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**ADDIS ABABA UNIVERSITY**

**SCHOOL OF LAW**

**LL.M PROGRAM (BUSINESS LAW)**

**THE LEGAL REGIME ON RECOVERY OF MISAPPROPRIATED  
PUBLIC PROPERTY IN ETHIOPIA**

**BY**

**DEMMELLASH EJETA**

**A Thesis Submitted to Addis Ababa University, School of Law in Partial  
Fulfillment of the Requirements of the Degree of Masters in Business Law  
(LL.M)**

**Advisor: MURADU ABDO (PhD)**

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**By**

**Demmellash Ejeta**

**Advisor:** \_\_\_\_\_

**Signature** \_\_\_\_\_

**Examiners:**

**1.** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**2.** \_\_\_\_\_

**Signature:** \_\_\_\_\_

### **Declaration**

I, the undersigned, declare that this thesis is my original work and all sources used have been duly acknowledged.

Declared by: Demmellash Ejeta

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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## **Acronyms**

Art.:	Article
AUCPCC:	African Union Convention on Preventing and Combating Corruption
CAFRA:	Civil Asset Forfeiture Reform Act
ERCA:	Ethiopian Revenues and Customs Authority
ESAAMLG:	Eastern and Southern Africa Anti –Money Laundering Group
EUROJUST:	European Judicial Cooperation Unit
FAG:	Federal Attorney General
FDRE:	Federal Democratic Republic of Ethiopia
FEAC:	The Federal Ethics and Anti Corruption Commission
IACAC:	Inter-American Convention against Corruption
POCA:	Proceed of Crime Act
PSMLFTP:	The Prevention and Suppression of Money Laundering and Financing of Terrorism Crimes Proclamation
RACSPREP:	The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation
STAR:	Stolen Asset Recovery Initiative
UK:	United Kingdom
UNCAC:	United Nations Convention against Corruption
UNDOC:	United Nations Office on Drugs and Crime.
UNTOC:	United Nations Convention against Transnational Organized Crime
US:	United States

## **Abstract**

*I have developed an interest over issues pertaining to recovery of misappropriated property ever since I took a job as a prosecutor. In my early first two years in the profession, I came to sense something unsound and unjust in the asset recovery realm which I later realized it to be the absence of a non-conviction based civil asset forfeiture laws. This fortunately became the central tenet of this research. Save the exceptions, normally asset recovery is a post-conviction based process that comes after the accused is convicted. Hence, for a criminal confiscation to take effect a case has to pass through the cumbersome criminal procedure. Even if such rigorous criminal procedure is just and quite from the point of view of protection of human liberty, it is not without downsides from the perspective of the misappropriated property. This is because, despite the presence of an evidence which implicate the commission of crime a suspect or an accused that has succeeded in casting doubt in the case can avoid prosecution or conviction and the attendant confiscation of the fruit of crime.*

*Similarly, factors like death before investigation, prosecution and conviction, absence (unless trial in absentia is allowed) and immunity are barriers which prevent conviction and confiscation of the ill-gained property. To remedy these deficiencies, states have seriously expressed the need for a new approach to fight crime and recover proceeds of crime by adopting a new non-conviction based civil confiscation system.*

*Civil confiscation is a hybrid asset forfeiture system that shares the characteristics of both civil and criminal law. This system particularly targets the embezzled property by using a lesser standard of evidence regardless of the conviction of the accused. As an actor in the international arena, the Ethiopia legal system has belatedly introduced civil forfeiture laws in piece meal in the Prevention and Suppression of Money Laundering and Financing Terrorism Proclamation No. 718/2013 and in the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 882/2015. The main objective of this Thesis is appraising these civil forfeiture laws and the practice on the ground by employing both doctrinal and non-doctrinal methods.*

*Accordingly the research has found out that the recently introduced civil forfeiture laws fail to exploit hindsight advantage and still manifest limitations content and scope wise. Similarly due to dearth of awareness the civil forfeiture laws are almost neglected and the asset recovery is still fettered with the conviction based confiscation mentality. Another major finding is the vagueness and absence of a clear procedure law that befits the hybrid nature of civil forfeiture laws.*

*Based on these findings, the Thesis has suggested the need for an amendment of the civil forfeiture law so as to mend its deficiencies, the enactment of a self-standing civil forfeiture law and a procedural law that can accommodate its peculiar features. The Thesis has also underscored the potential susceptibility of civil forfeiture law to abuse and the need to enforce it with the highest ethical standard.*

# CHAPTER ONE

## Introduction

### 1.1 Background of the Study

Property constitutes one of the basic rights human beings are endowed with. It is even believed to be a cornerstone right. Despite the existence of innumerable scholarship in the area, scholars find it uneasy supplying a clear cut definition of property. Such difficulty arises from the disparity between the legal and the ordinary meaning of property.<sup>1</sup> In common parlance property is understood as a “thing owned by persons.” On the other hand in the law property is defined crudely as bundle of ‘legally recognized right held by one person in relationship to others with respect to a thing called object of property right.’<sup>2</sup> Save the existing difference in the scope and object of property right among property law of different countries, ‘property right refers an exclusive right to control, use, transfer, an object or a thing of economic importance and its fruits, exclude all other persons from its use and enjoyment and to follow the thing and its fruits in the hands of any person who might have unlawfully taken it.’<sup>3</sup> We find this notion of property reflected in the Ethiopia property law regime both in the constitution which provides the general and basic legal framework, the civil code and other pertinent subsidiary legislations.

Apparently, enjoying property right starts with acquiring the thing or the object of property. An owner or possessor of a property right may enjoy his/her right or may prefer to transfer this right by way of contractual arrangement for consideration or may transfer it freely by inheritance, donation etc. However, this right is not an unfettered right.; it may also be subjected to various restrictions and encumbrances stipulated in the law with a view to ‘reconciling the competing goal of individual owners or possessors and the society.’ Carrying their own respective justifications the different limitations like expropriation, requisition, regulatory taking, taxation and confiscation can be imposed on property right. Amongst these, confiscation is unique in that it is directly related to the illegality of the way the possessor or the owner acquired the property

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<sup>1</sup> John G.S. Sprankling, Understanding Property Law, LexisNexis, ( Matthew Bender & Company, Inc.)1999,p.4 Available at <https://urbanforensics.files.wordpress.com> (Accessed on April 20, 2016)

<sup>2</sup> Ibid

<sup>3</sup> Fasil Alemayehu, Law of Property, Teaching Material, Justice and Legal System Research Institute,(2009),p5.

right. In other words confiscation surfaces as a restriction on property right when the property is deemed to be proceeds of crime.

When property right established over a certain property is proved to be fruit of crime, initiation of investigation, prosecution and proving the commission of the crime up to the satisfaction of the court with sufficient evidence is a prerequisite to have the offender convicted and the property confiscated.

In very many cases, despite the existence of evidences which sufficiently implicate the commission of a crime, the failure of the state to substantiate its charges with the required highest standard of proof for criminal charges has been /is a blessing in disguise for the accused that are not found guilty. Worse, the acquittal verdict can create a wrong impression and direct connotation of legalizing the ownership title over the illegally obtained property. In addition to this death, permanent illness of the accused, absence, immunity of the suspect may hinder the proceeding of the criminal confiscation system. Furthermore these days it is common to see individuals other than government employees and public organizations accumulating unexplained enormous amount of wealth from the scratch in a short period of time. However, there is no legal machinery to bring them into question and probe the source of their wealth.<sup>4</sup> Fraught with these deficiencies the conviction based confiscation system has made the process of recovering proceeds of crime cumbersome which in turn has made the war against crime less effective. To fill the wide gap the criminal confiscation system bears, the international community is resorting to the civil forfeiture system as an alternative strategy to fight crime and recover misappropriated asset.

Civil forfeiture is a relatively new approach to crime that takes after a hybrid character derived from criminal and civil law. This strategy deviates from the extra stringent conviction based confiscation system and employs a lower civil standard of evidence for confiscation purpose without the need to rely on the conviction of the accused.

To tackle the challenge the criminal confiscation system poses, states have expressed their concern by adopting international instruments which commend the integration of civil forfeiture

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<sup>4</sup>Under the 2004 criminal code Art. 419 the scope of the unexplained wealth law was limited to public servants in the new proclamation that provides for corruption offences proclamation no.881/2015 Art.21 the scope is extended to embrace employees of public organizations and persons who possess wealth on behalf of these groups. It still does not incorporate other persons who can enrich themselves unlawfully.

system into the legal tradition of ratifying states. Thereupon a number of states have assimilated civil forfeiture system into their legal system.

Giving a belated response, Ethiopia has domesticated civil confiscation laws in to its legal system. These laws do have a limited scope of application confined to Money laundering and financing terrorism, and corruption offences. The central tenet of this paper is to make a closer scrutiny of the civil forfeiture laws in force and appreciate the gaps in the laws and procedures followed to enforce same. The research also endeavors to make a cursory look at of the pragmatic side of the civil forfeiture law relying on pending cases.

Besides the typical civil forfeiture law, literally speaking there are different variants of non conviction based confiscation systems which do not rely on conviction of the offender. These are administrative confiscation found in the customs law, legislative confiscation in the terrorism law and concessive confiscation under corruption law. These approaches as variants of the non conviction based mechanism are succinctly addressed. Further, the illicit enrichment law is one strategy adopted to fight crime in number of jurisdictions. Diverging form the normal procedure, an offence based on illicit enrichment is established by a mere possession of unexplained wealth and the suspect assumes the burden of proving the legitimate origin of the property. Owing to its distinct feature and scope unlawful enrichment law is also fairly discussed.

## **1.2 Statement of the Problem**

In generic terms, the legislative confiscation under the Anti Terrorism law of Proclamation no.652/2009, Administrative confiscation in customs proclamation 859/2014 and concessive confiscation under Proclamation 883/2015 are the different modalities of non conviction based confiscations which do not require the conviction of an accused for their enforcement. In the strict sense, the typical civil confiscation laws are found in the 2013 Proclamation no. 780/2013 Money Laundering and Financing Terrorism law and in the 2015 Proclamation no. 882/2015 Revised Special Procedure and Rule of Evidence Proclamation.

The incorporation of the civil forfeiture law and its importance in the asset recovery realm can never be overemphasized. Nevertheless, it fails to exploit the advantage of lateness as there are still substantive and procedural gaps the civil forfeiture law endures.

To start with the civil action laws incorporated under proclamation 882/2015 that also applies by way of cross reference to Money Laundering and Financing Terrorism law envisages an *in personam* civil action directed against a person. The legal action supposed under this provision takes after a normal civil claim and the parties are captioned as Attorney General v. Ato X. This presupposes the existence of a respondent person who may be or might not be attending the civil confiscation claim for whatever reason. This approach tries to reach the property by bringing a civil action on the person suspected of gaining property illegally.

The main limitation of this system is it fails to envisage situations that compel the institution of the civil action against the property. These circumstances can happen when the suspect is dead before investigation, before prosecution or when the commission of the crime is disclosed after the death of the offender. It does not also govern scenarios whereby a property suspected of being proceeded of a crime is found but the owner is unknown. These scenarios are well addressed in the Prevention and Suppression of Money Laundering and Financing Terrorism law. However, they are overlooked in the corruption law.

Civil confiscation is a cross between the civil and criminal law that shares both attributes. This hybrid nature requires a concomitant procedural law that befits its peculiar feature. However, beyond ordaining the law the procedural aspects are not meticulously addressed which has posed a problem on the implementation of the law. In going over these issues the research tries to highlight these gaps and call for an amendment and a restructure of the law to make it clearer.

Similarly the concept of extended confiscation in the Prevention and Suppression of Money Laundering and Financing Terrorism law is distinct from the common extended confiscation approach. Normally the notion of extended confiscation is about questioning the lawful origin of any other property belonging to the accused which is unrelated to the case the culprit is convicted. In contrast under The Prevention and Suppression of Money Laundering and Financing Terrorism Law extended confiscation has a constricted scope limited to a property linked with the crime and enforceable if the accused found guilty.

The unexplained wealth law is one of the forceful asset recovery tools used in different jurisdictions. This law under the Ethiopian context has limitations in the category of the persons it targets and in defining acts that constitute unexplained wealth. With regard to the category of

persons it targets, only employees of public organizations and public servants fall under the purview of this law. Other groups of persons unless they are suspected of possessing wealth on behalf of the targeted groups are outside the territory of unlawful enrichment law. Besides, there is a shallow understanding of wealth as the actual wealth of a person manifested in one's personal life.

The research hinging on these basic concepts makes an attempt to assess the substantive and the procedural problems in the law as well as the practical problems witnessed on the ground in the implementation of these laws.

### **1.3 Research Questions**

1. What are the limitations of the civil confiscation laws in force?
2. What looks like the pragmatic side of civil forfeiture laws and the problems encountered in their implementation?
3. Does the existing procedure law fit in the unique hybrid nature of civil forfeiture laws?

### **1.4 Literature Review**

Saba G/Meskel has written LLM thesis titled 'A case for civil Forfeiture in Ethiopia' at the University of Southern Cape in 2014. The two researches are quite different in their premise, scope, analytical method and conclusion.

To begin with, the divergence between the two researches starts from the very nature of the research and the methodology employed. Methodologically Saba's research is a purely desk top research that calls for the introduction of civil action or civil forfeiture law. In contrast this research employs both doctrinal and empirical methods and is engaged in assessing the substantive gaps and procedural problems encountered in the implementation of civil forfeiture laws. To this effect, this Thesis is privileged in accessing relevant cases and interview data to assess the pragmatic side of the law on the ground.

The inputs and focuses of Saba's research are those legislations enacted before 2014 namely Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005; Customs Proclamation No 622/2009 , Terrorism proclamation no. 652/2009 and Proclamation no. 780/2013 Suppressing and preventing of money laundering and financing terrorism law.

Proclamation no.882/2015 which is the center of this research and the ground breaking law in introducing civil action rule is a post 2014 development outside the scope of Saba's research. Beyond this, in addressing the above mentioned pre 2014 legislations Saba's research simply gives a skin deep narration of the laws in those legislations.

In contrast the central theme of this research is making a closer scrutiny of the civil forfeiture laws enacted before and after 2014 by scrutinizing the pragmatic side of the laws based on interview data and court cases. It discusses the model civil forfeiture laws, the nature of civil forfeiture laws in different scholarships and international instruments. It picks up the experience of US and UK. On this backdrop it attempts to see the nature of civil forfeiture laws in Ethiopia. Raising particular cases it highlights the challenges faced in the practice.

What is more, the recommendation sections clearly manifest the distinction between the two researches. This Thesis primarily gives recommendations to remedy the defects of civil forfeiture laws in force, it reasons out and advocates for a robust model of civil forfeiture laws. It further recommends the need for an expanded civil forfeiture law application beyond corruption; and Money Laundering and Financing Terrorism Crimes.

### **1.5 Objective of the Research**

What pushed states into the robust civil asset forfeiture system is the inadequacy of the criminal confiscation system in recovering proceeds of crime and fighting crime. The introduction of this approach into Ethiopia's legal system does not have a different reason either. This research is initiated with the objective of appraising these laws and showing the gaps which may still let embezzled property unreturned. Similarly with the increase in the awareness and increased use of the civil forfeiture laws the vagueness in the procedure will inevitably be a serious hindrance for a proper implementation of the laws. The research gives signals for the amendment and restructure of the civil confiscation laws in force and the general enactment of a comprehensive self standing civil forfeiture laws.

### **1.6 Significance of the Research**

The specific significance of the research is:-

1. Revealing the deficiencies and inconsistencies in the civil forfeiture law in force, it alerts the concerned organ to revisit the laws and close the loopholes that may serve to siphon embezzled property.

2. It persuades the legislator to enact a comprehensive and harmonized self standing civil forfeiture law that brings together the scattered civil forfeiture provisions. This helps in resolving the existing disparity.
3. It calls for the enactment of a procedure law that can accommodate the hybrid characteristics of civil forfeiture laws.
4. Arguing in favor of unlawful enrichment law with a panoramic view, the research suggests the extension of the scope of the unjust enrichment law to embrace any person beyond public servants and employees of public organizations.

### **1.7 Methodology**

Both doctrinal and non doctrinal research methodologies have been followed. Different legal literature, interview data and relevant active cases are as well referred. The research has also obtained useful inputs from formal and informal discussions held with practitioners. Finding an organized statistical data was a real pain in the neck due to the poor data management system of institutions.

### **1.8 Limitation of the study**

Normally research proposals prepared on the desktop tend to be more ambitious to catch everything. These aspirations are however challenged by a different reality on the ground in most cases. The challenge is even more when the research has an empirical touch. This research partly hinging on the non doctrinal approach was not fortuitous enough to escape this reality. It had thus to confront both truths -the ambition at the proposal stage and the challenge on the ground.

Different data from different divisions of the Office of the Attorney General<sup>5</sup> were relevant to assess the pragmatic side of the law. The institution suffers from an overarching data management problem. The data management system is not programmed in a manner that provides the required information about the case. This has made it difficult to consult relevant cases at the required level and with the necessary detail. Some of the cases do not have the needed detailed information the research requires. Even, the information obtained on some very essential and directly relevant cases was so scanty that the research could not avail itself of these

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<sup>5</sup>On March 2016 following the establishment of the Federal Office of Attorney General by proclamation no.943/2016 The four prosecution organs, the Ministry of Justice, Anti-corruption commission ,Revenue and Customs Authority and Consumers Association prosecution office are amalgamated under the Federal Attorney General .

very useful cases. Nevertheless with the kind cooperation of individuals few pertinent cases are found. On the other hand the effort to obtain interview data was successful.

Another limitation the research would like to confess is that in the second chapter the section covering non conviction based confiscation models is compelled to rely largely on one material prepared by EUROJUST. This is due to the fact that these models are articulated by this institution and are not found in other materials. The endeavor to get further writings on these specific models was futile. Acknowledging these limitations the research still endeavors to draw a fair picture of the practice of civil forfeiture laws in Ethiopia.

### **1.9 Structure of the Research**

The paper is organized in to five chapters. The first chapter is the introductory part where the general background, statement of the problem, objective of the research and the methodology followed to conduct the research are presented. The second chapter gives a general theoretical framework on different kinds of confiscation laws. The historical background of civil asset forfeiture, including contending views in favor and against civil forfeiture laws based on its implication on property right are also topics treated under this chapter.

The third chapter discusses civil asset recovery rules in the light of three international instruments which are credited for inducing the concept at an international level:- These are he Vienna convention; the Palermo convention and UNCAC. The civil confiscation laws of US and UK along with the four non conviction based confiscation models articulated by EUROJUST are considerations of this chapter.

Chapter four boils down the issue to the Ethiopian account. An in depth examination of the civil forfeiture laws is made. Their scope, nature and limitation are discussed at length. The unexplained wealth model of confiscation, administrative confiscation, concessive confiscation and legislative confiscation are also given coverage under this chapter. The fifth chapter finalizes the research with concluding remarks and recommendations.

## CHAPTER TWO

### Historical Development of Confiscation

#### 2.1 Introduction

‘No one should benefit from his wrongdoing.’ Nothing else; this is the philosophy behind both criminal and civil confiscation of ill gotten property. Criminal confiscation to take effect has to pass through stringent procedures designed to ensure the observance of the rights of suspects. Absence-unless the specific crime allows trial in absentia, death, permanent illness, flee from justice and immunity obstruct the initiation of criminal prosecution.<sup>1</sup> These circumstances prevent criminal prosecution and the attendant confiscation of fruits of crime. Hence, unless these gaps are filled, crime, instead of being an abhorred social evil will inevitably turn out to be a beneficial business enterprise for offenders and families of deceased offenders. What necessitated civil forfeiture is the need to close these gaps and convey the message crime does not benefit.

This chapter attempts to give some basic ideas on what civil confiscation is; its historical development, the different legal avenues available to recover misappropriated property; the distinguishing characteristics of civil forfeiture and the views related to property right at a bird’s eye view.

#### 2.2 Historical Development of Confiscation

Defined in general terms, confiscation or forfeiture means the permanent deprivation of property by order of a court or other competent authority or taking away of an existing right over a specific property by a government without paying compensation.<sup>2</sup> The historical background of civil forfeiture is said to have its source back to the pre Christian ancient Greek and Roman era.<sup>3</sup> This was characterized by the habitual practice of seizing and confiscating the property of those

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<sup>1</sup> Council of Europe, Impact Study On Civil forfeiture, ( 2013), Belgrade P.10 (Council of Europe) Project on Criminal Asset Recovery In Serbia Available at <http://www.coe.int> (Last accessed on April 20,2016)

<sup>2</sup> Douglas Kim, “Asset Forfeiture: Giving up Your Constitutional Rights”, Campbell L. Rev. Vol. 19, No. 527 (1997), p. 529 ,Available at <http://scholarship.law.campbell.edu> & United Nations Office On Drug and crime, Manual On International Cooperation For the Purpose of Confiscation of proceeds of Crime See also United Nations, 2012 (Available at <https://www.unodc.org> p.2 (Last accessed on June 6 , 2016 )

<sup>3</sup> David Benjamin Ross, “Civil Forfeiture: A Fiction that Offends Due process ”, Regent U. L. Rev., Vol. 13, (2001), Regent University Law Review, p. 260 Available at <https://www.regent.edu> (Last accessed on April 16,2016)

who oppose the ruler and confiscation of instruments of death based on the superstitious belief that these objects require religious expiation.<sup>4</sup> The Deodand Law of the Medieval English era is also acknowledged to have a bearing in the development of the modern concept of confiscation.<sup>5</sup> The word “Deodand” is derived from the Latin word “Deo Dandum” which means ‘given to God’<sup>6</sup> The law of Deodand was primarily applied for animals causing human death.<sup>7</sup> In the early English law, any personal chattel which was used as the immediate instrument of death was called a Deodand.<sup>8</sup> As to how confiscation is enforced in the Deodand there are two divided views in the literature. Some argue that the law of Deodand required the confiscation of the chattels or object which caused the death of a person to be forfeited to charity or to the crown either to atone for the death or out of a desire for revenge.<sup>9</sup> In the understanding of this approach confiscation actions are brought against the object or animal itself as a perpetrator irrespective of the innocence of the owner and the object which caused the death itself was directly confiscated.<sup>10</sup> On the other hand some others interpret the laws of Deodand as a form of action brought against an object that brought about the death of a person to assess and recover the value of the object.<sup>11</sup> As opposed to the former view, the central idea contained in this view is that, the object which caused the death itself is not directly confiscated rather it is the assessed value which is forfeited to the crown.<sup>12</sup> In other words the ox that gored, the knife that stabbed and the cart that crushed were confiscated and their value assessed by officials assigned to identify the

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<sup>4</sup> Ibid.

