

# **Forfeiture of Criminally Acquired Property in Tanzania: Some Reflections on Historical and Socio-Economic Factors**

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## **Abstract**

Forfeiture of criminally acquired property, popularly known as asset recovery, is considered to be an effective mechanism of addressing serious and organised crime within national boundaries and across international frontiers. 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. Tanzania has a legal and institutional framework that deals with forfeiture of criminally acquired assets. However, having this framework is one thing and letting it to operate is another thing altogether. This paper focuses, albeit briefly, on efforts made to have a legal and institutional framework that is supportive and acts as a vehicle towards effective ill-gotten asset recovery in the country. It adopts a historical and socio-economic approach. The paper comes up with one main conclusion that despite some elaborate provisions of the law with some national and international dimensions, there is under-utilisation of the legal and institutional framework in place to deal with the issue of recovering proceeds of criminality. So far there are very few decided cases in which courts ordered forfeiture of proceeds and instrumentalities of crime. Whereas the paper attempts to outline some of the factors, which cause the under-utilisation of the framework in place, it leaves room for further studies in future on what should be done to address the situation.

## **1. Introduction**

This paper looks at asset recovery, whereby criminally acquired assets are forfeited. The paper focuses on efforts made to have a legal and institutional framework in Tanzania that is supportive and acts as a vehicle towards effective ill-gotten asset recovery. In doing so, an historical and socio-economic approach is adopted. Most states the world over, Tanzania included, are suffering from massive swindling of wealth through criminal activities that are perpetrated by criminals within national boundaries and across international boundaries.<sup>1</sup> Criminals who gang up into organised and networked groups take advantage of 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 are lost each year to various illegal activities.<sup>2</sup>

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

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<sup>1</sup> Kaniki, A.O.J., "Transnational Crime and National Security: Issues and Options for Tanzania," **NDC Journal**, National Defence College-Tanzania, First Edition, July 2015, pp.25-37, at p.26.

<sup>2</sup> UNODC and World Bank, **Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan**, World Bank, Washington, DC, June 2007, p.10.

extremely difficult to recover.<sup>3</sup> This figure is equivalent to annual GDP of the world's 12 poorest countries, where 240 million people live.<sup>4</sup> In fact criminals always ensure that they conceal their profits from crime.<sup>5</sup> One way of concealment is through channeling those assets into the financial system either locally or in foreign jurisdictions. Through such concealment, a massive cross-border flow of the global proceeds from criminal activities takes place thereby jeopardising socio-economic wellbeing of citizenry and posing a serious threat to security and stability of most developing and transition countries.

## 2. Conceptual Outlook of Asset Recovery

### 2.1 Definition and Rationale

Asset recovery is a recent concept, which has earned its prominence in the wake of efforts taken to curb serious and organised crimes that are profit-driven. The concern is that law enforcement machinery should ensure that criminals are deprived of their proceeds and instrumentalities of criminality so that crime does not pay. No one should be allowed to benefit from criminal activity. Benefit from crimes is considered to be against the general sense of justice.<sup>6</sup> It is in this line of argument that several definitions that are given by authors on the term "asset recovery" have that bearing. The following attempts are to that effect. According to Piotr Bakowski, asset recovery refers to the seizure of property, without compensation, related to criminal activity.<sup>7</sup> UNODC, too, defines "asset recovery" as a term used to describe efforts by governments to repatriate to the country of origin proceeds of crime hidden in foreign jurisdictions.<sup>8</sup> Matthew Hitchcock Fleming is of the view that asset recovery means the process through which criminals are deprived of the proceeds and/or instrumentalities of crime.<sup>9</sup>

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<sup>3</sup> See Brun, J.P., *et al.*, **Asset Recovery Handbook: A Guide for Practitioners**, World Bank, UNODC, 2011.

<sup>4</sup> Greenberg, T.S., *et al.*, **Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture**, The World Bank, Washington, D.C., 2009, p.7.

<sup>5</sup> Lord Steyn notes in one of UK's leading asset recovery cases *R. v. Rezvi* [2003]1 AC 1099, 1146 that:

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.

<sup>6</sup> Ulfsdotter, I., "Sweden's Forfeiture Regime in a Time of Change – A Comparative Study of Swedish and Australian Law Regarding Forfeiture of Unexplained Wealth", Master's Thesis, Faculty of Law, Lund University, 2012, p.14.

<sup>7</sup> Bakowski, P., "Asset Recovery for Arab Countries in Transition," Library Briefing, Library of the European Parliament, 16/05/2013.

<sup>8</sup> UNODC, **Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime**, United Nations, Vienna International Centre, Vienna, Austria, September 2012, p.1.

<sup>9</sup> Fleming, M.H., "An Examination of the Means of Establishing the Efficacy of Asset Recovery and Anti-Money Laundering Policies", PhD in Public Policy Thesis, University College London, January 2008, p. 9. Source: <http://discovery.ucl.ac.uk/1444207/1/u591509.pdf>, accessed on 25<sup>th</sup> January, 2017.

Gathering from what is stated above, it may be argued that asset recovery is the process through which serious and organised crime activities are disrupted by depriving criminals of the proceeds and instrumentalities of crime through confiscation/forfeiture. The process encompasses a number of stages namely, identifying and tracing the proceeds and instrumentalities of crime; restraining them to avoid their dissipation; linking them to criminal activity and its perpetrators, confiscating them from perpetrators, and returning them to their true owners.<sup>10</sup>

## 2.2 Origins and Evolution of Asset Recovery

Asset recovery, which is effected through forfeiture, has a long history. Historically, forfeiture actions traced their way back to Roman law although some academics argue that they originated in Biblical times.<sup>11</sup> It is generally accepted that the origins and evolution of modern forfeiture laws in common law countries go back to the ancient English law of *deodand* (from *deo dandum* in Latin meaning ‘given to God’). Practices of *deodand* featured prominently during the medieval England especially after Julius Caesar’s invasion of Britain in 43A.D when England became a Roman province.<sup>12</sup> Under the *deodand* practices, a person’s property was the object of forfeiture to the Crown when the property was the instrument of a human fatality. The property was figuratively “given to God” even though the Crown confiscated the title.<sup>13</sup> There was a strong belief that the Crown represented God. This was owing to the then existing legal order of linkage between church/religion and the state, where rulers were seen as a combination of priest, magic man and king. The reason for “giving the property to God” is that such property that caused death or great injury was considered to have committed an offence against God. Put in other words, if the king’s subject died, an amount equal to the value of any inanimate object that was responsible directly or indirectly for the death had to be forfeited to the crown. In principle, what *deodand* required was that property should be forfeited if it violated the law<sup>14</sup> and had to be redistributed in some way in the community either through charitable donations or masses for the victim’s soul.<sup>15</sup> *Deodand* practices

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<sup>10</sup> Gray, L., K., *et al.*, “Few and Far: The Hard Facts on Stolen Asset Recovery”, World Bank, Washington, DC, 2014, p.15. Source: <http://star.worldbank.org/star/publication/few-and-farhard-facts-stolen-asset-recovery>, accessed on 28/10/2016.

