

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW



**UNIVERSITY of the
WESTERN CAPE**

**SOUTH AFRICAN-GERMAN CENTRE
FOR TRANSNATIONAL CRIMINAL JUSTICE**

A CRITICAL ASSESSMENT OF THE ETHIOPIAN CIVIL FORFEITURE LAW

By
**UNIVERSITY of the
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Declaration

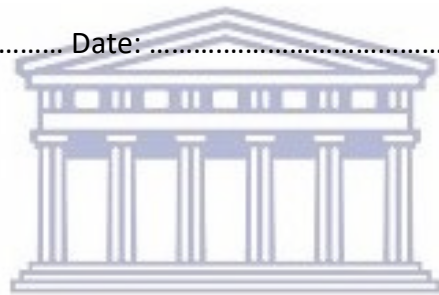
I, **Girma Gadisa Tufa**, declare that **A Critical Assessment of the Ethiopian Civil Forfeiture Law** is my own work, that it has not been submitted for any degree or examination in any other university. All the sources used, referred to or quoted have been duly acknowledged.

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Abbreviations and Acronyms

AU	African Union
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FDRE	Federal Democratic Republic of Ethiopia
UNCAC	United Nations Convention against Corruption
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
ACHPR	African Charter on Human and Peoples' Rights



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Key Words

Anti-Corruption

Anti-Money Laundering

Asset Recovery

Civil Forfeiture

Confiscation

Corruption

Economic Crime

Ethiopia

Money Laundering

Prosecution



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CHAPTER ONE

INTRODUCING THE STUDY

1.1 Background to the Study

Economic crimes pose a serious problem to the international community as a whole. Crimes, such as corruption, money laundering, terrorist financing, cybercrime and drug trafficking constitute obstacles to the development of a country, the free flow of trade, the fair distribution of wealth and the well-being of all nations.¹ Because of the systematic commission of these crimes and their far-reaching effects, it is necessary to fight them with all appropriate means.

For instance, the global community already has agreed on the seriousness of the problems that corruption poses to the stability and security of every society.² It has recognised the fact that corruption weakens the institutions and values of democracy, undermines ethical values and justice, and jeopardises sustainable development and the rule of law.³ Thus, its members have agreed to co-operate in tackling it.

Asset recovery is a major post-commission mechanism for fighting economic crime. It is defined as:

the legal processes by which states use their coercive powers to obtain or regain ownership of proceeds and objects of crime or substitute assets.⁴

It is the act of confiscating property involved in the commission of crime and proceeds obtained from criminal activities.

Confiscation is defined in different international legal instruments. The United Nations Convention against Corruption (UNCAC) stipulates that:

confiscation, which includes forfeiture where applicable, shall mean a permanent deprivation of property by an order of court or other competent authority.⁵

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- 1 Wright (2006) at 50-52, Ryder (2011) at 3 & 5 and European Parliament (2013) at 14.
 - 2 Para 1 of the Preamble to UNCAC.
 - 3 Para 1 of the Preamble to UNCAC.
 - 4 Ivory (2014) at 27.
 - 5 Article 2(g) of UNCAC.

The same definition is contained in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention).⁶ Confiscation is the most important tool for depriving criminals of the proceeds of their crimes. In addition, it is an important mechanism for preventing corrupt individuals from enjoying the fruits of their illegal acts.⁷

Asset recovery is recognised also as one of the fundamental pillars in the fight against corruption.⁸ Furthermore, as Ryder notes:

an integral part of the global financial crime strategy is the ability of the law enforcement agencies to deprive corrupt individuals, organised criminals, drug cartels and terrorists of their illegal earnings.⁹

Forfeiture law equips law enforcement agencies with weapons to fight economic crime. However, effective recovery of ill-gotten assets presupposes the existence of explicit legal mechanisms and institutions that give effect to what is provided in law.

There are generally two types of forfeiture to recover the proceeds and instrumentalities of crime.¹⁰ These are criminal forfeiture and civil forfeiture. Criminal forfeiture, also known as conviction based forfeiture or in *personam* forfeiture, is the act of confiscating proceeds and instrumentalities of crime after the conviction of the suspect, usually as part of sentencing.¹¹ Civil forfeiture, also known as objective forfeiture, is a civil proceeding aimed at confiscating property that has some connection with the crime but without the suspect being convicted necessarily. Basically, in civil forfeiture, the case is instituted with the aim of recovering the assets without the liberty of the accused being affected. Civil confiscation and civil forfeiture may be used interchangeably.

Ethiopia has been taking different measures to combat economic crime. The country has ratified various international legal instruments aimed at fighting financial and related crimes.

6 Article 1(f) of the Vienna Convention.

7 Stessens (2000) at 29.

8 Article 51 of UNCAC.

9 Ryder (2011) at 178.

10 Greenberg *et al* (2009) at 13.

11 Greenberg *et al* (2009) at 13.

For instance, Ethiopia is a State Party to UNCAC¹² and to the African Union Convention on Preventing and Combating Corruption (AU Convention).¹³ Moreover, the government has been making legislative reforms that help to fight economic crime.

In 2015, the legislature enacted a dedicated proclamation that governs corruption crimes.¹⁴ Before that, corruption crimes were part of the Criminal Code.¹⁵ The civil forfeiture regime was introduced recently, as one method of combating corruption, by the Revised Anti-Corruption Special Procedure and Rule of Evidence Amendment Proclamation No 882 of 2015 (hereafter Anti-Corruption Proclamation).¹⁶

Also, institutional arrangements have been made with the aim of consolidating power and enhancing the capacity of the bodies that are tasked with investigating and prosecuting crimes.¹⁷ Since 2016, the Federal Attorney General has been in charge of the investigation and prosecution of economic crimes, including corruption. Prior to the enactment of the proclamation that established the Federal Attorney General, most corruption-related issues were administered by the Federal Ethics and Anti-Corruption Commission.¹⁸ Other supplementary laws were enacted also.¹⁹

As far as economic crimes and the Ethiopian regime of civil forfeiture are concerned, an area of law that needs to be considered is the anti-money laundering laws. Money laundering was criminalised initially under the Criminal Code.²⁰ A separate law to govern money laundering

12 Ethiopia signed UNCAC on 10 December 2003 and ratified it on 26 November 2007.

13 Ethiopia signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.

14 Corruption Crimes Proclamation No 881 of 2015.

15 Chapter II Title III of Book IV of the Criminal Code of the Federal Democratic Republic of Ethiopia (2004).

16 Article 32 of the Anti-Corruption Proclamation. The Anti-Corruption Proclamation amended the Revised Anti-Corruption Special Procedure and Rule of Evidence Proclamation No 434 of 2005.

17 Federal Attorney General Establishment Proclamation No 943 of 2016. Although its effectiveness is controversial, the investigation and prosecution powers of various units, such as the Federal Ethics and Anti-Corruption Commission and the Ethiopian Revenue and Custom Authority, have been transferred to the Federal Attorney General.

18 The Federal Ethics and Anti-Corruption Commission was established by Proclamation No 235 of 2001. This Proclamation was amended by Proclamation No 433 of 2005 and again by Proclamation No 883 of 2015. The investigative and prosecuting powers of the Commission now have been transferred to the Federal Attorney General.

19 The Asset Disclosure and Registration Proclamation No 668 of 2010 is a typical example of a law that enhances the effectiveness of other basic laws in fighting economic crime since it enables responsible organs easily to identify the licit or illicit origin of a suspect's properties.

20 Article 684 of Criminal Code of the Federal Democratic Republic of Ethiopia (2004).

and the financing of terrorism was enacted in 2009.²¹ Civil forfeiture was introduced recently by the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 780 of 2013 (hereafter Anti-Money Laundering Proclamation).²² In this Proclamation, cross-reference is made to the Revised Anti-Corruption Special Procedure and Rule of Evidence Amendment Proclamation No 434 of 2005, which later was amended by the Anti-Corruption Proclamation.²³ Thus, civil forfeiture in the Anti-Corruption Proclamation will be applicable to the Anti-Money Laundering Proclamation.

Despite the enactment of all these laws and the institutional restructuring, the level of economic crime remains high and grand corruption cases involving senior government officials are being tried across the country.²⁴ Thus, the effectiveness of the Ethiopian legal framework in fighting economic crime requires close scrutiny. For instance, Ethiopia scored 35 points and ranked 107 out of 180 countries in Transparency International's Corruption Perceptions Index of 2017, with only two points of progress in the past five years, from a score of 33 in 2012.²⁵ Moreover, the existing legal gaps need further study to enable the regime of civil forfeiture to play its role effectively in recovering ill-gotten assets.

In this research paper, I shall analyse the Ethiopian legal framework on civil forfeiture. More concretely, the study examines the civil forfeiture provisions in the Anti-Money Laundering Proclamation and the Anti-Corruption Proclamation. Further, the study analyses the

21 Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 657 of 2009.

22 Article 35 of the Anti-Money Laundering Proclamation. The Anti-Money Laundering amended the Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation No 657 of 2009.

23 Article 55(1) of the Anti-Money Laundering Proclamation.

24 A typical example is the corruption case involving General Kinfe Dagneu, a senior ruling party member and former Chief Executive Officer of the Metal and Engineering Corporation, and other rich businesspersons in the capital city. Another example is a corruption case involving Bereket Simon, a former Federal Government Communication Affairs Minister.

25 Transparency International (2017) "Corruption Perceptions Index 2017", available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (visited 15 March 2018) and Transparency International (2012) "Corruption Perceptions Index 2012", available at <https://www.transparency.org/cpi2012> (visited 15 March 2018).

The Corruption Perceptions Index ranks countries and territories according to how corrupt their public sector is perceived to be. "A country or territory's score indicates the perceived level of public sector corruption on a scale of 0-100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. A country's rank indicates its position relative to the other countries and territories included in the index". Transparency International (2014) "Corruption Perceptions Index 2014", available at <https://www.transparency.org/cpi2014/results> (visited 15 October 2018).

effectiveness of the procedure included in the existing laws for the recovery of stolen assets. In addition, the study discusses the concept of civil forfeiture as it appears in some international legal instruments.

1.2 Statement of the Problem

As one method of combating economic crime, the concept of civil forfeiture was introduced into the Ethiopian legal system by the Anti-Money Laundering Proclamation in 2013.²⁶ However, a clear procedure as to how it is to be implemented is not provided in this Proclamation. The lack of a clear procedure of implementation is affecting directly the effectiveness of civil forfeiture in fighting money laundering.

It is obvious that the main objective of civil forfeiture is to enable authorities to recover illegally obtained assets even in the absence of criminal proceedings for certain justifiable reasons. The reasons can be the absence of sufficient evidence, flight of the suspect or accused or the death of the accused. The civil forfeiture laws are expected to cover these gaps in criminal forfeiture. In this regard, the Anti-Corruption Proclamation includes a provision that allows the institution of civil proceedings against the suspect.²⁷ However, it does not include explicitly the possibility of instituting a civil case against the assets in a situation when a criminal case cannot be instituted against the suspect.

The other basic issue under civil forfeiture is that of the assets subject to forfeiture. Defining the assets subject to forfeiture is a crucial element in asset recovery in general and civil forfeiture in particular.²⁸ The wider the range of properties subject to forfeiture, the more effective becomes the task of recovering stolen assets. In the Anti-Corruption Proclamation, proceeds of crime are subject to civil forfeiture. However, instrumentalities of crime are not.

Another concern of civil forfeiture in Ethiopia is the rights of third parties. Usually, those who commit economic crimes hide their ill-gotten assets in the name of other individuals, especially close relatives. In order to cover such scenarios, widening the scope of civil forfeiture

26 Article 35(3) of the Anti-Money Laundering Proclamation.

27 Article 32 of Anti-Corruption Proclamation.

28 Greenberg *et al* (2009) at 43.

is necessary. At the same time, respect for the property rights of innocent third parties is needed. Thus, one of the hitches to be dealt with under Ethiopian civil forfeiture law is how to strike a balance between these competing interests.

1.3 The Development of Civil Forfeiture

The history of the notion of civil forfeiture can be traced back to the Law of Moses.²⁹ The relevant verse of the Bible provides that:

If an ox gores a man or a woman to death, the ox is to be stoned to death, and its meat must not be eaten. In such a case, however, the owner of the ox will not be held responsible.³⁰

It is not necessary for the owner to engage in a wrongful conduct. The fact that the bull killed a person was sufficient for it to be killed, irrespective of the liability of the owner.

