

Is the forfeiture of criminally-acquired property in Tanzania compliant with the Constitution?

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Summary: *Asset recovery, which involves the forfeiture of criminally-acquired property, is considered to be an effective mechanism of addressing serious and organised crime within national boundaries and across international frontiers. This is a paradigm shift from penal law and policy-making bodies of concentrating on persons only to also address their minds to property. The current legal position is that asset recovery in Tanzania is conviction based. This means that forfeiture orders must be preceded by the conviction of an accused. When carried out as expected, the mechanism has an impact of depriving criminals of their ill-gotten wealth, thereby striking them at a point where it hurts most. All this is aimed at ensuring that the convict is denied the enjoyment of the fruits of his criminal acts, serving as a deterrent and an attempt by the state to suppress the conditions that lead to unlawful activities. It disrupts criminal activities and prevents the possibilities of using the proceeds of crime to reinvest in other forms of crime. Tanzania has a legal and institutional framework that deals with the forfeiture of criminally-acquired assets. However, the basic question into which this article enquires is whether this framework is human rights compliant. To respond to this question, the discussion looks at the provisions of the Bill of Rights as entrenched in the country's Constitution in relation to the asset recovery legal regime and inquires whether the latter reflects those constitutional provisions. Despite some limitations that are apparent*

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in the course of enforcing legal provisions on asset recovery, the article concludes that all Tanzanians, including suspects, are treated equally before the law. As such, they are all expected to enjoy the rights and freedoms that are contained in the Constitution. There are avenues through which those who feel aggrieved can pursue their complaints.

Key words: *forfeiture; illegally-acquired property; concealing profits from crime; Constitution; human rights compliance*

1 Introduction

This article attempts to look at whether the forfeiture of illegally-acquired property, popularly known as asset recovery, is human rights compliant in Tanzania.¹ In doing so, the article enquires into the issue of whether the asset recovery process complies with human rights aspects in relation to suspects and other persons that are involved in the asset recovery process. It should be noted at the outset that the Tanzanian Constitution contains a Bill of Rights.² Therefore, it is crucial to examine whether the asset recovery process is human rights compliant. The discussion therefore covers aspects such as the asset recovery regime in Tanzania with the emphasis on analysing stages of the asset recovery process, the Bill of Rights in Tanzania and the extent to which it is reflected in the procedural and substantive legal regime in the asset recovery process. Some limitations in the course of enforcing the legal provisions on asset recovery are also examined.

2 Asset forfeiture legal regime in Tanzania

This part sets out to discuss the main features of what the law provides in the asset recovery process. It is a widely-accepted notion in the international community that criminals should be stripped of the proceeds of their crimes. The objective is to remove the incentive for the commission of crime. The legal framework that deals with asset recovery in Tanzania, therefore, is premised on this objective. It should be noted that the current legal position is that asset recovery in the country is conviction-based save for two instances where civil forfeiture may be effected.³ These are, first, where a person has

1 The current legal position is that asset recovery in Tanzania is conviction based.
2 See Part III of Chapter One of the Constitution of the United Republic of Tanzania of 1977.
3 See secs 9 and 14 of the Proceeds of Crime Act, Cap 256 [RE 2002], which provide that conviction is one of the preconditions for the forfeiture order to be

died while under investigation or after being charged but before a conviction; and, second, where a person cannot be brought before the court.⁴ This means that, except for civil forfeiture, full criminal trials are carried out in respect of predicate (income-generating) offences.

The asset recovery legal regime in Tanzania is not contained in a single law. There are several statutes that make provision for the recovery of criminally-acquired assets. However, such provisions are ancillary to other matters. As long as the country has a conviction-based forfeiture system, all predicate offences must first undergo full criminal trials. This explains why various pieces of legislation ranging from substantive to procedural laws are involved. Most of these pieces of legislation create several predicate offences and penalties to be meted out. In addition, however, they contain forfeiture provisions to those predicate offences, most of which are also covered by the main forfeiture law, namely, the Proceeds of Crime Act.⁵ The laws that contain forfeiture provisions include the Prevention of Terrorism Act;⁶ the Wildlife Act;⁷ the Fisheries Act;⁸ the Economic and Organised Crime Control Act;⁹ the Criminal Procedure Act;¹⁰ the Forest Act;¹¹ the Anti-Trafficking in Persons Act;¹² and the Drug Control and Enforcement Act.¹³

The following part of the discussion gives an appraisal of the main forfeiture law, namely, the Proceeds of Crime Act, with a view to establishing the extent to which asset recovery processes and mechanisms are effected. The Proceeds of Crime Act is the primary legislation that deals specifically with the forfeiture of proceeds and instrumentalities of crime. Part II of the Act contains provisions for making application for a confiscation order.¹⁴ In this part of the Act the

issued by the court.

- 4 See secs 4(1)(c), 5 and 12 of the Proceeds of Crime Act (n 3) in respect of the issuing of a forfeiture order where a person has absconded. See also secs 13A and 30 of the same Act regarding civil forfeiture due to the death of the accused and due to the practical impossibility to prosecute the accused person, respectively.
- 5 Cap 256 [RE 2019]. According to its long title, this is an Act to make better provision for dealing with the proceeds of crime.
- 6 Cap 19 [RE 2019] sec 36(1).
- 7 Cap 283 [RE 2009] sec 111(1).
- 8 Act 22 of 2203 secs 38(1) & 39.
- 9 Cap 200 [RE 2019] sec 23.
- 10 Cap 20 [RE 2019] secs 351 & 352.
- 11 Cap 323 [RE 2002] sec 7.
- 12 Act 6 of 2008 sec14.
- 13 Cap 95 [RE 2019]. The Act states explicitly in sec 49(1) that where any person is convicted for an offence under Part III, the property owned by him on the date of the conviction or acquired by him after that date shall be forfeited to the government in accordance with the provisions of the Proceeds of Crime Act.
- 14 See secs 9-13 of the Proceeds of Crime Act.

granting of forfeiture orders is provided for, and their effect not only on the accused who has been found guilty, but also on third parties who had an interest in the forfeited assets. Modalities of dealing with registered foreign forfeiture orders are also provided under this part.¹⁵ Non-conviction-based forfeiture occurs where the Director of Public Prosecutions (DPP) suspects, on reasonable grounds, that any person has acquired, holds or is dealing with tainted property and it is not possible (a) for any person to bring the person before a court on a charge of any serious offence; or (b) for a foreign pecuniary penalty order or a foreign forfeiture order to be made in respect of the person. In such a situation the DPP may apply to the High Court for an order to declare the property forfeited to the United Republic of Tanzania.¹⁶ Part VI provides for information-gathering powers, such as production orders, search powers, monitoring orders and obligations of financial institutions.¹⁷ Part VII, the last part, is reserved for miscellaneous provisions.¹⁸

Having outlined the main contents of the Act, the following discussion revolves around the way in which those salient features of the Act are made use of in the asset recovery processes and mechanisms. The discussion is mainly guided by four related, connected and interdependent stages that are involved in the asset recovery process. The stages are, first, identifying and tracing the criminally-acquired assets through the institution of an investigation; second, securing the assets; third, the confiscation or forfeiture of identified criminally-acquired assets; and, fourth, the enforcement of a forfeiture order. The discussion ventures to analyse the legal framework that is involved in all these stages. In the course of this analysis, the discussion underscores which institutions are mandated by the law to undertake a given assignment in order to accomplish the processes and mechanisms in place.

2.1 Identifying and tracing criminally-acquired assets

Identifying and tracing assets that are alleged to have been acquired through criminal activities is a very important and basic stage in the asset recovery process. This stage involves tracking and unveiling hidden assets through financial investigation. It forms the foundation of the rest of the stages because the collection of intelligence and evidence aimed at enabling tracing the assets and establishing

15 Secs 14-17 of the Proceeds of Crime Act.

16 Under secs 4(1)(c), 5 and 12 of the Proceeds of Crime Act (n 4).

17 Secs 58-70 Proceeds of Crime Act.

18 Secs 71-79 Proceeds of Crime Act.

ownership is undertaken. All recovery efforts that follow thereafter largely depend on this preliminary stage.