<sup>11</sup> For some discussion on this aspect, see Van Jaarsveld, I.L., “The History of *in rem* Forfeiture-A Penal Legacy from the Past” **Fundamina: A Journal of Legal History**, (2006), Vol. 2, No.2, pp. 137-147, p.141.

<sup>12</sup> *Ibid.*

<sup>13</sup> Krane, J.A., “Civil Forfeiture and the Canadian Constitution”, LL.M Thesis, Graduate Department of the Faculty of Law, University of Toronto, 2010, p.11.

<sup>14</sup> *Ibid.*, pp.141-144. See also Schwarcz, S.L and Rothman, A. E., “Civil Forfeiture: A Higher form of Commercial Law”? (1993) **Fordham Law Review**, pp. 289-291; Amani, N.P., “Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?,” **Eastern Africa Law Review**, Issue No. 2, Vol.41, December, 2014, pp.125-155, at p.133.

<sup>15</sup> Stahl, M.B., “Asset Forfeiture, Burdens of Proof and the War on Drugs,” **Journal of Criminal Law and Criminology**, Vol. 83, No. 2, 1992, pp. 274-337, at p.295.

also required that where one of the king's subjects was murdered and unfortunately the murderer was not identified, the local community had to pay the Crown the fine.<sup>16</sup>

As time went by, other forms of common law forfeiture were developed alongside *deodand*. These were forfeiture resulting from conviction for a felony such as treason and statutory forfeiture. Under forfeiture for felony, the estate of the criminal was forfeited to the crown upon conviction of a felony.<sup>17</sup> The reason behind was to totally strip a convicted felon of his right to own property or transmit the same to an heir. Such person's property was regarded as being corrupted by his crime. This was regarded as breaching the King's law and therefore amounted to denial of the right to own property.

Regarding statutory forfeiture, property used or acquired in violation of customs or revenue laws were to be forfeited. An example of such laws was the Navigation Laws of 1660, which required goods to be shipped in English ships. Any violation resulted in forfeiture of both the goods and the ship.<sup>18</sup> The action was *in rem* against the object, and the owner had to file a claim to contest the forfeiture. Moreover, an "act of an individual seaman without the knowledge of the master or owner, could result in forfeiture of the entire ship."<sup>19</sup> This harsh result was justified as a penalty on the ship's owner for negligently choosing his crew.<sup>20</sup>

It would, however, be noted that *deodand* had over time lost much of its religious significance and by the nineteenth century, *deodand* forfeitures simply became another source of crown revenue. This was the situation until their ultimate abolition in 1846 when the UK Parliament introduced the Fatal Accidents Act.<sup>21</sup> The Act allowed compensation to be awarded by a court to a deceased family for a wrongful death. Equally, the forfeiture of the property of a person convicted of a felony died away and the coming into force of the Forfeiture Act 1870 and the development towards a situation where forfeiture could only be undertaken to items that were immediately connected with a specific crime, not those representing the benefit from the crime.<sup>22</sup> It is argued that these two English common law types of forfeitures, namely *deodand*, which involved the forfeiture of the value of property linked to death of one of the King's subjects and forfeiture of the property of a person convicted of a felony withered away with the rule of absolute monarchy.<sup>23</sup> One of the key factors that led to the decline of such types of forfeiture upon separation of church and state was the rise of private property and the

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<sup>16</sup> Friedman, D., "Asset Recovery: An Overview," in Smith, I. and Owen, T. (Eds.), **Asset Recovery: Criminal Confiscation and Civil Recovery**, LexisNexis UK, London, 2003, pp.1-32, at p.2.

<sup>17</sup> Jaarsveld, *op cit.*, pp.141-144.

<sup>18</sup> Gordon, J.E., "Prosecutors who Seize too Much and the Theories they Love: Money Laundering, Facilitation, and Forfeiture," **Duke Law Journal**, Vol.44, 1995, pp.744-775, at pp.746-747.

<sup>19</sup> *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993).

<sup>20</sup> *Ibid.*

<sup>21</sup> The Fatal Accidents Act, 9&10 Vict.c.93 (1846) was commonly known as Lord Campbell's Act.

<sup>22</sup> Her Majesty's Crown Prosecution Service Inspectorate, *et al.*, **Joint Thematic Review of Asset Recovery: Restraint and Confiscation Coursework**, Criminal Justice Joint Inspection, London, March 2010, p. 2.

<sup>23</sup> Friedman, *op cit.*

consequential interests of state interference.<sup>24</sup> It was through legislative innovation that the common law protections of private property have given way to public interest legislative techniques designed to recover unlawfully acquired property. This qualification of the ordinary protections of private property was not similar to the original notion of ‘asset stripping’ of a convicted felon, which essentially involved the forfeiture of the felon’s right to own property *per se*.<sup>25</sup> Rather it introduced a new concept of asset recovery on the basis that property derived from the proceeds of crime was not in fact the property of the criminal.

All in all, it may be argued that the early forfeiture practices that went through the English common law jurisprudential development form a foundation of modern forfeiture laws that operate today especially in most former British colonies, including Tanzania.

### 3. Turning Crime into a Rewarding Economic Enterprise

All over the world there are relentless efforts by criminals to turn crime into a rewarding economic enterprise. One of the reasons behind is generally to acquire wealth and power that derives from possession of wealth.<sup>26</sup> It has been stated that:

Today, crime is seen as a business enterprise and individuals are drawn into it as a means of personal enrichment. Massive wealth is acquired through illicit means which, as a result, affects the socio-political and economic fabrics of the society. The gap between the rich and poor widens as the minority rich individuals take control of the major means of the economy while the majority are left to languish in poverty.<sup>27</sup>

Criminals who gang up in organised syndicates with transnational characters 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 lack of jurisdiction, complications involved in investigation, bribing government/law enforcement officials so that they do not take legal actions against them or otherwise. This enables them to maintain their power and cover their bad reputation in the society, thereby keeping them flourishing at the expense of the public peace.<sup>28</sup> This explains why there are continued global efforts to ensure that criminals do not profit from their criminal activities. It is very 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.<sup>29</sup> In the

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Palmer, M.J., “White Collar Crime: Crime in Australia”, Paper Presented at The First National Outlook Symposium, Australian Institute of Criminology, Canberra, 5&6 June 1995, p.4. Source: [www.aic.gov.au/events/aic%20upcoming%20events/1995/outlook95.html](http://www.aic.gov.au/events/aic%20upcoming%20events/1995/outlook95.html), accessed on 3<sup>rd</sup> April, 2017.