There were practices that resemble civil forfeiture in the Roman Empire, though most of confiscations were part of punishment.³¹ Later, civil forfeiture was introduced into English common law, where it passed through various development stages.³² There were three kinds of forfeiture under ancient English common law. These were forfeiture from attainder, statutory forfeiture and *deodand* forfeiture.³³ Attainder forfeiture was imposed as part of sentencing after conviction.³⁴ It is related to conviction-based forfeiture. However, it differs from the current criminal forfeiture in that even estates of the criminal that had no connection to the criminal conduct were subject to the forfeiture.³⁵

Statutory forfeiture, which is also known as forfeiture for a felony, is a predecessor of criminal forfeiture.³⁶ Forfeiture for a felony was originated in the medieval period by courts as a method of punishing tenants when they failed to comply with their obligations.³⁷ Subsequent

29 Eissa & Barber (2011) at 1; and Hewitt (1983) at 326.

30 Exodus Chapter 21 Verse 28.

31 Jaarsveld (2006) at 141.

32 Jaarsveld (2006) at 142

33 Lieske (1995) at 271.

34 Lieske (1995) at 172.

35 Jaarsveld (2006) at 142.

36 Jaarsveld (2006) at 142.

37 Jaarsveld (2006) at 142.

laws included provisions that permitted forfeiture of offending objects used in violation of custom and revenue rules.³⁸

Deodand forfeiture is the predecessor of modern civil forfeiture. The concept of *deodand* forfeiture was based on the perception that objects are capable of causing harm. If any property resulted in the death of a person, it was forfeited for the benefit of the king.³⁹ *Deodand* forfeiture was conducted irrespective of the innocence or guilt of the owner of the property.

In the eighteenth century, the notion of civil forfeiture was used as a mechanism for fighting crimes such as piracy and slave trafficking.⁴⁰ The idea of civil forfeiture became increasingly significant towards the end of the twentieth century. One of the reasons for this was the increase in crime at a global level and the systematic commission of crimes that left no or little room to obtain a conviction of the suspect. Furthermore, as Young notes:

Modern forfeiture laws are concerned not so much with punishing individuals for their past wrongs but with achieving specific criminal justice objectives including disgorging offenders of their ill-gotten gains, disabling the financial capacity of criminal organisations, and compensating victims of crime.⁴¹

Nowadays, most countries are introducing civil forfeiture, mainly as a weapon for fighting serious criminal activities.⁴² Modern civil forfeiture began in the USA in the late 1970s and 1980s.⁴³ International legal instruments, such as the UNCAC, have embraced the use of civil forfeiture to combat corruption. However, the civil forfeiture provisions in UNCAC do not impose mandatory obligations on States Parties to apply it in their domestic legal systems.⁴⁴

38 Lieske (1995) at 175.

39 Lieske (1995) at 173.

40 Smith & Cassella (2016) at 69.

41 Young S (ed) (2009) at 1.

42 Young S (ed) (2009) at 1.

43 Young S (ed) (2009) at 2.

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

1.4 Objectives of the Study

The general objective of this research paper is to analyse critically the legal regime of civil forfeiture in Ethiopia, paying particular attention to the anti-corruption laws and anti-money laundering laws of the country. The study has the following specific objectives:

- to analyse the civil forfeiture provisions in the anti-corruption laws and anti-money laundering laws;
- to examine the conditions that need to be fulfilled in order to initiate civil forfeiture proceedings;
- to examine how the rights of third parties who have connections to the assets of the suspect are protected;
- to examine the procedures followed in implementing civil forfeiture decisions.

1.5 Research Questions

The study seeks to answer the following questions:

- Are the provisions in Ethiopia's anti-corruption and anti-money laundering laws sufficient for the effective implementation of civil forfeiture?
- What, if any, are the gaps that need to be filled in Ethiopia's anti-corruption and anti-money laundering laws to attain a comprehensive civil forfeiture law?

1.6 Significance of the Study

The concept of civil forfeiture is a recent phenomenon in the Ethiopian legal system. There is a dearth of literature on the subject. This research, by examining the civil forfeiture provisions included in the anti-corruption laws and anti-money laundering laws, identifies their limitations and indicates the need for a more inclusive civil forfeiture law. It may help with further inquiry in the area of civil forfeiture.

1.7 Outline of Remaining Chapters

In order to achieve the designated objectives, the remaining chapters will proceed as follows:

Chapter Two discusses civil forfeiture under international and regional instruments. It discusses the unique nature of civil forfeiture and its difference from criminal forfeiture. The chapter provides arguments in favour of and against civil forfeiture.

Chapter Three examines the Ethiopian civil forfeiture laws. In particular, it analyses the civil forfeiture provisions in the Anti-Corruption Proclamation and Anti-Money Laundering Proclamation. This chapter addresses the core questions of this research.

Chapter Four presents the concluding remarks of the study and recommendations.



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CHAPTER TWO

GENERAL OVERVIEW OF ASSET FORFEITURE

2.1 Introduction

This chapter discusses the international legal instruments related to economic crime, focusing on the asset recovery dimension. The international instruments discussed are those to which Ethiopia is a State Party. These include UNCAC, the Palermo Convention and AU Convention. The Financial Action Task Force Recommendations also form part of the discussion. The chapter addresses also the advantages and disadvantages of both criminal forfeiture and civil forfeiture, as well as the differences between these.

2.2 United Nations Convention against Corruption

UNCAC is an international instrument which was adopted by the United Nations General Assembly on 31 October 2003 and came into force on 14 December 2005. Ethiopia signed UNCAC on 10 December 2003 and ratified it on 26 November 2007. UNCAC provides basic principles, rules and mechanisms that help States Parties to combat and eradicate corruption. It requires States Parties to adopt comprehensive measures that affect their laws, institutions and practices in the fight against corruption.¹

The duty of States Parties extends to their internal activities and to their relations with other States Parties. The Preamble to UNCAC affirms that:

the prevention and eradication of corruption is a responsibility of all States and ... they must co-operate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, if their efforts in this area are to be effective.²

UNCAC provides four basic mechanisms that help countries fight corruption. These are prevention, criminalisation, international co-operation and asset recovery.

Chapter V of the Convention sets out the obligations of States Parties regarding the recovery of assets lost to corruption. Asset recovery is recognised as a fundamental principle of

1 Gebeye (2015) at 87.

2 Para 10 of the Preamble to UNCAC.

the Convention.³ UNCAC is considered to be the international instrument that revolutionised the regime of asset recovery.⁴ The repatriation of money lost to corruption and deposited abroad is very important, particularly for developing countries. History indicates that most corrupt officials deposit their corruptly acquired assets in overseas banks.⁵

Article 52 of UNCAC requires States Parties to take prevention and detection measures aimed at controlling the transfer of assets. It is a preventive scheme within the context of asset recovery. It also obligates States Parties to make their financial institutions effective enough to control the transfer of proceeds of crime. It requires that financial institutions conduct customer due diligence and scrutinise high-value account holders and funds deposited by and on behalf of politically exposed persons (PEPs). States Parties are required also to prevent the establishment of banks that have no physical presence and that are not affiliated to a regulated financial group.

Article 53 deals with obligations of States Parties in relation to civil proceedings. It requires States Parties to allow one another to bring a civil action in their respective courts to establish title to or ownership of stolen assets.⁶ In other words, States Parties are required to grant legal standing in their courts to other States Parties.⁷ It enables a State Party to institute a case as a private civil litigant. Moreover, States Parties are required to take measures that permit their courts to order a person who has committed corruption to pay compensation to other States Parties.⁸ This enables a State Party to seek damages as a victim of corruption committed by individuals.

Article 54 contains measures that States Parties should take to ensure recovery of assets through international co-operation. A robust system of international co-operation is very helpful in efforts to achieve effective asset recovery.⁹ The measures in Article 54 are aimed at enabling States Parties to provide one another with mutual legal assistance in the confiscation

3 Article 51 of UNCAC. See also Gebeye (2015) at 91.

4 Brunelle-Quraishi (2011) at 121.

5 Monfrini (2008) at 42.

6 Article 53(a) of UNCAC.

7 Terracino (2012) at 283.

8 Article 53(b) of UNCAC.

9 Terracino (2012) at 285.

of corruptly acquired assets and instrumentalities. One of the measures is the establishment jurisdiction for courts in relation to asset forfeiture. In other words, a State Party is obligated to empower its courts to receive and give effect to a confiscation order issued by a court of another State Party.¹⁰ A State Party is required also to take measures necessary to authorise its courts to order the confiscation of assets found in the territory of another State Party.¹¹ The effectiveness of this kind of mutual legal assistance depends upon the domestic legal and institutional arrangements of States Parties. A well-structured domestic legal system fosters international co-operation.

In providing mutual legal assistance, States Parties have the obligation to permit their courts to implement freezing or seizure orders issued by the courts of other States Parties.¹² They also must permit their courts to issue freezing or seizure orders for assets situated in the territory of other States Parties.¹³ States Parties are required to authorise their courts to take provisional measures to preserve assets so as to give effect to confiscation orders issued by other States Parties.¹⁴

Moreover, Article 54 provides for confiscation without a criminal conviction. However, unlike criminal confiscation, non-conviction based confiscation is not mandatory. It is left to the discretion of States Parties. The Convention recommends the use of non-conviction based confiscation whenever the suspect cannot be prosecuted because of death, flight or absence or in any other appropriate cases.¹⁵

Claman considers the fact that non-conviction based confiscation is not mandatory as one of the shortcomings of the Convention.¹⁶ In practice, though many countries are introducing non-conviction based confiscation, most still require a conviction as a pre-condition for confiscation.¹⁷ There is a possibility for criminals to escape conviction because of the high

10 Article 54(1)(a) of UNCAC.
11 Article 54(1)(b) of UNCAC.
12 Article 54(2)(a) of UNCAC.
13 Article 54(2)(b) of UNCAC.
14 Article 54(2)(c) of UNCAC.
15 Article 54(1)(c) of UNCAC.
16 Claman (2008) at 346.
17 Terracino (2012) at 287.

standard of proof required in criminal proceedings. High-ranking state officials are in a position to shield themselves from prosecution through amnesty laws. They may also be in an office that enables them to shred documents that may help in their conviction. Had UNCAC made non-conviction based confiscation mandatory, it would have tackled such scenarios and made the regime of asset recovery more effective.

Article 55 of UNCAC sets out the obligation of States Parties to provide mutual legal assistance for confiscation purposes. Adherence to this obligation can take two forms, depending on the type of assistance requested. These are direct enforcement (when the request is for the enforcement of a confiscation order) and indirect enforcement (when the request is to obtain a confiscation order). In the case of direct enforcement, the requested State Party executes a confiscation order issued by the court of the requesting State Party.¹⁸ With indirect enforcement, the requested State Party submits the request for a confiscation order to its courts on behalf of the requesting State Party. If the confiscation order is granted, the requested State Party must execute it.¹⁹ In both cases, the obligation extends only to the proceeds of crime, property, equipment or other instrumentalities located within the boundaries of the requested State Party.

Article 56 provides for proactive international co-operation. It requires States Parties to take measures that enable them to forward information to other States Parties without having received a prior request. This obligation exists only when the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or might lead to a formal request for assistance.