Criminals increasingly develop sophisticated ways of concealing their illicitly-acquired assets without respecting borders. Efforts to recover these assets must cross borders. However, a jurisdiction where assets have been hidden will not confiscate or repatriate the assets to the country of origin unless evidence is presented, linking them to an illegal activity.¹⁹ Therefore, whether assets are located in or outside the country, the evidence should 'establish that the targeted assets derive directly or indirectly from the commission of a crime'.²⁰ It is at this stage where investigation is instituted for that purpose and other stages that follow thereafter. The role of investigators in this endeavour is not only to locate assets but also to establish the manner in which criminals hold those assets.

In view of the above, investigators should in the course of investigation strive to meet three objectives, namely, locating the assets, linking them to an unlawful activity and proving the commission of a predicate offence. The identification and tracing of the proceeds of crime and securing the property for final confiscation are essential and integral parts of the whole asset recovery process. At this stage investigators not only strive to locate the assets but also to gather evidence that establishes the manner of holding the assets and to link them with criminality. As such, investigators trace assets for the purpose of freezing and seizing them, so that these assets can ultimately be confiscated through a judicial order and returned to the victims of crime.²¹ This is an uphill task which should be conducted in parallel with the investigation of a predicate offence, which is a criminal offence generating material benefit. It sometimes is very challenging to gather evidence that links the assets and instrumentalities of crime to the criminal activities. The reason behind this is that criminals always seek to transfer and hide assets that are illicitly acquired. They are prepared to exploit any available opportunity at any cost in order to obscure the location and path of the assets.

19 T Lasich 'The investigative process: A practical approach' in Basel Institute on Governance, International Centre for Asset Recovery *Tracing stolen assets: A practitioner's handbook* (2009) 49.

20 UNODC *Manual on international cooperation for the purposes of confiscation of proceeds of crime* United Nations, Vienna International Centre, Vienna, Austria, September 2012 35.

21 C Monteith & A Dornbierer 'Tracking and tracing stolen assets in foreign jurisdictions' International Centre for Asset Recovery, Basel Institute on Governance, Basel, Switzerland, Working Paper Series 15 2013 10, <http://www.fatf-gafi.org/pages/faq/Moneylaundering> (accessed 10 November 2015).

The Proceeds of Crime Act, which is the main law that governs criminally-acquired assets in the country, provides for both substantive and procedural aspects of recovering proceeds and instrumentalities of crime located in and outside the country.²² The Act provides for investigative powers of a police officer to identify and trace any property believed to be tainted property.²³ As such a police officer may enter any premises and conduct a search if he believes on reasonable grounds that there is tainted property on such premises.²⁴ The officer may seize any property found in the course of the search which the officer believes, on reasonable grounds, to be tainted property.²⁵ The Act mandatorily requires a police officer to seek and obtain a search warrant from the court before conducting a search.²⁶ It is apparent that a search warrant, being a written authority, generally speaking, is a precondition for validating the search. The police officer must have it duly and properly issued.

However, a police officer may enter premises and conduct a search and seize tainted property without the authority of an order of the court or a court warrant where he believes on reasonable grounds that it is necessary to do so in order to prevent the concealment, loss or destruction of the tainted property, or where the seriousness and urgency require and justify immediate intervention.²⁷ Search and seizure may sometimes be carried out even in the absence of the accused, as in the case of *Rajabu Athumani v R*.²⁸ In this case the accused was convicted of burglary and theft. The main matter raised on appeal was his contention that the conviction should be quashed as it was based upon the discovery of the stolen property in his house while he was not present. It was not contended that the search was invalid in any other way. It was held that the absence of the accused does not invalidate the search of premises.

A police officer is further empowered to enter and search any premises for any property-tracking document in relation to a serious offence, and to seize any document found in the course of the search which he believes, on reasonable grounds, to be a property-tracking document in relation to the serious offence.²⁹ The document is important to the investigator as it is relevant to identifying, locating

22 AA Mbagwa 'The role of procedural laws in asset recovery: A roadmap for Tanzania' LLM dissertation, University of the Western Cape, 2014 49.

23 Sec 31(1) Proceeds of Crime Act.

24 Sec 31(2) Proceeds of Crime Act.

25 Sec 31(3) Proceeds of Crime Act.

26 Sec 32 Proceeds of Crime Act.

27 Criminal Procedure Act Cap 20 [RE 2019] sec 42 and sec 34 Proceeds of Crime Act.

28 (1967) HCD n 449.

29 Sec 62 Proceeds of Crime Act.

and quantifying tainted property or any property of an offender in a serious offence.³⁰ The entry and conducting of the search by the officer should be authorised by a court order. Furthermore, where a police officer has reasonable grounds to suspect that a person has in his possession or control a property-tracking document, he may apply to a court for an order directing the person to produce to the police officer a document prescribed in the order.³¹ A person against whom a production order is issued cannot refuse to produce it on the ground that its production might tend to incriminate him or make him liable to a penalty or would be in breach of any obligation or privilege not to disclose the existence or contents of the document.³² Where a document is produced to the police officer, he may inspect, take extracts from, make copies of or retain the document.³³ The provision is a breakthrough in asset recovery as it denies criminals the opportunity to conceal illicit assets and evidence on the basis of confidentiality, thereby clearing the way for the recovery of illegal assets.³⁴

2.2 Securing the assets

It is worth noting that at times an organised crime and asset tracing investigation may take a long time to complete. As such possibilities of assets being dissipated or transferred cannot be ruled out altogether. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. All this is done to ensure that the assets are available to satisfy a final forfeiture order.³⁵ According to the Proceeds of Crime Act, the securing of assets is effected through a restraining order issued by court upon an application made by the DPP.³⁶ The restraining order issued by a court remains in force until the criminal charge against the person in relation to whom the order was issued is withdrawn or such person is acquitted of the charge.³⁷ The order also ceases to have effect when the confiscation order is satisfied or discharged.³⁸

30 Sec 3 Proceeds of Crime Act.

31 Sec 58(1) Proceeds of Crime Act.

32 Sec 58(8) Proceeds of Crime Act.

33 Sec 58(6) Proceeds of Crime Act.

34 Mbagwa (n 22) 51.

35 A Adekunle 'Proceeds of crime in Nigeria: Getting our act together' Inaugural Lecture Series, Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria (2011) 18.

36 Sec 38(1) Proceeds of Crime Act.

37 Sec 52(1) Proceeds of Crime Act.

38 Sec 52(2) Proceeds of Crime Act.

2.2.1 *Forfeiture through court process*

The third stage in the asset recovery process is the forfeiture of identified assets that are alleged to have been acquired through criminal activities. Forfeiture is effected through a court due process. As mentioned, forfeiture under the Proceeds of Crime Act generally is conviction based. This means that a conviction for the commission of a serious offence is a precondition for forfeiture.³⁹ Under Part II of the Proceeds of Crime Act, where a person is convicted of a serious offence, the DPP may, within six months of the conviction of a person of a serious offence, apply to the convicting court for a forfeiture order against any property that is tainted property in respect of the offence.⁴⁰ Upon application, the DPP has to give notice to the person convicted and to any other person interested in the property to be forfeited.⁴¹ The purpose of the notice so given is to enable the person convicted and any other person interested in the property to be forfeited to appear and to contest the application.⁴²

2.2.2 *Enforcement of a forfeiture order*

When the court grants a forfeiture order, the said order has to be enforced. The DPP is empowered under the National Prosecutions Service Act⁴³ to take any appropriate measures to enforce the forfeiture order. The enforcement of the forfeiture order is effected domestically and in foreign jurisdictions using mutual legal assistance. In other words, assets that are located outside the country can be forfeited through a formal request to the foreign country to that effect. This It means that if the assets are located in a foreign jurisdiction, a mutual legal assistance request must be submitted. It is well settled under the Mutual Assistance in Criminal Matters Act⁴⁴ that where the assets are in a foreign country, the DPP may request the foreign country to enforce the order.⁴⁵ The order may then be enforced by authorities in the foreign jurisdiction by directly registering and enforcing it.⁴⁶ Normally the forfeited property is vested in the United Republic of

39 According to the Written Laws (Miscellaneous Amendments) Act 15 of 2007, which amended, among other laws, the Proceeds of Crime Act, Cap 256 [RE 2019], the term 'serious offence' means money laundering and includes a predicate offence.