<sup>27</sup> Amani, *op cit*, p.127.

<sup>28</sup> Mganga, B.E.K., “Confiscation of Proceeds of Crime: The Law and Practice in Tanzania,” **National Prosecutions Service Journal**, Issue No. 002 April-June 2013, pp.14-15, at p.14.

<sup>29</sup> According to UNODC, **Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime**, Publishing and Library Section, United Nations Office,

last analysis, the goal underlying most criminals' conduct, that is greed for material gain, is frustrated. Hence confiscation of proceeds of crime has compensatory and deterrent effect. That is so because economic gain is the motive behind most criminal offences. If that gain cannot be realized; engaging in criminal activities becomes useless.

Penal laws, which involve punishments, have been in place since time immemorial. However, much as punishments are meted out in one way or the other, practice shows that most criminals retain the benefit in monetary terms or otherwise from criminal activities while victims are left feeling let down by the criminal justice system. It has, so far, been proved that imprisonment and the imposition of suspended sentences as well as fines alone have failed to be a sufficient deterrent compared to the potential economic gains criminals stand to amass.<sup>30</sup> After all imposing custodial sentences is costly and criminals regard it as a temporary inconvenience. In fact the enormity of revenues derived from some crimes diminishes the deterrence capacity of traditional penal sanctions.

Therefore dispossessing criminals of assets they criminally acquired is undoubtedly a milestone towards addressing crime and criminal activities. While part of the wealth remains in the respective countries, the rest crosses borders and is hidden in foreign multi-jurisdictions. Such wealth is hidden in banks located in the financial havens. In this respect the most hit are developing countries, where there have been massive looting of public resources by public officials and private individuals from their respective countries. Such massive resources are stashed in foreign banks for their private ends while citizens continue to grapple with abject poverty.

#### 4. Tanzania is not spared

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 expense of national wealth.<sup>31</sup> Grand corruption is also done by private individuals in the country. A number of corruption scandals that were recently reported or unearthed raise eye brows. It is on record that the country has so far lost billions of shillings through corruption related scandals. Examples of such scandals are

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Vienna, September 2012, at p.3, the term "instrumentalities," means the assets used to facilitate crime, such as a car or boat used to transport narcotics.

<sup>30</sup> See Shaidi, L.P., "Tanzania Penal System: Retribution or Correction of Offenders," **Eastern Africa Law Review**, Vols. 35-40, December, 2009, pp.171-195, at p.172. The author argues that the effectiveness of the deterrence theory is highly questionable especially on the notion that the criminal and his crime are the products of society.

<sup>31</sup> For some detailed analysis of the drivers and consequences of grand corruption in public finance in Tanzania over the period of rapid economic growth from the end of the 1990s, see Gray, H.S., "The Political Economy of Grand Corruption in Tanzania," **African Affairs**, 114/456, 2015, pp.382-403. Downloaded from <http://afraf.oxfordjournals.org/by David Irwin> on November 18, 2015. See also Amani, N.P., "Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?" *op.cit.*, pp.125-155.

abound; including the Radar Equipment bought from UK's BAE Systems,<sup>32</sup> the External Payment Arrears [EPA] scandal, the Richmond saga,<sup>33</sup> Alex Stewart (Assayers),<sup>34</sup> Bank of Tanzania Twin Towers<sup>35</sup> and VIP Lounge at JNIA.<sup>36</sup> The most recent one is the Tegeta Escrow Account scandal, which involved payment of 122 million USD. 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.<sup>37</sup> Going by various sources of information, it is apparent that the country is losing a big amount of money through criminal activities, including corruption-related scandals and possibilities of recovering the same are very slim.<sup>38</sup>

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<sup>32</sup>The money used to buy the Radar Equipment, i.e. USD 39,970,000, was recovered to the tune of 29.5 million pounds as *ex gratia* for the benefit of the people of Tanzania.

<sup>33</sup> See Parliament of Tanzania, **Hansard - Parliamentary Debates**, 6<sup>th</sup> February, 2008, pp.41-105 and 7<sup>th</sup> February, 2008, pp.43-99. The Richmond scandal concerned fraud and corruption in connection with a contract with American firm Richmond Department Company.

<sup>34</sup> *R. v. Basil Pesambili Mramba & Two Others*, Criminal Case No. 1200 of 2008, The Resident Magistrates' Court of Dar es Salaam, at Kisutu. 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 jail term. The court however, did not order the two accused to pay the government Sh.11.7 billion for the loss caused. Nor did the High Court, on appeal by both prosecution and defence, order the two accused to pay the government this amount of money as compensation. (See *Basil Pesambili Mramba & Another v. R.*, Consolidated Criminal Appeals No. 96 of 2015 and No.113 of 2015, In the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam, Unreported).

<sup>35</sup> See *Amatus Joachim Liyumba v. The Republic*, Criminal Appeal No.56 of 2010, The High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam (Unreported), where the appellant who was the Director of Administration and Personnel [DAP] in the Bank of Tanzania [BoT] was charged and convicted by the trial court with two offences namely abuse of office and occasioning loss to a specified authority c/ss. 96(1) and 284(A)(1) of the Penal Code, Cap.16, [R.E.2002], thereby causing the Government of Tanzania to suffer loss of USD 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.

<sup>36</sup> The Parliamentary Public Accounts Committee (PAC) proposed thorough investigation on the Chinese Company Sonangol International Ltd (CSIL), amid suspicions that the company has swindled the Tanzanian government. The move came as the Controller and Auditor General (CAG) report revealed that the company signed the Memorandum of Understanding (MoU) with Tanzania Airport Authority (TAA) and agreed to construct VIP Lounge at Julius Nyerere International Airport (JNIA) from 2006 to 2012, but it constructed the lounge below the agreed standard. See Nelson Kessy, "PAC wants probe on Chinese firm," *Guardian on Sunday*, 1<sup>st</sup> February, 2015. Source: <http://www.ippmedia.com/frontend/index.php?1=76927>.

<sup>37</sup> See Parliament of Tanzania, **Hansard - Parliamentary Debates**, 28<sup>th</sup> November, 2014, pp.64-328 and 29<sup>th</sup> November, 2014, pp.2-28.

<sup>38</sup> See Amani, **op cit.**, at pp.125-126 who recapitulates this ugly fact by stating that:

In the recent past, Tanzania has witnessed a strong wave of corruption and illicit acquisition of assets allegedly by politically exposed persons who amass colossal

## 4.2 A Brief Historical Development of Asset Recovery Regime in Tanzania

### 5.1 Crime Situation Prior to Mid 1980s in Relation to Asset Recovery

Prior to the mid 1980s crime was traditionally treated as a local or national issue, and investigation and prosecution of crime were considered to be confined within national boundaries. The relative absence of transborder organised crime was due to the society's underdevelopment, in particular of infrastructure and communication systems, and its relatively low level of involvement in international trade.<sup>39</sup> As such the law enforcement machinery in the country could easily handle any situation. Generally speaking, a traditional mode of life prevailed in the country such that there was less vulnerability brought by organised crime as a global phenomenon. The most disturbing organised crimes of the time in the country included stock theft, the killing of witches, armed robbery, poaching and the cultivation of cannabis.<sup>40</sup> Putting it in other words, the crime pattern, as Mwema points out, was largely dominated by ordinary traditional offences such as simple thefts, sporadic incidents of armed robberies, simple forgeries and the like.<sup>41</sup>

#### 5.1.1 Legal Framework in Place

The legal framework that was in place was tailored to fit the situation. It was to a large extent able to address the crime that was mainly traditional and local in nature. It would be appreciated that traditionally, the masterpiece of legal regime for defining crimes and prescribing their punishments in Tanzania has been the Penal Code<sup>42</sup> and the most significant procedural law has been the Criminal Procedure Act.<sup>43</sup> Regarding matters related to evidence, the Evidence Act<sup>44</sup> has been the main source. Other laws that have

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sums of illicit money and deposit the loot in their offshore bank accounts. While this costs the government so dearly, efforts to retrieve illicit assets become largely limited....

<sup>39</sup> Bagenda, P.M., "Tanzania," in Gastrow, P. (Ed.), **Penetrating State Business-organised Crime in Southern Africa**, Volume 1, Institute for Security Studies Monograph No.86, 2003, pp. 74-93, at p.75.

<sup>40</sup> The cultivation of cannabis (bhang) was mainly for local business and consumption. The local market was a factor for the flourishing of the business. According to figures obtained from Tanzania Police Force Headquarters, Criminal Statistics Section, 25,752 cases on cannabis fields destroyed by law enforcement agencies and being in possession of cannabis sativa countrywide were reported over in 1971-1985. There was a steady increasing in numbers of the reported cases countrywide over time.

<sup>41</sup> Mwema, S.A., "Current Situation and Countermeasures against Money Laundering: Tanzania's Experience," 117<sup>th</sup> UNAFEI International Seminar Participants' Papers, Resource Material Series No.58, pp.428-436, at p. 428.

<sup>42</sup> Cap. 16, [R.E. 2002].

<sup>43</sup> Cap. 20, [R.E. 2002]. This Act repealed and replaced the Criminal Procedure Code, Cap.20.

<sup>44</sup> Cap. 6, [R.E. 2002].

supplemented the traditionally known masterpieces in the penal legal regime, but seen to be of limited use have included the Extradition Act, 1965,<sup>45</sup> the Fugitive Offenders (Pursuit) Act, 1969,<sup>46</sup> the Witness Summonses (Reciprocal Enforcement) Act, 1969<sup>47</sup> and the Economic and Organised Crime Control Act, 1984.<sup>48</sup>

From what has been stated above, criminal law remained almost wholly territorial. Nobody would expect that organised criminal syndicates would one day go beyond the national boundaries with such dramatic force and speed. By then offences committed abroad were not a concern of national authorities, which were correspondingly, not willing to assist the authorities of other state to bring offenders to justice. Moreover, the legal framework of that time was largely capable of addressing these offences, which to a large extent revolved within and around the national boundaries. Although such laws namely, the Extradition Act, 1965,<sup>49</sup> the Fugitive Offenders (Pursuit) Act, 1969,<sup>50</sup> the Witness Summonses (Reciprocal Enforcement) Act, 1969<sup>51</sup> were in place, they were not actively operational. They were purposely enacted to facilitate the extradition of criminals and to follow in hot pursuit as well as secure witnesses across national boundaries. Given the traditional and local nature of crime by that time, these laws seemed to be dormant.

Notwithstanding the fact that some criminal offences such as stock theft, which was committed extensively in many parts of the country for economic gain generated proceeds of crime, the situation was not all that alarming. Economic gains accruing out of criminal activities did not raise much concern. As such there were no legal provisions seeking for forfeiture of proceeds and instrumentalities of crime. The Judicial System Review Commission of Tanzania, 1977 has stated in its report that there was no general power in a court to order the forfeiture of any instrument or article used in the commission of an offence or which is subject matter of the offence.<sup>52</sup> This means that forfeiture of proceeds and instrumentalities of crime could not be undertaken. The Commission aptly puts it in one of the issues it raised:

Under the existing law,... a taxi driver who uses his taxi to convey stolen property or property reasonably believed to have been fraudulently or otherwise unlawfully obtained is entitled to have his taxi back after the end of the case.<sup>53</sup>

The Commission then recommended as follows:

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<sup>45</sup> Cap. 368, [R.E. 2002].

<sup>46</sup> Cap. 57, [R.E. 2002].

<sup>47</sup> Cap. 67, [R.E. 2002].

<sup>48</sup> Cap.200, [R.E. 2002]. This Act was enacted to repeal and replace the Economic Sabotage (Special Provisions) Act, 1983.

<sup>49</sup> Cap.368, [R.E. 2002].

<sup>50</sup> Cap. 57, [R.E. 2002].

<sup>51</sup> Cap. 67, [R.E. 2002].

<sup>52</sup> See The United Republic of Tanzania, **The Report of the Judicial System Review Commission**, Government Printer, Dar es Salaam, 1977, p.233, paragraph 14.1.

<sup>53</sup> *Ibid.*, paragraph 14.2.

We have carefully considered the issue of whether or not it is desirable in the interests of justice and the community to grant to our courts a general power to order forfeiture of property used in, or in connection with, the commission of a crime. We have reached the settled view that such a power should be granted to our courts [as] a matter of urgency.<sup>54</sup>

However, it would be noted from the foregoing that the Commission's concern all along was property used in, or in connection with, the commission of a crime. There was no mention at all on proceeds of the crime. Moreover, the envisaged property used in, or in connection with, the commission of a crime appeared to be simple. According to the Commission's report, instrumentalities of crime of that time mainly included:

real and personal property and choses in action, e.g. a bank account intended to be used for paying accomplices or informants, *et cetera*; a hide-out, e.g. alarm house; a bunch of skeleton keys; a jemmy; a flick knife; a motor-vehicle; radio equipment; etc.<sup>55</sup>

Despite the fact that criminals somehow benefited from criminally acquired assets, economic gain consideration did not feature much in the minds of members of the Commission. This gives a true reflection of what was transpiring during that time to stakeholders responsible for addressing crimes in the country. They were traditionally preoccupied by and concentrated only on crimes and not proceeds accruing therefrom.