Article 57 deals with the repatriation and disposal of recovered assets. It requires States Parties to establish a domestic legal framework that enables their authorities to return the confiscated property.²⁰ If the confiscated property is embezzled public funds or laundered embezzled public funds, the requested State Party is obligated to return it to the requesting

18 Article 55(1)(b) of UNCAC.

19 Article 55(1)(a) of UNCAC.

20 Article 57(2) of UNCAC.

State Party.²¹ If the confiscated property is proceeds of other corruption offences, the requesting State Party can get it back, if the confiscation was conducted through mutual legal assistance on the basis of a final judgment of the requesting State Party. In addition, the requesting State Party is required reasonably to establish prior ownership of the confiscated property.²² Returning the confiscated asset is possible also if the requested State Party recognises the damage caused to the requesting State Party. In all other cases, UNCAC requires States Parties to repatriate the confiscated assets to the prior legitimate owners or to the victims of the crime.²³

The requested State Party is empowered to deduct from the confiscated assets the reasonable costs incurred in the investigation and prosecution leading to the repatriation of the assets.²⁴ The requesting State Party and the requested State Party may conclude an agreement to determine the final disposal of the confiscated assets.²⁵

2.3 United Nations Convention against Transnational Organised Crime (Palermo Convention)

The Palermo Convention was adopted on 15 November 2000 and entered into force on 23 September 2003. Ethiopia ratified the Convention on 23 July 2007. It is an effective tool and necessary legal framework for international co-operation to combat criminal activities such as corruption, illicit trafficking in endangered species of wild flora and fauna, and money laundering.²⁶ The purpose of the Palermo Convention is to promote co-operation to prevent and combat transnational organised crime more effectively.²⁷ It requires States Parties to criminalise corruption and to take measures to fight it.²⁸ It requires also that money laundering be criminalised and measures be taken to tackle it domestically.²⁹

21 Article 57(3)(a) of UNCAC.

22 Article 57(3)(b) of UNCAC.

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

24 Article 57(4) of UNCAC.

25 Article 57(5) of UNCAC.

26 Para 10 of the Preamble to the Palermo Convention.

27 Article 1 of the Palermo Convention.

28 Articles 8 & 9 of the Palermo Convention.

29 Articles 6 & 7 of the Palermo Convention.

Article 12 of the Palermo Convention addresses confiscation and seizure. Confiscation is defined as “the permanent deprivation of property by order of a court or other competent authority”.³⁰ Seizure refers to “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority”.³¹ States Parties are required to take measures to identify, trace, freeze and seize proceeds of crime and instrumentalities for confiscation purposes. The proceeds of crime or assets of equivalent value to the proceeds of crime, equipment and instrumentalities used in or destined for use in criminal activities are all subject to confiscation.

If the proceeds of crime have been converted into other assets, those assets are also subject to confiscation.³² Whenever the proceeds of crime are intermingled with assets acquired from a legitimate source, such assets are subject to confiscation up to the value of the proceeds.³³ Moreover, income or other benefits derived from assets into which the proceeds of crime have been converted, or with which they have been intermingled, are subject to confiscation up to the value of the proceeds.³⁴ As far as the conversion and intermingling of assets and income derived from the proceeds of crime are concerned, there is a high probability of the involvement of third parties. In order to avoid prejudice, the Convention guarantees the protection of the rights of the *bona fide* third parties.³⁵

Article 13 provides for international co-operation in confiscation. It is similar to Article 55 of UNCAC. If the request is for the enforcement of a confiscation order issued by a court of the requesting State Party, the requested State Party is required to execute it directly.³⁶ If the request is to obtain a confiscation order, the requested State Party is required to apply for such an order. If the order is granted, the requested State Party is obligated to execute it.³⁷ Article 13(7) caters for the possibility of refusal of co-operation by the requested State Party. If the

30 Article 2(g) of the Palermo Convention.

31 Article 2(f) of the Palermo Convention.

32 Article 12(3) of the Palermo Convention.

33 Article 12(4) of the Palermo Convention.

34 Article 12(5) of the Palermo Convention.

35 Article 12(8) of the Palermo Convention.

36 Article 13(1)(b) of the Palermo Convention.

37 Article 13(1)(a) of the Palermo Convention.

acts to which the request relates are not criminalised by the Convention, the requested State Party may refuse to co-operate. That is the dual criminality requirement.

Article 14 provides for disposition of the confiscated assets. They should be handled in accordance with the domestic law and administrative procedures of the requesting State Party. However, priority should be given to returning them to their legitimate owners or as compensation to victims of the crime.³⁸ The Palermo Convention recognises only conviction based confiscation. It does not provide for non-conviction based confiscation.

2.4 African Union Convention on Preventing and Combating Corruption (AU Convention)

The AU Convention was adopted on 11 July 2003 and entered into force on 5 August 2006. It is the result of the concern of States Parties with the devastating effect of corruption on the socio-economic development of the continent. One of the objectives of the Convention is to promote and strengthen the mechanisms used to prevent, detect, punish and eradicate corruption.³⁹ To achieve the aim of fighting corruption, the focus of the Convention is upon the criminalisation of corrupt conduct.⁴⁰ Ethiopia signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.

The AU Convention is concerned with corruption in both the public sector and the private sector. It requires States Parties to take measures to prevent and combat corruption in the private sector,⁴¹ and to create an enabling environment for civil society and the media to participate in fighting corruption.⁴² Article 16 provides for confiscation and seizure of the proceeds and instrumentalities of corruption. The Convention defines confiscation as a:

penalty or measure resulting in a final deprivation of property, proceeds or instrumentalities ordered by a court of law following proceedings in relation to criminal offence or offences connected with or related to corruption.⁴³

38 Article 14(2) of the Palermo Convention
39 Article 2(1) of the AU Convention.
40 Para 9 of the Preamble to the AU Convention.
41 Article 11 of the AU Convention.
42 Article 11 of the AU Convention.
43 Article 1 of the AU Convention.

Although the definition is broad in encompassing property, proceeds and instrumentalities, its scope is limited to a confiscation order issued pursuant to criminal proceedings. In other words, an order for confiscation following civil proceedings is not enforceable under the Convention. It excludes also the enforcement of a confiscation order issued by non-judicial organs.

States Parties are required to adopt legislative measures that enable their competent authorities to search, identify, trace, freeze and seize proceeds or instrumentalities of corruption.⁴⁴ In addition, the legislative measures must enable the competent authorities to order confiscation of assets which correspond in value to proceeds of crime⁴⁵ and repatriate proceeds of corruption.⁴⁶ States Parties may request from one another seizure of either proceeds of crime and instrumentalities or assets that may serve as evidence in the proceedings.⁴⁷ According to Article 16(3), even where extradition is refused or is not possible due to death, disappearance or escape of the suspect, the requested State Party still is required to hand over the assets to the requesting State Party.

The mutual legal assistance obligation is contained in Article 18 of the Convention. States Parties are required to provide one another with the greatest possible technical co-operation and assistance.⁴⁸ The duty to co-operate extends also to conducting and exchanging research on how to combat corruption, exchanging of expertise, and in providing joint training.⁴⁹ Article 19 provides for international co-operation. States Parties are required to take legislative measures to prevent corrupt public officials from enjoying their illegally acquired assets by freezing their overseas accounts and facilitating their repatriation to the country of origin.⁵⁰ States Parties have an obligation to co-operate in investigations and prosecutions of crimes covered by the Convention.

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

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

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

47 Article 16(2) of the AU Convention.

48 Article 18(1) of the AU Convention.

49 Article 18(3) and (4) of the AU Convention.

50 Article 19(3) of the AU Convention.

2.5 Financial Action Task Force Recommendations

The Financial Action Task Force (FATF) is an intergovernmental body established by the G-7 summit in 1989.⁵¹ The mandate of the FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing.⁵² The FATF Recommendations are considered to be international standards that states should implement through measures relevant to their particular circumstances.⁵³ The Recommendations are soft law. However, they are powerful since countries try to comply, because they fear being listed as a non-compliant jurisdiction by the FATF and because of the continuous mutual evaluations.⁵⁴

In addition to country members, the FATF has associate members, the so-called FATF-Style Regional Bodies. The main task of the associate members is to promote a member country's implementation of the FATF Recommendations.⁵⁵ Currently, they are nine in number. The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is one of these groups. Ethiopia has been a member of ESAAMLG since September 2013. The member countries of ESAAMLG have agreed to adopt and implement the Forty Recommendations and Special Recommendations of the FATF.⁵⁶

Recommendation 3 requires countries to criminalise money laundering. It requires broadening of the scope of predicate offences by including all serious crimes. The scope of predicate offences may include also conduct that occurred in another country, as long it constitutes a crime in that country.⁵⁷ The FATF Recommendations provide for preventive measures to help combat money laundering. One of these preventive measures is the undertaking of customer due diligence.⁵⁸ Countries are required to enact a law that prohibits financial institutions from keeping anonymous accounts. The measures should include

51 Madinger (2012) at 71.

52 FATF (2012) at 7.

53 *Podeschi v San Marino* No 66357/2017, Para 82.

54 FATF (2018) at 3.

55 Bureau of International Narcotics and Law Enforcement Affairs (2016) at X.

56 Section I of the Memorandum of Understanding among Member Governments of the ESAAMLG.

57 Interpretative Note to Recommendation 3, Para 5.

58 FATF Recommendation 10.

empowering financial institutions to identify and verify the identity of the customer and the beneficial owner of suspect transactions.⁵⁹

Recommendation 4 addresses confiscation and provisional measures. It is recognised that “a robust system of provisional measures and confiscation is an important part of an effective anti-money laundering and counter-terrorist financing regime”.⁶⁰ The Recommendation defines confiscation as “the permanent deprivation of funds or other assets by order of a competent authority or a court”.⁶¹ Another relevant measure authorises competent authorities to freeze, seize and confiscate laundered property, proceeds and instrumentalities of predicate offences, and property used or intended for use in money laundering or financing of terrorism.⁶² The FATF advises countries to adopt non-conviction based asset recovery. Alternatively, countries are advised to take measures that require suspects to establish the licit origin of their assets alleged to be liable to confiscation.

Recommendation 38 provides for mutual legal assistance for the purposes of freezing and confiscation. One of the required measures is authorising the domestic institutions to execute expeditiously such requests from other countries. It is stressed that the competent authorities should be permitted to respond to requests relying upon non-conviction based confiscation and related provisional measures.

2.6 Mechanisms of Forfeiture

There are two widely used mechanisms of forfeiture. These are criminal forfeiture and civil forfeiture. They are applicable in both the common law tradition and the civil law tradition. Both mechanisms have their advantages and disadvantages. In addition, they are not substitutes for but rather complements to each other. In principle, civil forfeiture is considered

59 FATF (2012) at 58.

60 FATF (2012) at 1.

61 FATF (2012) at 112.

62 FATF Recommendation 4.

as an alternative mechanism to criminal forfeiture when the latter cannot be deployed for justifiable reasons.⁶³

2.6.1 Criminal Forfeiture

Criminal forfeiture is an *in personam* action against the accused. The availability of the accused matters in criminal forfeiture, since it is part of the criminal proceedings brought against the accused with a view to obtaining a conviction. In order to forfeit the illegally obtained assets, it is mandatory to establish the guilt of the accused. Thus, criminal forfeiture is ordered as part of the punishment whenever the accused is sentenced to prison or to pay a fine.⁶⁴ Criminal forfeiture can be object-based or value-based.⁶⁵ Object-based criminal forfeiture is confiscating the ill-gotten asset itself. If it is impossible to do so, perhaps because it is lost, value-based forfeiture can be used. In this case, the convicted person is required to pay the value equivalent of the ill-gotten assets from his legal assets.

2.6.1.1 Advantages of Criminal Forfeiture

Recovering stolen assets through criminal forfeiture has several advantages. Firstly, the prosecutor establishes the guilt of the accused and the case for forfeiture in a single proceeding.⁶⁶ Since the forfeiture decision is part of the sentence, there is no need to bring a separate claim to obtain a forfeiture order against the ill-acquired assets. Criminal forfeiture thus enables the government to save resources and time. It also reduces the court's case load.

Secondly, if the stolen assets are lost the court can order value-based forfeiture against the accused.⁶⁷ Unlike civil forfeiture, where establishing a link between the assets and the criminal conduct is mandatory, in value-based criminal forfeiture it is possible to forfeit without the need to establish such a link. In other words, the connection between the criminal act and the asset does not have to be proved to secure a value-based forfeiture order.⁶⁸

63 Bogore (2014) at 15.

64 Cassella (2008) at 9.

65 Greenberg *et al* (2009) at 13.

66 Cassella (2009) at 47.

67 Cassella (2009) at 48.

68 Nikolov (2011) at 23.

Thirdly, time limits generally do not impede the filing of a case for criminal forfeiture.⁶⁹ In most jurisdictions, criminal forfeiture either is not subject to a statute of limitations or subject to a fairly long one. Thus, there is less room for a person to go unpunished because of the delay in initiating the case.