40 Sec 9(1) Proceeds of Crime Act.

41 Sec 10 Proceeds of Crime Act.

42 As above.

43 Cap. 430 [RE 2019] sec 12.

44 Cap 254 [RE 2002] sec 4.

45 As above.

46 See United Nations Convention against Corruption (UNCAC) arts 54 and 55; United Nations Convention against Transnational Organised Crime (UNTOC) art 13; United Nations Convention against Narcotics Drugs and Psychotropic Substances art 5; and the Terrorist Financing Convention, art 8.

Tanzania and is registered in the name of the Treasury Registrar on behalf of Tanzania.

3 The Bill of Rights in Tanzania

With the entrenchment of the Bill of Rights in the Constitution of the United Republic of Tanzania of 1977 in 1984 as per the Fifth Constitutional Amendment,⁴⁷ Tanzania had taken a step forward towards not only respecting but also creating an avenue for its citizens to be able to realise human rights. According to the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984,⁴⁸ with the Bill of Rights coming in force in March 1988, all basic rights and freedoms, also referred to as political civil liberties as provided for under Part III of Chapter One of the Constitution of the United Republic of Tanzania of 1977, are guaranteed.⁴⁹ Section 5(1) of the Act provides that '[w]ith effect from March, 1988 the courts will construe the existing law including customary law with such modifications, adaptations and exceptions of the Fifth Constitutional Amendment Act 15 of 1984, ie, the Bill of Rights'.

Before March 1988 Tanzania did not have a Bill of Rights providing for basic rights that include freedom of assembly and association,⁵⁰ freedom of movement,⁵¹ freedom of expression⁵² and freedom of religion.⁵³ Other rights are the right to work,⁵⁴ the right to life,⁵⁵ equality before the law,⁵⁶ personal freedom,⁵⁷ the right to participate in government,⁵⁸ the right to acquire and own property⁵⁹ and the right to a fair remuneration.⁶⁰ These are the rights and freedoms that have to be enforced subject to the laws of the land. All Tanzanians are entitled to enjoy these rights and freedoms. These are natural rights and freedoms bestowed on them by the fact that they are human beings. The state therefore is duty bound to ensure that in the course of implementing appropriate law enforcement measures,

47 See the Fifth Constitutional Amendment Act 15 of 1984.

48 Act 16 of 1984.

49 This part covers arts 12 to 32 of the Constitution.

50 The Constitution of the United Republic of Tanzania 1977, Cap 2 [RE 2002] art 20.

51 Art 17 Tanzanian Constitution.

52 Art 18 Tanzanian Constitution.

53 Art 19 Tanzanian Constitution.

54 Art 22 Tanzanian Constitution.

55 Art 14 Tanzanian Constitution.

56 Art 13 Tanzanian Constitution.

57 Art 15 Tanzanian Constitution.

58 Art 8 Tanzanian Constitution.

59 Art 24 Tanzanian Constitution.

60 Art 23 Tanzanian Constitution.

it respects, protects, promotes and fulfils those fundamental rights and freedoms to the letter.

The fact that Tanzania has the fundamental rights and freedoms as enshrined in the Bill of Rights is important. However, more important is the enforceability of such rights and freedoms. The enforcement of the Bill of Rights guarantees fundamental rights and freedoms to the citizenry, otherwise no meaningful purpose is served by having a Bill of Rights which is not enforceable.

Arguably, the effective enforcement of fundamental rights and freedoms in Tanzania and elsewhere in the world is meaningless without having effective enforcement procedures in place. A well-articulated mechanism enables any person to have an avenue through which he can demand those rights and freedoms. The Bill of Rights establishes under article 30(3) that the High Court of Tanzania has a role to enforce the fundamental rights and freedoms as enshrined in the Constitution of the United Republic of Tanzania of 1977. It is stated in article 30(3) that any person who alleges that any provision of this part of the Bill of Rights or any other law involving a basic right or duty has been, is being or is likely to be contravened may, without prejudice to any action or remedy lawfully available to him in respect of the same matter institute proceedings to the High Court for redress. The High Court should follow the procedure provided for by the Basic Rights and Duties Enforcement Act 1994,⁶¹ when dealing with matters under the Bill of Rights. The Act was enacted pursuant to the provisions of article 30(4) of the Constitution which provides that: the legislature may enact a law for the purpose of regulating procedure for instituting proceedings on matters pertaining to the Bill of Rights; specifying the powers of the High Court in relation to the hearing of the proceedings instituted pursuant to that effect; and ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with the Constitution. Under the Act, the High Court for purposes of trying human rights cases is composed of three judges of the High Court and every question in a petition should be determined according to the opinion of the majority of the judges hearing the petition.⁶²

61 Cap 3 [RE2002].

62 Sec 10 Basic Rights and Duties Enforcement Act (n 61).

4 Illicitly-acquired assets: A violation of the citizenry's human rights

A few individuals who are in a position to divert public funds through corruption or any other malpractices violate the human rights of their fellow citizens. Such individuals and other suspects of such criminal acts, who gang up into organised and networked groups, take advantage of a liberalised market economy together with technological innovations in terms of ease and fast communications to amass huge profits with less risky activities within and across national frontiers. The exact value is difficult to determine with accuracy. However, the United Nations Office on Drugs and Crime (UNODC) has estimated that between \$1 trillion and \$1,6 trillion is lost each year to various illegal activities in the world.⁶³

It is further estimated that corrupt public officials in developing and transition countries loot as much as \$40 billion each year, concealing these funds overseas where they are extremely difficult to recover.⁶⁴ This figure is equivalent to the annual gross domestic product (GDP) of the world's 12 poorest countries, where 240 million people live.⁶⁵ In Nigeria alone, \$420 billion has since independence been stolen from state coffers.⁶⁶ Persons suspected of committing such criminal acts always ensure that they conceal their profits from crime.⁶⁷ One such way of concealment is through channelling those assets into the financial system, either locally or in foreign jurisdictions. Such estimated figures signal a massive cross-border flow of the global proceeds from criminal activities that jeopardise the socio-economic well-being of the citizenry and pose a serious threat to the security and stability of most developing and transition countries.

Tanzania is not spared from what has befallen other countries. Grand corruption and abuse of power that take place in high levels of the political system have recently featured prominently at the

63 UNODC and World Bank *Stolen Asset Recovery (StAR) initiative: Challenges, opportunities, and action plan*, World Bank, Washington DC June 2007 10.

64 JP Brun et al *Asset recovery handbook: A guide for practitioners* (2011).

65 TS Greenberg et al *Stolen asset recovery: A good practices guide for non-conviction based asset forfeiture* Stolen Asset Recovery (StAR) Initiative, The World Bank, Washington DC (2009) 7.

66 S Kingah 'The effectiveness of international and regional measures in recovering assets stolen from poor countries' (2011) 13 *University of Botswana Law Journal* 6, quoting A Bacarese 'Advancing international understanding and cooperation in combating fraud and corruption: Recovering stolen assets – A new issue?' (2009) 10 *Academy of European Law Forum* 422.