<sup>5</sup> Patricia M. Canavan, “Civil Forfeiture of Real Property: The Government’s Weapon Against Drug Traffickers Injures Innocent Owners”, *Pace L. Rev.*, Vol. 10, No. 487, (1990) Available at <http://digitalcommons.pace.edu/plr/vol10/iss2/12> (Last accessed on June 06, 2016)

<sup>6</sup> Tamara Piety, “Comment, Scorched Earth: How the Doctrine of Civil Forfeiture Has Laid Waste to Due Process?”, *U. Miami L. Rev.*, Vol. 45, No. 911, (1991)., University of Tulsa, College of Law, [P. 928 Available at http://digitalcommons.law.utulsa.edu/fac](http://digitalcommons.law.utulsa.edu/fac) (Last accessed on June 06, 2016)

<sup>7</sup> Jean B. Weld, *Forfeiture Laws and Procedures in United States Of America*, US Department of Justice. Asset Forfeiture and Money Laundering Section, Criminal Division, U.S Department of Justice , p.18 Available at <http://www.unafei.or.jp/english/pdf/RS> (Last accessed on April 16, 2016)

<sup>8</sup> Patricia M. Canavan, “Civil Forfeiture Of Real Property , cited above , note 5, at p.488

<sup>9</sup> Ibid.

<sup>10</sup> Karis Ann-Yu Chi, “Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California”, *Cal. L. Rev.* Vol. 90, No. 1638 , (2002), P.11, Available at <http://scholarship.law.berkeley.edu> (Last accessed on June 06, 2016)

<sup>11</sup> Patricia M. Canavan, *Civil Forfeiture of Real Property* , cited above , note 5, at p.488

<sup>12</sup> Ibid.

cause of the death and the value of the object. Consequently the proceeds collected from the objects is shared out for religious or philanthropic purpose in the name of the deceased.<sup>13</sup>

This view puts forward different rationales why confiscation is made in the law of the Deodand. The first justification is predicated up on the religious belief that the object which caused the death of the person is already tarnished and the forfeiture is regarded as a token of ritual cleansing.<sup>14</sup> The second rational justifies confiscation based on its advantage of preventing possible reprisal or private justice measure by the victim's relatives on the owner of the object.<sup>15</sup>

The third reason associates confiscation with natural impulsive reaction human beings make as in the case of "of kicking a door when it pinches one's finger."<sup>16</sup> In short the two views except that they differ in the kinds of chattels subject to confiscation and the way they justify it, both do not contest the practice of treating the animals and the objects as a defendant in the law of the Deodand to have lineage with the modern concept of confiscation. Over time the Deodand lost much of its significance and was ultimately abolished.<sup>17</sup> From these grounds one can surmise that the ancient and the medieval era notion of confiscation were based on the superstitious belief and authoritarian behavior of kings.

Forfeiture of estate based on criminal conviction of persons in the medieval English law was also regarded as the second precursor of the modern notion of confiscation.<sup>18</sup> Accordingly, persons convicted of felony and treason were subjected to a harsh confiscation measure. While a convicted felon was required to forfeit his chattels to the crown and his land escheated, a convicted traitor is forced to surrender all his personal and real property to the crown.<sup>19</sup> The reason why these forfeitures were made and the properties granted to the crown is based on the belief that violation of criminal law was thought to be perpetrated against the peace of the king.<sup>20</sup> The third antecedent of confiscation law and the one that had a stronger influence on the modern civil confiscation laws is the English admiralty law and the custom and revenue laws. The former

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<sup>13</sup> Charles Doyle, Crime and Forfeiture, Congressional Research Service, 2013, Available at [www.crs.gov](http://www.crs.gov) (Last accessed on June 6, 2016)

<sup>14</sup> Patricia M. Canavan, Civil Forfeiture of Real Property, cited above, note 5, at p. 929.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Joshua Alan Krane, Forfeited, Civil Forfeiture And The Canadian Constitution, A thesis submitted in conformity with the requirements for the degree of Master of Laws, Graduate Department of the Faculty of Law University of Toronto, (2010), Toronto), P.11 Available at <https://tspace.library.utoronto.ca/> (Last accessed on April 20, 2016)

<sup>18</sup> Patricia M. Canavan, 'Civil Forfeiture Of Real Property', cited above, note 5s, at p.489

<sup>19</sup> *Ibid.*

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

is enforced against vessels by instituting civil forfeiture proceedings when the ship owners were overseas or when there is lack of jurisdiction. The latter were applied for revenue evasion crimes.<sup>21</sup>

### **2.3 Routes for Recovering Misappropriated Public Property**

In addition to the traditional process of arrests, indictments, convictions and imprisonments of criminals an equally important integral part of a country's criminal justice system is its ability to deprive criminals of their illegal earnings."<sup>22</sup> The most common mechanisms used to denude criminals of the financial benefit of their illegal activities are confiscation.<sup>23</sup> Generally there are two types of forfeiture processes widely used internationally to recover the proceeds and instrumentalities of crime based on the judicial procedure they pursue.<sup>24</sup> These are criminal asset forfeiture and civil asset forfeiture; the civil confiscation takes two forms in *rem* and in *personam* proceedings.<sup>25</sup> In addition, in number of jurisdictions there exists also a non judicial confiscation system called administrative confiscation.<sup>26</sup> Following different judicial and administrative path states utilize these mechanisms to confiscate the objects and fruits of crime. This sub section briefly considers these asset recovery mechanisms.

#### **2.3.1 Criminal forfeiture**

Criminal forfeiture is an element of the criminal justice system that constitutes part of the sentencing process.<sup>27</sup> A criminal forfeiture takes place after a criminal prosecution is instituted and the guilt of the defendant is ascertained following a trial or a guilty plea.<sup>28</sup> Criminal confiscation requires that the property used or derived from the crime be indicted along with the individual defendant. If the defendant is found guilty of the crime charged, the instrumentalities of the crime along with the proceeds can be forfeited as part of the final judgment in the criminal

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<sup>21</sup> Patricia M. Canavan, Civil Forfeiture of Real Property , cited above , note 5, p.1638

<sup>22</sup> Ryder N.(Dr.), ‘‘To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States of America and the United Kingdom’’, *Journal of Business Law*, (2013), P.3 Available at <http://eprints.uwe.ac.uk> (Last accessed on April 20,2016)

<sup>23</sup> Ibid.

<sup>24</sup> Theodore S. Greenberg and others *Stolen Asset Recovery, A Good Practice for Non Conviction Based Asset Forfeiture*, (2009), the World Bank, p.13

<sup>25</sup> Ibid.

<sup>26</sup> Theodore S. Greenberg and others, *Stolen Asset Recovery , A Good Practice For Non Conviction Based Asset Forfeiture*, cited above, note 23, p.22

<sup>27</sup> Jeffery Simser, Perspectives on Civil confiscation, Civil Remedies for Illicit Activities Office, Ministry of the Attorney General (MAG), (2008)University of Hong Kong, p.8

<sup>28</sup> Patricia M. Canavan, Civil Forfeiture of Real Property , cited above , note 5, at p.13

case.<sup>29</sup> Since criminal forfeiture is part of the sentence in a criminal case the success or failure of the confiscation is totally reliant up on the conviction or acquittal of the defendant.<sup>30</sup> Jurisdictions differ in the standard of proof they require for the conviction proceeding of the defendant and for the confiscation proceeding of the property. During the adjudication of the conviction proving the case beyond reasonable doubt or ‘intimate conviction’ of the court is required.<sup>31</sup> Some jurisdictions use secondary balance of probability standard of proof proceeding for the confiscation proceeding. Some other jurisdictions apply the same standard of proof required for the criminal proceeding.<sup>32</sup>

There are three approaches to the enforcement of conviction based confiscation namely property based, value or benefit based and a hybrid system of confiscation.<sup>33</sup>

The property based confiscation is widely practiced in civil law countries. It allows the direct confiscation of the instrumentalities used to commit the offence and the proceeds collected there from.<sup>34</sup> In this system even if a property seized and restrained is found to be unrelated to the specific crime the individual is convicted, judges have extended power of confiscating the property if they are convinced beyond reasonable doubt that the property is proceeds of crime.<sup>35</sup> This system is tied to a specific property and thus, if this particular property is transferred to a third party or, its value is substantially diminished, or has been mixed with another property the court can impose a commensurate amount of fine instead.<sup>36</sup>

The value based confiscation also called the benefit system as opposed to the property based system is focused on assessing the value or the benefit accrued from the criminal conduct.<sup>37</sup> This system quantifies the proceeds obtained from the offense and at the sentencing stage the court will pass a judgment executable either as a judgment debt or as a fine an amount equivalent to the benefit against any property whether it is linked or not with the crime the defendant is

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Jean-Pierre others, Asset Recovery Handbook Guide for Practitioners, p.105 .Stolen Asset Recovery Initiative (STAR) ( 2011), The World Bank Available at <http://star.worldbank.org> (accessed on June 6,2016)

<sup>32</sup> Ibid.

<sup>33</sup> Council of Europe, Impact Study On Civil forfeiture , cited above note 1at P.11

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Tamara Piety, Comment, and Scorched Earth: How the Doctrine of Civil Forfeiture Has Laid Waste to Due Process? , cited above, note 5, p.111

convicted.<sup>38</sup> Then the court having regard to the defendant's ability to pay and the benefit obtained from the commission of the crime passes a confiscation order it thinks appropriate.<sup>39</sup>

Countries following the hybrid system use either of the two systems depending on the nature of the case. If the specific property or the proceeds of the crime is available a direct confiscation order is enforced against the property itself. However, when the proceeds have been used, destroyed, concealed and in any case do not exist a recourse is made to the value based or the benefit approach.<sup>40</sup>

In general, as the conviction based confiscation is an *in personam* action against the defendant the move towards confiscating the instrumentalities and the proceeds of the crime necessarily requires winning a conviction judgment. The above three ways of recovering instrumentalities and proceeds of crime characterize how the conviction based confiscation works in different legal systems.

### **2.3.2 Administrative confiscation**

In addition to the conviction based and civil confiscation systems which are court annexed asset recovery avenues, there is also a non conviction based administrative confiscation system. Administrative confiscation is a non judicial forfeiture process that empowers an administrative organ of a government to confiscate a property based on statutory rule which provide for the confiscation of an illegal property within the administrative bureaucracy.<sup>41</sup> In most legal systems which avail themselves of this approach, administrative confiscation is exercised in cases associated with breach of custom laws; especially with the possession and transaction of objects declared illegal by law. This is often implemented when prohibited objects and vehicles used for the transportation of these objects are seized.<sup>42</sup>

Based on the value of forfeitable assets and kind of property subject to confiscation, the administrative confiscation laws vary in different jurisdictions. To see the practice in USA under the Federal Civil Asset Forfeiture Reform Act (CAFRA) and the customs laws it is allowed to

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<sup>38</sup> Ibid.

<sup>39</sup> Jean-Pierre others ,Brun ,Asset Recovery Handbook Guide for Practitioners, cited above, note 31

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

confiscate administratively cash and other property worth less than \$500,000 and conveyance used to transport or store those objects of any value.<sup>43</sup> The confiscation of real property and other properties that value above the \$500,000 price cap can only be made through the formal judicial proceeding. Administrative confiscation does not however take place forthwith upon seizure of the object. The federal statutory rule obliges the confiscating body to give a proper notice for those who have an ownership interest over the property seized and to publicize its intent to forfeit.<sup>44</sup> Failure to meet these due process requirements may drag the case to a full-fledged judicial proceeding.<sup>45</sup> The Ethiopian customs law on the other hand does not have value and type restriction on the administratively forfeitable properties.<sup>46</sup>

### **2.3.3 Civil Confiscation**

#### **2.3.3.1 In *Personam* and in *rem* Civil Confiscation**

The term "non conviction based confiscation or civil forfeiture" is a combination of words that have opposite meaning. "Civil" is defined as: "Relating to private rights and remedies sought by civil actions as contrasted with criminal proceedings." 'On the other hand, the word "confiscation" implicates losing of one's right as a result of commission of crime.<sup>47</sup> The modern concept of civil confiscation came in to the legal scene carrying a hybrid concept of the criminal and the civil element together in response to the growing economic crimes.<sup>48</sup>

The underlying purpose of confiscation is to ensure that criminals do not enjoy the fruits of their criminal conduct by depriving them the ill-gotten gains. It is also intended to deter potential offenders and removing from criminals the financial means of committing further crimes.<sup>49</sup> However achieving these goals relying on the traditional conviction based confiscation system has made the fight against crime fragile and challenging. This is because conviction based confiscation requires proving the case to the satisfaction of the court beyond reasonable doubt

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<sup>43</sup> Charles Doyle, *Crime and Forfeiture*, Congressional Research Service , cited above, note 13, P.8

<sup>44</sup> U.S Department of Justice Office of the Attorney General , Annual Report of the Department of Justice Asset Forfeiture Program, (1990), p.17

<sup>45</sup> Ibid.

<sup>46</sup> Art. 54 Art.147(1) Proclamation 859/2014,

<sup>47</sup> Patricia M. Canavan, Civil Forfeiture Of Real Property, cited above, note 5, p.941

<sup>48</sup> Id., p. 944

<sup>49</sup> V. Basdeo, *The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: a Constitutional Dilemma*, (2014), p.1055 Available at <http://citeseerx.ist.psu.edu> (Last accessed on June 06,2016)

and having the suspect convicted before proceeding to the confiscation process.<sup>50</sup> As a result a culprit who succeeded in casting a slight doubt on the case can avoid conviction and the concomitant confiscation of the ill gotten property. Furthermore, even if guilty offenders were forced to forfeit instruments or objects of crime until 1980s the prevailing attitude of the criminal justice systems around the world was to allow offenders to enjoy or retain the fruits of their crimes.<sup>51</sup> This proved the traditional post conviction confiscation system to be inefficient to serve its fundamental purpose of depriving the criminals the proceeds of their crime; if we see the practice in United kingdom, UK has recovered £5,818,000 in 2010 via non conviction based confiscation only £639,000 was confiscated through the traditional criminal confiscation system. This counts only eleven percent of the amount recovered via civil forfeiture.<sup>52</sup> What rendered the traditional confiscation system less successful is, it is focused only on the instrumentalities and objects of the crime. But the fruits of the crime were available out there waiting for them after serving out the terms of the sentence.<sup>53</sup> Such legal loophole in the law has drawn back the struggle to reduce crime by encouraging potential offenders to get in to cost benefit analysis of committing a crime.

The modern concept of civil confiscation was introduced in a number of legal systems to fill this legal gap in response to the growing in crime and the proceeds derived therefrom. Currently, civil confiscation along with the strong criticism forwarded against it is gaining wide acceptance. It is also endorsed in different international and regional instruments like the United Nations Convention against Corruption which recommend the incorporation of same in domestic laws.

Non conviction based civil confiscation is variously described in different jurisdictions as civil forfeiture, civil asset forfeiture, non-conviction based forfeiture, asset forfeiture, object forfeiture

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<sup>50</sup> Julia C.Bacay, Measures to Identify, Trace, Freeze And Confiscate The Proceeds of Crime: The Philippine Setting, (Philippines) p.57 Available at <http://www.unafei.or> (Last Last accessed on June 06,2016)

<sup>51</sup> Arnar Jensson, Crime should not pay: Iceland and the International Developments of Criminal Assets Recovery, Thesis for MA Degree in International Affairs University of Iceland, School of Social Sciences Department of PoliticalScience,2011,(Netherlands),p.12Available@[http://skemman.is/stream/get/1946/10146/25325/1/MA\\_ritg\\_Arnar\\_Jensson\(Last](http://skemman.is/stream/get/1946/10146/25325/1/MA_ritg_Arnar_Jensson(Last) (accessed on June April 6, 2016)

<sup>52</sup> Jon Petter Rui, Non-conviction Based Confiscation in the European Union-an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, August 08, 2012 Available at <http://download.springer.com> (Last accessed on June April 6, 2016)

<sup>53</sup> Jean-Pierre others, Asset Recovery Handbook Guide for Practitioners, cited above, note 31, p.7

or civil recovery.<sup>54</sup> Although it takes after varied behaviors in different jurisdictions, essentially, non conviction based confiscation is a personification that authorizes the prosecution of a property suspected to have involved in a criminal proceeding as an *in rem* or the suspect as in *personam* irrespective of the guilt or innocence of the owner.<sup>55</sup>

In *personam* or *in rem* confiscation is proceedings whereby civil recovery action is brought either against the person or the property itself.<sup>56</sup> It requires evidence that proves the property to be instrumentality or proceeds of unlawful activity.<sup>57</sup> Regarding the standard of proof required for civil confiscation there are different parameters set in various jurisdictions.

With respect to the proceeding, non- conviction based confiscation takes either a criminal or civil proceeding. The non conviction based confiscation that follows the criminal proceeding is found legislated either in the criminal code or other legislations that establish crime and apply the criminal procedure laws. However, even if the criminal proceeding is applied the conviction of the defendant in the criminal proceeding is not a prerequisite for the confiscation to take effect. Countries like Switzerland, Thailand, Slovenia and Liechtenstein fall under this category.<sup>58</sup> The other approach the non conviction based confiscation operates is using the civil proceeding. In jurisdictions that employ this scheme the civil confiscation laws exist stipulated in a separate legislation and operate either separately from or parallel to the criminal proceeding. This method requires a less strenuous standard of proof based on ‘balance of probabilities’ or ‘preponderance of evidence.’ Countries like USA, UK, South Africa and Columbia are among countries which apply the civil proceeding.<sup>59</sup>

An *in rem* civil confiscation proceeding ‘assigns guilt to the property;’ it eliminates those barriers which obstruct the proceeding of criminal forfeiture. Accordingly, the death or flee of the offender or any legal immunity if any cannot bar the commencement and continuation of the

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<sup>54</sup> Theodore S. Greenberg and others, *Stolen Asset Recovery, A Good Practice For Non Conviction Based Asset Forfeiture*, cited above, note 23, p.2

<sup>55</sup> Marian R. Williams (Ph.D) and others, *Policing For Profit, the Abuse of Civil Forfeiture*, Institute For Justice ,(2010) , p.9 Available at <https://www.jj.org> (Last accessed on June 06,2016)

<sup>56</sup> *Id.* p.9

<sup>57</sup> Ryder N.(Dr.), *To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States of America and the United Kingdom*, cited above, note 22, p.14

<sup>58</sup> Jean-Pierre others, Brun , *Asset Recovery Handbook Guide for Practitioners* ,cited above, note 31, P. 106

<sup>59</sup> *Ibid.*

confiscation process.<sup>60</sup> Moreover, since civil confiscation relies on balance of probabilities or preponderance of evidence standards of proof, the acquittal of the defendant due to the insufficiency of evidence does not preclude civil confiscation proceeding from carrying on.<sup>61</sup>

### **2.3.3.2 Civil Action in Foreign Jurisdictions**

Civil proceeding in foreign jurisdictions is another option offered for states to recover misappropriated public asset by instituting a civil actions against the defendant in foreign jurisdictions where the asset is located.<sup>62</sup> This approach is almost identical to the aforementioned approach its basic distinction with the civil in *personam* and in *rem* proceedings is that the property sought for confiscation is found in a foreign jurisdiction. UNCAC under article 53 has incorporated a provision that allows the ratifying states to recover misappropriated assets by instituting civil action in the courts of foreign jurisdiction where the embezzled public asset is siphoned.<sup>63</sup> The required precondition to initiate such action is establishing connection between the defendant and the jurisdiction; a connection is said to exist when the stolen property is located in that jurisdiction, when the defendant or her relatives live in the requested country.<sup>64</sup> The procedure follows the civil proceeding standard of evidence required by the requested state which is mainly a lower standard of probable cause and preponderance of evidence standard of proof.<sup>65</sup>

## **2.4 Property right vs. civil confiscation**

Civil forfeiture quite good as it is, it is not welcomed unanimously. There are ardent opponents of the system who suspiciously see it as a serious threat to property right. This topic tries to go over in brief the contending views in favor and against this approach.