It may be argued that the enactment of the Economic and Organised Crime Control Act, 1984<sup>56</sup> and the Criminal Procedure Act, 1985<sup>57</sup> reflected much on the Commission's concern, calling for forfeiture provisions which limited to property used in, or in connection with, the commission of a crime. The two Acts have forfeiture provisions, which empower the court to issue an order to the effect that the property used in, or in connection with, the commission of a crime is either destroyed, disposed of or dealt with in any manner the court may specify.<sup>58</sup> All in all, there were no enactments throughout the period before early 1990s that had provisions on forfeiture of proceeds of crime. Neither did any law enforcement agency take stock of effects of proceeds of crime thereby coming up with mechanisms of addressing them.

## 5.2 Late 1980s Economic Reforms and their Impact on Crime

Economic reforms that started from mid 1980s have prompted the country to shift from state controlled mechanisms to an open market economy. In the process, the country's policies, legal and regulatory frameworks on investment have been adjusted to cope up with the newly established economy. The market economy led to the growth of Tanzania's trade and investment regionally and internationally under the attendant drivers

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<sup>54</sup> *Ibid.*, paragraph 14.4.

<sup>55</sup> *Ibid.*

<sup>56</sup> Cap. 200, [R.E. 2002]. This Act was enacted to repeal and replace the Economic Sabotage (Special Provisions) Act, 1983.

<sup>57</sup> Cap. 20, [R.E. 2002].

<sup>58</sup> Section 23 of the Economic and Organised Crime Control Act, 1984, Cap. 200, [R.E. 2002] and section 351 of the Criminal Procedure Act, 1985 Cap. 20, [R.E. 2002].

namely, general process of globalisation and improved communications technology.<sup>59</sup> Globalisation has brought impacts to every aspect of life. It has eventually caused the world economy to undergo a profound transformation in terms of intensified trade, investment, financial transactions, information technology, capital and commodity mobility and cooperation in security. All this has turned the world into a global village. As a result of globalisation many countries including Tanzania have inevitably opted for open market or liberalised economies in order to boost trade and become more competitive in the global marketplace.

### 5.2.1 Emergence of Transnational Crime in Tanzania

Criminals have taken advantages of opening up of the economies to commit transnational criminal activities in the country. With liberalisation of the economy and its attendant globalisation a number of crimes of cross-border nature have begun to emerge. This has been the case since the country has now been connected directly to the world economy. Putting it in other words, the increasing trade and cross-border activities in Tanzania have stimulated transnational crime. On the same note, new communication systems and digital technology have made dramatic changes in ways of life. Eventually, the improved communications technology has as well shaped the way transnational organised criminals use network structures to run their operations effectively and efficiently across the globe. As a matter of fact, organised criminal groups in Tanzania and beyond increasingly exploit information and communications technology to support operational activities. Such operations include sophisticated intelligence operations for gathering information on soft targets, reducing the groups' vulnerability, and identifying individuals they can corrupt for their objectives. In the course of such operations, the groups also make use of the information technology to commit identity fraud in order to sneak through the national boundaries.<sup>60</sup>

Apart from globalisation of the economy and improved communications technology, porous borders have facilitated the escalation of crime situation in the country. The country's position on the East Coast of Africa makes it a strategic location for widespread transnational crimes. The fact that Tanzania is bordered by eight countries, namely Kenya, Uganda, Rwanda, Burundi, the DRC, Zambia, Malawi and Mozambique complicates the matter. Vast and highly porous borders are among the favourable conditions for the commission of transnational crime in the country. This observation is supported by the following facts:

- i. Security weakness within the borders, which makes it easy for criminals to criss-cross the borders with impunity.
- ii. Inadequate number of law enforcement personnel with insufficient resources.
- iii. Inadequate marine patrol vessels in the Indian Ocean and the lakes.
- iv. Few official entry and exit points such as Namanga, Horohoro, Sirari, Mtukula, Kigoma, Tarakea, Songwe and Tunduma, etc., along the borders with

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<sup>59</sup>Kaniki, A.O.J., "Proliferation of Counterfeit Products in Tanzania: A Threat to Human Security," **The Tanzania Lawyer: Journal of the Tanganyika Law Society**, Vol. 1 No.2, 2014, pp. 42-73, at pp.42-43.

<sup>60</sup> Kaniki, A.O.J., "Proliferation of Counterfeit Products in Tanzania: A Threat to Human Security," *op cit.*, p.55.

neighbouring countries but with several unofficial entries and exits [*panya routes*] that allow cross-border criminal activities to take place.

Corruption is another tool which facilitates the commission of transnational crime. By the mid 1990s, corruption in Tanzania was so rampant in all sectors of the economy as well as in politics.<sup>61</sup> Through corruption, transnational criminal groups co-opt government officials to compromise the ability of law enforcement, regulatory, or other agencies that are directly responsible with interdicting or eradicating such criminal groups. According to Horwood there is a large scale movement of men from East Africa and the Horn towards South Africa through smuggling, alleged corruption and complicity of national officials.<sup>62</sup> Peter on his part points out drug trafficking as among the notable serious and organised crimes where high level corruption takes place.<sup>63</sup>

An increased number of immigrants has also had a share in the emergence of transnational crime in Tanzania. The opening up of the market economy under the banner of trade liberalisation has seen the country experiencing a massive influx of foreigners coming in the country for various purposes, including investment. It needs to be appreciated that immigration has been taking place since time immemorial. Balzer argues that the number of immigrants has been increasing the world over due to the following facilities:

- i. Transportation systems have improved and expanded dramatically, particularly airline and automobile travel; international tourism and business travel are at record levels;
- ii. Communication systems have improved and expanded most notably satellite and fiber optic telephone and television transmission, fax transmission, and computer information storage, processing, and transmission;
- iii. Reduction or elimination of many trade and travel restrictions between different parts of the world;
- iv. Expansion of world trade which has brought stronger participation by the economies of various regions of the world, making the world economic interdependence now a basic fact of life; and

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<sup>61</sup> See Heilman, B. and Ndumbaro, L., "Corruption, Politics, and Societal Values in Tanzania: An Evaluation of the Mkapa Administration's Anti-Corruption Efforts," **African Journal of Political Science** (2002), Vol.7 No.1, pp.1-19. Source: [www.embamex.sre.gob.mx/kenia/images/stories/pdf/ajps007001002.pdf](http://www.embamex.sre.gob.mx/kenia/images/stories/pdf/ajps007001002.pdf); accessed on 27<sup>th</sup> February, 2017.

<sup>62</sup> Horwood, C., **In Pursuit of the Southern Dream: Victims of Necessity, Assessment of the Irregular Movement of Men From East Africa and The Horn to South Africa**, International Organisation for Migration (IOM), Geneva, 2009, p.9.

