000 (Palermo Convention), adopted on 15 November 2000, entered into force on 29 September 2003.

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 29 November 1985 (A/RES/40/34).

Domestic Legislation

Tanzania

Constitution of the United Republic of Tanzania, 1977.
Criminal Procedure Act [Cap 20 RE 2002].
Economic and Organised Crime Control Act [Cap 200 RE 2002].
Forest Act No 4 of 2002.
Judiciary Administration Act, No 4 of 2011.
National Prosecutions Services Act No27 of 2008.
Office of the Attorney General (Discharge of Duties) Act No 4 of 2005.
Police Force and the Auxiliary Services Act [Cap 322 RE 2002].
Prevention and Combating of Corruption Act [Cap 329 RE 2002].
Proceeds of Crime Act, [Cap 95 RE 2002].
Treasury Registrar (Powers and Functions) Act [CAP 370 R.E 2002]

South Africa

Administration of Estates Act 66 of 1965.
Constitution of the Republic of South Africa, 1996.
Criminal Procedure Code Act 51 of 1977.
Prevention of Organised Crime Act 121 of 1998.
Public Finance Management Act 1 of 1999.
South African Police Service Act 68 of 1998.

Nigeria

Constitution of the Federal Republic of Nigeria, 1999.
Corrupt Practices and Related Offences Act No5 of 2000.
Criminal Procedure Act, Cap 80 of the Laws of the Federation of Nigeria.
Economic and Financial Crimes Commission (Establishment Act), 2004.
Finance (Control and Management) Act, Cap 144 of the Laws of the Federation of Nigeria.

Cases

Amri Medical Relief Limited and the EFCC, Suit No FCT/HC/CV/54/2010, High Court of Federal Capital Territory, in Abuja Judicial Division, Holden at Abuja in 2010.

Barr Innocent C Onwu v The EFCC and two others, Suit No FCT/HC/M/708/11, High Court of Federal Capital Territory, Abuja Judicial Division, Holden at Apo Abuja in 2012.

Barrister Obinna Ezeodili v The EFCC and Another, Case No FCT/HC/CV/234/2013, High Court of Federal Capital Territory, Abuja Judicial Division, Holden at Maitama Abuja in 2013.

Din Agric v NDPP, unreported judgement of the ECD, Case No 81/2008, delivered on 04/12/2008.

DPP v Moran [2002] VSCA 154, Supreme Court of Victoria Court of Appeal.

Esai Dangabar v Federal Republic of Nigeria (2012) LPELR-19732 (CA).

Ex Parte Hullet 1968 (4) SA 172 (D).

Ex Parte Thompson (1983) (4) SA 392 (E).

Fraser v ABSA Bank Ltd 2007(3) SA 484 (CC).

Jansen v The State (20043/14 & 229/14) [2015] ZASCA 151 (2 October 2015).

Republic v Hun Chin Tai and others (unreported), Criminal Sessions Case No38 of 2009 High Court of Tanzania, Dar es Salaam Registry.

Mngomezulu v NDPP [2007] SCA 11(RSA).

NDPP and Meir Elran, Case No CCT 56/12 [2013] ZACC 2.

NDPP In Re Rubber Duck with Registration DTP 988; Boat Trailer with Registration DNT 118 EC, Case No. 1466/07, High Court of South Africa, Eastern Cape Division.

NDPP v Aereboe and Others [2000] 1 All SA 105 (N).

NDPP v Basson [2002] 2 All SA 225.

NDPP v Mcasa 2000(1) SACR 287(TkH).

NDPP v ROCook Properties 2004 (2) All SA 491 (SCA).

NDPP v Rautenbach and Another [2005] 1 All SA 412 (SCA).

Nwude v Chairman EFCC [2005] All FWLR Part 276.

S v Sassin and Others (84/02)[2003] ZNCHC 44 (20 October 2003).

Sylvester Lucas v Republic (unreported), Criminal Appeal No 67/2014, Court of Appeal of Tanzania, at Dodoma.

The Attorney General v Mugesu Anthony and two others (unreported), Criminal Appeal No 220/2011, Court of Appeal of Tanzania, at Mwanza.

The Federal Republic of Nigeria v Cecilia Ibru (unreported), Charge No FHC/L/297C/2009.

The Federal Republic of Nigeria v Tafa Balogun and others (unreported), Charge No FHC/AB/CR/14/2005.