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<sup>60</sup> Id. p.107

<sup>61</sup> Jean-Pierre others, Brun , Asset Recovery Handbook Guide for Practitioners ,cited above, note 31 ,P. 106

<sup>62</sup> Council of Europe, Impact Study On Civil forfeiture, cited above, note 33, p.12

<sup>63</sup> Ibid. See also Simon N.M. Young, "Why civil actions against corruption?", Journal of Financial Crime, Vol. 16 No., 2, (2009), pp. 144-159

<sup>64</sup> Abiodun Odouste,( Ph. D), Assets Repatriation and Global Best Practices: Lessons for Nigeria, (2014),University of Lagos, AUDA, vol. 6, No. 1, p. 77

<sup>65</sup> Id. p.78

Any Rand puts it, "The right to life is the source of all rights -- and the right to property is their only implementation; without property rights, no other rights are possible."<sup>66</sup> Another writer capitalizes this idea metaphorically describing property rights as the fountain from which other rights flow.<sup>67</sup>

These statements accentuate the superior position property rights occupy in the life of human beings. The recognition of property rights as fundamental rights in different international, regional human rights instruments and state laws is an affirmation to these propositions. In general terms human rights instruments guarantee everyone the right to own and enjoy property and prohibit an arbitrary deprivation of such right. 'Property tells about the relationship between individuals; and individuals and the society.' Thus, inherent in the right of property itself is a balancing that must consider the rights of others and indeed obligations towards the society as a whole.<sup>68</sup>

Thus one can easily infer that, Property right is a right that can be restricted in the interest of the public or for the proper exploitation of other's property rights under the conditions provided in the law. The commonest types of limitations imposed on property rights include: Expropriation, requisition, legal servitudes and right of recovery<sup>69</sup> Furthermore beyond their traditional meaning as fiscal instruments used to generate income by the state, different kinds of property taxes levied on the use, and transfer and ownership of property presuppose both right and restriction.<sup>70</sup> In addition to these common restrictions, we have civil forfeiture the issue under discussion as a restriction on property right from quite different stand point.

In criminal sanctions, before forfeiture order, the whole process has to pass through a cumbersome criminal procedures 'the accused are presumed innocent until proven guilty beyond

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<sup>66</sup> Ayn Rand, The Virtue of Selfishness, (1964), New American Library, p. 94 (cited in Robert McGee Barry, Property Rights vs. Utilitarianism: Two Views of Ethics Reason , University Utilitarianism Reason Papers 27 (Fall 2004): 2004, pp. 85-112

<sup>67</sup> Id. p.90

<sup>68</sup> Anneke Smit and Marcia Valiante; Public Interest, private property Law and Planning policy in Canada, (2015), p.6 UBC press

<sup>69</sup> Fasil Alemayehu, Law of Property, Teaching Material, Justice and Legal System Research Institute,(2009),p.5

<sup>70</sup> John Norregaard, Taxing Immovable Property Revenue Potential and Implementation Challenges, IMF working paper, (2013), p.6. See also Joan M.Youngman, Victory Thuronyi, (ed .), Tax on Land and Buildings, Tax Law Design and Drafting, (1996), vol. 1, International Monetary Fund , p.2

a reasonable doubt; they may stand mute in the face of accusation, and no inference may be drawn from their silence'<sup>71</sup> Thus, confiscation made following the conviction of the accused is less likely to receive criticism for violation of property right under normal circumstances. This is because the property declared a forfeit is a misappropriated asset which the accused does not have a legitimate title from the very outset.

In contrast, civil forfeiture is interested in pursuing the property instead of the person; as a result the due process procedural safeguards guaranteed in criminal proceeding are not strictly adhered to. 'There is no presumption of innocence; the legal threshold for seizing private property is very low; the onus is on the owner to reclaim their property; and no conviction is required for the government to forfeit private property once it has been seized' to confiscate the property what the government needs to show is a civil standard of evidence.<sup>72</sup> Because of this relaxed procedure even some dare to call civil confiscation as 'state sanctioned theft' and 'a license to steal.' They assert that while the right to property is a fundamental right that warrants a significant procedural protection; the lax procedures employed in civil forfeiture is an egregious encroachment up on property right that entails an arbitrary deprivation of property right.<sup>73</sup> This lenient procedure has attracted criticisms towards this approach as a serious threat to property right.

Here, a point worthy of noting is that, there is no a uniform type of civil confiscation system. States adopt different modalities of civil confiscations; and the procedural safeguards granted vary accordingly- hence the criticisms. The evolution of civil confiscation in US is a very good manifestation of this variation. In US, the federal civil forfeiture law in its earliest phase was harsh and severely criticized.<sup>74</sup> It is through the gradual reforms it undertook that the civil forfeiture laws accommodated rules that give due protection to right of innocent owners and

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<sup>71</sup> <http://www.heritage.org/research/reports/2015/04/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-for-reform> (Last accessed on November 05,2016)

<sup>72</sup> Drug Policy Alliance, Above the Law: An Investigation of Civil Asset Forfeiture in California, p.3, Available at <https://www.drugpolicy.org> (July 28,2016)

<sup>73</sup> David Benjamin Ross, Civil Forfeiture: A Fiction that Offends Due process, cited above, note 2, P.269

<sup>74</sup> The Heritage Foundation, Arresting your property, (2002), Washington DC, p.4, Available at [www.heritage.org](http://www.heritage.org) (Accessed on April 20 2016) the right of innocent owners whose property was misused without their knowledge; the right of third parties who have a legitimate interest on the property which is sought for confiscation; the right of access to legal counsel ;the proportionality of the confiscated property compared to the damage the underlying crime caused was not duly observed

those who have legitimate interest.<sup>75</sup> Apart from the federal government states do also employ different standards which range from the weakest probable of cause to the highest beyond reasonable standard including states which do not have civil forfeiture laws at all.<sup>76</sup> As we shall see in the upcoming chapter the nature of civil confiscation varies depending on to the legal tradition of each jurisdiction. US civil forfeiture system for example has a scheme that fines abusive confiscations and frivolous claims..<sup>77</sup> A corresponding compensation scheme intended to prevent abuse of civil forfeiture law by authorities is also designed in UK Proceed of Crime Act (POCA).<sup>78</sup> Such compensation schemes are arranged to prevent authorities from abusing the law, similarly with a view to mitigating abuse instrumentalities of crime used to facilitate the commission of crime are precluded from the ambit of civil confiscation.<sup>79</sup> Both systems do also give protection for those who have legitimate interest on the property. All these arrangements are designed to prevent possible abuse of the law and reconcile the system with property right. As we see in the fourth chapter, the Ethiopian approach has also a balancing schemes designed to protect legitimate interests over a property sought for confiscation.

To recap, civil confiscation entertains contrasting views from the proponents and opponents of the system. The former upholding it as an effective tool to fight crime and recover misappropriated property, the latter criticizing it as an arbitrary encroachment on property right. The writer opines that, the right to property needs a strong protection. Equally believes that the extra stringent criminal procedure should not have to be used as an escaping hole to avoid civil liability and amass ill gained property.

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<sup>75</sup> Ibid. & Civil Asset Forfeiture Act (CAFRA 2000). In the reform the right of innocent owners, the right of third parties, right access to legal counsel, issue of proportionality between the confiscated property and the damage sustained by the underlying criminal act, the provision of notice before the seizure of real estate, the requirements of setting a bond etc which were restricted and denied in the earlier regime were improved

<sup>76</sup> Julia C. Bacay, Measures to Identify, Trace, Freeze and Confiscate The Proceeds of Crime, cited above, note 48, pp.21-22. For example in North Carolina Civil Confiscation doesn't exist. Only criminal confiscation. In Nebraska and Wisconsin require beyond reasonable doubt standard; states like Alabama, Alaska use the probable cause standard; Maryland, Virginia use the preponderance of evidence standard ; Minnesota, Florida use clear and convincing evidence; Georgia and Washington use both probable and beyond reasonable doubt standard.

<sup>77</sup> Sandra Guerra Thompson, Congressional Reform of Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners, (September/October 2001)? Institute for Justice, University Of California Press. P.72

<sup>78</sup> Thomas Jaggard and Mark Sutherland Williams, "Civil Recovery then and now", Criminal Bar Quarterly, Issue 2, Criminal Bar Association, Sweet & Maxwell (2010), London, P. 6. See also POCA , Sections 270-272 and 281, 308

<sup>79</sup> Ibid.

To reconcile the tension between these contending forces different jurisdictions with civil forfeiture laws provide a fair measure of protection to legitimate interests on the property. Besides, civil forfeiture is a court annexed system. The judiciary is there to guard and balance private and public interest impartially. What is required from the respondent to avoid confiscation is to counter the evidence of the prosecuting body by merely showing the lawful origin of the suspected property- which the researcher believes is hardly difficult for a respondent that has acquired the property legitimately. To prevent the potential misuse of the law, what the state should do is to inculcate highest ethical standard and lay down a transparent and accountable system. On top of that the state has to work on the provision of speedy justice to thwart any harm the seizure of the property may cause on the enjoyment of the property right. These measures help draw a delicate balance between property right and civil forfeiture.

## **2.4 Summary**

In nutshell, this chapter has made an attempt to acquaint the reader with the theoretical aspects of civil forfeiture. It has briefly walked through the historical development of civil forfeiture from its origin back in the medieval period of the Deodand to the modern concept of civil confiscation. Along with the civil confiscation system the common asset recovery mechanisms, the criminal confiscation and administrative confiscation are also topics the chapter delicately dealt with. The last section has fairly discussed the opposite blocks of thoughts which stand supporting and opposing the civil confiscation system.

The ensuing chapter tries to see civil forfeiture laws in the international and national contexts. To this effect, selected international instruments that have bearing on the civil forfeiture regime are examined. The different modalities of non conviction based forfeitures exercised in different jurisdictions and country specific overview benchmarking the US and the UK civil forfeiture legal tradition is also made.

## **CHAPTER THREE**

### **Asset Recovery in International Instruments and Selected Countries**

#### **3.1 Introduction**

In the previous chapter an attempt is made to give a conceptual overview of civil confiscation and its general features. This chapter endeavors to see the global reaction towards civil forfeiture based on international conventions states signed and experience of selected countries. The first section looks into three primordial instruments recognized for tacitly and explicitly provoking the concept of confiscation.

These are:-

- the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,
- the United Nations Convention against Transnational Organized Crime and
- the United Nations Convention against Corruption.

The next part deals with four model civil confiscation practices implemented in European countries; namely,

- Non-conviction based confiscation linked to criminal proceeding,
- Extended confiscation,
- Standard civil confiscation and
- Non-conviction based confiscation based on unexplained wealth.

These models are articulated by the European Union's Judicial Cooperation Unit after an intensive study of the civil forfeiture laws and practices of European Union countries. The last section, benchmarking US and UK- countries with a long established and well developed practice, tries to see the civil forfeiture legal tradition of these two countries.

#### **3.2 Asset Recovery in International Instruments**

While criminals and criminal groups were abreast of time technically and technologically with cross border chain, the legal tools states use to combat crime and recover illegally obtained assets were fragmented and unresponsive to the complex methods criminals employ to obfuscate the

fruits of crime.<sup>1</sup> It is with a view to tackling this problem with a concerted effort that nations committed themselves in different bilateral, regional and international instruments<sup>2</sup>.

This section in brief discusses asset recovery regime under three international conventions. In particular, it covers the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; The United Nations Convention against Transnational Organized Crime and United Nations Convention against Corruption. Accordingly, the ensuing discussion makes a succinct overview of asset recovery under these instruments.

### **3.2.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (The Vienna Convention)**

The Vienna Convention came into force in 1988 in response to the rising demand for drugs in 1970's and 1980's for non-medical purpose especially in the developed world; this created a fertile ground for the illegal production of these drugs in bulk by criminal groups.<sup>3</sup> The Vienna Convention is the first international instrument that linked criminals with the proceeds of their crime and voiced the problem associated with law enforcement aspect of the fight against illegal drugs through international law 'legally if not in actual reality.'<sup>4</sup> "It was also the first multilateral instrument containing a well structured set of international norms on confiscation of the proceeds of crime and closely related matters, such as tracing, freezing, seizure and related international cooperation." This Convention takes also the precedence to mandate the criminalization of money-laundering.<sup>5</sup> With a view to harmonizing criminal laws related to drug offences, requires states parties to the convention to criminalize illicit drug trafficking, money laundering and

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<sup>1</sup> Commentary on the United Nations Convention against Transnational Organized Crime , (2004), United Nations office on Drug and Organized Crime, (New York. UN publication), p. See acknowledgment page.

<sup>2</sup> Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ), UN DOC. E/CN.7/590, [New York: UN Publication Sales), p.1

<sup>3</sup> Martin Jelsma and Amira Armenta, *The UN Drug Control Conventions, a Primer*, (1<sup>st</sup> ed., 2015), Trans National Institute ,p.7

<sup>4</sup> Gallant, Michelle M. *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*,( 2005), Cheltenham: Edward Elgar Publishing, P.13 & Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 ),1998 UN DOC. E/CN.7/590, [New York: UN Publication Sales), p. 466

<sup>5</sup> UNDOC- Digest of organized crime cases, (2012), UN, New York, p.88

confiscation of assets,<sup>6</sup> In addition to criminalizing money laundering and illicit trafficking, the unique attribute of this convention is the great deal of emphasis it gave to confiscation of the proceeds of crime. The instrument is hailed as ‘unprecedented formal and binding international convention with a global reach that underscores confiscation as a major weapon to attack the financial power of those involved in the lucrative illicit drug trafficking business. It also urges mutual legal assistance and cooperation among states and requires to ease ‘bank secrecy rules and give information to make the confiscation more feasible.’<sup>7</sup>It defines key concepts of international drug control; money laundering, confiscation and provisional measures of confiscation and sets the foundation for domestic legal implementations of those concepts.

In the Vienna Convention criminal proceeds are defined very broadly and capture any money or assets derived from drug crimes, any property exchanged or traded for that purpose, any proceeds intermingled with properties acquired from legitimate sources and any income derived from investments of the proceeds.<sup>8</sup>

The Vienna Convention, stressing on the indispensability of criminal confiscation, gently suggests on the reversal of the burden of proof on the accused to prove the legitimate source of the property; leaving the detail to each party state to determine the procedure and level of proof in conformity with their domestic legal system and other relevant factors.<sup>9</sup> The inclusion of this concept in the Vienna Convention depicts the serious attention given to confiscation as a strategy at an international level to fight illicit drug trafficking. Above all, it is the first multilateral instrument that gave a glimpse to the notion of reversal of burden of proof. Deviating from the traditional criminal procedure, it strangely suggested a shift of burden of proof from the state to the accused.

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<sup>6</sup> Jay Sinha, The History and Development of The Leading International Drug Control Conventions, Law and Government Division, 21 February 2001, p. 33. In addition mutual legal assistance and extradition are addressed.

<sup>7</sup> Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, cited above note 2, P. 138

<sup>8</sup> Id. Articles 1 (p), (q) cum 5 (6) (a), (b) and (c) & Arnar Jensson, *Crime should not pay: Iceland and the International Developments of Criminal Assets Recovery*, Thesis for MA Degree in International Affairs University of Iceland, School of Social Sciences Department of Political Science, 2011, (Den Haag Netherlands), p.27 ( Available at [http://skemman.is/stream/get/1946/10146/25325/1/MA\\_ritg\\_Arnar\\_Jensson](http://skemman.is/stream/get/1946/10146/25325/1/MA_ritg_Arnar_Jensson). (Last accessed on June April 6, 2016)

<sup>9</sup> Gallant, Michelle M., *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*, cited above, note 5, p.143

### **3.2.2 The United Nations Convention against Transnational Organized Crime (The Palermo Convention)**

The Palermo Convention, which came into force in 2003,<sup>10</sup> is another UN instrument that reflected the need and the consensus for an integrated global approach to combat the prolific transnational organized crimes of human trafficking, arms trafficking and money laundering, criminalization of corruption and any serious crime in an integrated approach.<sup>11</sup> Much like the Vienna Convention, the Palermo Convention contains identical provisions which oblige states to adopt measures on tracing, freezing, and seizure which enable eventual confiscation of proceeds, equivalent value of proceeds and instrumentalities of crime. It also imposes an obligation on states to ease bank secrecy rules to facilitate the confiscation process and the procedure.<sup>12</sup> The basic difference between the Vienna and the Palermo conventions apparently lies in the subject matters they address. While the former is separately dedicated to drug related crimes, the latter focuses on organized crimes like human and arms trafficking and money laundering.<sup>13</sup> To ease the confiscation process, like the Vienna Convention, the Palermo Convention recommends the shifting of burden of proof to the accused to demonstrate the legitimate source of the asset.<sup>14</sup>

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

Although there were previous regional and international treaties addressing corruption, the United Nations Convention against Corruption (UNCAC) is a landmark, binding international anti-corruption treaty adopted by the UN General Assembly in October 2003. At an international

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<sup>10</sup> Available @ <https://www.unodc.org> (accessed on December, 1, 2016)

<sup>11</sup> *Legislative Guides For the Implementation of the United Nations Convention Against Transnational Organized Crime and The Protocols thereto*, (2004), UNDOC, New York, P.141

<sup>12</sup> Gallant, Michelle M. Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies, cited above, note 5

<sup>13</sup> Article 2(b) of United Nations Convention against Transnational Organized Crime defines “Serious crime” as a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more ..

<sup>14</sup> *Id.* Article 12(7) reads State Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings. See also, Gallant, Michelle M. Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies, cited above, note 5, P. 151

level, the Palermo Convention had given corruption a good deal of coverage; however, because of its special focus on organized crime, corruption is treated as a subset in a tandem with cases which have a transnational component or cases linked to an organized criminal group.<sup>15</sup> UNCAC distinctly is the first multilateral instrument fully dedicated to corruption.<sup>16</sup> UNCAC provisions provide in a logical sequence the preventive and punitive as well as international cooperation and asset recovery chapters as the step-by-step measures states may employ to fight corruption.<sup>17</sup>

“The UNCAC is seen as revolutionizing the realm of asset recovery in the field of international law.”<sup>18</sup> A ‘fundamental principle’ of the Convention, and one of its main innovations, is the serious attention given to recovery of assets. Chapter five of the convention known as the “selling point” of the Convention extensively and comprehensively laid a framework states should adopt in their civil and criminal law to facilitate the recovery of misappropriated property.<sup>19</sup> What has been recognized as a major departure and breakthrough compared to existing international instruments dealing with corruption is, UNCAC shying away from the traditional conviction based confiscation approach brought in the civil confiscation system in black and white.<sup>20</sup>

### **3.3 Non-conviction Based Confiscation models**

The non-conviction based confiscation system implemented in different States varies in its nature based on the legal tradition states follow. The European Union Judicial Cooperation Unit (EUROJUST) having made an intensive assessment of the variation in laws pertaining to non-conviction based confiscation, has classified the non-conviction based confiscation systems implemented in different European member states into four categories as discussed hereunder.

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<sup>15</sup> Ophelie Brunelle-Quraishi, “Assessing The Relevancy and Efficacy of The United Nations Convention Against Corruption: A Comparative Analysis,” *Notre Dame Journal of International & Comparative Law*, (2011), p.427

<sup>16</sup> Hannes Hechler, *UNCAC in a nutshell*, U4 Anti corruption resource centre, Norway 2013 p.1

<sup>17</sup> Id p.1

<sup>18</sup> Ophelie Brunelle-Quraishi Assessing The Relevancy And Efficacy Of The United Nations Convention Against Corruption, cited above, note 15

<sup>19</sup> Hannes Hechler, *UNCAC in Nutshell*, U4 Anti Corruption Resource center,(2013 ), p.2 Available at <http://www.u4.no/> (accessed on December 24,2016)

<sup>20</sup>UNCAC, cited above, Art.53 .See also Theodore S. Greenberg and others , *Stolen Asset Recovery. A Good Practice For Non Conviction Based Asset Forfeiture*, (2009 ), the World Bank, p.13

The categorization does not necessarily mean a state follows one particular model countries may implement more than one model.<sup>21</sup> This part tries to glance over these models in brief.

### **3.3.1 Non-Conviction Based Confiscation Linked to Criminal Proceeding**

This model primarily requires the institution of a criminal proceeding against the offender; a recourse to civil forfeiture laws is made when the criminal case cannot be followed to its end either because the offender cannot be brought before court or cannot be convicted due to lack of sufficient evidence.<sup>22</sup> The circumstances giving rise to these situations can be immunity of the offender criminal prosecution, the death of the offender during the criminal proceeding, the offender might be under age to assume criminal responsibility or the offender might also fled justice.<sup>23</sup> When such situations occur, the court entertaining the criminal proceeding does not close the case, it keeps on entertaining the confiscation claim applying the non-conviction based confiscation rules provided the state establishes a link between the crime and the property sought for confiscation.<sup>24</sup>

### **3.3.2 Extended confiscation**

Like the first model civil confiscation under this model is issued by the court entertaining the criminal case. In extended confiscation, the court convicts the accused for a particular crime and awards a decision on the confiscation of the property.<sup>25</sup> The court passes a confiscation order based on two conditions; the first one is when the court believes that the property is a proceed of a crime for which the court convicted the accused and the second one is when the value of the property the convicted owns is not proportional to his legal income and the court believes that the property is obtained by the unlawful conduct of the person convicted.<sup>26</sup> In such situations, establishing a direct link between the property and the offence is not necessary.<sup>27</sup> If the court is convinced that part of the property was obtained through other unlawful conduct of the convicted

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<sup>21</sup> EUROJUST, Report on Non Conviction based confiscation, (2013), P. 11 Available at <http://www.statewatch.org/news/2012/nov/eu-eurojust-opinion-confiscation.pdf> ( Accessed on March 29,2016)

Italy & Slovenia use non conviction based confiscation linked to criminal proceeding and standard confiscation  
<sup>22</sup> Id. pp.9 and 19

<sup>23</sup> Council of Europe, Impact Study On Civil forfeiture, (2013), Belgrade p. 8 (Council of Europe) Project on Criminal Asset Recovery In Serbia ,2013 Available at <http://www.coe.int> (Last accessed on April20,2016)

<sup>24</sup> EUROJUST, Report on Non Conviction based confiscation, cited above, note 21

<sup>25</sup> Id. pp. 10 ,19

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

for which the accused is found guilty, the court can issue a confiscation order against the whole property.<sup>28</sup> Similarly, if the property is partially tainted by the unlawful conduct of the convicted this suffices to the court to pass a confiscation order over the whole property without the need for further assurance on the legitimacy of the origin of the remaining property.<sup>29</sup>

While the above two models fall within the criminal category, the basic distinction between the two lies in that in the first model the state has to adduce direct evidence that links the crime and the property whereas in the second model establishing a direct link between the property and the crime is not necessary if a portion of a person's property is partially tainted by unlawful conduct of the accused for which he is found guilty.