67 Lord Steyn notes in one of the of the UK's leading asset recovery cases, *R v Rezvi* [2003] 1 AC 1099, 1146: 'It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential.'

expense of national wealth. Grand corruption is also committed by private individuals in the country. A number of corruption scandals that were reported or unearthed raise eyebrows. It is on record that the country so far has lost billions of shillings through corruption-related scandals. Examples of such scandals abound, including the radar equipment bought from the UK's BAE systems, which occurred in 2008;⁶⁸ the external payment arrears (EPA) scandal, which dominated media headlines in 2009; the Richmond saga;⁶⁹ Alex Stewart (Assayers) incident;⁷⁰ and the BoT Twin Towers situation.⁷¹ The Tegeta Escrow account scandal, which involved the payment of US \$122 million should also be reckoned with.⁷² In 1995 TANESCO

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- 68 The money used to buy the radar equipment, US \$39 970 000, was recovered to the tune of £29,5 million as *ex gratia* for the benefit of the people of Tanzania. This famous radar 'change' was aimed at improving education facilities in terms of buying school desks and books for primary schools. Whether there was proper management of these recovered funds and whether they were put to good use, nobody can tell.
- 69 See Parliament of Tanzania *Hansards – Parliamentary Debates* 6 February 2008 41-105 and 7 February 2008 43-99. The Richmond scandal concerned fraud and corruption in connection with a contract with the American firm Richmond Department Company to provide for a 1000mw emergency power plant, which would convert gas from Songosongo into electricity. Despite the fact that all the bidding companies were found unsuitable, both in terms of their capabilities and financial surety, former Prime Minister Edward Lowassa intervened and awarded the contract to the Richmond Development Company LLC. Given the energy crisis, the government directly backed Richmond. By the end of 2006 it became evident that the company was not able to deliver, and that there were potential irregularities in the tendering process. Richmond only invested \$30 million in generators for a total capacity of 20mw, and tried to obtain more than \$115 million. A number of investigations followed: First, the Prevention and Combating of Corruption Bureau found no evidence of corruption. However, the Parliamentary Committee under the chairmanship of Dr Harrison Mwakyembe found evidence of corruption. As a result, in 2008 the Prime Minister Lowassa and a number of ministers involved resigned.
- 70 *R v Basil Pesambili Mramba & 2 Others*, Court of Resident Magistrates of Dar es Salaam, at Kisutu, Criminal Case 1200 of 2008. In this corruption-related case, former Minister for Finance, Basil Mramba, former Minister for Energy and Minerals, Daniel Yona, and former Permanent Secretary and the Treasury, Gray Mgonja, were taken to court for their involvement in wrongfully granting tax exemptions to the UK gold auditing company Alex Stewart (Assayers) Government Business Corporation, causing a Sh 11,7 billion loss to the government of Tanzania. The trial court found Basil Mramba and Daniel Yona guilty and sentenced them to a three-year prison term. The court, however, did not order the two accused to pay the government Sh 11,7 billion for the loss caused, neither did the High Court order the two accused to pay the government this amount of money as compensation on appeal by both prosecution and defence. (See the case of *Basil Pesambili Mramba & Another v R Consolidated Criminal Appeals* 96 of 2015 and 113 of 2015, High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam (unreported).
- 71 See the case of *Amatus Joachimu Liyumba v R* High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam, Criminal Appeal 56 of 2010 (unreported), where the appellant, who was the Director of Administration and Personnel in the Bank of Tanzania was charged and convicted by the trial court of two offences, namely, the abuse of office and occasioning loss to a specified authority c/ss 96(1) and 284(A)(1) of the Penal Code, Cap 16 [RE2002], thereby causing the government of Tanzania to suffer a loss of US \$153 077 715,71. He appealed to the High Court but his appeal was dismissed in its entirety. However, no compensation order was made against the accused/appellant.
- 72 See Parliament of Tanzania *Hansards – Parliamentary Debates* 28 November 2014 64-328 and 29 November 2014 2-28.

signed a large and significantly expensive power supply with IPTL. Since then, a number of investigations into the tendering process have been conducted and the case ended in front of the International Centre for Settlement of Investment Disputes (ICSID). The charges of corruption were finally dropped at the level of the ICSID due to the failure of the government to provide evidence in time. However, in 2014 further allegations of corruption involving IPTL and an Escrow account emerged. The scandal raised hot debates in the 2014/2015 parliamentary sessions where members of parliament argued that the payment was shrouded in fraud, corruption and gross negligence.⁷³ Going by various sources of information, it is apparent that the country lost a large amount of money through criminal activities, including corruption-related scandals, and the possibilities of recovering same were very slim.

Admittedly, transnational criminal organised syndicates are mainly attracted to continue committing crimes because they are able to enjoy the proceeds of their crimes and evade the legal consequences of such crimes either through a lack of jurisdiction, complications involved in investigation or otherwise. This explains why there are continued global efforts to ensure that criminals do not profit from their criminal activities. It is important to note that depriving criminals of their ill-gotten gains is tantamount to disrupting and dismantling their criminal organisations. Indeed, seizing the instrumentalities of crime prevents others from using the infrastructure in place.⁷⁴

In the last analysis, the goal underlying the conduct of most criminals, which is greed for material gain, is frustrated. Hence, the confiscation of the proceeds from crime has a retributive and deterrent effect. That is so because economic gain is the motive behind most criminal offences. These criminals enrich themselves through various means but at the expense of their fellow citizens. Citizens feel the pinch or magnitude of the diverted public funds by the few public officials through corruption or any other malpractices. It is a fact that such funds would be used to provide social services and other developments. But then, the citizens are denied such enjoyment because the funds are no longer in place. This, it is argued, is a violation of fundamental human rights at its best. Moreover, while part of the looted assets remains in the country, a large portion of it crosses the national borders in order to ensure that the chances

73 As above.

74 According to UNODC *Manual on international cooperation for the purposes of confiscation of proceeds of crime* Publishing and Library Section, United Nations Office, Vienna, September 2012 3, the term 'instrumentalities' denotes the assets used to facilitate crime, such as a car or boat used to transport narcotics.

of identifying and tracing the assets remain slim or not possible at all. Obviously, the looting affects the country's economy. As a result, the country's natural resources shrink to the extent of jeopardising good governance and the rule of law. It is obvious that given such a state of affairs, where a few enrich themselves and majorities are impoverished, the citizenry suffers the consequences the most.

The following are some of the human rights that are susceptible to violation, namely, the right to work⁷⁵ and the right to life.⁷⁶ Where the meagre resources of a country are looted by a few people for their own personal benefit, this may affect economic undertakings, thereby causing the majority of people to fail to meet basic needs and, thus, they are not guaranteed a quality life. Another right which is violated is equality before the law.⁷⁷ A fair hearing is the cornerstone of the administration of criminal justice. Illicitly-acquired assets affect the administration of justice where the resources that are allocated to the judicial administration become insufficient, thereby affecting the due process.

The citizenry's fundamental and basic human needs in a broader context are denied due to inadequate resources in place in public coffers. Citizens are essentially denied their fundamental human rights ranging from economic and social to cultural rights, which are guaranteed not only by international human rights instruments of which Tanzania is a state party but also the country's Constitution. Among these is the African Charter on Human and Peoples' Rights of 1981 (African Charter), which establishes a human rights protection system in the African region.⁷⁸ The Charter covers civil, political, economic, social and cultural rights. It obligates state parties, Tanzania included, to promote and protect these rights for individuals and also for the peoples.

Another African regional human rights instrument is the African Union (AU) Anti-Corruption Convention,⁷⁹ the operation of which covers all member states of the AU. The Convention contains provisions that cover the recovery of corruptly-acquired assets. In

75 Art 22 Constitution of the United Republic of Tanzania 1977.

76 Art 14 Tanzanian Constitution.

77 Art 13 Tanzanian Constitution.

78 The Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Tanzania signed the Charter on 31 May 1982, ratified it on 18 February 1984 and deposited it on 9 March 1984, <https://au.int/sites/default/files/treaties/36390> (accessed 1 June 2021).