2.6.1.2 Disadvantages of Criminal Forfeiture

The criminal forfeiture mechanism is not without drawbacks. One of its disadvantages is the requirement of conviction of the accused. Since it is ordered as a part of the sentence, there is no forfeiture in the absence of a conviction. If a conviction cannot be obtained because of the death or disappearance of the accused, a court cannot give a forfeiture order.⁷⁰ If the accused pleads guilty on one count in a multi-count case, it may result in limiting the forfeiture to assets that have a link with the admitted single count.⁷¹

The high standard of proof required in criminal forfeiture is another disadvantage. It requires the prosecutor to prove the guilt of the accused beyond a reasonable doubt. As a result, any reasonable doubt created in the mind of the judges or jury may impede a conviction and thereby the forfeiture.

2.6.2 Civil Forfeiture

Civil forfeiture is an *in rem* action. A case is initiated against the assets itself, not against the individual.⁷² The target of the proceedings is not the person who committed the crime; rather it is the assets that have a link to the crime. In other words, the focus of civil forfeiture is the proceeds and instrumentalities of crime. Nikolov defines civil forfeiture as:

an irrevocable and unconditional appropriation by the state of property acquired directly or indirectly through criminal or illegal activity, by virtue of a judgement passed by a civil court or an order issued by other competent authorities, but not by virtue of a verdict passed by a criminal court on filed charges and on the grounds of the conviction.⁷³

69 Cassella (2009) at 48.

70 Cassella (2008) at 11.

71 Cassella (2009) at 49.

72 Greenberg *et al* (2009) at 14.

73 Nikolov (2011) at 17.

Civil forfeiture does not result in the loss of liberty. It is assets-based proceedings and the asset is the defendant. For instance, in the United States, the civil forfeiture cases usually carry names such as *United States v \$100 000*.⁷⁴

The case for civil forfeiture can be instituted before, during or after criminal proceedings. The outcome of the criminal proceedings is irrelevant in deciding a civil forfeiture. The conviction or acquittal of the accused has nothing to do with the forfeiture of the illegally obtained assets. Since a civil forfeiture case is a separate claim from the criminal case, assets that have a connection to the crime, in which the accused may have an interest, can be forfeited even though the accused has been acquitted in the criminal proceedings.

In a civil forfeiture case, the state is required to prove only the connection between the assets and the crime. It is not mandatory to convince the court beyond a reasonable doubt. It is sufficient that the prosecutor proves that the assets are proceeds of crime or used to commit a crime.⁷⁵ The standard of proof is proof on a preponderance of the evidence.

2.6.2.1 Advantages of Civil Forfeiture

Civil forfeiture has many advantages. Firstly, it is not necessary to secure the custody of the suspect or accused to institute or proceed with a claim. A civil forfeiture case can be conducted in the absence of the accused. The defendant is the asset(s), not a person, which leads to the conclusion that the attendance of the latter is not necessary. There are various reasons which make the presence of the accused either difficult or impossible, thereby nullifying a criminal case to obtain conviction and forfeiture order. The person may be dead (for example, Sani Abacha of Nigeria). He may have fled the country to escape prosecution. There are also instances where the accused makes his conviction impossible by suppressing the investigation or by influencing the witnesses or the judge.⁷⁶ The accused may not be able to stand trial due to illness or may be immune from prosecution because he has been granted amnesty.⁷⁷ In all these scenarios, it is impossible to obtain the conviction needed to apply the criminal forfeiture

74 Cassella (2008) at 9.

75 Cassella (2009) at 49.

76 Daniel & Maton (2008) at 243.

77 Greenberg *et al* (2009) at 15.

system. Here civil forfeiture provides an effective alternative to remedy the shortcomings of criminal forfeiture.

Secondly, unlike criminal forfeiture which requires proof beyond a reasonable doubt, in most jurisdiction civil forfeiture requires a lower standard of proof. It requires the prosecutor to prove the link between the crime and the assets on a preponderance of the evidence.⁷⁸

Thirdly, conviction of the accused is irrelevant in civil forfeiture. The basis of a civil forfeiture order is the involvement of the assets in criminal activities. An order of civil forfeiture may be obtained even after the criminal bench acquits the accused. For instance, if the accused is acquitted due to insufficient evidence, the prosecutor still may institute a civil forfeiture case.

Fourthly, civil forfeiture allows for the forfeiture of assets under the control of third parties.⁷⁹ In criminal forfeiture, it is difficult to forfeit assets that are related to third parties since they are not parties to the criminal proceedings. In a civil forfeiture case, any person with a vested interest can be made a party to the proceedings, giving him or her the opportunity to contest the forfeiture. Once the prosecutor has given proper notice to all interested parties, it is possible to obtain a forfeiture judgment regardless of who owns the assets.⁸⁰

2.6.2.2 Disadvantages of Civil Forfeiture

Civil forfeiture is not without demerits. It is first and foremost a civil action. Although there is a need to establish the connection between a crime and the assets, this does not change the civil nature of the proceedings. Claims in civil proceedings are subject to statutory time limitations.⁸¹ Thus, if the state fails to institute a case within the prescribed time limit, the chance forfeiting the ill-gotten asset may be lost.

In civil forfeiture, only assets that are traced for the crime in question are subject to forfeiture. Unlike criminal forfeiture, where the court can order value-based forfeiture, in civil forfeiture the judgment cannot be extended beyond assets that have a link to the crime. Other

78 Nikolov (2011) at 23.

79 Cassella (2009) at 45.

80 Cassella (2009) at 45.

81 Cassella (2009) at 46.

assets of the accused fall outside the ambit of civil forfeiture. The court cannot order forfeiture of substitute assets since civil forfeiture follows the object-based approach.

2.6.2.3 Civil Forfeiture in the Common Law and Civil Law Systems

The inception and development of the civil forfeiture system occurred in the common law countries, such as the United States and the United Kingdom. It has spread across other common law countries, such as South Africa and Ireland.⁸² The civil law countries are following in the footsteps of the common law countries. For instance, countries such as Switzerland, Colombia and Albania have enacted civil forfeiture legislation.⁸³ Civil forfeiture thus is an important remedial tool in both the civil and common law jurisdictions.

However, Greenberg *et al* have identified important differences in civil forfeiture under the two systems. Unlike the civil law system, the common law system endows the prosecutor with broad discretionary power. In the common law system, the prosecutor can determine whether to proceed with prosecution or dismiss the case based on the available evidence. In the civil law countries, the prosecutor needs to obtain court approval before dismissing a case.⁸⁴ Furthermore, in the common law system, a civil forfeiture case is instituted in a civil court. In the civil law countries, it is instituted in a criminal court.⁸⁵ Apart from these differences, in both the common law and the civil law tradition, civil forfeiture is recognised as an *in rem* action, conviction is not required, and establishing a nexus between the unlawful acts and the assets is sufficient.⁸⁶

2.6.3 Comparing Civil Forfeiture and Criminal Forfeiture

As mentioned above, civil forfeiture and criminal forfeiture are the most widely practised asset confiscation mechanisms. They have similarities and differences. Both civil forfeiture and criminal forfeiture share the same objective,⁸⁷ which is the forfeiture of the proceeds and

82 Simser (2008) at 17.

83 Greenberg *et al* (2009) at 17.

84 Greenberg *et al* (2009) at 48.

85 Greenberg *et al* (2009) at 17.

86 Gebremeskel (2014) at 33.

87 Greenberg *et al* (2009) at 13.

instrumentalities of crimes to the government. Both share common justifications.⁸⁸ These are prohibiting criminals from profiting from their criminal activities, compensating the victims, and discouraging further commission of crime. Both came into effect through the judicial process. In both mechanisms, a court judgment is necessary.

They have fundamental differences as well. Criminal forfeiture requires conviction, whereas civil forfeiture does not. In criminal forfeiture, both object-based and value-based forfeiture are available, whereas in the civil forfeiture only object-based forfeiture is applicable. The standard of proof in criminal forfeiture is proof beyond a reasonable doubt whereas it is proof on a preponderance of the evidence in civil forfeiture. Criminal forfeiture is an *in personam* action, whereas civil forfeiture is an *in rem* action. Criminal forfeiture is imposed as part of the sentence, whereas civil forfeiture can be imposed before, during or after conviction and even, for that matter, in the absence of any criminal charge.

2.6.4 Issues in Civil Forfeiture

Civil forfeiture is a recent development compared to criminal forfeiture, at least in terms of appearing in the international legal instruments and national laws. As a result, some issues and challenges are inevitable. In order to stand and continue as an important mechanism for fighting economic crime, the concept of civil forfeiture needs to be supported by reasonable and convincing justifications.

One of the challenges facing civil forfeiture emanates from the well-founded principle of the presumption of innocence. The core idea of the presumption of innocence is that, until the prosecutor proves his guilt, the accused is innocent. This principle is embedded in different international and regional legal instruments.⁸⁹ The presumption of innocence is one of the general principles considered to be a pillar of the criminal justice system everywhere. It protects the accused against self-incrimination and confers upon him the right to remain silent. What is more, it places the burden of proof on the shoulders of the prosecutor.

88 Greenberg *et al* (2009) at 13.

89 See Article 11(1) of the Universal Declaration of Human Rights (UDHR), Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 7(b) of the African Charter on Human and Peoples' Rights (ACHPR).

Civil forfeiture cases are instituted on the basis of the criminal act that resulted in the illegal gain of assets. Those opposing civil forfeiture argue that it shifts the burden of proof from the prosecutor to the defendant, lowers the standard of proof, and then violates the presumption of innocence. The proponents of civil forfeiture base their response on the distinctions between criminal proceedings and civil proceedings, arguing that the presumption of innocence applies to criminal proceedings and not to civil proceedings.⁹⁰ Civil forfeiture constitutes civil proceedings. In civil proceedings, as opposed to criminal proceedings, the burden of proof lies on both parties. Moreover, the presumption of innocence guarantees a trial that affects the liberty of the accused, not the licit or illicit nature of assets. Therefore, civil forfeiture does not violate the presumption of innocence.

Another challenge of civil forfeiture is related to the individual right to property. Those who are against civil forfeiture argue that, since the acts that give rise to civil forfeiture are criminal, applying the civil standard violates the right to private property.⁹¹ The seizure and restraining processes are criticised also as interference with the enjoyment of individual property rights. The response to this criticism is noted to exist in the purpose of property law itself. It is argued that the law protects the right to private property and its enjoyment free of interference only when such rights are established legally. The legal protection does not extend to property acquired by unlawful means.

Another challenge relates to the retroactive application of civil forfeiture legislation. Those who argue against civil forfeiture claim that retrospective application violates the principle that prohibits the enactment of *ex post facto* laws. The counter-argument is that this allegation works only in criminal law cases. Civil forfeiture is not penal in nature. It is a civil law consequence of obtaining assets illegally.⁹² Thus, civil forfeiture laws can be enforced without violating the basic principles of criminal law.⁹³

Another issue is third-party rights. There is a possibility for ill-gotten assets to be transferred to a third party. In such scenario, instituting a case against the asset may affect the

90 See Article 66(1) of the Rome Statute, Article 11(1) of the UDHR and Article 14(2) of the ICCPR.

91 Sanbei (2012) at 6.

92 Greenberg *et al* (2009) at 45.

93 Greenberg *et al* (2009) at 46.

rights of the third-party. Unlike criminal forfeiture proceedings, in which a third party cannot participate, in a civil forfeiture case it is possible to include third parties precisely because it is a civil case. Accordingly, giving notice to individuals with a potential interest in the assets can simplify the task of addressing third-party rights.⁹⁴ It is necessary to protect the rights of third parties who acquired the assets in good faith. By contrast, if the third party acquired rights over the assets knowing them to be proceeds of crime, the assets should be subject to forfeiture.

2.7 Conclusion

This chapter has discussed asset forfeiture under some of the international instruments, namely, UNCAC, the AU Convention and the Palermo Convention. Most of these international instruments provide for criminal forfeiture as the conventional approach to forfeiture. UNCAC provides also for civil forfeiture. However, States Parties are not required to adopt it. The chapter also has addressed the differences between criminal forfeiture and civil forfeiture. Criminal forfeiture is conviction dependent and requires that the prosecution prove its case beyond a reasonable doubt. Civil forfeiture eases the difficulties of criminal forfeiture by lowering the standard of proof to proof on a preponderance of the evidence and allowing forfeiture in the absence of conviction. However, the opponents of civil forfeiture argue that it violates private property rights and the presumption of innocence. Despite the critics, more and more countries are adopting civil forfeiture as it is a powerful tool in fighting economic crime.