<sup>63</sup> See Peter, C.M., "Combating Organised Crime in Tanzania," in Goredema, C. (Ed.), **Organised Crime in Southern Africa: Assessing Legislation**, Institute for Security Studies- Monograph 56, June 2001.

- v. Population increase, resulting in more crowding, more areas of poverty, disease, and hunger, and large movements of people across national borders.<sup>64</sup>

The cumulative effect of these conditions is more people, more opportunities, more effective movement of people and information across national borders<sup>65</sup> and more opportunities and possibly reasons for committing crime. Among the people migrating, whether legally or illegally entering the countries, are criminals. Tanzania, being part of the globe, has been at a receiving end; grappling with all these kinds of people most of whom came under the umbrella of investment. It is therefore no wonder that the country has witnessed a drastic increase in total volume of criminal incidences, as Table 1 below indicates:

**Table 1: Reported cases over the period between 1976 – 2015**

<b>Offences</b>	<b>1976-1985</b>	<b>1986-1995</b>	<b>1996-2005</b>	<b>2006-2015</b>
Armed Robbery	2,313	5,795	10,107	11,569
Motorcycle Theft	339	861	98,125	24,607
Motor Vehicle Theft	91	1,861	2,037	3,686
Theft	6,233	68,718	101,305	135,047
Counterfeiting Banknotes	139	4,138	5,791	6,431
Stock Theft	16,239	39,843	59,498	24,479
Goods Smuggling	348	9,494	4,477	867
Cannabis Sativa(Bhang)	18,079	26,359	37,877	63,491
Unlawful Possession of Government Trophy	972	2,627	6,089	8,230
<b>Total</b>	<b>44,753</b>	<b>159,696</b>	<b>325,306</b>	<b>278,407</b>

*Source:* Tanzania Police Force Headquarters Criminal Statistics Section.

With new developments, however, the view that law enforcement and criminal justice machinery could easily handle any criminal situation in the country no longer held water. Eventually with rapid economic growth and global integration, crime in Tanzania and elsewhere has now been internationalised. It has acquired global characteristics. As such criminal activities are now being carried out without respecting national boundaries or sovereignty. In this regard Mr. Robert Manumba, former Director of Criminal Investigation in Tanzania, observed:

As you all know, crimes of today have assumed an internationalised character. The nature, form and pattern of crimes have drastically changed from traditional to new

<sup>64</sup> Balzer, A.J., "International Police Cooperation: Opportunities and Obstacles," **Policing and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West**, College of Police and Security Studies, Slovenia, 1996. Source: <https://www.ncjrs.gov/policing/int63.htm>, accessed on 13<sup>th</sup> January, 2017.

<sup>65</sup> *Ibid.*

forms. This therefore pre-supposes that we as Law Enforcers have to accommodate such changes by keeping abreast with all the techniques relevant to counter these new patterns of crimes. Lagging behind is tantamount to declaring victory to the criminals.<sup>66</sup>

The bottom-line here is that with technological advancement, communication improvement and porous borders, Tanzania has witnessed the emergence of new types of crimes in the country. To say the least, the nature, form and pattern of crime have drastically changed from traditional to new forms that are transnational. The country started witnessing serious and organised criminal activities including trade in illicit drugs, firearms trafficking, terrorism, trafficking in human beings, cyber crimes in the form of dissemination of obscene materials, hacking, theft from banks and financial institutions using ATM and Master Cards, grand corruption, smuggling, commercial poaching in game reserve areas and national parks, illegal logging, illegal fishing at high seas within EEZ, drug trafficking and abuse, human trafficking, illicit trade in small arms and light weapons, money laundering, fraud, the manufacture of fake bank notes, tax evasion, counterfeit goods and pharmaceuticals, major and serious frauds on the public revenue, embezzlement, misappropriation and theft of public funds and other malpractices.<sup>67</sup> Some of these serious and organised criminal activities came with a shock. They were alien to the traditional way law enforcement agencies used to deal with ordinary and local criminality. Law enforcement agencies were taken unawares, especially to activities related to cyber crime.

The transnational criminal groups exploited the country's strategic geo-position, the gap created by unlimited opening up of the economy, the sophistication of those involved in the commission of the crime, the lack of technical capacity and capability to detect the crime, and ineffective or absence of appropriate legislation essential to deal with such type of crime. In Tanzania transnational crime began to be more pronounced than in the past hence posing a threat to the country. Tanzania was used as a transit and destination point mainly in drug trafficking, human trafficking, money laundering, car theft, etc.

Criminal organised groups or individuals, who are now highly sophisticated in terms of capacity and capability, well coordinated and technologically conscious, adapt and take advantage of changes that occur in the societies. They are currently becoming increasingly mobile and often take deliberate advantage of internal borders and, indeed, they are disregarding the borders between countries.<sup>68</sup>

## 5.2.2 Wealth Amassing through Criminal Activities

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<sup>66</sup> See a speech he made as Guest of Honour at a Closing Ceremony of Basic Finger Prints Course and Crime Scene Investigation Course on 14<sup>th</sup> November, 2003 at Dar es Salaam Police College. Manumba was by then Deputy Director of Criminal Investigation.

<sup>67</sup> Some of these serious and organised criminal activities are discussed by Feleshi, E.M., "Prosecution-led Investigation in Tanzania: The Role of the National Prosecutions Service in Criminal Investigations," **National Prosecutions Service Journal**, Issue No. 002 April-June 2013, pp.4-8, at p.6.

<sup>68</sup>Kaniki, A.O.J., "Transnational Crime and National Security: Issues and Options for Tanzania," *op cit.*, at p.26.

Criminal groups have taken advantage of liberalised market economy together with technological innovations in terms of easy and fast communications to realise huge profits with less risky activities. The situation could be better explained as a scramble for wealth amassing through criminal activities. Criminals are ensured that they can continuously exploit any available opportunity to commit crimes that generate massive economic gains. They have turned crime into a rewarding economic enterprise. Armed robbery is a typical example, which illustrates the point. Armed robbery incidents caused great shocks in the country. There has been a sharp rise in bank robberies involving indigenous Tanzanians who colluded with foreigners from neighbouring countries as key players. It is, for instance, in records that between years 2001 and 2005, five major bank robbery incidents were reported, where billions of money were stolen. In all these incidents, local criminals had teamed up with foreign accomplices to commit the crimes.<sup>69</sup> Crime analysis shows that armed robbery incidents are among the serious offences through which criminals realise huge profits. Table 2 sheds some light:

**Table 2: Armed Robbery Cases Reported to Police Stations from 2001 to 2015**

<b>Year</b>	<b>Reported cases</b>	<b>Value of Property (TZS)</b>
2001	1,047	3,112,933,891
2002	1,237	2,197,101,149
2003	1,111	1,973,305,882
2004	1,175	10,782,645,314
2005	1,080	2,441,029,339
2006	1,028	2,407,559,998
2007	977	3,249,572,344
2008	1,031	6,368,159,780
2009	1,409	9,654,477,126
2010	1,332	3,930,770,108
2011	1,271	3,550,619,348
2012	1,215	5,660,077,875

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<sup>69</sup> Mapunda, A.S., "Crime Trends in Tanzania," in REDET, **The Tanzania Police Force and Transition to Democracy**, REDET Workshop Papers 1, Dar es Salaam University Press, Dar es Salaam, 2008, pp.134-145, at p.135.