Secondary Sources

Books, Chapters in Books and Journal Articles

Acquinas T (1971) "Of the Effects of Laws: Whether an Effect of Law is to Make Men Good?" in Morris C (ed) *The Great Legal Philosophers: Selected Readings in Jurisprudence* Philadelphia: University of Pennsylvania Press.

Adekunle TK (2013) "Plea Bargaining and the Nigerian Penal System: Giving Judicial Imprimatur to Corruption" 1(1) *New Ground Research Journal of Legal Studies Research and Essays* 10-17, available at <http://www.newgroundresjournals.org/journals/NGRJLSRE> (accessed 1 July 2016).

Alldrige P & Mumford A (2005) "Tax Evasion and the Proceeds of Crime Act 2002" 25 (3) *Legal Studies* 353-373, available at <http://heinonline.org> (accessed 10 September 2015).

Aristotle (1947) *The Ethics* Chase DP & Smith JA (eds) London: JM Dent.

Aristotle (1971) "Nicomachean Ethics" in Morris C (ed) *The Great Legal Philosophers: Selected Readings in Jurisprudence* Philadelphia: University of Pennsylvania Press.

Australian Institute of Criminology (2008) *Confiscation of Proceeds of Crime: Federal Overview* Canberra: Australian Institute of Criminology.

Bacarece A (2009) "Advancing International Understanding and Cooperation in Combating Fraud and Corruption: Recovering Stolen Assets" 10 *ERA Forum* 76-84, available at www.springer.com/article/10.1007%2Fs12027-009-0124-5 (accessed 15 March 2016).

Baldwin FN (2000) "United States and Civil in rem Forfeiture: The History and its Ancient Roots" 3(3) *Journal of Money Laundering Control* 51-66, available at <http://heinonline.org> (accessed 21 May 2016).

Bambale YY (2003) *Crimes and Punishments under Islamic Law* (2ed) Lagos: Malthouse Press Limited.

Bazley S & Foster C (2004) *Money Laundering Business Compliance* Croydon: LexisNexis.

Beccaria C (2013) *An Essay On Crimes and Punishment* The Federalist Papers Project, available at www.thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-on-Crimes-and-Punishments.pdf (accessed 9 March 2016).

Bekker PM (1996) "Plea Bargaining in United States of America and South Africa" 29 *CILSA* 168-222, available at www.reference.sabinet.co.za/webx/access/journal_archive/00104051/206.pdf (accessed 17 June 2016).

Bekker PM (2001) "American Plea Bargaining in Statutory Form in South Africa" 34(3) *CILSA* 310-324, available at <http://www.jstor.org/stable/23251040> (accessed 17 June 2015).

Bennun ME (2007) "Negotiated Pleas: Policy and Purpose" 20(1) *SACJ* 17-45, available at <http://heinonline.org> (accessed 20 June 2015).

Bentham J (1945) "Ends in which a Law May have in View" in Everett CW (ed) *The Limits of Jurisprudence Defined* New York: Columbia University Press.

Bentham J (1971) "An Introduction to the Principles of Morals and Legislation Chapter XIII Cases Un-meet for Punishment" in Morris C (ed) *The Great Legal Philosophers: Selected Readings in Jurisprudence* Philadelphia: University of Pennsylvania Press.

Blumberg A (1967) *Criminal Justice* New York: Quadrangle.

Brun JP et al (2011) *Asset Recovery Hand Book: A Guide for Practitioners* Washington DC: The International Bank for Reconstruction and Development/World Bank.

Byrd BS (1989) "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution" 8(2) *Law and Philosophy* 151-200, available at <https://springer.com/articles/10.1007%FBF00160010> (accessed 14 April 2016).

Cassella SD (2004) "Overview of Asset Forfeiture Law in the United States" 17(3) *South African Journal of Criminal Justice* 347-367, available at <http://heinonline.org> (accessed 21 May 2016).

Cohen SA & Doob AN (1989-1990) "Public Attitudes to Plea Bargaining" 32 *Criminal Law Quarterly* 85-109, available at <http://heinonline.org> (accessed 21 May 2016).

Damals A (2007) "The Financial Task Force" in Muller WH, Kalin CH & Goldworth JD (eds) *Anti-Money Laundering: International Law and Practice* Chichester: John Wiley & Sons.

Dancig-Rosenberg H & Gal T (2013) "Restorative Criminal Justice" 34 (6) *Cardozo Law Review* 2313-2346, available at <http://heinonline.org> (accessed 20 December 2016).

Eissa A & Barber R (2011) *Confiscation Law Hand Book* West Sussex: Bloomsbury Professional Ltd.

Fine AJ (2013) "Kaley v United States: The Right to Counsel of Choice Caught in the Net of Asset Forfeiture" 19 *Duke Journal of Constitutional Law and Public Policy Sidebar* 58-82.

Fosu AK (1992) "Political Instability and Economic Growth: Evidence from Sub-Saharan Africa" 40(4) *Economic Development and Cultural Change* 829-841, available at <http://www.jstor.org/stable/1154636> (accessed 1 July 2016).

Frederickson GH & Ghere RK (2013) *Ethics in Public Management* New York: ME Sharpe Incorporation.

Gallant MM (2005) *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* Cheltenham: Edward Elgar Publishing Limited.

Gardiner GQC (1958) "The Purposes of Criminal Punishment" 21(2) *The Modern Law Review* 117-129, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1958.tb00463.x/pdf> (accessed 7 June 2016).

Graham K (2012) "Crimes, Widgets and Plea Bargaining: An Analysis of Charge Contents, Pleas and Trials" 100 (6) *California Law Review* 1573-1630, available at <http://heinonline.org> (accessed 28 February 2016).

Graves C M *et al* (2005) "Making the Case for Restorative Justice" 39(3 & 4) *Clearinghouse Review* 219-228, available at <http://heinonline.org> (accessed 20 December 2016).

Greenberg TS *et al* (2009) *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* Washington DC: The International Bank for Reconstruction and Development/World Bank.

Grotius H (1971) "Of Punishment, Book II Chapter XX" in Morris (ed) *The Great Philosophers: Selected Readings in Jurisprudence* Philadelphia: University of Pennsylvania Press.

Grubisic M, Nusinovic M & Jore G (2009) "Towards Efficient Public Sector Asset Management" 33(3) *Financial Theory and Practice* 329-362, available at www.fintp.hr/en/archive/towards-efficient-public-sector-asset-management_283/ (accessed 30 June 2016).

Hajnal PI (2013) *The G8 System and the G20: Evolution Role and Documentation* London: Ashgate Publishing Co.

Heumann M (1978) *Plea Bargaining: The Experience of Prosecutors, Judges and Defence Attorneys* London: The University of Chicago Press Limited, available at <http://www.jstor.org/stable/1154636> (accessed 29 March 2016).

Hobbes T (1894) "Of Punishments and Rewards" in Morley H (ed) *Leviathan or Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (4ed) Manchester: George Routledge and Sons Ltd.

Igbinedion S (2014) "Workability of the Norms of Transparency and Accountability Against Corruption in Nigeria" 3(1) *Journal of Sustainable Development, Law and Policy* 149-176, available at <http://www.ajol.info/index.php/jsdlp/article/download/122621/112169> (accessed 27 May 2016).

Jimu I (2009) *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan* Basel: Basel Institute on Governance.

Johnson M & Cornell S (2007) "Countering Terrorist Financing: Lessons from Europe" 8(1) *Georgetown Journal of International Affairs* 69-75, available at www.comw.org/tct/terrofinance.html (accessed 1 March 2016)

Jowett B (1871) *The Dialogues of Plato* London: Oxford University Press.

Kant I (1887) *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* Edinburgh: T&T Clark.

Kaye N (2006) "Freezing and Confiscation of Criminal Proceeds" 1 (77) *Revue Internationale De Droit Penal* 323-331, available at <http://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-323.htm> (accessed 1 April 2016).

Knox TM (1952) *Hegel's Philosophy of Right* London: Oxford University Press.

Koen R (2007) "The Antinomies of Restorative Justice" *Acta Juridica* 247-271, available at <http://heinonline.org> (accessed 19 December 2016).

Kwesigabo G, Mwangi AM *et al* (2012) "Tanzania's Health System and Workforce Crisis" 33 *Journal of Public Health Policy* 35-44 available at www.ncbi.nlm.nih.gov/pubmed/23254848 (accessed 1 July 2016).

Larissa Gray *et al* (2004) *Few and Far: The Hard Facts on Stolen Asset Recovery* International Bank for Reconstruction and Development: Washington.