94 Greenberg *et al* (2009) at 69.

CHAPTER THREE

THE CIVIL FORFEITURE LAWS OF ETHIOPIA

3.1 Introduction

This chapter addresses the legal framework of civil forfeiture in Ethiopia. It discusses civil forfeiture mechanisms in relation to the constitutional right to private property. The question of whether civil forfeiture is consistent with private property rights as contained in the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) is an important one. The chapter considers also whether civil forfeiture accords with the FDRE Constitution as regards the presumption of innocence. It addresses the civil forfeiture provisions of the Anti-Corruption Proclamation and the Anti-Money Laundering Proclamation. Matters such as the property subject to forfeiture, the protection of the rights of *bona fide* third parties and international co-operation in civil forfeiture are the focus areas of this chapter.

3.2 Constitution of the Federal Democratic Republic of Ethiopia

One of the criticisms raised against civil forfeiture law is that it violates private property rights. Measures intended to combat crime may affect the constitutional rights of individuals.¹ The public's interest in fighting economic crime and the individual's interest in safeguarding private property rights are in conflict.² Hence, striking a balance between the need to combat economic crime, on one hand, and the need to protect the private property rights, on the other hand, is important in establishing the legitimacy of civil forfeiture in the domestic law.³

The FDRE Constitution is the supreme law of the land.⁴ For any other laws to be valid, they have to be consistent with the Constitution. The Constitution stipulates that laws in contradiction with it are not valid. It provides that:

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- 1 Basham & Sibilla (1979) at 656.
 - 2 Van Der Walt (2000) at 9.
 - 3 Van Der Walt (2000) at 1.
 - 4 Article 9(1) of the FDRE Constitution.

any law, customary practice or a decision of an organ of state or a public official, which contravenes this Constitution, shall be of no effect.⁵

In the context of this paper, the provisions of the Anti-Corruption Proclamation and the Anti-Money Laundering Proclamation related to civil forfeiture need to be consistent with the Constitution.

The FDRE Constitution recognises private property rights. In this connection, it provides that:

every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.⁶

The private property can be “any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen”.⁷

The Constitution guarantees the protection of private property rights against interference. However, it does not outlaw all interference. Rather, it forbids arbitrary interference. International instruments prohibit only arbitrary interference.⁸ Private property rights of individuals are not absolute. The clause “unless prescribed otherwise by law on account of public interest” contained in article 40(1) of the Constitution provides for instances where private property rights may be restricted by law to promote the public interest. Expropriation is a typical example where property rights may be restricted for a public purpose.⁹ In the same way that protecting private property rights is important, so is protecting the public interest by fighting economic crime. As protecting private property rights is the duty of the state, so is taking and enforcing legislative measures to prevent crime.¹⁰ Forfeiting the proceeds of crime is an *ex post facto* response to economic crime. Civil forfeiture is a powerful tool that serves to deprive criminals of their ill-gotten assets.

5 Article 9(1) of the FDRE Constitution.

6 Article 40(1) of the FDRE Constitution.

7 Article 40(2) of the FDRE Constitution.

8 Article 17(2) the UDHR and article 14 of the African Charter on Human and Peoples’ Rights (ACHPR).

9 Gebremichael (2016) at 191.

10 Chapter III of UNCAC.

Private property rights are protected when the property is acquired through legal means. The legal protection does not guarantee non-interference with property obtained illegally. Forfeiting property obtained illegally is not arbitrary interference, once it is proved that it has been obtained illegally. It is an interference intended to serve the public interest. It helps to deter crime by sending a message that the government will not allow criminals to enjoy their ill-gotten assets. The civil forfeiture provisions included in the Anti-Money Laundering Proclamation and the Anti-Corruption Proclamation are not means of unlawful interference with private property rights. They are tools to deter criminal conduct. Criminals should not be allowed to enjoy their proceeds of crime under cover of protection of private property rights. The practice in jurisdictions such as South Africa and the USA support the constitutionality of civil forfeiture.¹¹ To conclude, the civil forfeiture provisions in the Anti-Corruption Proclamation and the Anti-Money Laundering Proclamation are not in contradiction with the private property rights guaranteed by the FDRE Constitution.

Another constitutional right alleged to be affected by civil forfeiture is the presumption of innocence. The FDRE Constitution guarantees the presumption of innocence as follows:

accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.¹²

The presumption of innocence is a fundamental constitutional right of an accused person. It protects the liberty of the accused. It is the duty of the prosecutor to prove the guilt of the accused beyond a reasonable doubt. Until proved guilty, the accused person is presumed innocent. In a civil forfeiture case, the duty of the state is to establish that the property is proceeds of crime on a preponderance of the evidence. In a criminal forfeiture, the target of the proceedings is the accused and the decision affects the accused's liberty. By contrast, in a civil forfeiture case, since the target of the proceedings is the ill-gotten assets, the presumption of innocence is not negated.

11 Gupta (2002) at 166-167. See also *Deutschmann NO v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E) at 124.

12 Article 20(3) of the FDRE Constitution.

Civil forfeiture does not shift the onus of proof since the state has to show the illegal origin of the assets before the defendant is asked to show their licit origin.¹³ Also, the issue is not whether the concerned person has committed a crime, rather it is a question of the lawful nature of the property. The presumption of innocence applies in a criminal matter, not in a civil matter,¹⁴ and civil forfeiture is civil, not criminal, in nature. Criminal law safeguards are not applicable in civil proceedings.¹⁵ The person whose property is targeted is not presumed guilty. That means civil forfeiture is neutral about the conduct of the property holder.¹⁶ It is not in conflict with the presumption of innocence.¹⁷ Therefore, the civil forfeiture provisions in the Anti-Corruption Proclamation and Anti-Money Laundering Proclamation are not inconsistent with the presumption of innocence contained in the FDRE Constitution.

3.3 The Criminal Code and Forfeiture

The modern codification of Ethiopian criminal law started in 1930 when the first Penal Code was enacted. A more comprehensive Penal Code followed in 1957. Parliament enacted the current Criminal Code in 2004. Before the enactment of the Corruption Crimes Proclamation (see §3.4 below) and the Anti-Money Laundering Proclamation, the Criminal Code provisions were used to deal with these crimes. Later, because of the changing nature of these crimes, the legislature decided to enact separate proclamations that include the new global developments and that allow the government to tackle the adverse effects which these crimes have on the economy of the country.¹⁸ However, the general principles of criminal law included in the Criminal Code remain applicable as far as they are relevant. For instance, the Corruption Crimes Proclamation provides that Articles 1 to 237 of the Criminal Code apply to corruption crimes.¹⁹

As to forfeiture, the Criminal Code provides that “any property which the criminal has acquired, directly or indirectly, by the commission of the crime for which he was convicted shall

13 Stahl (1992) at 284-285.

14 Article 11(1) of the UDHR, Article 14(2) of the ICCPR & Article 7(1)(b) of ACHPR.

15 Cheh (1991) at 1351. See also King (2016) at 155.

16 Boucht (2014) at 253.

17 Boucht (2014) at 253.

18 Para 5 of the Preamble to the Corruption Crimes Proclamation.

19 Article 34 of the Corruption Crimes Proclamation.

be confiscated”.²⁰ Before a forfeiture order may be issued, the court must convict the accused, and the property should be related, directly or indirectly, to the crime of which the accused has been convicted.

Besides criminal forfeiture, the Criminal Code provides for the possibility of forfeiture to the state of the proceeds of crime in certain other circumstances. In this regard, Article 100(2) stipulates that:

any fruits of a crime shall be forfeited to the State where its owner or any other claimant is not found within five years starting from the date of publication of notice having been made concerning the recovery of the property in accordance with the usual procedure.

Although this seems like civil forfeiture, it is not an *in rem* civil action in the strict sense. It is similar to civil forfeiture in that the forfeiture occurs without the conviction of the accused. However, the forfeiture under Article 100(2) is based upon a prescription period and does not involve a court order issued as part of civil proceedings. The state obligation is to comply with the notice publication requirement. If no one stakes a claim within the prescribed five years, the state can forfeit the property.

The Criminal Code contains the provisions that regulate criminal forfeiture. It does not deal with civil forfeiture. The enactment of separate proclamations for economic crime was motivated by the need to provide for civil forfeiture.

3.4 Corruption Crime Proclamation

The enactment of the Corruption Crimes Proclamation No 881 of 2015 is an important step taken by the government to combat corruption. The Proclamation deals with corruption more thoroughly than does the Criminal Code. It includes new developments and increases the punishments for corruption crimes.

As with many other crimes, a person convicted of corruption is subject to imprisonment or a fine or both. Besides, recovering the stolen assets (which can be the property of the state or an organisation or an individual) is an additional mechanism for deterring crime. Corrupt

20 Article 98(2) of the FDRE Criminal Code.

individuals ought to be deprived of their ill-gotten assets. The Corruption Crimes Proclamation provides for criminal forfeiture in the following terms:

Any public servant or employee of a public organisation convicted of corruption crime shall, in addition to the punishment under the infringed provision:

(a) forfeit the profit, interest, money or property unlawfully obtained or pay its equivalent value where the profit or property is not found.²¹

Once the accused is convicted, the court can order forfeiture of the stolen assets. The progress made by the Corruption Crimes Proclamation is the recognition of a broad notion of stolen assets, which includes the profit and interest earned from the unlawfully obtained property.

The Corruption Crimes Proclamation does not cater for civil forfeiture. There is no provision that empowers the public prosecutor or any other organ of state to initiate a civil forfeiture case. Article 7 provides that conviction or acquittal on a charge brought for a crime covered by the Proclamation does not exclude administrative and civil liabilities. It allows for the instituting of civil proceedings despite the acquittal of the accused. However, it does not specify whether the civil suit is to recover ill-gotten assets. Basically, the Corruption Crimes Proclamation provides the substantive structure of the corruption crimes, whereas the related procedural and evidentiary matters are regulated by the Anti-Corruption Proclamation. Therefore, the civil forfeiture provisions of the Anti-Corruption Proclamation apply to forfeit proceeds obtained from one or more of the crimes in the Corruption Crimes Proclamation.

3.5 Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation

Before 2015, the only recognised form of forfeiture of proceeds of corruption crimes was conviction based asset recovery.²² One of the new developments included in the Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No 882 of 2015 (Anti-Corruption Proclamation) is the non-conviction based asset recovery. The core provision governing non-conviction based asset recovery is Article 32 of the Anti-Corruption Proclamation. The title of Article 32 is “Recovery of Property by Civil Action”. From this title, it is

21 Article 4(3)(a) of the Corruption Crimes Proclamation.

22 Article 29 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation of 2005.

not clear whether the article concerns a civil action against property or a civil action against the concerned individual. It requires clarification.

3.5.1 The Nature of the Article 32 Civil Action

One of the basic points which needs to be addressed regarding Article 32 is the nature of the civil action it envisages. Article 32 provides for non-conviction based asset recovery as follows:

- (1) Without prejudice to the provisions of article 29 of this Proclamation the appropriate organ may institute civil action for purposes of confiscation of property obtained through corruption offences, or fruits thereof, or property proportionate therewith, property proportionate to the damage caused thereby even where the criminal proceedings were terminated or no conviction was obtained for any reason.
- (2) The appropriate organ may institute a civil action in situations other than those mentioned under sub-article (1) of this article for purposes of payment of compensation proportional to property obtained as a result of corruption offences, or fruits thereof, or property proportionate therewith, or property proportionate to the damage caused thereby.

Some writers argue that the civil action provided for by Article 32 is an *in personam* civil action and it does not involve a personification of property.²³ The argument is that the Anti-Corruption Proclamation is not as clear as the Anti-Money Laundering Proclamation in providing for civil forfeiture.

In fact, the Anti-Money Laundering Proclamation provides for civil forfeiture where specific reasons may lead to the absence of a conviction, allowing for an *in rem* civil action to be brought.²⁴ This is possible when the perpetrator is unknown and when he or she has died or absconded. That is not the case with the Anti-Corruption Proclamation. It leaves open the reasons that may lead to the absence of a conviction. However, this does not mean that the Anti-Corruption Proclamation does not recognise civil forfeiture. A close consideration of elements of Article 32(1) shows that the Anti-Corruption Proclamation is liberal in allowing civil proceedings whenever a conviction cannot be obtained, for whatever reason.