79 AU Convention Against Corruption was adopted by the AU Assembly in Maputo, Mozambique on 11 July 2003 and entered into force on 5 August 2005. Tanzania signed the Convention on 5 November 2003, ratified it on 22 February 2005 and deposited it on 12 April 2009, <https://au.int/sites/default/files/treaties/36382> (accessed 1 June 2021)).

view of its objectives,⁸⁰ it is argued that the Convention is aimed to provide a coordinated mechanism to effectively prevent and combat corruption and related offences. In order to ensure that this aim is achieved, it adopts a broader approach to asset recovery.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, which Tanzania has ratified, requires state parties to take steps to progressively achieve the full realisation of economic, social and cultural rights to the maximum of their available resources.⁸¹ It is true that this obligation cannot be met if the assets are diverted or plundered from the public coffers by a few who are in a position that enables them to do so. The most conspicuous rights that are susceptible to violation include the right to adequate food, the right to health and the right to due process. To realise such and other rights, adequate resources are required. Based on what has been stated above, there is reason behind the trend that in recent years law enforcement agencies around the world have become increasingly interested in pursuing property, as opposed to people, associated with criminal activity.⁸²

5 A human rights assessment of the asset-recovery process

This part of the discussion ventures, albeit briefly, on the second limb of viewing the human rights context in relation to the asset-recovery process, which is whether the asset-recovery process complies with human rights aspects in respect of persons who are accused of having illegally acquired property and other persons who are involved therein. Those other persons are victims, witnesses, experts and whistleblowers. Are their human rights guaranteed in the course of the asset-recovery process? This is the main question to be addressed.

There is no doubt that asset recovery is intended to prevent criminals from benefiting from their crimes. Thus, criminals are reduced from 'wealthy untouchables' to being highly vulnerable, thereby not only making crime unprofitable but also deterring future

80 Art 2 AU Convention against Corruption.

81 Art 21 ICESCR. Tanzania accessed to the Covenant on 11 June 1976, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN, (accessed 1 June 2021).

82 KÉ Davis 'The effects of forfeiture on third parties' (2003) 48 *McGill Law Journal* 185.

offenders.⁸³ Asset recovery has been identified as an important tool to combat international and domestic organised crime.⁸⁴

It is obvious that the asset-recovery process interferes with ownership and possession of property as well as other rights and freedoms, which are protected by the country's Constitution. The Bill of Rights, which is entrenched in the Constitution, is intended to give protection to every person. It means that all Tanzanians, regardless of whether one is innocent or a criminal, are protected by the Constitution. Any limitation to the enjoyment to such rights and freedoms provided for under the Constitution should be prescribed by law, reasonable and necessary for purposes of enhancing public benefit. This means that the state is duty bound to implement appropriate law enforcement measures in the interests of protecting the rights of society.⁸⁵ Whatever steps the state takes in the asset-recovery process should therefore have the backing of the law. Moreover, the state must guarantee that the investigative means applied or the decisions taken during the criminal proceedings to seek, seize, forfeit and return the illicitly-acquired assets do not in turn violate other fundamental human rights that are guaranteed to the person being prosecuted.⁸⁶ It needs to be underscored that what suspects so far face are mere allegations. According to article 13(6) of the Constitution of the United Republic of 1977,⁸⁷ which provides for equality before the law, suspects should be accorded a fair hearing and presumed innocent. Until the prosecution proves beyond a reasonable doubt and courts of law convict them of the charges preferred against them, that is when they are said to have committed the crimes. Thus, when the state engages itself in the asset-recovery process, it should ensure that the fundamental human

83 C Soko 'An evaluation of Zambia's asset recovery laws' LLM dissertation, University of the Western Cape, 2013 69.

84 See the Proceeds of Crime Act, Cap 256 [RE 2019] and the Mutual Assistance in Criminal Matters Act Cap 254 [RE 2002]. These are the main pieces of legislation that govern the asset recovery regime in Tanzania. The objects and reasons for enactment of the Proceeds of Crime Act, as contained in the Bill, *inter alia*, are to enable freezing and confiscation orders made by courts in the United Republic of Tanzania to be enforced abroad, and orders made in foreign countries in relation to foreign offences to be enforced against assets located in Tanzania. The Mutual Assistance in Criminal Matters Act provides mutual assistance between Tanzania and other foreign countries, on a reciprocal basis, to facilitate the provision and obtaining of such assistance by Tanzania and to provide for matters related or incidental to mutual assistance in criminal matters. Assistance is mainly sought in relation to evidence and the identification and forfeiture of property.

85 V Basdeo 'The law and practice of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma' (2014) 17 *Potchefstroom Electronic Law Journal* 1058, <http://dx.doi.org/10.4314/pej.v17i3.06> (accessed 25 March 2017).

86 K Attiso 'The recovery of stolen assets: Seeking to balance fundamental human rights at stake (May 2010) International Centre For Asset Recovery, Basel Institute on Governance, Working Paper Series 8 8.

87 Cap.2 [RE 2002].

rights of its subjects are protected. Procedures and all the processes for asset recovery should observe human rights, which are enshrined in the Tanzanian Constitution. A balance must be struck between the need to curb crime and that of respecting fundamental rights of the individuals accused.⁸⁸ The following are the most fundamental human rights the state should observe when dealing with individuals alleged to have illicitly acquired assets:

5.1 Presumption of innocence

The asset-recovery process demands that an administration of criminal justice system should prevail. The rationale behind this is that a person alleged to have illegally acquired assets is deemed innocent until proven otherwise, hence the presumption of innocence. According to the Tanzanian Court of Appeal in the case of *DPP v John Abdul Mwarabu*,⁸⁹ an accused is only required to raise a reasonable doubt as to his guilt. The presumption of innocence, as provided for in article 13(6)(b) the Tanzanian Constitution, therefore, should be observed. The phrase 'presumption of innocence' has been defined as a conclusion or inference as to the truth of a person being not guilty, harmless, or knowing nothing of evil or wrong.⁹⁰ The presumption of innocence in fact is a fundamental principle underlying criminal law and enforceable under the Bill of Rights as enshrined in the Tanzanian Constitution.⁹¹

Under this basic right, a person is presumed innocent until he is proven guilty by a competent court through due process. The burden of proving guilt rests entirely on the prosecution.⁹² The standard of proof is beyond a reasonable doubt. The accused does not have the onus of proving his innocence.⁹³ This is so because the presumption of innocence always remains with a suspected person until he is proved guilty by a court of law. This legal position has been reiterated by the Tanzanian Court of Appeal in the case of *Jackson Mlonga v R*⁹⁴ where it was stated that proof in a criminal case is beyond a reasonable doubt. The Court held in the case of

88 As above.

89 Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal 138 of 2003 (unreported).

90 TR Mnyasenga 'Locating the scope and application of the right to presumption of innocence in Tanzania' (2015) 2 *International Journal of Law, Education, Social and Sports Studies* 74.

91 As above.

92 Evidence Act Cap 6 [RE 2019] sec 3(2)(a).

93 AOJ Kaniki 'Administration of mob justice in Tanzania: Wither the law enforcement machinery?' (2015) 42 *Eastern Africa Law Review* 217.

94 Court of Appeal of Tanzania at Dodoma, Criminal Appeal 200 of 2007 (unreported).

*Fadhili Majura v R*⁹⁵ that a failure by the prosecution to prove the case beyond a reasonable doubt gives the benefit of doubt to the accused.⁹⁶ In asset-recovery cases, the prosecution, therefore, has the burden of proving beyond a reasonable doubt that the accused illegally acquired the assets subject to forfeiture. It is on this basis of presumption of innocence that a suspect has the right to own property and the right against the arbitrary deprivation of property. The Tanzanian Constitution states in article 24:

- (1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.
- (2) Subject to the provisions of subarticle (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalisation or any other purpose without the authority of law which makes provision for fair and adequate compensation.

From the provisions of the Constitution, property that was acquired lawfully is fully protected and an owner thereof also has the right against arbitrary deprivation of the property. However, the protection envisaged here does not extend to the proceeds and instrumentalities of crime. According to the laws of the land nobody is entitled to profit from unlawfully-acquired property.⁹⁷ Such property should be forfeited by the Tanzanian government in line with the point that crime should not pay. That is why the asset-recovery process is accompanied by a fully-fledged investigation and prosecution before a court of law. All this is aimed at ensuring that the convict is denied the enjoyment of the fruits of his criminal acts, serving as a deterrent and an attempt by the state to suppress the conditions that lead to unlawful activities.