### **3.3.3 Standard Confiscation.**

The standard confiscation model assumes civil characteristics by relying on a 'balance of probabilities' standard of evidence to dispose the case in a civil court when an indirect link to a crime or criminality with the property is established.<sup>30</sup> This approach is usually applied when the evidence available is not strong enough to initiate a criminal prosecution and have the accused convicted but when the evidence implicates the involvement of the respondent in the offense.<sup>31</sup> In countries following this model the state is expected to establish an indirect link between the property and the unlawful conduct; if the state succeeds in portraying this link the onus of proving the licit origin of the property is carried over to the respondent.<sup>32</sup> Then, a civil court weighs the case on balance of probabilities standard to decide whether the identified assets were most probably derived from illegal activity or not.

### **3.3.4. Non-Conviction Based Confiscation Based on Unexplained Wealth**

The unexplained wealth model is the radical form of non-conviction based confiscation carried out solely in a civil court which does not require any form of nexus between the respondent and criminality.<sup>33</sup> This is applied solely in a civil proceeding by making a comparison of the actual and declared property of the defendant and his legitimate income to ascertain the disproportion

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

between the two data.<sup>34</sup> In this case the defendant bears the onus of proving the legitimate source of the property. Failure to prove the legitimate origin of the property leads the court to believe the property to be ill -gotten and consequently issue a confiscation order.<sup>35</sup>

### **3.4. Civil Confiscation in the United States and United Kingdom**

The origin of civil forfeiture is said to have its roots back to the ancient and medieval era of England. Thus it will be advantageous to learn from the experience of a country recognized as the premier country in civil forfeiture laws in its early version and still which has a benefit of learning from a combined experience of others for a belated reintroduction of same in 2002. Similarly, although the civil forfeiture law of US has its source from the English law, the introduction and growth of modern civil forfeiture law is largely imputed to US together with Italy.<sup>36</sup> The US is a country credited for reviving civil forfeiture laws in its modern version. With a long established experience at the federal and the state level, the US civil forfeiture law affords varied menu to learn from.

#### **3.4.1 Civil confiscation in the US**

The civil forfeiture law of US is said to have inherited the 17<sup>th</sup> century English admiralty law of the British Navigation Act of the colonial era. This act used to be directly enforced against vessels engaged in acts of violating customs laws when the owners were oversea beyond the reach of the English court's jurisdiction.<sup>37</sup>

Civil forfeiture laws in US are found scattered in different pieces of legislations.<sup>38</sup> Except in rare situations these laws were almost disused for long.<sup>39</sup> Considerable utilization of these laws revived with the Comprehensive Drug Control Act of 1970's enacted in response to spread of

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Council of Europe, Impact Study On Civil forfeiture, cited above, note 23. p.. 11 Italy had a civil forfeiture law to confiscate property belonging to Mafia

<sup>37</sup> Marian R. Williams (Ph.D) and others, Policing For Profit, the Abuse of Civil Forfeiture, Institute For Justice ,(2010) , p.10 Available at <https://www.ij.org> (Last accessed on June 06,2016)

<sup>38</sup> Booz Allen Hamilton, Comparative Evaluation of Unexplained Wealth Orders ,( 2012), US Department of Justice-National Institute of Justice January, p.158 2012

<sup>39</sup> Michael Van Den Berg, "Proposing a Transactional Approach to Civil Forfeiture Reform", University of Pennsylvania Law Review, Vol. 163, (2015), (University of Pennsylvania Law School) p.875 civil forfeiture was rarely used during the American civil war to seize and confiscate the property of those supporting the rebellion

drug crimes.<sup>40</sup> On the other hand aggressive use of the laws is said to have started with the Federal Comprehensive Crime Control Act<sup>41</sup> that allowed the ‘perverse financial incentive sharing mechanism.’<sup>42</sup>

In its early phase, the federal civil forfeiture statute was criticized for its harsh and indiscriminate stance on property right of innocent owners and holders. The law enforcement organs were allowed to seize property relying on ‘the rankest of hearsay and flimsiest’ mere probable cause evidence.<sup>43</sup> The claimants assume the heavier burden of proving the licit origin of the property with a preponderance of evidence.<sup>44</sup> The harshest feature of the US civil forfeiture system was manifested by its over stretched application of the civil forfeiture laws to embrace instrumentalities used for the commission of crime; these include house, cars, boats and businesses.<sup>45</sup> As a result innocent owners whose property is wrongly used without their knowledge were victims of these forfeiture laws; their absolute innocence was not a defense to spare their property from confiscation.<sup>46</sup> Likewise third parties uninvolved in the underlying criminal act and who behaved in sheer good faith were also compelled to forfeit their property right.<sup>47</sup> The severity of the civil confiscation laws is further demonstrated by the ‘perverse and flawed incentives’ devised in the equitable sharing program which motivates enforcement agencies to hunt and seize selectively properties bearing huge amount of money.<sup>48</sup> Denial of court appointed legal counsel for indigent owners whose property is seized, the bond requirement which compels claimants to post a bond and seizure of property without warrant which denies the opportunity to object the forfeiture were facets characterizing the US civil forfeiture laws in

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<sup>40</sup> Eric Moores, “*Reforming the Civil Asset Forfeiture Reform Act*,” University of Arizona, James E. Rogers College of Law, (2010), p.780

<sup>41</sup> Michael Van Den Berg, Proposing a Transactional Approach to Civil Forfeiture Reform, cited above note 39

<sup>42</sup> Ibid

<sup>43</sup> Lalit K. Loomba, “The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984,” *Fordham L. Rev.*, Vol5. 8, No. 475, (1989), Available at: <http://ir.lawnet.fordham.edu/flr/vol58/iss3/6> ( Accessed on June,16,2016)

<sup>44</sup> Ibid.

<sup>45</sup> The Cabinet Office, Recovering the proceed of Crime, Performance and Innovation Report, Crown Publishing, (2000), UK, p.37

<sup>46</sup> Mary M. Cheh, “Civil Remedies To Control Crime”, *Legal Issues And Constitutional Challenges George Washington University Crime Prevention Studies*, vol. 9 (1998), p. 51

<sup>47</sup> Ibid

<sup>48</sup> Dick M. Carpenter II, Ph.D., and Larry Salzman, Seize First and Ask Later, The IRS and Civil forfeiture ,Institute for Justice, (2015) p.27

its initial phase.<sup>49</sup> This became a good source of scholarships propounding ideas in favor and against abolishment of civil forfeiture including a compromising middle position that advocates for its maintenance with a substantial reform.<sup>50</sup>

In view of this, the federal civil forfeiture law underwent a significant reform by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which tried to reconcile civil forfeiture and property right.<sup>51</sup> Among the changes include, the federal government's burden of proof is raised from the tenuous 'probable of cause' to the comparatively higher standard 'preponderance of evidence'; the bond obligation imposed on claimants to post ten percent of the value of the forfeited property intended to discourage owners from challenging the confiscation is totally eliminated by CAFRA.<sup>52</sup> In restricted cases court appointed counsel was also allowed to indigent claimants.<sup>53</sup>

CAFRA has also incorporated rules which allow courts to impose a civil fine on frivolous claimants who challenge the forfeiture unreasonably; a corresponding right is also given for claimants to recover attorney fees, court expenses and interest from the state when the complainant has significantly proved to the court that the forfeiture act of the state is unsubstantiated.<sup>54</sup> This rule is designed to prevent an abusive use of the law from both sides. CAFRA also provided a clearer definition of innocent owner as 'as one who did not know of the conduct giving rise to forfeiture or, upon learning of the conduct, did all that reasonably be expected to terminate such use of the property.'<sup>55</sup> Despite such praiseworthy changes, CAFRA's failure to eliminate the much disparaged financial reward arrangement called the 'equitable sharing program, is loudly raised as its major failure.'<sup>56</sup>

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<sup>49</sup> Lalit K. Loomba, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, cited above, note 43 , p. 49

<sup>50</sup> George Rainbolt and Alison F. Reif, *Crime, Property, and Justice: The Ethics of Civil Forfeiture*, Vol. 11, No. 1 (1997), pp. 39-55. University of Illinois Press on behalf of North American Philosophical Publications, the whole article gives a synopsis of arguments in favor and against civil confiscation, the whole article gives a synopsis of arguments in favor and against civil confiscation.

<sup>51</sup> Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, *Federal Sentencing Reporter*, (University of California Press), Vol. 14, No. 2, 2001 p. 87

<sup>52</sup> Sandra Guerra Thompson, *Congressional Reform of Civil Forfeiture: Punishing Criminals Yet Protecting Property Owners*, (September/October 2001)? Institute for Justice, University Of California Press. P.72

<sup>53</sup> Id. pp. 72-73

<sup>54</sup> Ibid.

<sup>55</sup> George Rainbolt, *Crime, Property, and Justice Revisited : The Civil Asset Forfeiture Reform Act of 2000*'', *Public Affairs Quarterly*, Vol. 17, No. 3 , (2003), University of Illinois Press on behalf of North American Philosophical Publications, p. 225

<sup>56</sup> George Rainbolt and Alison F. Reif, *Crime, Property, and Justice*, cited above, note 50

In addition to this US has also a special civil forfeiture law called the PATRIOT Act which is replaced by the US Freedom Act in 2015 allows the civil forfeiture of all assets belonging to a person branded as a terrorist on a the mere balance of probabilities without any requirement of showing a substantial nexus between the property and the offence.<sup>57</sup> Its Ethiopian counterpart exists in the terrorism law proclamation no. 652/2009. Parallel to the US federal, state jurisdictions do also have civil forfeiture laws with their own respective requirements among others include the standard of evidence required, the party bearing the burden of proving innocence and the equitable sharing arrangement<sup>58</sup>

### 3.4.2 Civil confiscation in UK

The UK is among countries which have a well developed civil asset recovery law introduced by the Proceed of Crime Act of 2002. The civil recovery law is applicable all over countries constituting the UK - England, Wales, Northern Ireland and Scotland uniformly except the respective difference in institutions enforcing the law and procedures.<sup>59</sup> The discussion herein below goes on with such understanding centering on England.

After the abolition of the deodand –a medieval era practice substantially connected to the contemporary concept of civil recovery, civil forfeiture was never used in England for more than a century and half<sup>60</sup> until its reintroduction in its modern version by the proceed of crime Act of 2002 hereinafter called POCA.

The POCA is a wide-ranging law that presents a ‘three tier’ of confiscation scheme: criminal confiscation, civil confiscation known as civil recovery in UK and taxation of illegal gains as an alternative legal weapons used to recover the proceeds of crime.<sup>61</sup> Prior to POCA UK had

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<sup>57</sup> Stefan D. Cassella, Forfeiture of Terrorist Assets Under the USA PATRIOT Act, (2001,) Available at <http://www.fear.org/UsaPatriot.txt> & <https://www.rt.com/usa/264005-freedom-patriot-act-surveillance/> (last accessed on February 14,2017)

<sup>58</sup> Marian R.Williams (PhD) and others, Policing For Profit, the Abuse of Civil Forfeiture, cited above, note 37,P.53

<sup>59</sup> UK Proceeds of Crime Act 2002

<sup>60</sup> Cecil Greek (PhD.) Drug Control and Asset Seizure: Review of The History of Asset Forfeiture in England and Colonial America. Available at <http://www.fear.org/history/Greek> ( Accessed on January,17,2017)

<sup>61</sup> David J. Dickson ,Towards more effective asset recovery in Member States—the UK example ,(2009), p.436 Available at <http://download.springer.com/static/pdf/97/art%253A10.1007%252Fs12027-009-0122-7.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs12027-009-0122-7&token2=exp=1484651708~acl=%2Fstatic%2Fpdf%2F97%2Fart%25253A10.1007%25252Fs12027-009-0122->

criminal confiscation laws in force chiefly related to drug offences.<sup>62</sup> However these were incomprehensive laws confined to drug related crimes. The POCA making a remarkable departure from these laws came into view incorporating, the stiffer civil confiscation rules and taxation supplementing the criminal confiscation. As the other two are outside the realm of the paper, a condensed overview of civil recovery is made hereunder.

The UK civil forfeiture regime allows the confiscation of ill gained benefits derived from any act designated as unlawful in the criminal code of that part of UK and any proceed of crime derived from unlawful conduct outside UK if the conduct would be unlawful in UK based on the principle of dual criminality.<sup>63</sup> The act uses the term recoverable property to name proceeds of crime. Recoverable properties are constituted of properties obtained directly by or in return for a criminal conduct or property that represents the recoverable property or properties which the act calls ‘Associated property.’<sup>64</sup>

The standard of evidence required to initiate a recovery action in UK is a mere balance of probabilities. Meeting this weaker standard of evidence shifts the onus of proof to the respondent to show the licit origin of property.<sup>65</sup> More over the recovery agency is not required to show a link between the property and the specific crime a merest showing of the illegitimate origin of the property suffices to present the claim.<sup>66</sup>

The Act has a number of reconciling exemptions and safeguards designed to protect property right of innocent owners and third parties. For a property to be recoverable a twelve years period of limit within which a property is obtained and a minimum threshold estimated value of £10,000 is set.<sup>67</sup> Such baseline is set to make the Agency focus on impactful cases involving a huge sum

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[7.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs12027-009-0122-7\\*~hmac=ae452f093ab0a680e28c3137e999c4151132cde00bc9012d4c513bf710d3efaD](https://www.springer.com/article/10.1007/s12027-009-0122-7?~hmac=ae452f093ab0a680e28c3137e999c4151132cde00bc9012d4c513bf710d3efaD) (Accessed on January,17,2017)

<sup>62</sup> Ibid.

<sup>63</sup> Visit [https://en.wikipedia.org/wiki/Proceeds\\_of\\_Crime\\_Act\\_2002](https://en.wikipedia.org/wiki/Proceeds_of_Crime_Act_2002) ,cited above ,note 59, p. 445

<sup>64</sup> Andrew Bodnar, An Overview of the Law of the United Kingdom Concerning the Proceeds of Crime, Matrix Chambers London International Bar Association Conference, (2009), Madrid, P. 9

<sup>65</sup> Simon NM Young and Jennifer Stone Civil Forfeiture for Hong Kong? A Discussion Paper of the Hong Kong ,Civil Forfeiture Project, Faculty of Law, University of Hong Kong, (2006), Centre for Comparative and Public Law Hong Kong, p.40

<sup>66</sup> Ibid.

<sup>67</sup> Elaine Koren, Civil Forfeiture Regimes in Canada and Internationally Literature Review, Department of Public Safety Canada , Canada (2013), p.13

of money and not to dwell on minor cases as they are not cost effective.<sup>68</sup> This amount is lowered to £1,000 for the confiscation of cash suspected of being illegally obtained or intended for commission of a crime.<sup>69</sup>

POCA gives fair enough protection for third parties who have legitimate interest on the property, true owners and bona fide purchasers;<sup>70</sup> and those who owned the property in good faith;<sup>71</sup> the act also devises a compensation scheme and a legal counselor for indigent respondents including compensation for financial losses.<sup>72</sup> As opposed to the US, the POCA has excluded instrumentalities from the ambit of recoverable properties.<sup>73</sup> A counterpart of the US equitable sharing scheme the “Recovered Assets Incentivisation Fund”(RAIF) is also incorporated in POCA.<sup>74</sup>

Should civil confiscation be a substitute to criminal confiscation or be a secondary alternative? The US law allows the initiation of the civil confiscation process at any time without the need to wait for the outcome of the criminal prosecution.<sup>75</sup> Scholarships in the area and court decisions in UK imply civil recovery not to be a substitute for criminal confiscation. Some opine that, the descending order of list the three schemes are enshrined in POCA, criminal confiscation first, civil recovery second and taxation third imply the normal assumption that the first of these options will be used first.<sup>76</sup> What this position advocates is civil confiscation should only be used when criminal confiscation is impossible. Courts did take similar stance, in the case between The Director of Asset Recovery agency v.(1) *Jia Jin He* (2) *Dan Dan Da Chen*, the court stated that “the approach of the authorities must be to let criminal proceedings take precedence, and only

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<sup>68</sup> Anthony Kennedy, Designing a civil forfeiture system: An issue list for policy makers and legislators, Asset Recovery Agency Belfast UK, p.150 , @ [http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1089943634036/475256-1201245199159/2008Mar-asset\\_recovery-designing.pdf](http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1089943634036/475256-1201245199159/2008Mar-asset_recovery-designing.pdf) (Accessed on 16/8/2016)

<sup>69</sup> Andrew Bodnar, An over view of the Law of the United Kingdom Concerning the proceeds of Crime, cited above, note 64, Section 289, p.14.

<sup>70</sup> Thomas Jaggar and Mark Sutherland Williams, “Civil Recovery then and now,” *Criminal Bar Quarterly*, Issue 2, Criminal Bar Association Sweet and Maxwell (2010), London, P. 6. See also POCA , Sections 270-272 and 281, 308

<sup>71</sup> Id. See also Section 266 of POCA

<sup>72</sup> Thomas Jaggar and Mark Sutherland Williams, Civil Recovery then and now, cited above, note 70

<sup>73</sup> David J. Dickson, Towards more effective asset recovery in Member States, cited above note 66, P.61

<sup>74</sup> Andrew Bondar, An overview of the laws of the law of the United Kingdom concerning the Proceeds of Crime, cited above, note 64 , at p.15

<sup>75</sup> Tamara Piety, “Comment Scorched Earth, How the Doctrine of Civil Forfeiture has laid waste to Due process”, *U.MiamiL.Rev*, Vol. 45, No.911, University of Tulsa ,College of Law, p.912

<sup>76</sup> @ [https://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/projects/CARPO/Output\\_2\\_-\\_Special\\_investigations/Przno\\_PP\\_Evans.pdf](https://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/projects/CARPO/Output_2_-_Special_investigations/Przno_PP_Evans.pdf), (Accessed on January 12, 2017).

act if such proceedings are either not being taken, or for any reason may have failed.<sup>77</sup> This was latter made more clearer by amendment section 2A(4) of the act which proclaimed civil recovery to be an option when conditions for criminal confiscation are not fulfilled.<sup>78</sup> Generally the policy position of the UK is that the fight against crime should be primarily led by the traditional criminal investigation and prosecution process and civil forfeiture should be used as an alternative recourse when criminal confiscation is impossible.<sup>79</sup>

While this is commendable in protecting property right, there still remains a more likely challenge; as long as the Agency is the one that weighs the evidence and determines which way to pursue, it may find it unwise, to throw itself into the full rigorous criminal trial which requires a highest standard of proof while the lenient civil recovery cut back is at its disposal with a merest civil standard of proof requirement.

### **3.5 Summary**

To sum up, this chapter has attempted to briefly assess the legal regime governing non-conviction based confiscation under international agreements and selected countries. To this effect, three international instruments that have bearing on asset recovery - The Vienna Convention, the Palermo Convention and UNCAC are discussed. The former two Conventions are pioneer instruments coming up with a new trend in the confiscation realm. Deviating from the traditional approach these instruments have introduced a lax evidentiary system that commends a reversal of burden of proof from the state to the accused. UNCAC on the other hand is credited as a revolutionary instrument in the asset recovery regime by bringing in the hybrid civil forfeiture system. The basic distinction between the two approaches lies in that, the confiscation system under The Vienna and The Palermo conventions operate within the criminal proceeding where as confiscation under UNCAC uses the civil proceeding.

The four non conviction based models the chapter dealt with are: - non conviction based confiscation linked to criminal proceeding; this model gives primacy to criminal confiscation and the civil forfeiture laws are used only when the criminal charge instituted against the offender is discontinued for various reasons. The other model linked to the criminal proceeding is the

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<sup>77</sup> Thomas Jaggar and Mark Sutherland Williams, "Civil Recovery then and now", cited above, note 70, at p.6

<sup>78</sup> Ibid

<sup>79</sup> Council of Europe, Impact study On Civil Forfeiture, cited above note 23, p.66

extended confiscation system. This system as the name indicates operates by questioning the lawful origin of other property other than the one the accused is found guilty. If the court finds the property to have an illicit origin it gives a confiscation order. Standard civil action is the third model. This model allows the use of civil forfeiture when the available evidence is not sufficient to mount on a criminal confiscation but there is implicative evidence to the commission of crime. The fourth approach is the unexplained wealth model; this mechanism operates in a civil court by showing the discrepancy between the legitimate and the actual income of the accused.