The categories of property that may be forfeited by civil action under Article 32(1) of the Anti-Corruption Proclamation are important. These are:

23 Ejeta (2107) at 45.

24 Article 35(3) of the Anti-Money Laundering Proclamation.

- property obtained through corruption crimes;
- fruits of property obtained through corruption crimes;
- property proportionate to what is obtained from the corruption crimes or fruits thereof;
and
- property proportionate to the damage caused by the corruption crimes.

The first and second instances are situations where the aim is to confiscate the property or its fruits obtained through corruption crimes themselves. This presupposes that the property is traceable. The second category encompasses property of equivalent value to the damage caused by the crime or to what is obtained from the crime. Value-based forfeiture is used when the proceeds of crime cannot be traced.

In the case of a civil action initiated to forfeit property obtained through corruption crimes or their fruits, the appropriate mechanism is *in rem* civil proceedings. There is no convincing reason to opt for an *in personam* civil action while the proceeds of crime or their fruits are traceable. Arguing that Article 32(1) provides only for *in personam* civil action contradicts the spirit of the law, because such action basically is designed to seek compensation from the defendant for the damage caused by the corruption crime whenever the proceeds cannot be traced, as stipulated in Article 32(2) of the Anti-Corruption Proclamation. Moreover, considering that the Anti-Corruption Proclamation was enacted after the Anti-Money Laundering Proclamation and that corruption is a predicate offence for money laundering, the argument that the civil action envisaged in Article 32(1) of the Anti-Corruption Proclamation is exclusively *in personam* remains unpersuasive. After all, the Anti-Money Laundering Proclamation introduced civil forfeiture in 2013 already and even made a cross-reference to the Anti-Corruption Proclamation regarding the importation of the *in personam* civil action.

In the third and fourth categories identified above, the civil action is initiated to forfeit property of proportionate value to what was obtained from the corruption crimes or its fruits, or proportionate to the damage caused by the corruption crimes. In these situations, the criminal proceedings against the accused would have been terminated or no conviction was obtained for some reason. In such case, the civil action is initiated against a person believed to

have benefited from the crime. It is an *in personam* civil action, because the proceeds of crime are untraceable. That is why the law allows for forfeiture of property of proportionate value. Therefore, Article 32(1) envisages both *in rem* civil forfeiture and an *in personam* civil action based on the availability of the proceeds of crime. When proceeds of crime are traceable, *in rem* civil forfeiture applies and when they are not, an *in personam* civil action applies.

Article 32(1) is not comprehensive. Initiating civil forfeiture case under Article 32(1) requires proof of prior criminal proceedings that were discontinued or for which no conviction was obtained. In other words, if there were no criminal proceedings, it would not be possible to launch a civil forfeiture case. Article 32(1) limits the application of civil forfeiture to those scenarios where prior criminal proceedings took place. For instance, a civil forfeiture case is not possible if the suspect dies before the prosecution commences or if a certain property is suspected to be criminal proceeds but the offender is unknown. The scope of civil forfeiture under Article 32(1) thus is somewhat narrow.

Unlike Article 32(1), which provides for both *in rem* civil forfeiture and an *in personam* civil action, Article 32(2) provides only for the latter. The purpose of a civil action envisaged by article 32(2) is to secure a payment of compensation proportionate to the property obtained through the corruption crime or to the fruits thereof or to the damage caused by the crime.²⁵ It is a civil action directed against the concerned person.

3.5.2 Relationship between Criminal Forfeiture and Civil Forfeiture

Civil forfeiture should not be seen as a substitute for criminal forfeiture.²⁶ They are complementary. Recovering ill-gotten assets through civil proceedings should not be considered as an alternative to recovery through criminal proceedings. Civil forfeiture is a mechanism that seeks to achieve what criminal forfeiture cannot achieve.

The Anti-Corruption Proclamation sets criminal forfeiture as the primary mode of securing confiscation. The fact that criminal forfeiture already was recognised by the Criminal Code before the coming into force of the Anti-Corruption Proclamation confirms that criminal

25 Article 32(2) of the Anti-Corruption Proclamation.

26 Greenberg *et al* (2009) at 29.

forfeiture is the conventional mechanism for recovering unlawfully obtained assets. Pursuant to Article 32(1), the initiation of a civil forfeiture case is possible only when the criminal matter has been terminated or a conviction has not been obtained.

It is noteworthy that a prior criminal case is not a precondition under Article 32(2). It permits a civil action in situations other than those mentioned in Article 32(1). One such situation is where no criminal proceedings have been initiated at all. The defendant cannot raise the absence of prior criminal proceedings as a preliminary defence in a case initiated under Article 32(2) of the Proclamation. However, Article 32(2) entertains only civil action for compensation. In general, under the Anti-Corruption Proclamation, civil forfeiture applies whenever criminal forfeiture cannot be applied.

3.5.3 Delegating the Power to Initiate a Civil Action

Article 32(3) of the Anti-Corruption Proclamation provides for the possibility of permitting or delegating to individuals and public organs the right to initiate a civil action. It reads as follows:

If the proceeds of corruption offence is the property of a government office, public enterprise or public organisation or any individual, the appropriate organ may give its permission or delegate for organs or individual to initiate a civil action against the suspected person for the recovery of the assets. The appropriate organ shall have the duty to follow up the result of such action by the other organs.

The civil action is directed against the suspect. That means it is an *in personam* civil action. The permission or delegation is at the discretion of the prosecutor. The concerned public organs or individuals cannot claim it as of right. Such discretionary power may be abused. The only requirement for the permission or the delegation of the power to initiate a civil action is ownership of the ill-gotten assets. Adding other requirements may help in decreasing the possibility of arbitrary delegation.

The reason for such delegation is to save the scarce resources and time of the prosecution office. However, considering the criminal nature of the underlying conduct that gives rise to the civil action, it is better to limit the initiating power to the office of prosecution. Especially if the civil proceedings arise from a grand corruption case, it is better that the prosecution office handle it since its members have the requisite experience.

3.5.4 Property Subject to Forfeiture

The property subject to forfeiture is a crucial element in asset recovery. When the scope of the property subject to forfeiture is broad, the chances of the criminals getting away with the corruptly obtained assets are minimised. One way of sending a strong message that crime does not pay is to widen the scope of the assets subject to forfeiture. In this regard, scholars propose that:

non-conviction based asset forfeiture legislation should be drafted so as to reach all assets of value, including proceeds of crime and property traceable thereto, instrumentalities of crime, fungible property, commingled goods and substitute assets and proceeds derived from foreign offences if the conduct giving rise to forfeiture is also a crime in the country where the assets are located.²⁷

In most of the international instruments, proceeds of crime or instrumentalities are subject to forfeiture.²⁸ Under the Anti-Corruption Proclamation, proceeds of crime and their fruits are subject to civil forfeiture.²⁹ However, the instrumentalities in corruption crimes are not subject to civil forfeiture. They are not subject to criminal forfeiture either. The Proclamation follows a narrow approach and assets are confined to the proceeds of crime. Unlike the Anti-Corruption Proclamation, in the Anti-Money Laundering Proclamation both proceeds of crime and instrumentalities are subject to forfeiture.³⁰

Perhaps forfeiting instrumentalities amounts to punishing innocent owners for their involvement in the underlying crime.³¹ However, excluding instrumentalities from forfeiture can be an escape hatch for those who knowingly take part in facilitating the illegal activities. In countries such as the US, the UK and Australia, instrumentalities are subject to civil forfeiture.³² The omission from the Anti-Corruption Proclamation of instrumentalities from the categories of assets subject to forfeiture is a gap which has to be filled.

27 Greenberg *et al* (2009) at 38.

28 Article 31(1) of UNCAC, Article 12(1) of the Palermo Convention and Article 5(1) of the Vienna Convention.

29 Articles 2(2) & 32(1) of the Anti-Corruption Proclamation.

30 Article 35(3) of the Anti-Money Laundering Proclamation.

31 Laing (2014) at 1229.

32 Kennedy (2006) at 155.

3.5.5 Rights of Innocent Third Parties

An important concern in civil forfeiture is the legal guarantee for the protection of the rights of third parties. Third-party rights are a crucial feature of a civil forfeiture system.³³ Criminals can conduct transactions which result in a merging of the property of third parties and the illegally obtained assets. Forfeiting the ill-gotten assets that are intermingled with the property of third parties affects their rights. It is necessary to provide a safeguard-to protect the interests of third parties. International instruments have recognised the need to protect third-party rights.³⁴ Striking a balance between the need to forfeit illegally obtained assets and the need to safeguard the rights of third parties enhances the effectiveness of the civil forfeiture system.

“Any workable forfeiture system must provide some mechanism for determining how forfeiture will affect the interests of the third parties involved.”³⁵ It is necessary to adopt mechanisms that protect third parties who have acquired rights over the proceeds of crime in good faith for a reasonable consideration. To enable them to exercise their substantive rights, a procedural safeguard is required.³⁶

Under the Anti-Corruption Proclamation, the relevant provisions concerning third-party interests are Article 12, Article 22 and Article 27. These articles relate to issuing of a restraining order and removal of seals on the suspected property. A restraining order is “an order which prohibits the offender from dealing with a certain property and includes the right to transfer, use and destroy the property in any manner”.³⁷ A restraining order can be issued in both criminal forfeiture and civil forfeiture. Where a restraining order is issued *ex parte*, the investigator or the prosecutor is required to notify any person affected by said order.³⁸ Such notification helps innocent third parties to take action to secure their interests.

The Anti-Corruption Proclamation stipulates that any interested person may apply for the removal of a seal upon property.³⁹ Where an application is made, before giving an order the

33 Kennedy (2006) at 150.

34 Article 31(9) of UNCAC, Article 12(8) of the Palermo Convention and Article 5(8) of the Vienna Convention.

35 Davis (2003) at 185.

36 Davis (2003) at 223.

37 Article 2(4) of the Anti-Corruption Proclamation.

38 Article 12(2) of the Anti-Corruption Proclamation.

39 Article 22(2) of the Anti-Corruption Proclamation.

court is required to inform all interested parties and hear them if they have submissions.⁴⁰ The reference to third parties is limited to proceedings that involve restraining orders or affixing and removal of a seal. The Proclamation does not address how to deal with proceeds of crime mixed with the property of third parties or with third parties who acquire rights over proceeds of crime unwittingly. *Bona fide* third parties must be protected. The protection has to be explicit in order to avoid uncertainties. The Anti-Corruption Proclamation does not include such protection, except as regards the making of a restraining order and the affixing and removal of a seal.

3.5.6 International Co-operation

International co-operation is basic to forfeiture law. It is one of the pillars of UNCAC. Article 43(1) of UNCAC requires States Parties to assist one another in civil proceedings related to corruption. States Parties also have the duty to afford one another mutual legal assistance in relation to identifying, freezing and tracing proceeds of crime for confiscation purposes.⁴¹ The need for co-operation emanates from the transnational nature of corruption crimes. Corrupt individuals are known to deposit their ill-gotten assets in foreign countries. Unless countries co-operate, it is difficult to recover proceeds of crime accumulated abroad. It is important to have laws and regulations which guarantee and facilitate co-operation.

The Anti-Corruption Proclamation does not include provisions for international co-operation. Ethiopia is ranked high amongst African countries for illicit financial flows.⁴² Corruption remains the main source of illicit assets. It is preferable to trace corruptly obtained money early and forfeit it before the perpetrators send it to offshore banks. Once the criminals send the assets abroad, it is difficult to recover them without the co-operation of the other countries. That is why international co-operation is crucial in fighting corruption.

To have an effective international system of co-operation, it is necessary to provide for it explicitly in law. Such stipulation facilitates and simplifies the work of law enforcement bodies. Though the Anti-Corruption Proclamation was enacted after the country had ratified

40 Article 27(1) of the Anti-Corruption Proclamation.

41 Article 46(3)(j) of UNCAC.

42 Report of AU Panel on Illicit Financial Flow from Africa (2015) at 93.

UNCAC, there is no provision dedicated to international co-operation in the Proclamation. This is a gap which requires attention.

3.6 Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation

The Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 780 of 2013 (Anti-Money Laundering Proclamation) is a comprehensive law containing both substantive and procedural rules in a single document. The Proclamation prescribes the duties of the designated financial institutions and the designated non-financial institutions to combat money laundering. It sets out the obligations of institutions and the financial intelligence unit in fighting money laundering. It regulates the role of Ethiopia in international co-operation to combat money laundering. Regarding confiscation, it is the first Proclamation to cater for a civil forfeiture mechanism in the Ethiopian legal system.