5.1.1 Presumption of innocence in relation to provisional measures for securing the assets

Some critics argue that this right, that is the presumption of innocence, is in conflict with provisional measures aimed at securing

95 Court of Appeal of Tanzania at Mtwara, Criminal Appeal 207 of 2007 (unreported).

96 See also cases of *Horombo Elikaria v R*, Court of Appeal of Tanzania at Mtwara, Criminal Appeal 50 of 2005 (unreported); *Bakari Omari @ Lupande*, Court of Appeal of Tanzania at Mtwara, Criminal Appeal 50 of 2005 (unreported) and *Faniel Kiula v R* (1967) HCD 369.

97 Those laws that contain elaborate provisions regulating the confiscation of criminal proceeds include the Proceeds of Crime Act [Cap 256 [RE 2002]]; the Prevention and Combating of Corruption Act 11 of 2007; the Drug Control and Enforcement Act 5 of 2015; the Prevention of Terrorism Act 21 of 2002; the Wildlife Act 2009 Cap 283 [RE 2009]; the Fisheries Act 22 of 2003; the Anti-Trafficking in Persons Act 6 of 2008; and the Anti-Money Laundering Act 12 of 2006.

assets that are involved in the commission of predicate offences. Their arguments hinge on a reasoning that the measures are not against an accused person who is merely a suspect as he has not yet been found guilty of the offence. The following statement has been made:⁹⁸

This right collides with provisional orders because they are enforced against or in relation to property which is merely suspected to be connected to a criminal offence. This means that a property owner, who in most cases is the suspect under investigation, has his use or enjoyment of his property limited through provisional orders, way before his culpability or the tainted nature of his property is determined by a court of law.

The critics do not pay attention to the reason behind having such provisional measures, which deprive suspects of the enjoyment of rights to own property that is subject to forfeiture. In this case, the freezing and seizure of the assets are provisional measures to preserve assets pending forfeiture. As regards a restraint order, which is also a provisional measure, it has the effect of securing the assets. According to the Proceeds of Crime Act, securing assets is effected through a restraining order issued by court upon an application made by the Director of Public Prosecutions.⁹⁹ As noted above, the order is aimed at ensuring that the proceeds and instrumentalities of crime are not dissipated by an accused person before a forfeiture order is made by the court. Ordinarily, applications for restraint orders are made against the property of a person who has not been charged but is expected to be charged,¹⁰⁰ who has been charged but has not yet been convicted¹⁰¹ or has been convicted of a serious offence.¹⁰² Persons affected by a restraint order are deprived of property rights pertaining to the property to which the restraint order applies.¹⁰³ They are prohibited from dealing in any manner with the property.¹⁰⁴ The restraint order issued by a court remains in force until the criminal charge against the person in relation to whom the order was issued is withdrawn or such person is acquitted of the charge.¹⁰⁵ The order also ceases to have effect when the confiscation order is satisfied or discharged.¹⁰⁶

98 J Phillipo 'The asset forfeiture regime in Malawi and its implications for combating of money laundering' LLD thesis, University of the Western Cape, 2015 212.

99 Cap 256 [RE 2002] sec 38(1).

100 Secs 38(1) & 39(4) Proceeds of Crime Act.

101 Secs 38(1) & 39(3) Proceeds of Crime Act.

102 Secs 38(1), 39(1) & (2) Proceeds of Crime Act. See also BEK Mganga 'Confiscation of proceeds of crime: The law and practice in Tanzania' (2013) *National Prosecutions Service Journal* 14-15.

103 Basdeo (n 85) 1053.

104 As above.

105 Sec 52(1) Proceeds of Crime Act.

106 Sec 52(2) Proceeds of Crime Act.

In essence, all these orders are applied for in order to remove the possibility of the assets being dissipated or transferred in the course of trial before the final determination of the case. It should be appreciated that at times organised crime and an asset-tracing investigation may take a long time to complete. As such, the possibility of assets being dissipated or transferred cannot be ruled out altogether. Criminals normally conceal profits from crime. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. Moreover, these are sure ways of obtaining evidence. The assets serve as exhibits. Therefore, provisional preservation measures are taken for the purpose of securing the assets from being wasted, lost or improperly disposed of until forfeiture proceedings are instituted. All this is done to ensure that the assets are available to satisfy a final forfeiture order.¹⁰⁷

5.2 Rules of natural justice: Guarantee of and respect for the principle of a fair hearing

Rules of natural justice, which advocate a fair trial, need to be observed on the part of persons accused of predicate offences. At the international level, the Universal Declaration of Human Rights (Universal Declaration) states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.¹⁰⁸ Equally important, the International Covenant on Civil and Political Rights (ICCPR) obligates state parties to protect and preserve basic human rights.¹⁰⁹ The rights protected under ICCPR include equality before the courts and tribunals;¹¹⁰ fair trial and public hearing by a competent, independent and impartial tribunal established by law;¹¹¹ the right to be presumed innocent until proved guilty according to law;¹¹² and the right not to be tried or punished again for an offence for which one has already been finally convicted or acquitted of in accordance with the law and penal procedure of each country.¹¹³ At the regional

107 Adekunle (n 35) 18.

108 See art 10 of the Universal Declaration. The Declaration was adopted by the UN General Assembly on 10 December 1948.

109 The Covenant was adopted by the UN General Assembly in 1966 and came into force 23 March 1976. Tanzania acceded to the Covenant on 11 June, 1976, <https://tbinternet.ohchr.org/...layouts/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN> (accessed 1 June 2021).

110 Art 14(1) ICCPR.

111 As above.

112 Art 14(2) ICCPR.

113 Art 14(7) ICCPR.

level, the African Charter protects rules of natural justice.¹¹⁴ The African Charter provides for the right to be heard. This comprises (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; and (d) the right to be tried within a reasonable time by an impartial court or tribunal.¹¹⁵ The Charter also prohibits the application of laws with retrospective effect. That is to say, it provides that no one should be condemned for an act or omission which did not constitute a legally-punishable offence at the time of its commission.¹¹⁶ The minimum guarantees of a fair trial are emphasised by the AU Convention on Preventing and Combating Corruption.¹¹⁷ The Convention states in article 14 that any person alleged to have committed acts of corruption and related offences should receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter and any other relevant international human rights instrument recognised by the relevant state parties.

In Tanzania the rules of natural justice are enshrined in article 13 of the Tanzanian Constitution.¹¹⁸ This means that the right to be heard, the rule against bias and the right to know reasons for the decision should feature in the whole asset-recovery process, as enshrined in the Constitution in the following words:¹¹⁹

To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

- (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal

114 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Tanzania signed the Charter on 31 May 1982, ratified it on 18 February 1984 and deposited it on 9 March 1984, <https://au.int/sites/default/files/treaties/36390> (accessed 1 June 2021).

115 Art 7(1) African Charter.

116 Art 7(2) African Charter.

117 The AU Convention Against Corruption was adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, Mozambique on 11 July 2003 and entered into force on 5 August 2005. Tanzania signed the Convention on 9 December 2003 and ratified it on 25 May 2005, <https://au.int/sites/default/files/treaties/7786slafricanunionconventiononpreventingandcombatingcorruption.pdf> (accessed 1 June 2021).

118 Cap 2 [RE 2002].

119 Art 16(6) of the Constitution of the United Republic of Tanzania 1977, Cap 2 [RE 2002].

remedy against the decision of the court or of the other agency concerned.

Based on what has been stated above, this means that a fair hearing on the part of the individuals accused of acquiring illicit assets should be afforded to them in all stages of the asset-recovery process. This includes applications for provisional orders that involve court processes. All these go hand in hand with the right to legal representation, meaning that the person accused of a predicate offence has the choice of hiring an advocate of his choice or one provided under the legal aid forum as provided by the law upon meeting given conditions.