Levi M (1997) "Taking the Profit out of Crime: The UK Experience" 5(3) *European Journal of Crime, Criminal Law and Justice* 228-239, available at <http://heinonline.org> (accessed 21 May 2015).

Lipton J (2004) "Information Property: Rights and Responsibilities" 56 *Florida Law Review* 136-194, available at www.floridalawreview.com/wpcontent/uploads/2010/01/Lipton_BOOK.pdf (accessed 1 July 2016).

Lugakingira KSK & Peter CM (2008) "Victim Compensation and Aspects of Law and Justice in Tanzania" 18(3) *International Criminal Justice Review* 292-317, available at www.ijc.sagepub.com/content/18/3/292.abstract (accessed 1 July 2016).

Lugon-Moulin A (2008) "Asset Recovery: Concrete Challenges for Development Assistance" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang AG.

Madinger J (2006) *Money Laundering: A Guide for Criminal Investigations* Boca Raton: CRC Press.

Montesh M (2009) "An Analysis of the Role of South African Asset Forfeiture Unit and Special Investigation Unit" 22(2) *Acta Criminologica* 31-40, available at http://reference.sabinet.co.za/webx/access/electronic_journals/crim/crim_v22_n2_a4.pdf (accessed 1 July 2016).

Murdoch W (2006) "Judicial Scrutiny of Plea and Sentence Agreements: Regspraak" 1 *Tydskrif vir die Suid-Afrikaanse Reg* 224-230, available at www.reference.sabinet.co.za/document/EJC55006 (accessed 1 June 2016).

Ndzengu NC & Von Bonde JC (2011a) "Legal Expenses POCA Clauses: A Loophole to Make Crime Pay?" 3 *SACJ* 309-332, available at <http://heinonline.org> (accessed 17 June 2016).

Ndzengu NC & Von Bonde JC (2011b) "A Critical Assessment of the Introduction of Proportionality Analysis by the South African Courts in Civil-Forfeiture Jurisprudence" 32(1) *OBITER* 83-107, available at www.reference.sabinet.co.za/document/EJC85397 (accessed 1 July 2016).

- Odour JA, Fernando FM *et al* (2014) *Left out of the Bargain: Settlements of Foreign Bribery Cases and Implications for Asset Recovery* Washington DC: The International Bank for Reconstruction and Development/World Bank.
- Pauly CJ & Elbern S (eds) (2012) *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts* The Hague: Kluwer Law International.
- Pieth M (ed) (2008) *Recovering Stolen Assets* Bern: Peter Lang AG.
- Rabie MA & Strauss SA (1985) *Punishment: An Introduction to Principles* Cape Town: Lex Patria Publishers.
- Ribadu N (2008) "Challenges and Opportunities of Asset Recovery in a Developing Economy" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang AG.
- Rousseau JJ (1971) "The Social Contract" in Morris C (ed) *The Great Philosophers: Selected Readings in Jurisprudence* Philadelphia: University of Pennsylvania Press.
- Sa` CM *et al* (2013) "Accountability, Performance Assessment and Evaluation: Policy Pressures and Responses from Research Councils" 22 *Oxford University Press Research Evaluation* 105-117, available at <http://rev.oxfordjournals.org/content/22/2/105.full> (accessed 13 June 2014).
- Schott PA (2006) *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* Washington DC: The International Bank for Reconstruction and Development/World Bank.
- Seidman A & Seidman RB (2007) "Law, Social Change and Development: The Fatal Race" in Seidman A *et al* (eds) *Africa's Challenge: Using Law for Good Governance and Development* Eritrea: Africa Word Press Incorporation.
- Shams H (2004) *Legal Globalization: Money Laundering Law and Other Cases* London: The British Institute of International and Comparative Law.
- Shehu AY (2005) "International Initiatives against Corruption and Money Laundering: An Overview" 12(3) *Journal of Financial Crime* 221-245, available at <http://www.emeraldinsight.com/journals.htm?articleid=1533902> (accessed 27 June 2016).
- Shehu AY (2014) "Key Legal Issues and Challenges in Recovery of Proceeds of Crime: Lessons from Nigeria" 3(1) *International Law Research* 186-201, available at <http://dx.doi.org/10.5539/ilr.v3n1p186> (accessed 13 August 2015).

Snider TR & Kidane W (2007) "Combating Corruption through International Law in Africa: A Comparative Analysis" 40 *Cornell International Law Journal* 691-748, available at <http://heinonline.org> (accessed 6 April 2016).

Stennens G (2008) *Money Laundering: A New International Law Enforcement Model* New York: Cambridge University Press.

Steyn E (2007) "Plea Bargaining in South Africa: Current Concern and Future and Future Prospects" 2 *SACJ* 206-209, available at <http://heinonline.org> (12 February 2016).

Stolen Asset Recovery (StAR) Initiative (2007) *Challenges, Opportunities and Action Plan* Washington DC: The International Bank for Reconstruction and Development/World Bank.

Stolen Asset Recovery (StAR) Initiative (2009) *Management of Returned Asset: Policy Considerations* Washington DC: The International Bank for Reconstruction and Development/World Bank.

UNODC (1999) *Handbook on Justice for Victims: On the Use of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* New York: Centre for International Crime Prevention.

Warchol GL, Payne DM *et al* (1996) "Criminal Forfeiture: An Effective Alternative to Criminal and Administrative Proceedings" 19(3) *Police Studies* 51-66, available at <http://heinonline.org> (accessed 1 July 2016).

Weinrib EJ (2002) "Corrective Justice in a Nutshell" 52(4) *University of Toronto Law Journal* 349-356, available at <http://www.istors.org/stable/825933> (accessed 13 February 2016).

Williams H (1983) *Kant's Political Philosophy* England: Basic Blackwell Publisher Limited.

Wood AW (ed) (2002) *Kant's Groundwork for Metaphysics of Morals* New Haven and London: Yale University Press.

Young NMS (ed) (2009) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Cornwell: MPG Books Ltd.

Zimring FE & Johnson DT (2007) "On the Comparative Study of Corruption" 20 *Global Business and Development Law Journal* 243-262, available at <http://heinonline.org> (accessed 8 February 2015).

Papers/Manuals

CICAD (2011) *Asset Management systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets* (OEA/Ser.L/XIV.6), available at www.cicad.oas.org/lavado_activos/grupoexpertos/Decomiso%20y%20ED/Manual%20Bienes%20Decomisados%20-%20BIDAL.pdf (accessed 10 June 2016).

CICAD (2013) *Self-Evaluation Guide for Forfeiture and Administration of Assets* (CICAD/doc.16/13), available at www.cicad.oas.org/apps/Document.aspx?Id=2388 (accessed 17 June 2016).

FATF (2012) *Best Practices Paper: Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for On-going Work on Asset Recovery*, available at www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20Confiscation%20and%20a%20Framework%20for%20ongoing%20Work%20on%20Asset%20Recovery.pdf (accessed on 29 May 2016).

G8 Lyon/Roma Group (2005) *Best Practices for the Administration of Seized Assets*, available at www.coe.int/t/dqhl/monitoring/moneyval/web_resources/G8_BPAssetManagement.pdf (accessed on 2 July 2016).

Office of Treasury Registrar Tanzania (2015) *Client Service Charter*, available at https://tro.go.tz/docstation/com_content.article/36/client_service_charter_english.pdf accessed on 17 June 2016.

UNODC (2011) *Mechanism for the Review of Implementation of the United Nations Convention against Corruption - Basic Document*, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf (accessed on 22 June 2016).

UNODC (2012) *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime*, available at www.unodc.org/documents/organized-crime/Publications/Confiscation_Manual_Ebook_E.pdf (accessed on 12 May 2016).

UNODC (no date) *Alternative Dispute Resolution Manual: Court Users Guide*, available at https://www.unodc.org/documents/nigeria/publications/courtusersguide/ADR/courtusersguide/ADR_Court_Users_Guide.pdf (accessed 26 May 2016).

Reports

AU/ECA Conference of the Ministers of Finance, Planning and Economic Development (2015): *Report of the High level Panel on Illicit Financial Flows from Africa (Mbeki Report)*, available at www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 15 May 2016).

British Aerospace (BAE) (2010) *Settlement Agreement between the Fraud Office and BAE Systems plc*, available at <https://www.caat.org.uk/resources/companies/bae-systems/bae-settlement-basis-of-plea.pdf> (accessed 21 June 2016).

ESAAMLG (2009) *South Africa Country Report*, available at www.esaamlg.org/userfiles/South_Africa_Mutual_Evaluation_Detail_Report.pdf (accessed 25 June 2016).