Civil forfeiture laws of US and UK are topics discussed under the last section of the chapter. On their basics there is no a glaring difference on how these two jurisdictions approach civil forfeiture system. However, they still, sustain conspicuous differences in certain issues. US has a long established two tired and progressively refined civil forfeiture laws. In UK in contrast the modern concept of civil forfeiture is comparatively recent. The US federal civil forfeiture law requires a preponderance standard of evidence for civil forfeiture actions; where as in UK the less burdensome balance of probabilities is employed. In US civil forfeiture actions can be initiated at any time before, parallel to and after the criminal prosecution without relying on the process and outcome of the criminal case unless the claimant asks for the stay of the civil confiscation. In contrast in UK it is only when the circumstance does not allow to mount criminal confiscation that a recourse to civil action is made. The US federal civil forfeiture rules have a restricted scope of application covering nearly two hundred and fifty selected crimes. In UK civil forfeiture is applicable for all kinds of offences without any sort of distinction among crimes.

The kind of Property the two jurisdictions subject and exempt from confiscation is a difference worthy of highlighting. In US instrumentalities of crime are in principle forfeitable while they are exempted from confiscation in UK. An associated glaring difference between the two systems is seen in the requirement the two systems put on the value of properties that can be forfeited by a civil action. The US federal law does not put any price cap on the value of the property that can be recovered by a civil forfeiture, in UK it is set not to exceed €10,000 for a combined value of properties and the threshold is lowered to €1000 for cash.

The two jurisdictions have similar stance in retaining the perverse incentive scheme strategy in their civil recovery system. They do also have an innocent owners' defense mechanism designed to draw a balance between property right of legitimate owners and the civil forfeiture law.

Having briefly assessed the civil confiscation laws under international conventions, their models and the civil forfeiture laws off US and UK, the next chapter is dedicated largely to examining how the civil forfeiture rules are accommodated into the Ethiopian asset recovery regime.

## **CHAPTER FOUR**

### **The Legal Regime on Recovery of Misappropriated Public Property in Ethiopia**

#### **4.1 Introduction**

In the previous chapter an attempt is made to see the varied attributes of civil forfeiture laws in different jurisdictions. This disparity among the civil forfeiture laws mainly pertains to the standard of evidence required, the kind of property subjected to civil confiscation and the scope of civil forfeiture laws. This chapter discussing the legal framework of asset recovery in Ethiopian will in particular take a closer look at of how the Ethiopian legal system responded to the call for the introduction civil forfeiture laws and how these laws are integrated into the Ethiopian asset recovery regime.

In general, deterrence is the prime objective of any criminal law. Especially for offences motivated by economic gain the criminal law achieves its goal effectively when the law is strong enough to target and spoil the appetite for commission of crime. This is realized when criminals are deprived of the proceeds of their misconduct. The dispossession of fruits of crime carries over a 'crime does not pay' strong warning message for offenders not to get into a calculative commission of further crime. It as well sets a good example for potential wrongdoers who might be tempted by the profit crime accrues. Otherwise, if the legal system lets the convicted enjoy the proceeds of crime after serving out the imprisonment and similarly if an accused that has succeeded in avoiding conviction due to the insufficiency of evidence is allowed to retain the proceeds of his criminal act, the whole purpose of the criminal law is defeated. It is in view of remedying these gaps, confiscation became a focal point of crime fighting strategy at an international level.

As an actor in the international arena and transcendent nature of crime a nation can hardly insulate itself from such global influence. The attention given to recovery of proceeds of crime in recent legislations and amendments in Ethiopia is a response to these international stimuli. Thus far, the center of the Ethiopian criminal justice system has been preoccupied with the person suspected and accused of committing a criminal act. A success has been chiefly measured by the

achievement of the conviction rate set by the prosecution office.<sup>1</sup> In contrast a very lesser focus has been given to the tracing and confiscation of proceeds of crime and associated property.<sup>2</sup> This is partly attributable to lack of a clear overall policy objective to identify, freeze and confiscate proceeds of crime;<sup>3</sup> coupled with the underdeveloped ‘mind set to follow’ the proceeds of crime after conviction using the conviction based system.<sup>4</sup>

Predictably, this mentality is more pervasive in the non-conviction based confiscation system. The civil forfeiture rules in the Suppression and Prevention of Money Laundering and Financing Terrorism law and Anti Corruption Special Procedure and Rule of Evidence Proclamation Law have registered four and two years respectively. However, the random observation the researcher made via informal discussions and interviews with prosecutors illustrates that the confiscation system is still fettered with the conviction based confiscation mentality.<sup>5</sup> Almost all discussants and interviewees do not think of making a resort to the civil forfeiture system when an accused is acquitted or when the case is closed for insufficiency of evidence.<sup>6</sup> In two cases where civil forfeiture actions are instituted, the factors that compelled the use of civil forfeiture action are death and absconding of the accused.<sup>7</sup>

Be that as it may, while the incorporation of civil confiscation system is a laudable development, it still fails to exploit the retrospective advantage of lateness. The civil forfeiture rules harbor loopholes that may be used to siphon misappropriated property. The epicenter of this chapter is

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<sup>1</sup>Interview with Ato Gebru Gebeyehu, Chief prosecutor and former Director of the Investigation and Prosecution Directorate at the Federal Ethics and Anti Corruption Commission, March 30, 2017 & Eastern and Southern Africa Anti –Money laundering Group, Anti-Money Laundering and Combating the Financing of Terrorism, Mutual Evaluation Report The Federal Democratic Republic of Ethiopia (2009 ESAAMLG), -May 2015, p.35

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> In the case between FEAC v. Befkadu Assefa and Abraham Gertachew, the Federal Supreme court reversing the decision of the Federal High court convicted the defendant for supplying misbranded and substandard sewerage pipeline rings worth 78 million birr. High court file no 157611 18<sup>th</sup> bench, Supreme court file no 114809. In an interview with the prosecutor that has been following the case, there was no any move made to recover the 78 million birr damage the government sustained. Fortunately, the 2<sup>nd</sup> defendant owns a plastic factory which makes the recovery easy.

<sup>5</sup>In an informal discussion the researcher held with ten prosecutors in different times. Three of them have taken training on Money laundering and are well conversant with civil forfeiture laws. The rest do well know about civil forfeiture laws. But all of them do not have the idea at all to resort to the civil forfeiture laws to recover the assets when the accused is exonerated or when the case is closed by the public prosecutor for insufficiency of evidence to mount criminal prosecution. While these are among the gaps the civil forfeiture rule is meant to adress.

<sup>6</sup>Ibid.

<sup>7</sup> Federal Prosecutor v. Heirs and wife of Sheikh Ibrahim Federal high court File no 171098 8<sup>th</sup> civil bench & FEAC v. Yosef—Federal High court 2<sup>nd</sup> bench .

discussing the asset recovery laws in force with particular emphasis on the non-conviction based civil forfeiture system. It endeavors to show the gaps in the laws and the vagueness in the procedure substantiated by practical reflections.

## **4.2 The Legal Framework for Asset Recovery in Ethiopia**

### **4.2.1 Criminal Confiscation**

Ethiopia does not have a self-standing asset recovery laws. Pertinent forfeiture laws are found dispersed in different domestic laws and international instruments.<sup>8</sup> Criminal confiscation is the oldest asset recovery mechanism that is relatively less prone to due process related criticisms unlike the civil confiscation system. As it stands now the main problem raised against this approach is the lesser focus given to pursuing proceeds of crime after conviction which stems from the long established belief and complacency with the sentencing punishment.<sup>9</sup> It is not the prime concern of the paper to discuss at length the conviction based approach. It will be addressed briefly and elaborated in the course of the discussion in comparison with the non-conviction based approaches when found necessary.

Conviction based confiscation is as old as the criminal law and dates back to the 1957 Penal Code. The 2004 Criminal Code and other pieces of legislation sanction a conviction based confiscation enforced following the conviction of the accused.<sup>10</sup> As discussed in the first chapter criminal confiscation is part of the criminal prosecution directed against the accused. It is part of sentencing in a criminal charge which is ordered by the court after the accused is found guilty. In order to materialize the conviction based confiscation has to pass through the cumbersome

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<sup>8</sup> Article 98 of the Criminal Code of 2004; the administrative confiscation applicable for violation of custom laws (Proclamation no 859/2014); The Revised anti Corruption Special Procedure and Rules of Evidence Proclamation as amended (Proclamation no 882/2015); Anti-Terrorism Proclamation and the The Prevention and Suppression of Money Laundering and Financing of Terrorism crimes (Proclamation no 718/2013) allow non conviction based confiscation system including other pieces of legislation and different international instruments it has ratified. Most pertinent agreements containing confiscation rules are The Vienna convention (Ratified on October 11, 1994 <https://treaties.un.org/> accessed on November 26, 2016), The Palermo convention, (ratified on February 10, 2003) United Nations Convention against Corruption, (Ratified on November 26 2007) and the African Union Convention on Preventing and Combating Corruption. (Ratified on October 18, 2007)

<sup>9</sup> Interview with Ato Gebru Gebeyehu, Cited above note, 1

<sup>10</sup> "The Criminal Code of the Federal Democratic Republic .of Ethiopia 2004. Proclamation no. 414/2004 Article "Art. 98.(2)Confiscation of Property. (2) Any property which the criminal has acquired, directly or indirectly, by the commission of the crime for which he was convicted shall be confiscated. An order of confiscation may also apply to any property lawfully acquired by the criminal. This provision is a transposition of the art. 97 of the 1957 penal code) any property criminal in a number of pieces of legislations which make reference to the criminal law) This forfeiture laws apply for every fruit of crime.

criminal procedure and satisfy the highest standard of evidence requirement. Failure to meet this elevated scale of proof will result in the exoneration of the accused and automatic abatement of any move tended towards the confiscation of the property.

The stringent requirements and total reliance on the conviction of the accused has become a blessing for those who succeed in flashing doubt in the case to escape criminal liability and confiscation of the proceeds of crime. The advocacy for the civil confiscation system is inspired by the need to fill this gap.

#### **4.2.2 Non Conviction Based Confiscation**

Supplementing the criminal confiscation, the typical civil confiscation rules are found in two legislations. These are:

- the civil action laws found in the Revised Anti-Corruption Special Procedure and Rule of Evidence Proclamation (hereafter called RACSPREP) and
- in the Suppressing and Preventing of Money Laundering and Financing Terrorism Law hereafter called PSMLFTL).

The non conviction based forfeiture rules under the above two laws are civil action *in personam* proceeding and civil action *in rem* proceedings. The former approach is found in both laws where as the latter approach is exclusively found in the PSMLFT law. The basic distinction between the two approaches is that *in personam* civil actions contain a respondent person in the confiscation complaint and the case takes after the usual format and is captioned as *Attorney General v. Mr.X*.<sup>11</sup> In contrast *in rem* civil action personifies the property as a respondent and the forfeiture complaint carries weird titles like *Attorney General V.2 million birr*. It allows interested parties to interfere as a third party.<sup>12</sup>

Legislative confiscation found in the anti-terrorism law, administrative confiscation laws in custom offences and concessive confiscation found in the Revised Anti Corruption Establishment Amendment Proclamation are discussed as variants of non-conviction based confiscation system. The chapter also devotes a topic to discuss Customs Proclamation No.

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<sup>11</sup> Mr. X could be the suspect or heirs and successors

<sup>12</sup> A sample of in rem action is appended at the end

368/2003 which is recognized as a pioneer law that attempted to bring in the idea of non-conviction based confiscation system in Ethiopia.

#### **4.2.2.1 Non-conviction Based Confiscation under the Repealed Customs Proclamation No.368/2003**

The first conscious attempt to incorporate the idea of non-conviction based confiscation was made by the Re-establishment and Modernization of Customs Authority (amendment) Proclamation No. 368/2003<sup>13</sup> article 80(3). This sub article reads:

*‘where a person prosecuted for violation of the provisions of this proclamation is acquitted the Court may order the goods or means of transport seized be (a) forfeited where the Court is satisfied that an offence has been committed in respect of such goods or means of transport of such goods or means of transport.’ (Emphasis added).*

The proclamation extends the role of the criminal court to proceed with the forfeiture aspect of the case after exonerating the accused from criminal liability for want of strong evidence. This resembles the ‘non conviction based confiscation linked to criminal proceeding’ model discussed in Chapter Three. The law prevents the immediate release of the seized property upon exoneration of the accused from criminal liability. The judge is further required to stay on the case and adjudicate forfeiture issue based on civil standard of evidence. When the court is satisfied about the commission of a crime it can give forfeiture order.

While, this was an ingenious endeavor made to introduce civil recovery system, it was only applied when the accused is acquitted. It did not envisage other circumstances like death, and immunity. Worse, this lone provision was further debilitated by the reluctance of the judges to render a confiscation order after exonerating the accused.<sup>14</sup> This proclamation was later replaced by Customs Proclamation No. 859/2014 which gave Ethiopian Revenues and Customs Authority (ERCA) administrative confiscation power.

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<sup>13</sup> Proclamation no.368/2003 is repealed by custom proclamation 622/2009 which is in turn repealed by 859/2014 that introduced administrative confiscation.

<sup>14</sup> Interview with Ato Amdemikael Getachew Senior prosecutor and Zenabu Tadesse Assistant Attorney General at the Office of Attorney General Economic Crime division. Prosecutors in the former ERCA On March 10, 2017

#### **4.2.2.2 Civil Confiscation under the Revised Anti Corruption Special Procedure and Rules of Evidence Proclamation no.882/2015**

The Revised Anti-Corruption and Special Procedure and Rules of Evidence Proclamation No. 882/2015 as amended (hereinafter called RACSPREP)<sup>15</sup> and the Proclamation on Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No. 780/2013 (hereinafter called PSMLFTP)<sup>16</sup> are the two legislations which contain the civil confiscation rules in the strictest sense as discussed herein below respectively.

Ethiopia committed itself to implement the UNCAC civil action asset recovery rules by ratifying the instrument in 2007.<sup>17</sup> Nonetheless the domestication of the rules had to linger on until the 2015 amendment made on the corruption law. The RACSPREP authorizes the state organ to initiate a civil action to recover embezzled property or benefits derived from misappropriated property or a commensurate amount of personal property of the suspect or the accused to recompense the damage caused by the offender where the criminal proceeding is discontinued or not initiated at all for any reason.<sup>18</sup>

The nature of civil action presupposed under sub article (1) of article 32 is an in *personam* civil action instituted against a person who is believed to have benefited from a criminal act. But the criminal charge instituted against him is discontinued before conviction.<sup>19</sup> The possible scenarios that may bring in the termination of the case before conviction could be withdrawal of the charge for public purpose causes, flee of the accused from justice, permanent illness of the accused or the accused is exonerated or passed away in the course of the trial. Thus based on sub-article (1) of article 32 a civil action is brought when the criminal charge is discontinued. In contrast sub article (2) of article 32 visualizes situations where there is no a prior criminal charge instituted.

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<sup>15</sup>Art.32 of The Revised Anti-Corruption Special Procedure and Rules of Evidence Amendment Proclamation, 882/2015, A proclamation that provides for amendment of the Revised Anti Corruption and Special procedure and rules of Evidence proclamation 434/2005

<sup>16</sup>Art.55 of the Prevention and Suppression of Money Laundering and Financing of Terrorism crimes Proclamation no 718/2013) by a cross reference ordains the applicability of the confiscation laws of proclamation 434/2005 as amended by proclamation 882/2015.

<sup>17</sup> Available at <https://treaties.un.org/> Cited above note 10

<sup>18</sup> Art. 32(1)(2), of Proclamation 882/2015 Cited above ,at note 15

<sup>19</sup> Article 32/1of Proclamation 882/2015 reads “without prejudice to the provisions of article 29 of this proclamation the appropriate organ may institute civil action for purposes of confiscation of property obtained through corruption offences or fruits there of, or property proportionate to the damages caused thereby, even when the criminal proceeding were terminated or the conviction was not obtained for any reason.” ( Emphasis added)

The respondent under sub-article (2) unlike the respondent under sub-article (1) is not interconnected with a prior criminal trial process. The likely circumstances could be insufficiency of the evidence to mount on criminal charge, or the offender may enjoy legal immunity, or the person has fled justice before prosecution when trial in absentia is impossible or any other reason that hinders the initiation of a criminal prosecution.<sup>20</sup>

The incorporation of the civil action rules into the asset recovery regime is of an indescribable value that significantly remedies the deficiencies of the criminal confiscation system. However, despite being recent, it failed to avail itself of the hindsight advantage to the fullest. The civil action approach embodied in the RACSPREP is an in *personam* proceeding filed against an offender to recover a misappropriated property when a criminal prosecution is discontinued before conviction or when no prior criminal charge is brought against the offender.

However, there are still gaps left uncovered by the civil action rules under the two sub-articles. Article 32 does not address issues on how to make recourse to recover ill-gained property when the offender dies before investigation, prosecution, or when the commission of the crime is known after the death of the offender; or when there is a property considered to be proceed of corruption but the offender is unknown; these gaps are left unfilled. On the other hand the PSMLFT law has an airtight purely in *rem* proceeding that addresses these scenarios.<sup>21</sup> In these situations the in *rem* civil forfeiture action takes bizarre names like *Attoreny General v.YZ building*.

One may argue that article 32(2) of RACSPREP is a catchall provision that embraces every circumstance including in *rem* proceeding. A closer scrutiny of the article however tells the provision to be an in *personam* civil action. The provision envisages situations whereby the proportional amount of the personal property of the offender may be seized and confiscated to compensate the damage the offender has caused or to compensate the benefits obtained from the

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<sup>20</sup> Article 32/2 of Proclamation 882/2015 reads ‘the appropriate organ may institute a civil action in situations other than those mentioned under sub article 1of this article for purposes of payment of compensation proportional to property obtained as a result of corruption offences or fruits or property proportionate therewith or property proportionate to the damage caused thereby’

<sup>21</sup> Article 35(3) Proclamation 780/2013 reads “ in case where an offence involving money laundering or predicate offence or financing of terrorism is established by the court and the perpetrator thereof cannot be convicted because he is unknown)

crime. This happens when the embezzled property is not traceable or there is no direct benefit the offender obtained due to his criminal conduct but there is a damage sustained by the criminal act of the offender. Such confiscation of a commensurate amount of personal property is feasible only in *in personam* proceeding when there is an identified person whose personal property is sought for compensation.

In contrast an *in rem* proceeding has in principle a personified property as a respondent not a physical person. The suspect is a property whose owner is unknown or a property belonging to an offender who passed away before the commission of the crime is exposed. In other words *in rem* proceeding contemplates unknown owner and deceased person who had benefited from a criminal conduct.

Furthermore, the indubitable evidence that plainly manifests the *in personam* nature of the civil forfeiture action in the corruption offences is that both in *in personam* and *in rem* proceeding are separately treated in the PSMLFT law. Under PSMLFT law, when there is a given property suspected of being proceed of crime but the perpetrator is unknown; dead or absconded and if the prosecutor succeeds in establishing a satisfactory link between the property and the offence the court can order forfeiture of the property.<sup>22</sup> Such property can only be recovered through an *in rem* proceeding instituted against the property itself.

In addition to the pure *in rem* civil action, *in personam* civil action is also available as an alternative in the PSMLFT law.<sup>23</sup> The presence of the *in rem* and *in personam* proceedings in the same legislation proves the two systems to have been tailored to meet different situations following distinct procedure. This idea is further crystallized by the fact that while the RACSPREP was enacted two years after the coming into force of the PSMLFT law, it does not contain a referral provision that ordains the use of the PSMLFT confiscation procedure.<sup>24</sup>

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<sup>22</sup> Art 35(3) Proclamation 780/2013

<sup>23</sup> In the case between Federal Prosecutor v. Heirs and wife of Sheikh Ibrahim the defendant passed away in the middle of the trial and the prosecutor brought a civil action based on art 55 of PSMLFT law and art.32 of Proclamation 882/2015 Federal high court File no 171098 8<sup>th</sup> bench. This shows the difference between the procedure in the PSMLFT law and RACSPREP. While the PSMLFT can use the RACSPREP procedure the reverse does not hold true.

<sup>24</sup> The Prevention and Suppression of Money Laundering and Financing Terrorism proclamation is enacted in 2013 and the Anti Corruption Special Procedure and Rule of Evidence Proclamation enacted in 2015

In nutshell the asset recovery approach designed under article 32 of the RACSPREP is an *in personam* proceeding directed towards the property through a civil action brought against the offender. On the other hand the *in rem* proceeding envisaged under the PSMLFT law article 35(3) is an action that has the property as a defendant and applied when the offender is unknown; or is dead before investigation or prosecution.

The researcher lacks the gut to conclude that the legislator purposefully made corruption offences outside the purview of pure *in rem* proceeding. What the researcher rather believes to be is failure to appreciate well all the possible scenarios. Therefore, since such situations are common and likely to materialize, the incorporation of an *in rem* action in the corruption offences will help recover ill-gained property whose owner is unknown, or is dead before investigation or prosecution is initiated.