5.3 Third party rights

The asset recovery legal regime must take into consideration the extent to which provisional and ultimate forfeiture orders can affect third party interests. This is in full appreciation of the fact that any workable forfeiture regime must provide some mechanism for determining how forfeiture will affect the interests of the third parties involved in each of these cases, and no assessment of the merits of any given regime can be complete unless it takes that mechanism into account.¹²⁰ The concern here is where there are innocent or *bona fide* third parties, that is to say, those third parties that are not connected in any way to the commission of predicate offences of which the accused stands charged. The question arises as to whether they should be left to suffer the consequences. In Tanzania the asset recovery legal regime provides for the protection of third party interests, not only before or after provisional orders are made, but also when forfeiture orders are made.¹²¹ The starting point is the Constitution. The right to own property as envisaged in article 24(1) of the Constitution accommodates third parties. Moreover, the United Nations Convention against Corruption (UNCAC), of which Tanzania is a state party, provides that procedures for recovering corruption proceeds should not be enforced in such a way that prejudices *bona fide* third parties.¹²² In the same vein, Africa as a region has a convention that calls on its member states to cooperate and assist one another in preventing and combating corruption, namely, the African Union Convention on Prevention and Combating

¹²⁰ Davis (n 82) 185.

¹²¹ Proceeds of Crime Act Cap 256 [RE 2002] sec 43(3)(b). See also the case of *Attorney-General v Mugesu Anthony & 2 Others* Court of Appeal of Tanzania, Criminal Appeal 220 of 2011 (unreported).

¹²² Art 31(9) UNCAC. Tanzania signed the Convention on 9 December 2003 and ratified it on 25 May 2005.

Corruption (AU Convention against Corruption).¹²³ The Convention, the operation of which covers all member states of the AU, contains provisions that cover the recovery of corruptly-acquired assets.¹²⁴

However, it is fundamentally important that the asset-recovery regime should have provisions that ensure that third parties receive adequate notice of the whole process relating to assets in which they have an interest. Through the formal notice served upon them they will not only know what is going on but will also exercise their rights available under the law regarding the assets under consideration.

5.3.1 Rights of third parties in respect of provisional or preservation orders

The Proceeds of Crime Act requires the Director of Public Prosecutions to give written notice of an application for a restraining order against property to the owner of the property, and any other person whom he has reason to believe may have an interest in the property.¹²⁵ This requirement may only be waived and the court may proceed to grant any restraining order notwithstanding that no notice of the application has been given if it is satisfied that circumstances of urgency require the granting of the order, or if it would be contrary to public interest to give notice of the application. The purpose of such notice is to enable such persons, third parties included, who claim any interest in the property subject to the restraining order to adduce evidence at the hearing of the application in court.¹²⁶ Even after the order is made, any person having an interest in the property which is the subject of a restraining order may apply to court to exclude such other person's interest in the property from the order.¹²⁷

Similarly, a restraining order against a person's property may be granted subject to such conditions as the court may deem fit and make provisions for meeting out of the property a specified debt incurred by that person in good faith to a third party.¹²⁸

¹²³ AU Convention Against Corruption (n 118).

¹²⁴ Art 16 AU Convention Against Corruption on confiscation and seizure of the proceeds and instrumentalities of corruption; and art 17 on bank secrecy.

¹²⁵ Cap 256 [RE 2002] sec 40.

¹²⁶ Sec 41 Proceeds of Crime Act.

¹²⁷ Sec 43(3) Proceeds of Crime Act.

¹²⁸ Sec 38(3) Proceeds of Crime Act.

5.3.2 *Rights of third parties in relation to forfeiture orders*

Third party rights are observed even at the forfeiture stage. Where the Director of Public Prosecutions makes forfeiture application under POCA upon an accused person following his conviction of a serious or predicate offence against property in respect of accused's conviction, he is mandatorily required by law to give written notice to the accused or to any other person who he has reason to believe may have an interest in the property.¹²⁹ The accused, and any other person who claims an interest in the property, may appear and give evidence at the hearing of the application.¹³⁰ It is obvious that if the court is satisfied by the evidence adduced by the third party, the forfeiture order will take into consideration the extent of his interest in the property. In fact POCA expressly states that where an application for a forfeiture order is made against property, any person who has an interest in the property may, before the forfeiture is made, apply to the court for an order in respect of his interest in the property against which an application for a forfeiture order or a forfeiture order has been made.¹³¹ However, the court should be satisfied that the applicant was not in any way involved in the commission of the offence concerned or, if the applicant acquired his interest at the time, or after the commission of the offence, the applicant did so for the sufficient value, and without knowing and in the circumstances such as not to arouse reasonable suspicion that the property was, at the time of the acquisition, tainted property.¹³²

The asset recovery legal regime in Tanzania is not contained in a single law. There are several statutes that make provision for the recovery of criminally-acquired assets. However, such provisions are ancillary to other matters. As long as the country has a conviction-based forfeiture system, all predicate offences that are subject to freezing and confiscation must first undergo full criminal trials. This explains why various pieces of legislation ranging from substantive to procedural laws are involved. Most of these pieces of legislation create several predicate offences and penalties to be meted out. In addition, however, they have forfeiture provisions to those predicate offences, most of which are covered by the main forfeiture law, namely, the Proceeds of Crime Act.¹³³

129 Sec10(1)(a) Proceeds of Crime Act.

130 Sec10(1)(b) Proceeds of Crime Act.

131 Sec 16(1) Proceeds of Crime Act.

132 Sec 16(6) Proceeds of Crime Act.

133 Proceeds of Crime Act Cap 256 [RE 2002].

In view of the above, those other laws also take into consideration third party rights when the issue of forfeiture comes to the fore. Among those laws is the Prevention of Terrorism Act 2002.¹³⁴ According to the Act, where a person is convicted of an offence under this Act, the court may order that any property used for, or in connection with, or received as payment or reward for, the commission of that offence, be forfeited to the United Republic of Tanzania.¹³⁵ However, before making an order, the court shall give every person appearing to have an interest in the property, in respect of which the order is proposed to be made, an opportunity of being heard.¹³⁶ Every person here includes *bona fide* third parties. Similarly, the Wildlife Conservation Act, 2009¹³⁷ has forfeiture provisions that protect third party rights. The Act mandatorily requires the court upon convicting a person of an offence under the Act to order the forfeiture to the government of proceeds and instrumentalities of crime of which such person was found in possession.¹³⁸ However, the Act states that where assets used as instrumentalities of crime are owned by a person other than the one who was convicted, and where on an application of the owner of the assets, the court is satisfied that the owner did not know and could not by reasonable diligence know that such assets were intended by the accused to be used or employed for any purpose which rendered liability for forfeiture, the court may make no order for the forfeiture of such assets used as instrumentalities of crime.¹³⁹ This is why it is well settled that people who invest in property in circumstances where they know or ought to know that it qualifies either as proceeds of crime or as instrumentality of crime have a significantly weaker claim to protection from forfeiture than otherwise.¹⁴⁰

The Tanzanian Court of Appeal refrained from granting a forfeiture order in the case of *The Attorney-General v Mugesu Anthony & 2 Others*¹⁴¹ on the ground that the owner of the asset used to commit a predicate offence was not aware that it would be used as such. In this case the Attorney-General filed an application to restrain a property which was used to facilitate the commission of crime. The property involved was a truck of the make Scania, which was used to transport a consignment of 25 bags of *cannabis sativa* (*bhang*) weighing 283 kilogram in Mwanza region. The Court, however, declined to grant a

134 Act 21 of 2002.

135 Sec 36(1) Prevention of Terrorism Act (n 135).

136 Sec 36(2) Prevention of Terrorism Act.

137 Cap 283 [RE 2009].

138 Sec 111(1) Wildlife Conservation Act (n 138).

139 Sec111(2) Wildlife Conservation Act.

140 Davis (n 82) 220.

141 Criminal Appeal 220 of 2011 in the Court of Appeal of Tanzania at Mwanza (unreported).

forfeiture order on the ground that the owner of the truck, the third respondent, was an ignorant, innocent third party owner.