ESAAMLG (2009) *Tanzania Country Report*, available at www.esaamlg.org/userfiles/Tanzania_Mutual_Evaluation_Detail_Report.pdf (accessed 17 June 2016).

ForSaith J et al (2012) *Study for an Impact Assessment on a Proposal for a New Legal Framework on Confiscation and Recovery of Criminal Assets*, Technical Report for European Commission Directorate General Home Affairs, European Union, Rand Corporation, Santa Monica, available at http://ec.europa.eu/dgs/homeaffairs/elibrary/docs/external_study_used_as_a_basis_for_the_commission_ia_october_2012_en.pdf (accessed 12 August 2015).

GIABA (2011) *Report for Nigeria on Mutual Evaluation Implementation Action Plan, Anti-Money Laundering and Combating of the Financing of Terrorism*, available at www.giaba.org/media/f/306_MER%20Action%20Plan%20Nigeria%20%20English.pdf (accessed 18 June 2016).

Mkuya Salum (MP)(2015) "Minister of Finance Speech Introducing to the National Assembly the estimates of Government Revenue and Expenditure for the Fiscal year 2015/2016," available at <http://www.tra.go.tz/documents/BUDGET%20SPEECH%20MINISTER%20OF%20FINANCE%20FINAL%20FINAL.pdf> (accessed 12 February 2016).

Msekwa P (1980) *Tanzania Judicial System Review Commission Report* Tanzania Government Printers.

Mwakyembe HG (MP)(2016) “Minister of the Ministry of Justice and Constitutional Affairs Budgetary Speech for the Fiscal year 2016/2017,” available at www.sheria.go.tz/index.php?option=com_docman&Itemid=90 (accessed 28 June 2016)

StAR Initiative/EOCD (2011) *Tracking Anti-Corruption and Asset Recovery Commitment: A Progress Report and Recommendations for Action* Washington DC: The International Bank for Reconstruction and Development/World Bank.

United Republic of Tanzania (2014) *Director of Public Prosecutions Report on Development Projects* (unpublished).

UNODC (2006) *United Nations Convention against Corruption, Pilot Review Programme*, available at <https://www.unodc/en/treaties/CAC/pilot-review.html> (accessed 20 May 2016).

UNODC (2013) *Country Review Report of South Africa on the Implementation of Chapter III and Chapter IV of the United Nations Convention against Corruption*, available at www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_05_09_South_Africa_Final_Country_Review_Report.pdf (accessed 10 April 2016).

UNODC (2013) *Country Review Report of the United Republic of Tanzania*, Review by Sierra Leone and Australia of the Implementation by the United Republic of Tanzania of articles 15-42 of Chapter III, ‘Criminalisation and Law Enforcement’ and articles 44-50 of Chapter IV, ‘International Cooperation’ of the United Nations Convention against Corruption for the Review Circle 2012-2013, available at www.uncaccolition.org/files/official-documents/country-review-report-tanzania.pdf (accessed 7 April 2016).

UNODC (2014) *Country Review Report of the Federal Republic of Nigeria*, Review by Lesotho and Montenegro of the Implementation by the Federal Republic of Nigeria of articles 15-42 of Chapter III, ‘Criminalisation and Law Enforcement’ and articles 44-50 of Chapter IV, ‘International Cooperation’ of the United Nations Convention against Corruption for the Review Circle 2010-2015, available at https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2014_10_14_Final_Country_Review_Report.Nigeria.pdf (accessed 14 April 2016).

UNODC (2014) *Assessment Study Seizure, Confiscation and Management of Proceeds of Crime in West Africa: Proposed Establishment of an ‘ARIN’ type network for West Africa*, available at https://www.imolin.org/pdf/imolin/ARINWA_report_8_final_English.pdf (accessed 21 June 2016).

Electronic Sources

Adeleke GO (2012) "Prosecuting Corruption and the Application of Plea Bargaining in Nigeria: A Critique", available at http://www.icidr.org/ijalsq_vol3no1_april2012/Prosecuting%20Corruption%20and%20the%20Application%20os%20Plea%20Bargaining%20in%20Nigeria-A%20Critique.pdf (accessed 22 September 2015).

All Africa, *This Day* (11 October 2013) "EFCC and the Seized Assets", available at <http://allafrica.com/stories/201310110375.html> (accessed 7 February 2014).

All Africa, *This Day* (2 December 2014) "Nigeria has benefited from plea bargaining", available at <http://allafrica.com/stories/201412020793.html> (accessed 23 May 2016).

Center for the Study of Democracy (2012) Policy Brief No 33, "Management and Disposal of Confiscated Criminal Assets", available at www.csd.bq/artshow.php?id=16000 (accessed 24 April 2013).

Costa AM (2007) "Anti- Corruption Climate Change: It started in Nigeria", available at www.unodc.org/unodc/en/about-unodc/speeches/2007-11-13.html (accessed 12 May 2015).

De Koker L & Pretorius JL (1998) "Confiscation Orders in terms of the Proceeds of Crime Act: Some Constitutional Perspectives", available at <http://heinonline.org> (accessed 10 September 2013).

Dilulio JJ (1959) "Deterrence Theory", available at <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf> (accessed 11 June 2016).

Gallagher AT & Karlebach N (2012) "Prosecution of Trafficking in Persons cases: Integrating Human Rights Based Approach in the Administration of Criminal Justice", available at http://works.bepress.com/anne_gallagher/18 (accessed 1 July 2016).

Gharawi MA *et al* (2009) "Issues and Strategies for Conducting Cross-National E-Government Government Comparative Research" available at https://www.ctq.albany.edu/publications/journals/iceq_2009_crossnational (accessed 21 December 2016).

Klitgaard R (1998) "International Cooperation Against Corruption", available at <https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaard.pdf> (accessed 20 June 2016).

Lar V (2012) "EFCC is poorly funded", available at <https://efccnigeria.org/efcc/index.php/news/303-efcc-is-poorly-funded-senator-victor-lar> (accessed 17 May 2016).

Miron R (2016) "Getting Asset Recovery Moving in Tanzania", available at http://star.worldbank.org/star/getting_asset_recovery_moving_in_tanzania (accessed 23 June 2016).

Musa AI (2014) "Money Laundering and Asset Recovery: The Case of Nigeria", available at www.cislacnigeria.net/2014/12/money-laundering-and-asset-recovery-the-case-of-nigeria/ (accessed 25 November 2015).

Ofoche CCO (2012) "Socio-Economic Problems in Nigeria: Causes and Remedy" United States Army War College, Philadelphia, available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ada561627 (accessed 18 May 2016).

Ogundipe BO (2013) "Uncertainty remains over EFCC's Power to Manage Forfeited Assets", available at www.internationallawoffice.com/newsletters/detail.aspx?q=fa8df60f-2023-4fe7-8d3a-2ce5ceaf053a (accessed 1 July 2016).

Osipitan T & Odusote A (2014) "Challenges of Defence Counsel in Corruption Prosecution", available at <http://journals.univ-danubius.ro/index.php/juridica/article/view/2626/2741> (accessed 1 July 2016).

Simon H (2008) "Stolen Asset Recovery: Swiss Experience, Economics of Corruption Training in Passau", available at http://www.wiwi.unipassau.de/fileadmin/dokumente/lehrstuhle/lambsdarff/Economics_of_corruption_2008/poster_EOC2008_Simon_pdf (accessed 28 June 2013).

Smith J, Pieth M & Jorge G (2007) "The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention against Corruption" Bergen: Chr. Michelsen Institute (U4 Brief 2007: 2), available at www.u4.no/publications/the-recovery-of-stolen-assets-a-fundamental-principle-of-the-un-convention-against-corruption/ (accessed 30 June 2016).

Soniyi T (2013) "EFCC cannot Appoint Managers for Suspects' Properties Says the Court", available at www.thisdaylive.com/articles/efcc-cannot-appoint-managers-for-suspects-properties-says-court/148617 (accessed 12 July 2015).

Tope A (2012) "The Legality of the Use of Plea Bargaining in the Nigerian Criminal Justice System", available at <https://topeadebayollp.wordpress.com/2012/03/27/the-legality-of-the-use-of-plea-bargaining-in-the-nigerian-criminal-justice-system/> (accessed 12 May 2016).

Visran N (17 September 2014) “Ni Wizara ya Mifugo na Uvuvi au Uvivu?” *Raia Mwema News Paper*, available at www.raiamwema.co.tz/ni-wizara-ya-mifugo-na-uvuvi-au-uvivu (Accessed 1 July 2016).

World Bank (2015) “Tanzania Country Overview”, available at www.worldbank.org/en/country/tanzania/overview (accessed 13 February 2016).