To make a brief observation of the practice, the research has made an attempt to see how far the civil action law has been implemented since its coming into force in 2015. In the interview held with prosecutors at the Federal Attorney General from Cross Border Crime and Corruption Offences Directorates which have the jurisdiction over the issue, it is only in two instances civil actions have been instituted; in one case when the accused passed away,<sup>25</sup> and in another when the accused absconded.<sup>26</sup> While insufficiency of evidence is one of the grounds to use civil forfeiture laws, there are no instances whereby a civil forfeiture action is instituted when the accused is acquitted by the court for inadequacy of the evidence or when the case is closed by the prosecutor for a similar reason. This is a clear demonstration of lack of sufficient awareness on the essence of civil forfeiture. The concerned organ is thus required to work a lot on sensitizing the professionals on the subject matter so that the civil action law achieves its intended objective.

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<sup>25</sup> Interview with Ato Habtamu Zewde , senior Prosecutor at the Federal Attorney General, March,3 2017 it is only in the case cited above note 23 between the Federal Attorney and Heirs of Ibrahim that a civil action case is instituted up on the death of the defendant- the case is still pending

<sup>26</sup> Interview with Ato Bekalu Tamene, Senior prosecutor and a team leader at the Attorney General, March 30,2017, the interviewee was in the“Asset Tracing, Restraining, Management and Recovery Team at The Federal Ethics and Anti Corruption Commission before the establishment of FAG. In one case between the FEAC v. Yosef—( Whose father he could not exactly remember) an employee of commercial Nominees when the accused absconded a birr 70,000 was confiscated by a civil action .

#### 4.2.2.3 Confiscation under the Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No. 780/2013

The Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation (hereinafter called PSMLFT) proclamation contains a comprehensive four winged confiscation approaches. The traditional conviction based confiscation,<sup>27</sup> extended confiscation<sup>28</sup> in *rem* civil action<sup>29</sup> and in *personam* civil action.<sup>30</sup>

What is new about the conviction based confiscation in the PSMLFT law is the widest scope of properties it subjects to confiscation. In addition to the proceeds of crime and other associated properties, confiscation of instrumentalities of crime is allowed.<sup>31</sup> Instrumentalities of crime are properties like car, house, businesses and warehouses which may be used purposely or incidentally in the commission of crime.<sup>32</sup> Forfeiture of facilitator objects is one of the controversial issues in the asset recovery scholarship due to its drastic effect on the right of innocent persons whose property is used by the perpetrators without their knowledge or consent. The UK Proceed of Crime Act does not allow the confiscation of instrumentalities.<sup>33</sup> In US forfeiture of facilitators is allowed on condition that the state shows substantial connection

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<sup>27</sup> Art.35(1) Proclamation 780/2013

<sup>28</sup> Art. 35(2) Proclamation 780/2013 it contains the idea of extended confiscation by stretching the scope of forfeitable properties to other properties belonging to the accused other than those in the case it reads 'The court may also order confiscation of funds or property belonging to directly or indirectly to a person convicted of money laundering or a predicate offence or financing of terrorism which were acquired during a period of five years prior to being charged with the offence if there are reasonable grounds indicating such funds or property are the result of the offence of which the person is convicted and the person failed to prove that the property was obtained legally'

<sup>29</sup> PSMLFT 35(3) describes situations when a pure action against the property can be instituted when the offender is unknown it reads 'In case where an offence involving money laundering or a predicate offence or financing of terrorism, is established by the court and the perpetrator thereof cannot be convicted because he is unknown, he absconded or died the court may nevertheless order the confiscation of the seized funds or property if sufficient evidence is adduced that it constitutes proceeds of crime or instrumentalities'

<sup>30</sup> Art. 55 of Proclamation 780/2013 makes reference to the Revised anti corruption Special procedure and Rules of Evidence proclamation 434/2005 which as amended by 882/2015 contains civil action rules under art. 32

<sup>31</sup> Art. 35(1) (a,b &c) Proclamation 780/2013 provide that any proceeds of crime, incomes derived from the investment of the proceed of crime and properties intermingled with the proceed of crime are forfeitable.

<sup>32</sup> Stefan D. Cassella, Asset Forfeiture Law In The United States, p.8, Available at <http://assetforfeiturelaw.us/wp-content/uploads/2016/10/Chapter-for-Colin-King.pdf> ( Accessed on March 20, 2017)

<sup>33</sup>David J. Dickson ,Towards more effective asset recovery in Member States—the UK example ,(2009), p.436 Available at [http://download.springer.com/static/pdf/97/art%253A10.1007%252Fs12027-009-0122-7.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs12027-009-0122-7&token2=exp=1484651708~acl=%2Fstatic%2Fpdf%2F97%2Fart%25253A10.1007%25252Fs12027-009-0122-7.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs12027-009-0122-7\\*~hmac=ae452f093ab0a680e28c3137e999c4151132cde00bc9012d4c513bf710d3efaD](http://download.springer.com/static/pdf/97/art%253A10.1007%252Fs12027-009-0122-7.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs12027-009-0122-7&token2=exp=1484651708~acl=%2Fstatic%2Fpdf%2F97%2Fart%25253A10.1007%25252Fs12027-009-0122-7.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs12027-009-0122-7*~hmac=ae452f093ab0a680e28c3137e999c4151132cde00bc9012d4c513bf710d3efaD) (Accessed on January,17,2017)

between the property and the crime<sup>34</sup> The Ethiopian law takes after the UK approach and excludes instrumentalities from the sphere of civil confiscation. Instrumentalities are forfeitable under the PSMLFT law based on the conviction based criminal process. The law has also devised a mechanism to entertain claims of third parties who have legitimate interest on the property.<sup>35</sup>

#### **4.2.2.3.1 Extended confiscation**

Basically extended confiscation means, confiscation of property belonging to a person other than the one he is convicted when the court is convinced that it is the fruit of crime.<sup>36</sup> This notion of extended confiscation is included in the PSMLFT law with significant alteration.<sup>37</sup> As defined under chapter three extended confiscation normally stretches the confiscation to other property belonging to the convicted but unrelated to the charge. The Ethiopian approach to extended confiscation however deviates from this approach and puts two preconditions for an extended confiscation to be feasible. Primarily, the anticipated property must be obtained in the past five years prior to the charge. Secondly, the source of the property must be linked to the criminal charge the accused is found guilty. Therefore, even though the property is proceed of another crime, unless it is linked with the case the accused is convicted the property is not forfeitable.

As a whole extended confiscation is ‘based on the assumption that assets held by a perpetrator have been derived from crime, hence their lawful origin needs to be proved.’<sup>38</sup> It operates without precondition by targeting any property belonging to the accused. What the accused should do is to prove the legitimate origin of the property. However, the extended confiscation upheld under the Ethiopian PSMLFT law does not stretch its hand to the required length to reach properties that may have illicit origin. It is restricted to property acquired in the past five years before the prosecution and when the property has a link with the offence the accused is sentenced.

The researcher is of the opinion that the extended confiscation model should be incorporated without precondition. In a country that has poorly equipped and backward investigation system,

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<sup>34</sup> Stefan D. Cassella, Asset Forfeiture Law In The United States, cited above note 32,p.8

<sup>35</sup> Art 36 (3)- 35(1)/(d) and 36(3) of Proclamation 780/2013

<sup>36</sup> .Brayan Cave, A broader perspective, Global anti corruption /Foreign corrupt practice team, may 2014 p.2 @ <http://documents.lexology.com/b8b6fbc7-8ad7-4c8b-b725-5612fed9d5d2.pdf> (Accessed on March 7 20017)

<sup>37</sup> Art.35(2)

<sup>38</sup> Available at <http://forensic-blog.deloitte.pl/en/extended-confiscation-a-new-solution-fight-organized-crime/> ;\ (Accessed on March 7,2017)

putting a time and linkage requirement on the scope of extended confiscation amounts to killing off cogent evidence. If questioning the legitimate source of property owned by a person convicted of PSMLFT crime is allowed, laying such qualification may let the convicted enjoy properties which he might have acquired from the commission of another unrelated crime. A property right issue might be raised here. But, the extended confiscation approach is not blindly implemented. The only burden the accused in an extended confiscation assumes is showing the licit origin of his other wealth. The convicted can turn away this question by merely showing the legitimate source of the wealth.

The researcher also firmly believes that the application of extended confiscation should not have to be restricted to Money Laundering and Financing Terrorism crimes. The scope has to be stretched to other crimes especially to corruption offence which carry a tremendous amount of money behind. Thus, the inclusion of the extended confiscation in the fullest sense will have its own fair share of contribution in recovering embezzled property.

#### **4.2.2.3.2 *In rem* civil action**

The third type of confiscation contained in the PSMLFT law resembles a non-conviction based confiscation system called in *rem* proceeding. An in *rem* proceeding is a lawsuit directed towards a property. The judgment given is detached from the person and enforced upon the specified property.<sup>39</sup> This holds true for in *personam* action as well. The application of in *rem* proceeding varies among jurisdictions.<sup>40</sup> As discussed under Chapter Three, the US uses the radical form of in *rem* proceeding. The federal forfeiture law authorizes the use of in *rem* proceeding without any precondition over any kind of property.<sup>41</sup> The authorized state organ can proceed against the property directly regardless of the owner's presence or absence. The civil forfeiture claims in this case take weird names like State v. \$1million and the claimant or any interested party challenging the confiscation is notified as an intervening third party.<sup>42</sup>

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<sup>39</sup>Colin King, (Dr.), 'Using Civil Processes in Pursuit of Criminal Law Objectives:' A Case Study of Non-Conviction Based Asset Forfeiture, International Journal of Evidence and Proof (2012) No. 337, p.16, Available at <http://www.vathek.com/ijep/contents.php?vi=16.4> (Accessed on March 1,2017)

<sup>40</sup> See the discussion on chapter three

<sup>41</sup>In Us any property except real property and properties whose value does not exceed \$500 million other than monetary instruments are administratively forfeitable, if the administrative confiscation if challenged the police can either go for civil or criminal forfeiture

<sup>42</sup> A sample in rem action case is annexed

In contrast the *in rem* action in the PSMLFT law takes significantly different picture in the Ethiopian. An *in rem* proceeding is a recourse sought only upon three conditions :- when the perpetrator is unknown, has fled from justice or is dead.<sup>43</sup> When these conditions materialize and the court is convinced that the evidence is sufficient the recovery process goes on taking different procedural paths. In the first situation when the perpetrator is unknown but there is a property suspected of being proceeds of crime, the only option will be bringing a confiscation claim against the property itself. This resembles the pure *in rem* action confiscation. When the conviction is hindered due to death or fleeing of a perpetrator there are two options. If the perpetrator passed away or absconds before prosecution once again the confiscation claim follows the *in rem* proceeding and targets the property itself. On the other hand, if the perpetrator died or fled after prosecution the confiscation claim will continue to be part of the criminal charge.<sup>44</sup> In all these scenarios the court renders confiscation order when sufficient evidence that implicates the property to be fruit of crime is available.

#### **4.2.3 Legislative confiscation**

Under the Anti-terrorism Proclamation No. 652/2009, the virtual power of confiscation is retained by the House of Peoples` Representatives (the House). According to *article 27/1* “*Proceeds of terrorism or property of a terrorist organization or a terrorist shall be forfeited by the government.*” Based on Art. 25(1), the House is entrusted with the power of proscribing and de-proscribing an organization as terrorist organization when the matter is presented to it by the Government. One of the effects of such proscription is loss of legal personality,<sup>45</sup> which in turn engenders forfeiture of property belonging to terrorists.<sup>46</sup>

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<sup>43</sup> PSMLFT Proclamation no .780/2013 Art. 35(3)

<sup>44</sup>Federal Prosecutor V.Sheikh Ibrahim, cited above note 23.& FEAC VS. Yosef , cited above, note 26 in the former case when the accused passed away. the criminal bench closed the case and Federal prosecutor had to bring a civil action in the 8<sup>th</sup> civil bench. In the latter case when the accused fled the Federal High court second bench has given a confiscation order..

<sup>45</sup> Anti Terrorism Proclamation no.652/2009 (Art 25(3) Where any organization is proscribed as terrorist in accordance with sub-article (1) and (2) of this Article, its legal personality shall cease.

<sup>46</sup> Id. Art.(27)(1) reads Proceeds of terrorism or property of a terrorist organization or a terrorist shall be forfeited by the government. (2) Where a criminal charge is instituted on the matter the public prosecutor may request for an order of forfeiture within the same criminal charge file. If criminal charge is not instituted the application may be presented to the court under a separate file.

The cumulative understanding of these provisions shows the preclusion of the judiciary from deciding forfeiture issue pertaining to property of a terrorist or terrorist organization. The proclamation authorizes the government to forfeit any property belonging to terrorist organization or proceeds of terrorism from those earmarked as a terrorist by the House. The mentioning of the court under sub article (2) of article 27 principally presupposes the presence of a criminal prosecution. In such situations still the role of the court is not to weight evidence and give ruling on confiscation of the property. It is rather to order forfeiture on the same file for enforcement purpose irrespective of the outcome of the criminal charge.

This idea is further cemented in the second limb of the same sub-article which reads ‘if criminal charge is not instituted the application may be presented to the court under a separate file.’ This makes the criminal prosecution unimportant in determining issue of asset confiscation. The main role courts play in the forfeiture process for terrorist organizations and terrorists labeled as such is restricted to the provision of a confiscation order following the decision of the House for mere enforcement purpose. The main importance of the court will be entertaining the claim of parties that have a lawful interest on the property subjected to confiscation.<sup>47</sup>

Courts are back to their normal business during the investigation period. At this stage courts authorize the seizure and freezing of properties suspected of being used to commit a terrorist act as well as to hear an appeal from parties who have a legitimate interest over the seized property and consequently lifting the order when the complaint of the parties is found appropriate<sup>48</sup>

Such a radical anti-terrorism law can also be a variant of non-conviction based confiscation designed to denude terrorists and terrorist organizations summarily of any property they own regardless of its legitimate origin.

#### **4.2.4 Administrative confiscation**

The conviction based and civil action confiscation systems are judicial forfeitures that rely up on the decision of the court. Apart from this, there exists a non-judicial administrative forfeiture system. Administrative forfeiture is an *in rem* action that allows a legally entrusted state organ to forfeit property without court involvement. It is recognized as the cheapest and most efficient

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<sup>47</sup> Proclamation 652/2009 Art.(27(3) reads before making forfeiture order under sub article (1) of this Article, the court shall give every person appearing to have an interest in the property an opportunity to be heard.

<sup>48</sup> Ibid Art 26

means of confiscation that ends within the bureaucracy of an authorized government agency.<sup>49</sup> Administrative confiscation has different nature and scope in different countries. In US administrative confiscation power is given to different organs such as the Department of Justice, the Federal Bureau of Investigation (FBI) and the Customs Service.<sup>50</sup> The power of these organs is restricted to confiscation of property not exceeding five hundred thousand US dollar except cash and monetary instruments; on the other hand real property is altogether precluded from the ambit of administrative confiscation.<sup>51</sup> In Ethiopia, administrative forfeiture power is entrusted to the Revenues and Customs Authority<sup>52</sup> and it operates parallel to the criminal prosecution.<sup>53</sup> Unlike the US system, the Ethiopian law does not put a ceiling on the value and kind of forfeitable goods. Property of any value and kind is subject to forfeiture.<sup>54</sup> While the simplicity of the procedure administrative confiscation follows is seen as an advantage, in contrast the short cut procedure is severely criticized for violating due process right. To strike a fair balance the law has devised an internal complaint lodging procedure and a court appeal procedure on a fundamental error of law.<sup>55</sup>

Before the introduction of administrative confiscation, a non-conviction based asset recovery system was tried for the first time in the Customs Re-establishment Proclamation No. 368/2003. This law had a single provision that allowed the use of a lenient a civil standard of evidence for confiscation matters when the accused is freed from criminal liability.<sup>56</sup> This was however found inefficient to address the exigent problems. Moreover, the non conviction based confiscation claim was dragged into a protracted civil litigation.<sup>57</sup> It is with a view to remedying these challenges why administrative confiscation is brought in to the asset recovery regime.

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<sup>49</sup> Jacek W.Lentz, [types of asset forfeiture in California](http://www.assetforfeituredefender.com/resources/types-of-asset-forfeiture-in-california), Available at <http://www.assetforfeituredefender.com/resources/types-of-asset-forfeiture-in-california>, (Accessed on March 9 2017) After exhausting the administrative procedure there is a court appeal procedure.

<sup>50</sup> Alice W. Dery, "Overview of Asset Forfeiture," *Business Law Today*, (2012), America Bar Association, P.1 such as the Department of Justice, the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Customs Service, the Internal Revenue Service (IRS) or the Bureau of Alcohol, Tobacco and Firearms (ATF)( Jacek )

<sup>51</sup> Ibid.

<sup>52</sup> Proclamation no.859/2014 Art.143 &147

<sup>53</sup> Id. Art 148(9)

<sup>54</sup> Id.Art. 54 Art.147(1)

<sup>55</sup> Id.Art.54 Art 147(6)

<sup>56</sup> Proclamation 368/2003 Art.80(3).

<sup>57</sup> Interview with Ato Amdemichael Getachew , Cited above note 14

#### 4.2.5 Concessive Confiscation

Concession is another variant of non conviction based confiscation system introduced by proclamation 883/2015.<sup>58</sup> This approach is designed to recover misappropriated property through negotiation made between the state and the suspect or the accused.<sup>59</sup> Concession facilitates an opportunity for the offender to forfeit all the advantages obtained from his criminal act in exchange for exoneration from criminal liability. This approach is particularly used when the investigation process is cumbersome to find evidence and to trail the route of the proceeds of the crime; or even if there is a sufficient evidence to mount on criminal prosecution it is hardly possible to bring to justice the runaway offender who is willing to return the proceeds of crime in exchange for exculpation from criminal liability.<sup>60</sup> Negotiation is also applied to settle petty corruption offences when initiating full blown criminal process is found to be not cost effective to let the state focus on grand corruption cases.<sup>61</sup> This approach is also drawn on when the criminal charge does not ensure public interest;<sup>62</sup> and the offender is permanently ill that the criminal punishment can barely achieve its purpose.<sup>63</sup>

Concession has elements it shares with civil action. When institution of a criminal charge is impeded by insufficiency of evidence both civil action and negotiation can be used. When this scenario materializes negotiation is by far preferable to civil action. This is because the latter approach is subjected to a protracted civil litigation which makes it an expensive process. The researcher is of the opinion that, in so far as both are non conviction based approaches with an ultimate goal of recovering asset; it is wiser to make concession a primary choice. Similarly, when the permanent illness of an offender has obstructed the institution of a criminal proceeding, it is well again to settle via negotiation before instituting a civil action.

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<sup>58</sup> Art. 15 of Proclamation 883/2015 The Revised Federal Anti corruption Establishment Amendment Proclamation. Reads ‘ to terminate corruption investigation or corruption charges by ensuring forfeiture of the advantage obtained from the crime’ This is a proclamation that amended Proclamation 433/2005

<sup>59</sup> The power of FEAC is given to the FAG by proclamation no 943/2016

<sup>60</sup> Interview with Ato Gebru, Cited above note, 1( The interviewee was a participant in of the drafting committee)

<sup>61</sup> Ibid.

<sup>62</sup> Id. For example when the suspect or the accused is a lone sub specialist surgeon in the country dropping the criminal case via negotiation will by far protect public interest.

<sup>63</sup> Id. The deterrent and rehabilitative goals of a criminal punishment cannot be achieved by prosecuting a person who is permanently sick and on bed.

On the other hand when the offender flees from justice, it has quite different connotation in both approaches. Under the civil action system, when the offender absconds, there is a restrained property belonging to the runaway offender and the state is on the safe side with regard to recovering the proceeds of the crime. In contrast in case of a runaway negotiator the state is bare hand neither the offender nor the embezzled asset is under its control. As a result, the state is forced into negotiation with an absconding offender to recover the property in exchange for dropping the criminal case. As this is a choice between something and nothing, negotiation is a good design to recover proceeds of crime which fall outside the ambit of criminal and civil confiscation.

Even so, more than two years have elapsed since the promulgation of this law, there is no a single case settled via negotiation so far.<sup>64</sup> This is principally attributable to the absence of a regulation that provides detailed rules and procedures on the enforcement of the law.<sup>65</sup> The researcher urges for the prompt enactment of a regulation to put the law in to practice. This will have a considerable contribution in the asset recovery regime by bringing cases which have by far less probability of success under a negotiation table. Furthermore, when there are shared factors, choosing this approach instead of civil action is wiser and cost effective.

### **4.3 Asset Recovery Based on Unlawful Enrichment Law**

#### **4.3.1 Unlawful enrichment law in the Civil Code**

The idea of unlawful enrichment is found both in the civil and criminal law. It is thus imperative to make a brief look at of the unlawful enrichment law in the civil code and the legal behavior it regulates. To start with, in both the criminal and the civil contexts unlawful enrichment has the same objective of recovering property from a person that has improperly enriched oneself. But both have different causations. The unlawful enrichment laws of the Civil Code are part of the law of obligations that stem from a civil relationship to govern matters not covered by contract and tort.<sup>66</sup> It establishes debtor creditor relationship and is claimed against the debtor when one

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<sup>64</sup> Ibid

<sup>65</sup> Ibid and Art. 16 of Proclamation 883/2015, cited above note 58

<sup>66</sup> Discussion with Professor Tilahun Teshome, March 23, 2017

has enriched himself by the work of another or when one effects an undue payment.<sup>67</sup> A case in point is unlawful enrichment of one of the spouses from the common property in a spousal relationship<sup>68</sup> and when a minor has enriched himself by causing damage on the interest of the other.<sup>69</sup>

A related point worthy of a glimpse view is the civil action rule authorized in the criminal procedure law that gives a right to bring civil action when the accused is exonerated.<sup>70</sup> Article 158 of the code reads '*Independently of the involvement of the criminal prosecution, every person damaged by a criminal offence is free to take action under civil law.*' (Emphasis supplied) This may resemble a non-conviction based civil recovery. While it is true that it is a non-conviction based recovery, it is still dependent upon the existence of cause of action.<sup>71</sup> For example, in many of breach of trust offences committed in organizations when the prosecutor closes the case for insufficiency of evidence to mount a breach of trust criminal prosecution the organizations institute a separate civil suit to recover the property. This is still based on the civil relationship established by the employment contract. In general, the unlawful enrichment provisions in the civil code are not appropriate to recover proceeds of any crime. They are germane when there is a breach of obligation that emanates from a civil relationship.