2013	1,266	6,330,762,174
2014	1,127	8,347,211,386
2015	913	7,169,631,863
<b>Total</b>	<b>17,219</b>	<b>77,175,857,577</b>

*Source:* Tanzania Police Force Headquarters Criminal Statistics Section.

Organised criminal groups have exploited the country's strategic geo-position, the gap created by unlimited opening up of the economy, the sophistication of those involved in the commission of the crimes, the lack of technical capacity and capability to detect the crime, and ineffective or absence of appropriate legislation essential to deal with such type of crime. In addition, they took advantage of border-control weaknesses and poor regulatory frameworks to operate across the borders less interruptedly. The country had thus to grapple with both criminal activities, which are traditionally treated as local or national issues on the one hand and those which are transnational in nature on the other hand. The case of *Nurdin Akasha alias Habab v. Republic*,<sup>70</sup> leaves a history in the country of impounding a huge amount of drugs which were imported into the country in July, 1993.<sup>71</sup>

Basing on what has been discussed above, the following observations are made. First, there was lack of specific provisions in the existing legal framework or absence at all of the penal law to criminalise the new emerging and modern crimes. Second, lack of necessary skills to detect and investigate such kind of new crimes on the part of law enforcement machinery complicated the matter. The country was seen as a soft target for organised criminal syndicates to operate with impunity. Third, criminals took advantage of such loopholes to commit various economic and financial crimes which enabled them to amass enormous illicit wealth. Liberalisation of the economy gave rise to the mushrooming of capital intensive economic undertakings in the form of real estates, hotel industry, banking and financial institutions. Most of such kind of economic activities were facilitating money laundering since they were a result of the financial returns directly or indirectly flowing from new emerging or modern crimes. The absence of strong financial intelligence mechanisms in the country enabled dirty money to be infiltrated into investments. One such investment was the MERIDIAN BIAO bank, which had offices in Tanzania, Zambia and in other countries in the world. This bank was opened by suspected criminals from Malaysia and after operating for some time, it wound up its activities abruptly leaving several account holders in dilemma.<sup>72</sup> The bank also wound up its activities in Zambia under similar circumstances.

<sup>70</sup> [1995] T.L.R. 227 [CA].

<sup>71</sup> About 1,147.591 kilogrammes of mandrax drugs valued at well over US\$8,994,000 or well over TZS 4,997,500,000/= were impounded.

<sup>72</sup> Mwema, *op cit.*, p.429. See also Makame, L.E., "The Law of Money Laundering and its Trend in the Banking Industry: The Case Study of Tanzania", LL.M. Dissertation, University of Dar es Salaam, Dar es Salaam, 2003, p.118.

### 5.2.3 The Need for New Laws to Supplement the Existing Ones

It is apparent that Tanzania, being part of the globe, is a target to different types of transnational crime. This is an indicator that there is a paradigm shift from the way crime was understood. Putting it in other words, there is a sharp shift from what crime was traditionally perceived. It would be appreciated that crime was traditionally treated as a local or national issue, and investigation and prosecution of crime were considered to be confined within national boundaries. Consequently, criminal law remained almost wholly territorial. However, with the emergence of transnational crime, the same has now assumed international characters. The country therefore, felt the need to adjust its law enforcement techniques to fight the new threat. It is apparent that penal legislation was in place. As stated earlier on, the penal legal regime was mainly traditional and effective to deal with local or national issues. However, with the emergence of new forms of crime which are transnational in nature, new laws have had to be enacted to supplement the traditional penal laws.

This explains why Tanzania has from the early 1990s onwards 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 which were in place. Evaristo Longopa puts it in the following words:

Combating criminality through enactment of new legislation to curb emerging crimes is prevalent in Tanzania. This is owing to the fact that new crimes emerge with time. Again, old crimes become sophisticated according to development attained by a particular society in terms of economic, social or cultural and technological development.<sup>73</sup>

More importantly, the fact that criminals continued to retain and enjoy the fruits of their crimes even after their criminal activities are detected called for the new law to deprive them of such proceeds of crime through forfeiture. Therefore, an appropriate machinery to trace and seize such assets which were hidden in and outside the country had to be established. The enactment in 1991 of the Proceeds of Crime Act<sup>74</sup> and the Mutual Assistance in Criminal Matters Act,<sup>75</sup> was to that effect. These two Acts are the main pieces of legislation to govern asset recovery regime in Tanzania.

The Proceeds of Crime Act<sup>76</sup> is aimed at ensuring that crime does not pay. It is designed to underscore that criminals cannot benefit from their ill-gotten wealth. That is achieved by depriving the criminals of the profits and instrumentalities of their crimes. The Act has forfeiture and confiscation provisions, which primarily suppress criminals' profit making and prevent the re-investment of that profit in further criminal activity. In order to facilitate the forfeiture, the Act, read together with the Mutual Assistance in Criminal

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<sup>73</sup> Longopa, E., "Cracking Down Criminality and Erosion of Banker's Confidentiality Obligation in Tanzania," *Eastern Africa Law Review*, Issue No. 2, Vol.41, December, 2014, pp.1-31, at p. 5.

<sup>74</sup> Act No.25 of 1991 Cap. 256 [R.E.2002].

<sup>75</sup> Act No.24 of 1991 Cap. 254 [R.E. 2002].

<sup>76</sup> Cap. 256 [R.E.2002].

Matters Act,<sup>77</sup> provides a mechanism for tracing, freezing and confiscating the proceeds of serious crimes committed against laws of Tanzania. The objects and reasons for enactment of the Proceeds of Crime Act, as contained in the Bill are:

... to introduce a new law fashioned to provide the most effective weaponry so far against major crime. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the profits and instrumentalities of their crimes. By so doing it will suppress criminal activity by attacking the primary motive, profit-and prevent the re-investment of that profit in further criminal activity....

Furthermore, the Bill, when taken together with the Mutual Assistance in Criminal Matters Bill, is expected to enable freezing and confiscation orders made by courts in the United Republic 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<sup>78</sup> provides for mutual assistance between Tanzania and foreign countries, on 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. Both Acts came into operation on 1<sup>st</sup> May, 1994.<sup>79</sup>

## **6. Asset Recovery: An Uphill Task**

It should, however, be noted that recovery of illegally acquired public assets by a few individuals has not been easy. Such individuals who are criminals have powerful networks. For such assets to be recovered there has to be in place adequate legal and institutional frameworks. Tanzania has a conviction-based forfeiture system, which may be instrumental in asset recovery process. It means that confiscation and forfeiture orders must be preceded by conviction of an accused.<sup>80</sup> Indeed, the orders are in addition to any punishment the court may impose for an offence.

All this is aimed to ensuring that the convict is denied enjoyment of the fruits of his criminal acts. It also serves as a deterrent and shows the state resolve to suppress the conditions that lead to unlawful activities. Indeed, the Proceeds of Crime Act,<sup>81</sup> the Prevention and Combating of Corruption Act, 2007,<sup>82</sup> and other related pieces of legislation have elaborate provisions regulating confiscation of criminal proceeds.

### **Challenges relating to Asset Recovery in Tanzania**

Practice has shown that despite elaborate provisions of the law with some national and international dimensions, there is under-utilisation of the legal and institutional framework in place to deal with the issue of recovering proceeds of crime. There are a

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<sup>77</sup> Cap. 254 [R.E. 2002].

<sup>78</sup> Cap. 254 [R.E. 2002].

<sup>79</sup> See GN No.298/1994.

<sup>80</sup> See sections 9 and 14 of the Proceeds of Crime Act, Cap.256 [R.E.2002], which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

<sup>81</sup> Cap.256 [R.E.2002]

<sup>82</sup> Act No.11/2007.

number of factors that cause under-utilisation of the legal and institutional frameworks. Among them are the following:

**(a) Long and Cumbersome Procedures**

As already noted earlier on, Tanzania has a conviction-based forfeiture system. It means that forfeiture orders must be preceded by conviction of an accused.<sup>83</sup> 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 long thereby making the state bear costs of maintaining assets subject to preservation pending application for forfeiture orders. At times, the state incurs more costs than the value of the asset itself. Things get worse when in the end the court does not grant forfeiture orders.

**(b) Unfamiliarity with Forfeiture Laws by Some Law Enforcement Officials**

The enactment of laws on asset recovery in Tanzania is a recent phenomenon. As noted above, despite the fact that the Mutual Assistance in Criminal Matters Act and the Proceeds of Crime Act were enacted in 1991 and came into operation in 1994, these and other laws that were enacted later on are still unfamiliar to some of the law enforcement officials. The fact that the enactment of the Mutual Assistance in Criminal Matters Act and the Proceeds of Crime Act in 1991 was largely engineered by developed countries in the UN and the Commonwealth contributes to the unfamiliarity. These laws are uniform in all commonwealth African countries. They are not homegrown but imposed and dictated to developing countries, including Tanzania, by developed countries, which have a bigger say in the UN and the Commonwealth platforms.<sup>84</sup> As such it is no wonder that some of them, out of unfamiliarity, do not invoke the provisions of these laws in order to apply for forfeiture orders before courts of law. This state of affairs has resulted into having majority of investigators who lack skills and knowledge on detecting and investigating asset recovery cases. As a result, it is no wonder that there have been insufficient collection and gathering of relevant information, which could assist in revealing of hidden assets either within or outside the country.

**(c) Inadequate financial investigative skills and capacities**

Financial investigation, which means the collection, analysis and use of financial information by law enforcement organs, has meaningful contribution to the recovery of illicitly acquired assets. As opposed to ordinary criminal investigation, financial investigation enables a financial investigator to have access to financial data sources, such as credit reference data, tax records, records held by banks and financial institutions, etc. Such sources are instrumental in gathering and collecting evidence leading to asset

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<sup>83</sup> See sections 9 and 14 of the Proceeds of Crime Act, Cap. 256 [R.E.2002], which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

<sup>84</sup> It should be made clear that the Mutual Assistance in Criminal Matters Act was a Commonwealth Secretariat draft, adopted by the Commonwealth Ministers of Justice conference and uniformly domesticated in the Commonwealth countries. More developed Member States of the Commonwealth take advantage of such laws to pursue their interests. Similar efforts have been made by the United Nations, which has also a "Model Treaty" on the subject.

recovery. They are instrumental because they reveal profiles of targeted suspects in relation to their economic activities.

#### **(d) Insufficient Cooperation Among States**

Regional efforts and international cooperation are necessary in effecting asset recovery. This stems from the reality that while part of the proceeds may remain in the country, the rest may cross the national boundaries. As such mutual assistance between two countries is inevitably required. However, the fact that nation states jealously safeguard their jurisdictions<sup>85</sup> over criminal justice matters has produced a world where criminal justice policies, institutions, procedures and laws vary widely and deeply between the many countries of the world. This has eventually been a snag to effective asset recovery. It needs to be understood that effective international responses are affected by insufficient cooperation among states, weak coordination among international agencies; and inadequate compliance by many states.

#### **(e) Inadequate Resources**

Asset recovery is a very long and demanding process. It involves the following stages: first, tracing and identifying the criminally acquired assets through institution of investigation, second, freezing and seizure of the assets, third, confiscation or forfeiture of identified criminally acquired assets and fourth, returning of the assets to the rightful owners. In all these stages, physical and financial resources are required. However, budgetary constraints render asset recovery ineffective.

### **7. Conclusion**

This paper has examined, with an historical backdrop, the development of asset recovery globally and in Tanzania. The paper has shown that the origins and evolution of forfeiture law worldwide has a long history. The main purpose of having such kind of discussion was to raise conceptual and contextual understanding of the asset recovery regime in an historical and socio-economic perspective. Moreover, the paper has underscored that the evolution of crime in Tanzania as necessitated by a number of factors such as economic reforms, globalisation, improved communications technology and porous borders has inevitably necessitated for adopting asset recovery regime. This regime signaled one major milestone towards curbing serious and organised crime in the country and elsewhere. However, application of asset recovery regime has not been to its expectations due to a number of factors, some of which were addressed by this paper. As a result there has been under-utilisation of the legal and institutional framework in place. This, it is argued, is a legal and practical puzzle that defeats the purpose of having national

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<sup>85</sup> The dual notions of national sovereignty and exclusive state jurisdiction over criminal law matters, which continue to be supported by the United Nations Charter and by international law in general, still feature prominently in the development of modern criminal justice systems, whereas national borders are becoming increasingly obsolete and irrelevant to criminal activities.

legislation and international instruments aimed at forfeiting criminally acquired property. There is a need for further future studies aimed at addressing this drawback.