3.6.1 Property Subject to Forfeiture

The Anti-Money Laundering Proclamation defines confiscation as “the permanent deprivation of funds and property based on the decision of the court”.⁴³ It defines funds and property as:

any asset whether movable or immovable, or tangible or intangible, including legal instruments in any form evidencing title to or interest in such assets such as bank credit, traveler’s cheques, bank cheques, money orders, shares, bonds, and any interest, dividend or other income or value generated by such asset.⁴⁴

One element that determines the effectiveness forfeiture law is the categories of property subject to forfeiture. Considering the systematic nature of the crime of money laundering, it is important for the confiscation provisions to include a wide range of property, enabling the court to order forfeiture in circumstances where the criminals have transformed tangible assets into intangibles or have exchanged them for title deeds or other negotiable instruments. The definition of confiscation contained in the Anti-Money Laundering Proclamation is inclusive. It narrows the escape routes for ill-gotten assets.

43 Article 2(15) of the Anti-Money Laundering Proclamation.

44 Article 2(5) of the Anti-Money Laundering Proclamation.

The scope of the predicate offences is also worthy of mention. A predicate offence is “any offence capable of generating proceeds of crime and punishable at least with simple imprisonment for one year”.⁴⁵ That means any ill-gotten assets can be forfeited if the underlying crime is punishable by imprisonment of a year or longer. The scope of the predicate offences is wide enough to cover serious crimes that can generate high amounts of illegal gain. More importantly, the Anti-Money Laundering Proclamation allows for confiscation of both the proceeds and instrumentalities of crime. It is broader than the Anti-Corruption Proclamation, which does not permit forfeiture of instrumentalities.

3.6.2 Nature of the Civil Action

The Anti-Money Laundering Proclamation provides for civil forfeiture as follows:

In case where an offence involving money laundering, predicate offence, or financing of terrorism, is established by the court and the perpetrator thereof cannot be convicted because he is unknown, he absconded or died, the court may nevertheless order the confiscation of the seized funds or property if sufficient evidence is adduced that it constitutes proceeds of crime or instrumentalities.⁴⁶

To secure civil forfeiture under the Anti-Money Laundering Proclamation, it is necessary to show that the conduct that generated the illegal assets is a crime under the Proclamation. The illegal assets have to be proceeds of one of the predicate offences or assets used to finance terrorism.

The Proclamation recognises three reasons that could render a criminal conviction impossible and trigger civil forfeiture proceedings. These are cases where the perpetrator is unknown, has absconded or has died. If one of the three reasons exists, the court can order civil forfeiture provided that the evidence adduced is sufficient to persuade the court that the funds or property in question are the proceeds or instrumentalities of crime.

The Anti-Money Laundering Proclamation also has a cross-reference to the Anti-Corruption Proclamation. With respect to freezing, seizure and confiscation, the provisions of Anti-Corruption Proclamation are applicable to money laundering cases, insofar as they are

45 Article 2(4) of the Anti-Money Laundering Proclamation.

46 Article 35(3) of the Anti-Money Laundering Proclamation.

consistent with the Anti-Money Laundering Proclamation.⁴⁷ Accordingly, in a money laundering case, it is possible to make use of Article 32 of the Anti-Corruption Proclamation. It will be recalled that Article 32 provides for both *in personam* and civil forfeiture. Thus, the cross-referencing clause in the Anti-Money Laundering Proclamation enables use of the *in personam* civil action under Article 32 of the Anti-Corruption Proclamation in money laundering cases.

In order to secure the availability of proceeds and instrumentalities of crime for confiscation, the court may issue a freezing and seizure order for the period it deems appropriate. Freezing is a prohibition of transfer, conversion, disposition and movement of funds or property, while seizure involves, in addition to what is provided for freezing, the administration of the funds or property by a receiver appointed and supervised by the court.⁴⁸

When the court issues a freezing and seizure order, it is required to consider the rights of third parties. The order should be without prejudice to third-party rights acquired in good faith.⁴⁹ Any person claiming rights over the funds or property can apply to the court to lift the freezing and seizure order.⁵⁰ Providing such legal guarantee for the rights of third parties is useful both for the rights holders and for the court. The third parties are given an opportunity to defend their rights if their assets are mixed with the proceeds of crime or they have acquired rights over the proceeds of crime unknowingly. From the court's perspective, it helps to avoid unnecessary costs and wasting of time in freezing or seizing property that should not be frozen or seized.

Freezing of funds related to financing of terrorism differs from the regular freezing scheme. In addition to the freezing order issued by the court, the Council of Ministers can decide to freeze the funds of terrorists, of those who finance terrorism and of terrorist organisations designated as such by the United Nations Security Council.⁵¹ The decision of the Council of Ministers needs to be published in a newspaper having a wide circulation and has to specify the terms, conditions and time limits applicable to the freezing. The reason for giving

47 Article 55(1) of the Anti-Money Laundering Proclamation.

48 Article 2(13) and (14) of the Anti-Money Laundering Proclamation.

49 Article 36(2) of the Anti-Money Laundering Proclamation.

50 Article 36(3) of the Anti-Money Laundering Proclamation.

51 Article 37(1) of the Anti-Money Laundering Proclamation.

this power to an executive organ emanates from the connection between national security and the crime of terrorism. For the same reason, the power of proscribing and de-proscribing organisations as terrorist is given to the House of Peoples' Representative, not to the court.⁵²

3.6.3 Mutual Legal Assistance

The Anti-Money Laundering Proclamation provides for mutual legal assistance to foreign countries. Confiscation of funds and property is one of the areas in which foreign states can request assistance.⁵³ Executing freezing and seizure orders, identifying or tracing proceeds and instrumentalities of crime for evidentiary and confiscation purpose, and providing documents and information are part of mutual legal assistance. The execution of a request for mutual legal assistance is subject to the double criminality requirement. Pursuant to Article 40(1)(e) of the Proclamation, the request will not be executed if the crime referred to in the request is not provided for under the domestic law or does not have common features with a crime under Ethiopian legislation.

A request for confiscation is executed pursuant to Article 35 of the Proclamation.⁵⁴ That means that it is applicable both to criminal forfeiture and to civil forfeiture. The Proclamation provides that:

In the case of a request for a mutual legal assistance seeking the execution of a confiscation order, the competent authority shall either recognise and enforce the confiscation order made by a court of the requesting state or submit the request to the public prosecutor for the purpose of obtaining a confiscation order from the Ethiopian court and, if such order is granted, enforce it.⁵⁵

In terms of Article 43(1), a request for mutual legal assistance for the purposes of confiscation can take one of two approaches. The first one is where the requesting state seeks the enforcement of a confiscation order made by its domestic court. In such scenario, the order has to be enforced if there is no reason for refusal. The second approach is a request to grant a confiscation order. In this case, the requesting state is asking for a confiscation order from the Ethiopia. Such request has to be passed on to the public prosecutor to obtain a confiscation

52 Article 25(1) of the Anti-Terrorism Proclamation.

53 Article 39(2)(i) of the Anti-Money Laundering Proclamation.

54 Article 43(3) of the Anti-Money Laundering Proclamation.

55 Article 43(1) of the Anti-Money Laundering Proclamation.

order from the domestic court. The request will be enforced only when the domestic court grants the order of execution.

Article 48 of the Proclamation deals with the contents of a request for mutual legal assistance. These include details, such as the location of proceeds and instrumentalities of crime, the identity of the concerned person, the purpose of the request and the identity of the requesting and requested authorities. In the case of assistance for the enforcement of a confiscation order, a certified copy of the order, a document that shows the order is enforceable and not subject to appeal, and information related to a third-party claim, if any, must be provided.⁵⁶ The basic point here is the fact that the Anti-Money Laundering Proclamation provides comprehensively for mutual legal assistance for the purpose of a civil forfeiture.

As to the scope of the assets subject to forfeiture, the Anti-Money Laundering Proclamation is wider than the Anti-Corruption Proclamation, since it includes the forfeiture of instrumentalities of crime. Moreover, it also provides for international co-operation and mutual legal assistance, which are not provided for in the Anti-Corruption Proclamation.

3.7 Conclusion

Civil forfeiture is a powerful mechanism to recover ill-gotten assets. However, it has been criticised for violating the constitutional rights to private property and the presumption of innocence. The FDRE Constitution protects these rights. The Anti-Money Laundering Proclamation and Anti-Corruption Proclamation allow for civil forfeiture. They are not contrary to what is provided for in the Constitution, since civil forfeiture is not arbitrary interference with private property rights. It is lawful interference aimed at protecting the public interests by fighting economic crime. In fact, the underlying conduct that gives rise to civil forfeiture is criminal conduct. Further, civil forfeiture does not affect the liberty of the individual concerned. It does not reverse the onus of proof. Therefore, civil forfeiture is compatible with the FDRE Constitution.

56 Article 48(2) (c) of the Anti-Money Laundering Proclamation.

Civil forfeiture under the Anti-Corruption Proclamation applies only in instances where the criminal proceedings were terminated or no conviction was obtained for whatever reason. The Anti-Money Laundering Proclamation permits forfeiture of proceeds and instrumentalities of crime while the Anti-Corruption Proclamation is confined to forfeiture of proceeds of crime. The Anti-Money Laundering Proclamation provides for mutual legal assistance in freezing, seizure and confiscation through civil proceedings, while the Anti-Corruption Proclamation does not provide for international co-operation. If it is implemented properly, the civil forfeiture system contained in these two proclamations, despite the existence of certain gaps which need to be filled, can play an important role in combating economic crime.



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CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

This paper has discussed the importance of civil forfeiture in fighting economic crime. Considering the increasing level of economic crime in Ethiopia, criminal forfeiture alone is not sufficient to deprive criminals of their ill-gotten assets. The paper has discussed how the Anti-Money Laundering Proclamation and the Anti-Corruption Proclamation address the option of civil forfeiture.

The international community has devised different mechanisms for fighting economic crime. As part of these efforts, Ethiopia is taking various measures at the domestic level and international level. The domestic measures include enacting laws, amending existing ones, establishing and reforming institutions and empowering law enforcement personnel. The international efforts include the ratification of international instruments and participation in the regional organisations aimed at fighting economic crime. For example, Ethiopia is a State Party to UNCAC and the AU Convention and a member of ESAAMLG.

The international instruments, such as the Vienna Convention, the Palermo Convention, UNCAC and the AU Convention, focus on the importance of forfeiting proceeds and instrumentalities of crime. There are generally two types of forfeiture. These are criminal forfeiture and civil forfeiture. Criminal forfeiture is forfeiture of ill-gotten assets ordered after conviction of the suspect as part a sentence. Civil forfeiture is a civil process targeting the ill-gotten assets themselves and applies irrespective of whether or not the suspect is convicted. Criminal forfeiture is a conventional mechanism and it is included in the major international instruments, but civil forfeiture is not as well established. UNCAC merely encourages States Parties to apply civil forfeiture.

Both criminal forfeiture and civil forfeiture mechanisms have advantages and disadvantages. Criminal forfeiture allows for deciding the guilt of the suspect and confiscation of ill-gotten assets in a single case, without requiring separate confiscation proceedings.

However, the requirement of a conviction, based upon proof beyond a reasonable doubt, makes criminal forfeiture somewhat inconvenient. In this regard, civil forfeiture is preferable since it does not require conviction and the standard of proof is proof on a preponderance of the evidence. Civil forfeiture has demerits as it allows only an object-based forfeiture and it is subject to statutory limitations. Certain scholars criticise civil forfeiture, alleging that it violates private property rights and the presumption of innocence.

The FDRE Constitution provides for private property rights and the presumption of innocence. The private property rights are not absolute. They can be restricted to protect the public interest. The constitutional safeguard for private property rights applies to lawfully obtained assets and is not intended to protect illegally acquired property. Thus, a government can forfeit ill-gotten assets in the public interest. Civil forfeiture does not violate the presumption of innocence as the aim of the proceedings is not to deprive the suspect of liberty but to forfeit the proceeds and instrumentalities of crime.