#### **4.3.2 Unlawful Enrichment in the criminal Law**

Unlawful enrichment law is one of the asset recovery tools used in a number of jurisdictions. It takes varied names in different jurisdictions, illicit enrichment, unexplained wealth, unjust enrichment, misconduct by public officials etc. This act is criminalized<sup>72</sup> and named 'possession of unexplained property' in the Ethiopian corruption law. As much as its name, the nature of unlawful enrichment law has varied attributes.<sup>73</sup> Among international anti-corruption instruments

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<sup>67</sup> Art. 2162 &2164 of the Civil Code Proclamation of 1960

<sup>68</sup> Article 88 of the Revised Family code Proclamation no 213 /200

<sup>69</sup> Id. Art.303

<sup>70</sup> Art 158 of the Criminal procedure Code Proclamation 1961

<sup>71</sup> Ibid. and Discussion with Professor Tilahun Teshome, cited above note,66

<sup>72</sup> In many jurisdictions like USA and Western European countries Unlawful enrichment is not a criminal act.

<sup>73</sup> Lindy Muzizla and others, On the Take; Criminalizing Illicit Enrichment to Fight Corruption, (2012), Washington D,C: World Bank P.13 These elements are persons of interest, period of interest, conduct of enrichment (that is, the significant increase in assets), intent (including awareness or knowledge), and the absence of justification. UNCA defines it as 'a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income when committed intentionally' Article 1(1) of AUCPCC);defines it as the " the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in

the Inter-American Convention against Corruption (IACAC) takes the precedence in criminalizing unlawful enrichment and articulates it mandatorily followed by the African Union Convention on Preventing and Combating Corruption (AUCPCC), and UNCAC.<sup>74</sup> All the three instruments basically espouse the same idea except some differences. UNCAC and IACAC restrict the scope of persons targeted by unlawful enrichment laws to public officials only in contrast AUCPCC further stretches it to embrace every person possessing unexplained wealth. UNCAC makes illicit enrichment an intentional crime and exculpates officials whose wealth is increased without their knowledge<sup>75</sup>. On the other hand, IACAC restricts the applicability only to the period the official was in office.

In a similar fashion, we find variation among definitions of illicit enrichment provided in criminal laws of jurisdictions. To see randomly from countries the Stolen Asset Recovery initiative (STAR) selected for study, in Sierra Leone, the scope of illicit enrichment is literally limited to public servants<sup>76</sup> and in India the scope is a little bit wider and pulls other people when they are suspected of possessing wealth on behalf of public servants; in addition the India law puts time precondition that limits the liability to the period the official is in office.<sup>77</sup> Structurally, Columbia has a separate illicit enrichment law for private individuals.<sup>78</sup> Pakistan on

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relation to his or her income. IACAC on the other hand defines it as a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.

<sup>74</sup> Id. The Inter-American Convention against Corruption (IACAC) adopted in 1996, African Union Convention on Preventing and Combating Corruption (AUCPCC), (approved in 2003) the multinational instrument UNCAC adopted in 2003 and came into force in 2005

<sup>75</sup> For example when the fund in the bank account of the official increases without his knowledge

<sup>76</sup> Id (1) Sierra Leone Anti Corruption Act of 2008 Part IV any person who, being or having been a public officer having unexplained wealth, (a) maintains a standard of living above that which is commensurate with his present or past official emoluments or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, commits an offense

<sup>77</sup> Karen zadoyan and others, International Experience of the Criminalization of Illicit Enrichment, and the Possibilities of Criminalizing Illicit Enrichment in Armenia, (2014) Yerevan, P.5. @ <http://iravaban.net/wp-content/uploads/2014/12/Illicit-enrichment-Eng.pdf> (Accessed on March 15, 2017) India Prevention of Corruption Act of 1988, Article 13 states, "Criminal misconduct by a public servant. (1) A public servant is said to commit the offense of criminal misconduct, if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. This offense is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

<sup>78</sup> Lindy Muzizla and others, On the Take: Criminalizing Illicit Enrichment to Fight Corruption, Cited above note 73. P.13. Act no.599 of 2000. Criminal Code, of Columbia Article 327, provides for "the illicit enrichment, for private individuals." Whoever directly or through another person obtains, for his own benefit or for the benefit of a third party, an unjustified increase in assets, when it is determined to have been derived, in one form or another, from criminal activities)

the other hand has a broadly articulated provision uniformly applicable to public officers and other persons.<sup>79</sup>

Corruption offence is characterized by its clandestine nature. This makes the process of evidence collection intricate and discouraging. One of the strategies designed to mitigate problems associated with obtaining evidence is criminalizing illicit enrichment. The illicit enrichment eases the burden of proof the prosecutor assumes to a merest showing of the imbalance between the wealth of an accused and his lawful income.<sup>80</sup> Without the need to probe where it is sourced from.

Until the 2004 criminal code which came up with a provision that targeted government servants' unlawful enrichment was not an illegal act.<sup>81</sup> A decade and a year later it was amended to embrace employees of public organizations and other persons possessing property on their behalf.<sup>82</sup> These two step moves in the law of unlawful enrichment clearly show the pervasiveness of the problem and the corresponding gradual response of the state to resolve the problem. The researcher argues for a one more step forward action to stretch the scope of unlawful enrichment law to any person to make it comprehensive.

The unexplained wealth law differs in its scope and element among jurisdictions. In the category of persons targeted Pakistan and Columbia have a comprehensive illicit enrichment law uniformly applicable to any person without distinction. Time wise, in India Illicit enrichment is restricted to the property or fund one has obtained while in office. On the other hand in countries like Argentine cancellation of debt and extinguishment of obligations constitute an illicit enrichment.<sup>83</sup> In Paraguay similarly services afforded including debts cancelled to the accused, the spouse and first and second degree blood line relatives are regarded as an increase in wealth.<sup>84</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Nelly Gacheri Ksamunde, The Crime of Illicit Enrichment Under International Legal Regime, Available at <http://kenyalaw.org/kl/index.php?id=1891> (Accessed on March 14,2017)

<sup>81</sup>.Art.419 of the Criminal code

<sup>82</sup> Art. 21 of Proclamation 882/2015

<sup>83</sup> Lindy Muzizla and others, *On the Take; Criminalizing Illicit Enrichment to Fight Corruption* , Cited above note 73. P.19

<sup>84</sup> Ibid

To see the Ethiopian unlawful enrichment approach against this backdrop, with respect to category of persons targeted, the 2004 Criminal Code was limited to public servants and persons other than public servants were targeted only when they were suspected of possessing properties on behalf of public servants. Employees of public organizations were included by the 2015 proclamation that provides for corruption offences.<sup>85</sup>

Although Ethiopia has ratified the African Anti-corruption Convention which extends the reach of illicit enrichment to any private person<sup>86</sup> the legislator has preferred to distance private individuals from the territory of illicit enrichment. However by bringing employees of public organizations and any other person possessing wealth on behalf of the suspect in to the domain, the Ethiopian approach holds a middle ground between the two extremes, i.e, countries which have restricted the scope to the public officials only and countries which have lengthened it to get hold of any private individuals.

Jurisdictions do also have disparity in their understanding of what constitutes wealth. With a surface reading, the Ethiopian unjust enrichment law seems to focus on the covertly visible increase of wealth. The law is silent whether or not cancellation of debt, extinguishment of obligations and other services offered amount to unexplained wealth. In the practice, there are some specific cases which show debt payment as an instance of increase in wealth. In the case between FEAC v. Melaku Fanta *et'al*, one of the facts presented against the accused in the possession of unexplained property charge is the 1,058,266.77 debt payment the accused effected to Hibret Bank.<sup>87</sup> However, in majority of cases the investigation disregards debt payments and extinguishment of obligations as an increase in wealth. In unlawful enrichment cases what the investigators often do is writing letters to all banks requesting evidence if there is a fund in the name of the suspect and writing letters to the transportation offices, woreda and sub-city

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<sup>85</sup>Article 21 of proclamation 881/2015 reads (1)'any public servant or employee of public organization being or had been in office who (a) a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; orb) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means,(2) Where the Court, during proceeding under subarticle(1)(b), is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.

<sup>86</sup> Lindy Muzizla and others, *On the Take; Criminalizing Illicit Enrichment to Fight Corruption*, cited above note,72

<sup>87</sup> FEAC V. Melaku Fanta and others Federal High court 15<sup>th</sup> bench file no141354

administrations requesting evidence if the suspect owns vehicles and other immovable properties.<sup>88</sup> This is even done when there is specific information from whistle blowers.<sup>89</sup>

The advantage of an illicit enrichment is that the prosecution is expected to show the disparity between the lawful income of the suspect and the actual wealth. If properly exploited it is a strong and effective asset recovery tool that can significantly help the asset recovery effort. The effectiveness of the system is however challenged by different factors.

The major problem the investigation and the prosecution practically encounter is orchestrated witnesses and documents. The accused in many of unexplained wealth cases meet the evidentiary burden by simply arranging defendant witnesses who can testify to them deceitfully as if they obtained the money from the witnesses.<sup>90</sup> Some witnesses corroborate their testimony with a prearranged loan documents and cheques issued to the accused to make up the legitimate origin of the property.<sup>91</sup> Others testify orally as if they gave money to the accused without any supporting documentary evidence.<sup>92</sup> What makes the problem worse is courts are willing to accept the testimony of the defendant witnesses and orchestrated loan documents making a lesser effort to inquire into the witnesses' source of wealth.<sup>93</sup> Relying on these items of evidence, courts free the accused by informing the prosecutor to make a separate investigation of the wealth of the witness.<sup>94</sup> This is however hindered by lack of legal framework that enables to move on the licit origin of witnesses' wealth.

As it stands now, the scope of the unexplained property law has a delineated application limited to public servants and employees of public organizations and other façade persons possessing on their behalf only. This prevents the state organ from proceeding against the wealth of the

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<sup>88</sup> Interview with Ato Birhanu Abate, Chief Investigator at the Federal police crime investigation division, March 22, 2017 ( Until July 20016 Chief investigator at FEAC)

<sup>89</sup> Ibid

<sup>90</sup> Interview with Ato Gebru Gebeyehu, cited above note 1

<sup>91</sup> In the possession of unexplained property accusation brought against Ato Tesfaye Legesse former Employee of Ethiopia and Addis Abeba Road Authorities Investigation File no8965/2006 the suspect brought a witness and a 2 million birr cheque issued to him two times by the witness. The FEAC prosecutor closed case concluding that the property has legitimate origin. Based on the whistle blowers complaint on this decision the case is being investigated again again.

<sup>92</sup> Interview with Ato Gebru Gebeyehu, cited above note 1

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

defendant witness; who are in most cases traders and in a considerable number of cases highly paid employees of nongovernmental organizations and international organizations<sup>95</sup>

Trimming down the scope to public officials and employees of public organizations is a challenge on the state not to proceed against any private person who may have accumulated ill gained property. These days it is common to see overnight millionaires. In a backward country like Ethiopia that almost entirely relies on cash transaction and poor investigation skill and system, it is hardly possible to track the source of one's wealth unless the burden is shifted to the suspect to show the lawful origin of the property.

Broadening the scope of illicit enrichment law like Pakistan, Columbia and the African Anti-corruption Convention gives a state a right to bring into question any person owning fruit of crime without distinction. Furthermore, this fosters the objective sought in the illicit enrichment law in that it pierces the veil and exposes the true owner of the property who may be a public servant or employee of a public organization. Moreover, if the property has some illegitimate origin it will help in unraveling the underlying crime.

The special focus of the law on public servants and public organizations carries a justification designed to protect the direct public interest in those offices. But public interest should not have to be construed in the public office and public organization sense alone. The crime behind every ill gained wealth has a public interest cause. What is more, this restriction forewarns persons of interest to use a distant straw man to conceal the ill gained property.

Hence, to properly exploit this approach, the law needs to be revisited to expand its span to reach every person that is suspected of accumulating tainted property. Together with this an intensive training needs to be given to raise the understanding of professionals on the elements of unexplained wealth.

#### **4.4 Issues in Confiscation**

Civil confiscation is hailed for remedying the limitations the traditional conviction based confiscation system sustains. However this new trend still suffers from substantive and procedural shortcomings. Under this section, issues and gaps that seek further concern are discussed.

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<sup>95</sup> Interview with Ato Gebru Gebeyehu, cited above note 1, Interview with Ato Birhanu Abate, cited above note 86 in the case cited above note,83,the witness was an owner of a construction company .

#### 4.4.1 Civil Confiscation as a Substitute or as an Alternative?

States do have different practice as to when to initiate or use civil confiscation. In the US asset recovery system civil forfeiture law can be instituted at any time before, parallel to or after the institution of the criminal case given the party's right to ask for the stay of the civil proceeding if a parallel criminal proceeding is going on.<sup>96</sup> In contrast in UK recourse to civil confiscation is made only when the circumstances do not allow for criminal confiscation.<sup>97</sup> From the articulation of the civil action law, in Ethiopia civil confiscation is set as a secondary option used only when conditions necessary for criminal confiscation are not satisfied. A resort to an in *rem* civil action under the PSMLFT law is brought when it is impossible to convict the perpetrator<sup>98</sup> Under the RACSPREP similarly a civil action is filed when the criminal charge is discontinued or not instituted at all for whatever reason.<sup>99</sup> Thus, the Ethiopian approach to civil forfeiture resembles that of the UK used only when preconditions to initiate criminal confiscation are not fulfilled

#### 4.4.2 Jurisdiction

A key issue the civil forfeiture system left ambiguous is jurisdictional matter. It is provided that the Federal high court asserts criminal jurisdiction over Corruption and Prevention and Suppression of Money Laundering and Financing Terrorism offences.<sup>100</sup> Whether or not the criminal bench assumes jurisdiction over civil actions is not however clear enough. There is a view holding that since the use of civil procedure is warranted in the PSMLFT law and RACSPREP, the civil forfeiture actions accordingly follow the civil procedure rules.<sup>101</sup> However, this understanding is not fully espoused by the practice on the ground. In the case discussed above between the Federal Prosecutor and Sheikh Ibrahim Ali, the criminal bench which was well conversant with the ins and outs of the case did not entertain the forfeiture case

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<sup>96</sup> Jean B.Weld, *Forfeiture Laws and Procedures in United States Of America*, US Department of Justice. Asset Forfeiture and Money Laundering Section, Criminal Division, U.S Department of Justice , p.18 ([Available at http://www.unafei.or.jp/english/pdf/RS](http://www.unafei.or.jp/english/pdf/RS)) (Last accessed on April 16,2016)

<sup>97</sup> Thomas Jaggar and Mark Sutherland Williams, "Civil Recovery then and now", *Criminal Bar Quarterly*, Issue 2,Criminal Bar Association Sweet and Maxwell, (2010),London P. 6.

<sup>98</sup> Art.35(3) of proclamation 780/2013

<sup>99</sup> Art. 32(2)(3) of proclamation 882/2015

<sup>100</sup> Art.7 of Proclamation no.434/2005, cited above note 15 & Art.56 of 780/2013

<sup>101</sup> Art.55 of proclamation 434/20 05 & Art 55 of Proclamation 780/2013 and Discussion with Ato Zelalem Fekadu on March 31, 2016 a senior prosecutor at the Federal Attorney General (The discussant was a coordinator of the "Asset Tracing, Restraining, Management and Recovery Team at the investigation and prosecution directorate of FEAC till July 2016)

between the prosecutor and the heirs when the accused passed away before conviction. The prosecutor was compelled to institute a civil action afresh in the civil bench<sup>102</sup> in contrast in the case between FEAC v. Yosef when the accused absconded the court gave confiscation order following the prosecutor's claim.<sup>103</sup> Such inconsistent practice of courts portrays the pragmatic side of the law and the need to resolve the problem.

#### **4.4.3 Gaps in the Procedure**

Currently, the utilization of the civil confiscation law is minimal and this might have covered up the magnitude of the gap in the procedure. However, with a gradual increase in the use of the law the procedural problem will pose a serious challenge in the enforcement of the law. It is therefore necessary to enact a self standing procedural law that befits the hybrid character of the civil confiscation system. Fundamentally issues of jurisdiction: - should the case be entertained in the civil or criminal bench; which level of court should assume the jurisdiction; is it the first instance or the higher court; what kind of criteria should be employed to determine the level of the court; is it the pecuniary value of the forfeitable property or the type of the underlying crime. A holistic procedural law that remedies gaps appreciated and overlooked in this research need to be clearly addressed.

#### **4.4.4 Gaps in the Scope and Elements of the Law**

This section tries to recap and appreciate the specific issues pertaining to the gaps in the substantive elements of the civil forfeiture laws, extended forfeiture and unlawful enrichment laws.

It is not far from obvious; corruption is one of the most prolific crimes committed clandestinely and that exists behind several Money Laundering cases. The fight against this malice is reinforced by the incorporation of civil forfeiture laws. While this is laudable, the adopted civil forfeiture law is not complete enough as it still harbors gaps that serve to channel misappropriated assets. The civil action rule in the corruption law has limited scope applicable only when criminal charge instituted against an accused is discontinued or when a criminal charge is not instituted at all. These circumstances presuppose the presence of a defendant that had been attending a criminal charge. This rule however fails to envisage possible scenarios that,

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<sup>102</sup>Interview with Ato Habtamu zewdie,cited above note, 25

<sup>103</sup> Interview with Ato Bekalu Tamene, cited above note, 26, in this case absence of a challenging party might have eased the process.

may happen when the suspect passes away before investigation or prosecution, or when the commission of the crime is unmasked after the death of the offender or when the owner of proceeds of crime is unknown. These circumstances are addressed in The PSMLFT law. The civil action rule in the RACSPREP has to follow suit and make emendation.

The extended confiscation system is another area of law the research believes needs a review. The perception of extended confiscation is inspecting the legitimacy of any other property belonging to an accused. The extended confiscation version included under the PSMLFT proclamation is narrower that confines the range of the law to Money Laundering and Financing Terrorism law only. Plus its application is restricted to properties obtained in the past five years and particularly linked to the case the accused is convicted.

It is the opinion of the researcher that the breadth of the extended confiscation law has to be stretched to crimes other than Money Laundering and Financing Terrorism law. The extension of the law especially to corruption offences which carry tremendous amount of money behind will be of help in probing into the licit origin of other assets of the accused. In addition the researcher believes the five years time limit and the linkage requirement put in the PSMLFT law are barriers for further investigation of the legitimacy of the property. Ascertaining the licit origin of the property has not to be capped by a five years time limit and linkage requirement. The limitation should have to follow the normal period of limitation rules provided in the criminal law. The researcher opines the amendment of the extended confiscation in this line will have its own share of contribution for the recovery of misappropriated property.

The Unexplained wealth law is the other area the researcher believes to be worthy of re-consideration from two perspectives. The first pertains to the scope of persons the law targets. The unlawful enrichment law targets only public servants and employees of public organizations; other persons are watched out only when they are suspected of possessing property on behalf of the public servants and public organizations. The rationale behind narrowing the ambit to these groups of persons could be to give special protection to public property. Such constricted interpretation of the law will contravene the very notion of understanding crime as a public offence. Of course there are special crimes that are committed by special persons. But there is nothing new that makes the illicit enrichment law to be special and to be restricted to public servants and public organizations since anyone can enrich himself unlawfully. The burden of

proving the licit origin of one's wealth should be assumed by anyone suspected of amassing wealth unlawfully as well. This understanding is buttressed by the AUCPCC and contained in the unlawful enrichment laws of Pakistan and Columbia which extend illicit enrichment laws to any person that has accumulated unexplained wealth. Furthermore, the illicit enrichment law can achieve its objective wholly when the scope is extended to embrace any person. This deprives the public officials and employees of public organizations of façade persons to conceal embezzled assets. It further helps in uncovering other crimes behind unlawfully possessed property.

In addition to the scope of targeted persons, there is also a shallow understanding on the basic meaning of unexplained wealth. The unexplained property provision is narrowly construed as an increase in wealth expressed in a life style and pecuniary gain. Other benefits like extinguishment of obligation, services offered and payment of debt are not clearly enunciated. Consequently, the practice in the investigation of unlawful enrichment crime seems to have disregarded these facts and it is mainly geared towards the actual wealth of a suspect.

Regarding concessive confiscation, while this approach has its own peculiar feature that allows the recovery of embezzled property via negotiation, the absence of a clear rule and procedure has restrained its enforcement. To make the best out of its good attributes the concerned organ needs to take a prompt action and issue a regulation.