5.4 The protection of victims, witnesses, experts and whistleblowers

One of the challenging factors to most developing countries, including Tanzania, is that they have a cash-based economy where funds do not often flow through the established financial systems.¹⁴² It is estimated that 60 per cent of funds in Tanzania are kept outside banks.¹⁴³ This means that most financial transactions are carried out in cash. This poses a huge challenge in the fight against money laundering, terrorist financing and other serious and organised crimes. As a result, it is difficult to realise efforts upon asset recovery. Dealing in cash tends to leave little or no audit trail, and for this reason criminals prefer to deal in cash. Cash transactions leave the law enforcement agencies with disjoint or no information to work with. As such efforts to trace and track suspected financial flows may prove futile. Eventually gathering evidence that links the assets to criminal activities or those assets that are a benefit derived from an offence alleged to have been committed by the offender may at times become a very difficult assignment. This explains why the task of identifying and tracing the proceeds of crime requires a multi-sectored approach. This involves various sources.¹⁴⁴ Such sources may include gathering information from, among others, individual persons (whistleblowers) and other sources such as victims, experts and the like. It is through investigation that proceeds and instrumentalities of crime are revealed, especially when they are concealed with a view to hiding their origins. In addition to often providing evidence of criminal intent and identifying otherwise unknown accomplices, tracing through tracking the ownership trail may also lead to the seizure of property constituting illegal proceeds.¹⁴⁵ It therefore is important to rapidly locate and freeze assets reasonably believed to have been criminally acquired lest they are dissipated.

¹⁴² See the United Republic of Tanzania, Ministry of Finance *Financial Intelligence Unit Annual Reports (2011/2012)* 4; *(2012/2013)* 16-17 and *(2013/2014)* 23-24.

¹⁴³ According to Prof Benno Ndulu, then Governor of the Bank of Tanzania, in his address to the 18th Conference of Financial Institutions delivered on 24 November 2016 in Arusha, six out of ten shillings held in cash is outside the banking system; *Guardian Newspaper* 25 November 2016 1.

¹⁴⁴ Law enforcement officers should, therefore, involve various individual persons, sectors and institutions to gather intelligence and evidence that enable the identification and tracing of assets. The identification and tracing of assets involve locating the assets and linking them to the crime and the offender through accessing various sources.

¹⁴⁵ P Atkinson 'Introduction' in International Centre for Asset Recovery *Tracing stolen assets: A practitioner's handbook* (2009) 19.

The role played by victims, witnesses, experts and whistleblowers, therefore, cannot be underestimated. As such, these persons need protection. Efforts should be made to make possible to hide their identification lest they may suffer the wrath of reprisal from criminals or their associates. The UNCAC, to which Tanzania is a state party, recognises the protection of witnesses, experts and victims¹⁴⁶ as well as those who give information about cases of corruption and other related offences.¹⁴⁷ UNCAC urges state parties to take appropriate measures to ensure effective protection against any acts of reprisal, intimidation or any unjustified treatment of persons who facilitate the launching of an investigation or who are involved in the proceedings *per se*.¹⁴⁸ Otherwise, such persons will be discouraged from cooperation in investigations. Tanzania has taken an initiative of having enacted a law to provide protection to whistleblowers and witnesses, namely, the Whistleblower and Witness Protection Act, 2015.¹⁴⁹ It must be appreciated that whistleblowers play a fundamental role in exposing criminals who are associated with illicitly-acquired assets. They often provide information, which assists in identifying otherwise unknown accomplices, tracing through tracking the ownership trail that may also lead to the seizure of property constituting illegal proceeds. Therefore, they need adequate legal protection. The enactment of the Whistleblower and Witness Protection Act in Tanzania is a step forward towards achieving not only that goal but also protecting and respecting the basic rights and fundamental freedoms of whistleblowers and witnesses.¹⁵⁰

5.5 Some limitations in the course of enforcing legal provisions on asset recovery

In view of what has been discussed above regarding the human rights assessment of the asset-recovery process, there are some limitations in the course of enforcing legal provisions on asset recovery. These include:

5.5.1 *Inadequate asset management system*

Apart from having a law authorising the seizure and forfeiture of illicitly-acquired assets, it is important for jurisdictions to have organisational and administrative infrastructures to preserve,

146 Art 32 UNCAC.

147 Art 33 UNCAC.

148 Attiso (n 86)13.

149 Act 20 of 2015.

150 See secs 9, 10 and 11 of the Whistleblower and Witness Protection Act 20 of 2015.

manage and dispose of forfeited assets in a secure and accountable manner.¹⁵¹ The asset-recovery process is meaningful if assets that are subject to forfeiture are available, properly managed, and well-kept and maintained. More so, recovered assets are additional resources for development activities. As such any neglect, which depreciates their economic value, diminishes their economic contribution to the nation's prosperity.

However, so far there are some limitations to the effective asset management system. It is apparent that there are some aspects that are not covered in the legal framework but which ought to be in place. The fact that so far there are no provisions that require the proper maintenance of records or statistics of management of assets that are subject to forfeiture or forfeited assets and their use, makes it very difficult to do follow-ups and to make an assessment of how asset management as a whole is faring.

5.5.2 Some gaps in existing laws

Since the early 1990s Tanzania has enacted several laws directly addressing criminal activities that are perpetrated by criminals within national boundaries and across international boundaries with a view to supplementing those that were in place. However, there are still some provisions of the laws that are incompatible with international best practices on dealing with asset recovery issues. Such provisions include those on mutual assistance in criminal matters. Whereas UNCAC mandatorily requires requested state parties to furnish assistance, Tanzania makes it optional.¹⁵²

5.5.3 Failure by some investigators, prosecutors and trial courts to follow laid-down criminal practices and procedures

There are some procedural errors occasioned by some investigators, prosecutors or magistrates in the course of the administration of the criminal justice system. As a result, cases have been failing either at the trial or appellate stages. These errors range from a failure to follow some legal requirements during investigations; a lack of jurisdiction by the trial courts; and irregularities in tendering evidence during the trial to defective charges.

151 P Premabhuti 'Asset management measures in Thailand' in TS Greenberg et al *Stolen asset recovery: A good practices guide for non-conviction bases asset forfeiture* (2009) 175.

152 The Mutual Assistance in Criminal Matters Act Cap 254 [RE 2002] sec 12(2).

5.5.4 *Lengthy and cumbersome procedures*

Tanzania has a mainly conviction-based forfeiture system, which means that forfeiture orders must be preceded by the conviction of an accused.¹⁵³ Such orders are in addition to any punishment the court may impose for an offence. From a practical point of view, criminal investigations and prosecutions take a long time, thereby causing the state to bear the costs of maintaining assets subject to preservation pending applications for forfeiture orders. At times, the state incurs more costs than the value of the asset itself.

6 Conclusion: Is the forfeiture of illegally-acquired property in Tanzania human rights compliant?

In responding to this question, the benchmark is the Constitution, which is the basic law of the land. Other laws should be enacted in such a way that they are not in conflict with any provision of the Constitution. Considering the foregoing discussion, it is apparent that the procedural and substantive laws that are involved in the whole asset-recovery process and mechanisms abide by the Bill of Rights as entrenched in the Constitution. There have been arguments that the asset-recovery process is lengthy and cumbersome. While these arguments may have merit, such long and cumbersome procedure involved therein does not in main defeat the purpose of complying with human rights compliance. Nothing in the discussion goes contrary to the provisions of the Constitution, which insists that all persons are equal before the law and are entitled, without any discrimination, to protection and a fair trial.¹⁵⁴ The Constitution states that no law should have any provision that is discriminatory either of itself or in its effect.¹⁵⁵ There is a just cause to recover the illicitly-acquired assets. This is because of the fact that a few individuals amass wealth but do so at the expense of the majority, which is a violation of the fundamental human rights of those majority people, such as the right to work,¹⁵⁶ the right to life¹⁵⁷ and equality before the law.¹⁵⁸ All in all, it is concluded that the forfeiture of illegally-acquired property in Tanzania is human rights compliant. Much as the enforcement of human rights provisions as enshrined in the Constitution is not always absolute, limitations thereof need to be

153 See secs 9 and 14 of the Proceeds of Crime Act Cap 256 [RE2019] which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

154 See art 13 of the Constitution.

155 As above.

156 Art 22 Constitution.

157 Art 14 Constitution.

158 Art 13 Constitution.

observed for the public good. Moreover, whoever feels aggrieved, there are several avenues through which their complaints can be entertained. What should be done is to empower the people through raising their awareness so that they can pursue with ease their rights through those avenues, namely, administrative and quasi-judicial bodies and courts of law.