The two proclamations which provide for civil forfeiture are the Anti-Money Laundering Proclamation and the Anti-Corruption Proclamation. Under the Anti-Corruption Proclamation, initiating a civil forfeiture case is possible only where the criminal proceedings were terminated or no conviction was obtained for any reason. It is not possible if the suspect dies before the prosecution commences or if a certain property is suspected as proceeds of crime but the offender is unknown. Under the Anti-Money Laundering Proclamation, initiating a civil forfeiture case is possible even in the absence of prior criminal proceedings. It applies when the perpetrator is unknown, has absconded or has died.

The Anti-Money Laundering Proclamation allows for forfeiture of both criminal proceeds and instrumentalities, while the Anti-Corruption Proclamation allows for forfeiture of criminal proceeds only. Moreover, the Anti-Corruption Proclamation does not provide protection for *bona fide* third parties rights as does the Anti-Money Laundering Proclamation. Concerning international co-operation, the Anti-Money Laundering Proclamation provides for mutual legal assistance in freezing, seizure and confiscation involving civil proceedings. The Anti-Corruption Proclamation does not stipulate how international co-operation for civil forfeiture ought to be conducted.

4.2 Recommendations

4.2.1 Removing the Preconditions Attached to Civil Forfeiture

The need for civil forfeiture arises from the gaps in criminal forfeiture. The effectiveness of civil forfeiture law depends on how it addresses the shortcomings of criminal forfeiture. Under the Anti-Corruption Proclamation, instituting a civil forfeiture case is possible only when there is a prior criminal matter that was terminated or for which a conviction was not obtained. Such stipulation narrows the applicability of civil forfeiture to only a few scenarios. It does not cover situations where no criminal prosecution has been instituted. The Anti-Money Laundering Proclamation expanded the scope of civil forfeiture and allows for it when the perpetrator is unknown, has absconded or has died. Therefore, the civil forfeiture regime under the Anti-Corruption Proclamation needs to be re-articulated in a more inclusive manner to cover situations that are encompassed by the Anti-Money Laundering Proclamation. In addition, the scope civil forfeiture under both Proclamations has to encompass situation such as officials enjoying immunity from criminal prosecution.

4.2.2 Forfeiture of Instrumentalities

Under the Anti-Money Laundering Proclamation, it is possible to forfeit both proceeds and instrumentalities of crime. Under the Anti-Corruption Proclamation, forfeiture is limited to the proceeds of crime only. Considering that corruption is one of the predicate offences for money laundering, the clandestine nature of the crime and its increase in Ethiopia, forfeiting instrumentalities of corruption both through criminal forfeiture and through civil forfeiture helps in the efforts to combat corruption. It sends a strong message that not only proceeds of crime but also property used in committing the crime are subject to forfeiture. Such message serves a deterrence purpose.

4.2.3 International Co-operation

Economic crimes are transnational. Using their cross-border networks, criminals usually transfer assets obtained corruptly from one jurisdiction to other jurisdictions. As a result, without international co-operation recovering assets moved outside the country remains problematic. Although Ethiopia has ratified UNCAC, which advocates international co-operation to combat

corruption, the Anti-Corruption Proclamation does not contain provisions that deal with the international co-operation. Whether it is criminal forfeiture or civil forfeiture, international co-operation is vital. Therefore, to have a robust asset recovery regime, Ethiopia needs to include provisions for international co-operation in its anti-corruption laws.

4.2.4 Protection of the Rights of Third Parties

There is a possibility that ill-gotten assets may become intermingled with the property of innocent third parties. In such case, forfeiting that property may affect the rights of a third party. The rights of *bona fide* third parties should be safeguarded. Under the Anti-Money Laundering Proclamation, a property cannot be forfeited if the third party was unaware of its illicit origin and acquired it by paying a fair price or in return for a service of corresponding value or on any other legitimate grounds. However, the Anti-Corruption Proclamation does not contain such a safeguarding clause. Therefore, an explicit legal guarantee for the protection of the rights of third parties needs to be included in the Anti-Corruption Proclamation.

4.2.5 Expanding the Application of Civil Forfeiture

Currently, civil forfeiture is possible only under the Anti-Corruption Proclamation and the Anti-Money Laundering Proclamation. However, corruption and money laundering are not the only crimes which generate criminal proceeds. Economic crimes such as tax evasion, credit card fraud, insurance fraud and cybercrime generate huge sums of ill-gotten assets.¹ Therefore, to strengthen the regime of civil forfeiture in Ethiopia, it makes sense to expand civil forfeiture beyond the anti-corruption and anti-money laundering laws to cover other economic crimes.

1 Kohalmi & Mezei (2015) at 37.

BIBLIOGRAPHY

PRIMARY SOURCES

International and Regional Legal Instruments

African Charter on Human and Peoples' Rights, adopted on 27 June 1981 and entered into force on 21 October 1986.

African Union Convention on Preventing and Combating Corruption, adopted on 11 July 2003 and entered into force on 5 August 2006.

International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976.

International Covenant on civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976.

United Nations Convention against Corruption, adopted on 31 October 2003 and entered into force on 14 December 2005.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 20 December 1988 and entered into force on 11 November 1990.

United Nations Convention against Transnational Organised Crime and the Protocols thereto, adopted on 15 November 2000 and entered into force on 29 September 2003.

Universal Declaration of Human Rights, adopted on 10 December of 1948.

Ethiopian Laws

Asset Disclosure and Registration Proclamation No 668 of 2010.

Corruption Crimes Proclamation No 881 of 2015.

Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414 of 2004.

Federal Attorney General Establishment Proclamation No 943 of 2016.

Federal Democratic Republic Ethiopia Constitution, Proclamation No 214 of 1995.

Federal Ethics and Anti-Corruption Commission Establishment Proclamation No 235 of 2001.

Prevention and Suppression of Money Laundering and Financing of Terrorism Crimes
Proclamation No 718 of 2013.

Revised Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation
No 882 of 2015.

Revised Anti-Corruption Special Procedures and Rules of Evidence Proclamation No 434 of 2005.

Revised Federal Ethics and Anti-Corruption Commission Establishment (Amendment)
Proclamation No 883 of 2015.

Revised Proclamation for the Establishment of the Federal Ethics and Anti-Corruption
Commission No 433 of 2003.

Cases

Deutschmann NO v Commissioner for the South African Revenue Service 2000 (2) SA 106 (E).

Podeschi v. San Marino No 66357/2017.

SECONDARY SOURCES

Books

Brun JP, Gray L, Scott C & Stephenson MK (2011) *Asset Recovery Handbook: A Guide for Practitioners* Washington DC: World Bank.

Eissa A & Barber R (2011) *Confiscation Law Handbook* West Sussex: Bloomsbury Publishing Limited.

Greenberg T, Samuel L, Grant W & Gray L (2009) *Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture* Washington DC: International Bank for Reconstruction and Development/World Bank.

Ivory R (2014) *Corruption, Asset Recovery and the Protection of Property in Public International law* Cambridge: Cambridge University Press.

King C & Walker C (eds) (2016) *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* Abingdon: Routledge.

Madinger J (2012) *Money Laundering: A Guide for Criminal Investigators* Boca Raton: CRC Press.

Pieth M (ed) (2008) *Recovering Stolen Assets* Bern: Peter Lang AG.

Plummer J (ed) (2012) *Diagnosing Corruption in Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors* Washington DC: World Bank.

Ryder N (2011) *Financial Crime in 21st Century: Law and Policy* Cheltenham: Edward Elgar Publishing Limited.

Stessens G (2000) *Money laundering: A New International Law Enforcement Model* New York: Cambridge University Press.

Terracino JB (2012) *The International Legal Framework against Corruption: States' Obligation to Prevent and Suppress Corruption* Cambridge: Intersentia.

Wright A (2006) *Organised Crime* Cullompton: Willan Publishing.

Young SNM (ed) (2009) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Zinkernagel G, Monteith C & Pereira P (eds) (2013) *Emerging Trends in Asset recovery* Bern: Peter Lang AG.

Chapters in Books

Cassella SD (2009) "An Overview of Asset Forfeiture in the United States" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Claman D (2008) "The Promise and Limitations of Asset Recovery under the UNCAC" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang AG.

King C (2016) "Hitting Back at Organised Crime: The Adoption of Civil Forfeiture in Ireland" in King C & Walker C (eds) *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* Abingdon: Routledge.

Monfrini E (2008) "The Abacha Case" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang AG.

Simser J (2009) "Perspectives on Civil Forfeiture" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Journal Articles

Basham JC & Sibilla GA (1979) "Criminal Law: Private Rights and Public Interests in the Balance" 20(4) *William & Mary Law Review* 655-739.

Boucht J (2014) "Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) ECHR" 5(2) *New Journal of European Criminal Law* 221-255.

Brunelle-Quraishi O (2011) "Assessing the Relevance and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis" 2(1) *Notre Dame Journal of International & Comparative Law* 101-166.

Cassella SD (2008) "The Case for Civil Forfeiture: Why *In Rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime" 11(1) *Journal of Money Laundering Control* 8-14.

Cheh MM (1991) "Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (42) *The Hastings Law Journal* 1325-1413.

Davis KE (2003) "The Effects of Forfeiture on Third Parties" 48 *McGill Law Journal* 185-224.

Gebeye BA (2015) "The Legal Regime of Corruption in Ethiopia: An Assessment from International Law Perspective" 4(1) *Oromia Law Journal* 73-124.

Gebremichael B (2016) "Public Purpose as a Justification for Expropriation of Rural Land Rights in Ethiopia" 60(2) *Journal of African Law* 190-212.

Gupta D (2002) "Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis" 37 *Harvard Civil Rights-Civil Liberties Law Review* 159-183.

Hewitt DR (1983) "Civil Forfeiture and Innocent Third Parties" *Northern Illinois University Law Review* 323-355.

Jaarsveld V (2006) "The History of *In Rem* Forfeiture — A Penal Legacy of the Past" 12(2) *Fundamina: A Journal of Legal History* 138-147.

Kennedy A (2006) "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislatures" 13(2) *Journal of Financial Crime* 132-263.

Kohalmi L & Mezei K (2015) "The Concept and Typical Forms of Economic Crime" *Journal of Eastern- European Criminal Law* 33-42.

Laing AW (2014) "Asset Forfeiture & Instrumentalities: The Constitutional Outer Limits" 8 *New York University Journal of Law & Liberty* 1201-1234.

Lieske, R (1995) "Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment" 21(1) *William Mitchell Law Review* 265-299.

Mezmur T & Koen R (2011) "The Ethiopian Ethics and Anti-Corruption Commission: A Critical Assessment" 15 *Law, Democracy and Development* 215-235.

Nikolov N (2011) "General Characteristics of Civil Forfeiture" 14(1) *Journal of Money Laundering Control* 16-31.

Smith DB & Cassella SD (2016) "The Role of Civil Forfeiture" 100(4) *Judicature* 68-73.

Stahl MB (1992) "Asset Forfeiture, Burdens of Proof and the War on Drugs" 83 (2) *Journal of Criminal Law and Criminology* 274-337.

Van Der Walt AJ (2000) "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" 16 *South African Journal on Human Rights* 1-45.

Internet Sources

Bureau of International Narcotics and Law Enforcement Affairs (2016) "International Narcotics Control Strategy Report", available at <https://www.state.gov/documents/organization/253983.pdf> (visited 21 October 2018).

European Court on Human Rights Jurisprudence and Civil Recovery of Illicitly Obtained Assets (Confiscation in Rem), available at <https://rm.coe.int/16806ebc98> (visited 10 July 2018).

European Parliament (2013) "Report on Organised Crime, Corruption and Money Laundering: Recommendations on Action and Initiatives to be Taken (Interim Report) (2012/2117(INI))", available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0175+0+DOC+PDF+V0//EN> (visited 15 October 2108).

FATF (2012) "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation" (updated October 2108), available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (visited 21 October 2018).

FATF (2018) “Procedures for the FATF fourth Round of AML/CFT Mutual Evaluations”, available at <http://www.fatf-gafi.org/media/fatf/content/images/FATF-4th-Round-Procedures.pdf> (visited 21 October 2018).

Transparency International (2012) “Corruption Perceptions Index”, available at <https://www.transparency.org/cpi2012>(visited on 15 March 2018).

Transparency International (2017) “Corruption Perceptions Index”, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017(visited on 15 March 2018).

UNODC (2006) “Legislative Guide for the Implementation of the United Nations Convention against Corruption”, available at https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (visited on 12 October 2018).



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