#### **4.4.5 Potential Abuse**

Critics regard civil forfeiture law as abusive and against the cardinal principle of criminal law - 'no punishment without crime.' They emphasize that the state has to assume the full burden of proving the illicit origin of the property with the highest standard required for criminal confiscation. If the evidence is found to be insufficient to mount on a criminal prosecution and to convict the accused, the state should take the risk. Using the civil forfeiture laws to confiscate property instead is violation of constitutionally protected property right.

Of course, the lenient procedure the civil forfeiture system employs seems prone to abuse. Unless ethically enforced, it is also hardly possible to conclude that the traditional criminal confiscation system is immaculate and completely free from potential abuse either. But the extra stringent procedure followed in the criminal confiscation system significantly reduces the

vulnerability of the system from abuse. The stand of the researcher is that civil forfeiture law in itself is not abusive. Civil forfeiture is not a system that is thoughtlessly implemented and that entails automatic confiscation of a property. With a comparatively less cumbersome procedure it has its own approach designed to ensure protection of property right. To begin with it is not every single case that is dragged in to the civil forfeiture system. A resort to this approach is made when the evidence is found to be sufficient to indicate the commission of the crime and the property one has amassed is suspected to be the fruit of crime. Above all, civil forfeiture system is not a non-judicial asset forfeiture system. The suspect has every right to counter the civil action brought against him in court by proving the legitimate source of the property. The appellate mechanism is also there for a party aggrieved by the decision of the court.

Moreover, civil forfeiture has not to be narrowly understood and related to the insufficiency of the evidence alone. Civil forfeiture is also resorted to when other circumstances like death of the offender before investigation and prosecution happens, when proceeds of crime is found and the owner is unknown; when the offender enjoys immunity or flees from justice and when the criminal charge is withdrawn. When these scenarios materialize, it is against justice to let the offenders and their associates enjoy the fruits of their unlawful conduct. It is with a view to remedying such deficiencies of the traditional conviction based confiscation system why states made recourse to the civil confiscation system.

There are also views which regard civil forfeiture against the rules of *res judicata* and double jeopardy. In this respect as well the Position of the Thesis is that civil forfeiture is not a criminal proceeding directed against a person. It is rather a civil legal action brought against the property that represents the benefit of the unlawful activity. It does not involve issues of arrest, prosecution and conviction of a person. Its whole purpose is reclaiming property obtained from unlawful conduct. Hence, it does not raise issues of *res judicata* and double jeopardy

It is also the firm stand of the researcher that, the civil forfeiture law as it follows lower standard of evidence should not have to compromise the right of individuals unreasonably. As the procedure is lax it may tempt the enforcing organ to use it as a short cut. But, civil forfeiture as ordained in the law is an option that steps in finally after all possibilities for criminal confiscation have been exhausted. Above all, the civil forfeiture law has to be enforced with the highest ethical standard and professional as well as institutional integrity. Thus, if such reconciling

schemes are properly implemented, civil forfeiture laws will have by far outweighing advantage in fighting crime and recovering misappropriated property.

#### **4.5. Summary**

In sum, civil confiscation is a recent development in the Ethiopian legal tradition introduced by the Money Laundering and Financing Terrorism Law proclamation 780/2013 and the Anti Corruption Special Procedure Rule and Evidence proclamation 882/2015.

The Ethiopian civil forfeiture law system significantly takes after the different models discussed in the preceding chapter. The non conviction based confiscation linked to the criminal proceeding model which is applied when the criminal proceeding is discontinued and the standard civil confiscation model which is applied when the evidence is insufficient to mount criminal prosecution are incorporated under Article 32 of Proclamation 882/2015.

Non conviction based confiscation based on unexplained wealth model exists in the same proclamation with different approach. In the European model discussed under chapter three this approach is purely presented in a civil court by showing the discrepancy between the actual wealth and legal income of the respondent. In Ethiopia depending on the situation the case can be presented either in the criminal or the civil court. The extended confiscation model is also found under proclamation 780/2013. The basic difference between the Ethiopian approach and the European model is that, in the European case any property other than the one the accused is found guilty can be confiscated if the court believes that it is the proceed of crime, without the need to establish link, where as in Ethiopian case the property must be linked to the crime the accused is found guilty and must be found in the past five years before the institution of the criminal charge under litigation.

The Ethiopian approach to civil forfeiture has basic similarities and differences with the US and UK civil confiscation systems. Like the US federal forfeiture law the standard of evidence required to initiate a civil action is a preponderance of evidence.<sup>104</sup> With regard to the scope, The

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<sup>104</sup> Article 55 of Proclamation No. 434/2005, Revised Anti Corruption Special Procedures and Rules of Evidence Proclamation, makes reference to the civil procedure law

Ethiopian approach has opted for a narrow approach confining the applicability of the law to Corruption and Money Laundering and Financing Terrorism Offences. In contrast, the UK the civil asset recovery law has an across the board application to every crime without distinction. The US has also a good approach subjecting nearly two hundred and fifty selected crimes to civil confiscation. As to recoverable objects, the Ethiopian approach resembles the UK civil recovery law and precludes the instrumentalities of crime from the sphere of forfeitable properties. Concerning the protection of property right of persons with legitimate interest over the property, like the two systems, innocent third parties and those who have lawful claim are given procedural safeguard to challenge the confiscation.

In general, the integration of civil forfeiture law in to the Ethiopian legal system is a commendable development. However, the laws still suffers from substantive deficiency and implementation problem. It fails to exploit to the fullest the hindsight advantage as it still contains loopholes that may serve to siphon proceeds of crime and as it lacks clearly defined procedural law that assimilate the hybrid nature of civil forfeiture laws.

Beyond the limitation observed in the substance of the law, implementation is the other major problem witnessed in the civil forfeiture laws. The asset recovery system is still fettered with the traditional conviction based mentality. Thus, the concerned organ needs to work hard towards raising the awareness of those involved in the execution of the civil forfeiture law.

## **CHAPTER FIVE**

### **Conclusions, Findings and Recommendations**

#### **5.1 Conclusion and Finding**

Until recently the traditional mind setting towards crime fighting has centered on conviction and imprisonment of the accused. Confiscation of the proceeds of crime has been regarded as secondary. This approach has proved to be less effective in achieving the goal of criminal law as the fruits of the crime were available for a criminal's enjoyment at the end of a prison sentence. The deterrence effect of imprisonment becomes much more effective when combined with the strong asset forfeiture laws to deprive criminals of their motive behind the commission of crime in the first place.

The ineffectiveness of the conviction based confiscation system is mainly attributed to its limitation to target and hit the main motive behind crime, i.e., making a profit. This inadequacy is in turn partly blamed on the law itself. As criminal confiscation is premised on a guilty verdict, the extra stringent procedure and the highest standard of evidence required to secure the conviction of the accused makes the asset recovery endeavor very complicated. The conviction based confiscation is a convenient safe haven for offenders; in that the heavier burden of evidence imposed on the state gives an advantage for the accused to exculpate themselves from criminal liability and spare the proceed of the crime form confiscation by a merest flashing of doubt in the case.

In the normal course of things, when the preconditions are fulfilled to mount on a criminal prosecution conviction based confiscation is the preferred option. However, there are circumstances which make prosecution, and confiscation following conviction impossible. The suspect may die, may flee from justice; the suspect may enjoy immunity, the case can be withdrawn, the defendant can be exonerated from criminal liability due to inadequacy of evidence even if there are indicative facts for the commission of the crime . Fraught with these gaps, the recovery of misappropriated property based on traditional conviction based system is apparently a daunting task.

Thus, what should be done when such circumstances happen? Would it be fair to allow proceeds of crime to be enjoyed by the suspect or the accused or heirs and successors of the offenders?

The reaction at an international and national level to counter this problem was a retreat to the hybrid civil forfeiture system which enables the confiscation of ill gained property without a criminal proceeding and conviction by just bringing legal action against the property and using a relaxed civil standard of evidence.

While the civil confiscation system has these advantages it was not welcomed unanimously. It had to endure severe criticisms. A common criticism forwarded against this approach is that it is really ‘criminal forfeiture dressed up in civil clothing.’ This is to emphasize the fact that “civil forfeiture achieves the same objectives as criminal forfeiture but without the procedural safeguards and protections that apply to criminal proceedings.” The approach was criticized for violating the right to be presumed innocent and the double jeopardy rule. On the other hand, its proponents defend it arguing that civil forfeiture is not ‘a criminal but a civil proceeding intended to recover property obtained from unlawful conduct’ that has no bearing on the liberty of the person.

Amidst these contending views, civil forfeiture is gaining gradual acceptance. The modern version of civil forfeiture is said to have its root back to the 1780’s Admiralty Law of the US which is in turn said to have been influenced by the Deodand - guilty property fiction concept of the England medieval era. Currently, pushed by the inadequacy of the conviction based confiscation system, many jurisdictions have steadily assimilated the concept into their legal tradition.

The civilized and cashless economies are forced into the relaxed civil forfeiture system despite having an up-to-date technology and the required skilled human resource. For a stronger reason, in backward nations like Ethiopia which have an investigation system loaded with dearth of technology and skilled human power, enmeshed in a cash economy that makes tracing the proceeds of crime very burdensome, the introduction of the civil forfeiture system will have a meaningful effect in recovering tainted assets and fighting crime.

Except the attempt made by Customs Proclamation No. 368/2003 which included a solitary provision that allowed civil forfeiture, and except the international instruments it ratified, the Ethiopian legal tradition has been following a close door policy towards this system. This resistance has however finally succumbed to the civil forfeiture system little by little.

Literally speaking, all forfeitures undertaken without conviction are non-conviction based confiscations. In this line of understanding, the legislative confiscation sanctioned in the Anti-terrorism Proclamation No. 652/2009 which authorizes the House of Peoples Representatives to confiscate every property belonging to an organization or individual proscribed as terrorist; administrative confiscation pronounced under Proclamation No. 859/2014 which empowers Ethiopian Revenue and Customs Authority to confiscate goods caught in contravention of customs laws and concessive forfeiture which allows The Federal Ethics and Anti Corruption Commission to recover assets via negotiation as ordained by the Revised Anti Corruption commission Establishment Amendment Proclamation 883/2015 are non-conviction based confiscations not predicated on the conviction of the offender.

In the strictest sense however, the classical type of non conviction based civil forfeiture laws in Ethiopia are found in the Revised Anti Corruption Special Rules of Procedure and Evidence Proclamation No.882/2015 and the Prevention and Suppression of Money Laundering and Financing Terrorism Proclamation 718/2013.

The adoption of civil confiscation law into the Ethiopian legal tradition is a landmark achievement in the asset recovery regime and in the fight against crime. While its importance cannot be overemphasized, the civil forfeiture law in force fails to exhaustively exploit the hindsight advantage of recency. The civil action rule under the Revised Anti Corruption Special Rules of Procedure and Evidence Proclamation fails to envisage and close every possible loophole that may serve to drain off proceeds of crime. It is silent on how to deal with proceeds of corruption crime when the offender dies before or during investigation and prosecution; there is no legal way out available to confiscate proceeds of crime when the owner is unknown.

Jurisdiction is an issue that seeks a serious attention in the civil asset forfeiture realm. The inconsistent practice on the ground is a vivid portrayal of the problem. The research has attempted to give a small picture of the practice on the ground revealing the inconsistency stand of courts in this regard. There is an instance where a court declined to resume entertaining confiscation claims when the accused passed away before conviction. There is also a contrary case in point where courts gave a confiscation order accepting the confiscation claim when the accused absconded.

Lack of awareness to use civil forfeiture laws is what equally needs earnest focus. Despite the existence of a number of cases that can be entertained by the civil forfeiture system, except in two instances this researcher could not find further attempts to use civil confiscation laws from Corruption Crime and Cross Border Crimes Directorates of the Federal Attorney General which entertains major economic crimes including money laundering and financing terrorism cases.

The legal framework has also assimilated extended confiscation and unlawful enrichment laws as important asset recovery tools. The extended confiscation under the Prevention and Suppression of Money Laundering and Financing Terrorism Proclamation law has a narrower scope of application limited to Money Laundering and Financing Terrorism crimes. Likewise, the unlawful enrichment law is encumbered with scope limitation. It targets only public servants and employees of public organizations. Other persons come into view only when they are suspected of possessing of wealth on the suspect's behalf.

Together with the substantive gap, a problem worthy of attention in the unlawful enrichment law is lack of enough awareness on the clear meaning of what an increase of wealth means. There is a constricted understanding of unexplained wealth as the actually existing wealth of the person manifested in life style and pecuniary gain. Debt payments, service provisions and extinguishment of obligation are overlooked in the practice.

Besides, while there is a law that allows the recovery of proceeds of corruption crime through negotiation, regulations and directives necessary for its enforcement are not put in place so far. This has hindered the law from being translated into practice.

In sum the civil forfeiture laws, the extended confiscation rules, the unlawful enrichment and concessive approach are of paramount importance in recovering misappropriated assets and fighting crime. Without the need to overemphasize their importance, yet, in the opinion of this researcher, these laws still suffer from some substantive deficiencies and implementation problems that seek further consideration and rectification as recommended herein below.

## **5.2 Recommendations:-**

### **5.2.1 In rem civil action**

The civil action rule in the Revised Anti Corruption Special Procedure and Rule of Evidence proclamation in general presupposes one way or the other the

existence of a respondent person whose criminal charge is terminated for whatever reason or no criminal charge is instituted at all. What are not foreseen by this rule are scenarios which make finding the offender difficult or impossible. Plausible examples are when the owner of proceed of crime is unknown or when an offender is dead before investigation or when the commission of a crime is exposed after the death of the offender. In this regard the Prevention and Suppression of Money Laundering and Financing Terrorism Law contains a watertight provision that covers these situations. Amending the civil action law in the Revised Anti Corruption Special Rules of Procedure and Evidence Proclamation accordingly will fill in these gaps and make the civil forfeiture law complete.

### **5.2.2 Scope of Civil Forfeiture Law**

Besides an amendment in the substance of the civil forfeiture laws, the present researcher strongly calls for the overall application of the civil forfeiture laws in addition to corruption, money laundering and financing terrorism crimes. Apparently the *raison d'être* behind civil forfeiture law is to recover proceeds of crime. Nonetheless the civil forfeiture laws in force are particularly limited to corruption, money laundering and financing terrorism offences. The benchmarked countries US and UK have a good experience in this regard. In the former the civil forfeiture law subjects nearly two hundred fifty crimes and in the latter civil recovery has an across the board application over any crime. In so far as the aim is depriving offenders of the proceeds of crime and fighting crime, there is no good reason the researcher sees in curbing the scope to corruption, money laundering and financing terrorism law. Adopting either of these two benchmarked approaches is a good additional tool to recover assets.

### **5.2.3 Self standing Civil Forfeiture Law**

At this stage of the game, the civil forfeiture laws are not being put into practice at the required level. This has smothered the gravity of challenge associated with procedural matters. Ineluctably, with the gradual increase in the awareness and use of the civil forfeiture law the problem will become a serious impediment. It is necessary to enact a self-standing civil forfeiture law that fits in its hybrid nature.

#### 5.2.4 **Extended Confiscation**

This Thesis also appeals to a substantial amendment on the extended confiscation rule. The extended confiscation law in force has a narrower scope of application. Its ambit is limited to money laundering and financing terrorism laws only. The Thesis sees no rationale in limiting the sphere of the law to these crimes only. Extending its application to other crimes specially corruption offences which wield huge amount of money will have a meaningful effect in recovering embezzled asset.

The extended confiscation is further restricted by a time limit and link requirement. Properties subject to extended confiscation are those obtained in the past five years and particularly connected to the one the accused is convicted. The researcher believes such requirements exclude the opportunity to recover ill gained properties which are obtained five years before and not linked to the case. Revisiting the law and filling these gaps will be also an additional tool.

#### 5.2.5 **Unlawful Enrichment Law**

Possession of unexplained wealth under the Corruption Proclamation has a persons of interest restricted to public servants, employees of public organizations and others possessing the property on their behalf. The current researcher recommends the unlawful enrichment law be stretched to embrace any other person possessing proceed of crime. This has twofold benefits. On the one hand, it deprives the target groups a straw man to conceal the proceeds of their crime. On the other hand, the investigation of unexplained wealth of any other person will help in unraveling the crime behind, if any. There is no compelling reason in circling the application of the law around these groups of persons alone as the crime can be committed by any other person. If giving special protection to public resource is the rationale behind, that is unconvincing and contravenes the very essence of crime as a public wrong.

In addition to the target groups, the content of the law needs also further review. As the laws stands now, its scope gives the impression that unexplained wealth is only an increase in the actual wealth of the suspect manifested by life style and pecuniary gain. This has to be amended to include debt payments, service

provisions and extinguishment of obligation in clear manners. Along with this, professionals need to be sensitized to broaden the line of investigation bearing these facts in mind.

#### 5.2.6 **Concessive Forfeiture**

Why it is needed to introduce negotiation as an alternative asset recovery scheme is to regulate circumstances which fall outside the ambit of criminal and civil confiscation. However, this law is not substantiated by the requisite legal machineries to put it into practice and exploit its good attributes. The researcher calls for the issuance of detailed rules and procedures necessary for its enforcement. Furthermore stretching the scope of concessive forfeiture beyond corruption offences will have its share of contribution in recovering misappropriated property.

#### 5.2.7 **Awareness**

In addition to the gaps in the law, lack of awareness is a problem worthy of attention. Based on the random observation, discussion and interview held with prosecutors at the Federal Attorney General, the researcher does not lack the gut to conclude that civil forfeiture laws are extremely underutilized. There is a misapprehension of civil confiscation as remedy usable only when the accused is dead or absent. Although cases are being closed for want of strong evidence by the prosecutor and the accused being acquitted due to insufficiency of evidence civil forfeiture law is not being put into practice when such situations materialize. This is basically attributable to lack of enough understanding on the whys of civil forfeiture. The concerned organ has to aggressively work to inculcate the essence of the law.

#### 5.2.8 **Ethics**

Civil forfeiture system quite good as it is, yet, it merits special attention. The system is relatively lax and tempting for the state to use as a shortcut to avoid the stringent conviction based confiscation. The resistance to the approach by different scholars stems from this lenient procedure and its susceptibility to abuse. In fact, it is undeniable that the relaxed evidentiary burden privilege of the state

makes the system more prone to abuse. It is the firm stand of the researcher that the system should not have to compromise property right unreasonably. To prevent potential abuse:

Civil forfeiture should only be a last recourse used when conditions necessary to mount on a criminal charge are not satisfied. It must not be misused as a shortcut tool to avoid the evidentiary burden of the full blown criminal confiscation. Most importantly the law has to be enforced with the highest degree of professional integrity and ethical standard. Accordingly, the concerned organ has to aggressively work to instill professionalism in its experts to commit themselves to this cause.

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### **List of Interviewees**

Ato Amdemikael Getachew, Senior Prosecutor at the Federal Attorney General Economic Crimes Division former ERCA prosecutor, at FAG Bureau Lideta, March 10, 2017

Ato Habtamu Zewde, a Senior Prosecutor at the FAG, at FAG Bureau Lideta March 3, 2017

Ato Bekalu Tamene, Senior prosecutor and a team leader at the FAG and Former Senior Prosecutor at the “Asset Tracing, Restraining, Management and Recovery Team at FEAC before the establishment of FAG, at FAG Bureau Lideta, March 30, 2017

Ato Gebru Gebeyehu, Former Director of Investigation and Prosecution Directorate at the Federal Ethics and Anti-Corruption Commission, at FEAC bureau, March 29, 2017, at (FEAC)

Ato Birhanu Abate, Chief Investigator at the Federal Police Crime Investigation Division and former Chief investigator at FEAC, at FAG Bureau Lideta, March 22, 2017, at FEAC

Ato Zenabu Tadesse, Assistant Attorney General at the Office of FAG Economic Crime Division, Prosecutors in the former ERCA, at FAG Bureau Lideta, March 10, 2016, at FAG bureau

Discussion with Professor Tilahun Teshome, at AAU Law School, March 23, 2016

Discussion with Ato Zelalem Fedadu, Senior Prosecutor Corruption Crimes Directorate at FAG Bureau Lideta, March 30, 2017

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Ato Tesfaye Legesse, former Employee of Ethiopia and Addis Abeba Road Authorities Investigation File no 8965/2006



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, )  
U.S. Department of Justice, )  
Asset Forfeiture and Money Laundering Section )  
Criminal Division )  
1400 New York Avenue, N.W. )  
Washington, D.C. 20530, )

Plaintiff,

v.

ONE GULFSTREAM G-V JET AIRCRAFT )  
DISPLAYING TAIL NUMBER VPCES, ITS )  
TOOLS AND APPURTENANCES, )  
 )  
 )

Defendant. )  
\_\_\_\_\_ )

No. CV  
VERIFIED COMPLAINT FOR  
FORFEITURE *IN REM*

Case: 1:11-cv-01874  
Assigned To : Jackson, Amy Berman  
Assign. Date : 10/25/2011  
Description: General Civil

**COMPLAINT FOR FORFEITURE *IN REM***

Plaintiff United States of America, by and through the United States Department of Justice, pursuant to 18 U.S.C. §§ 981(a)(1)(A) and 981(a)(1)(C), brings this Verified Complaint for Forfeiture in a civil action *in rem* against One Gulfstream Aerospace model G-V aircraft (the "Defendant Aircraft") purchased by Ebony Shine International Ltd., bearing manufacturer's serial number 669 and International Registration number VPCES (Cayman Islands), its tools and appurtenances. As of October 12, 2011, the Defendant Aircraft was located in Equatorial Guinea ("E.G."). In support of this case, the United States states as follows: