

An Inquiry into the Effectiveness of Illegally Acquired Asset Management System in Tanzania

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Abstract

This paper is set to inquire into the effectiveness of illegally acquired asset management system in Tanzania. It briefly looks at what is offered by the law and what transpires on the ground. The paper is premised on the fact that the whole asset recovery process is meaningful if assets that are subject to forfeiture are available, properly managed, well kept and maintained. All this depends on whether from the initial to the final stage of the whole asset recovery efforts there were transparent, accountable, efficient and effective management of the assets seized and recovered. It is on this line of argument that asset management is said to be effective and profitable. Short of that the whole legal battle aiming at recovering the assets under consideration is doomed to a dead end. More so, recovered assets are additional resources for development activities. As such any neglect, which depreciates their economic value, diminishes their economic contribution to the nation's prosperity.

Keywords: illegally acquired assets, management system, forfeiture, exhibits, economic value

1. Introduction

There is a pressing need to critically analyse the present illegally acquired asset management system in Tanzania, hereinafter referred to as asset management system, paying attention to how asset management is dealt with.¹ It is well settled that the moment assets have been secured in the course of investigation, law enforcement agencies [LEAs] or any other authority to that effect will need to ensure the safety and value of the assets up until the assets are eventually forfeited or released. In case of release, it means that the assets are returned to the original owner. When the assets are well kept and properly managed, it means that no claim for damages may arise from the owner thereof. After all, such measures as seizure and freezing are temporary in nature. They do not permanently deprive owners of their assets but “to limit the free disposal of assets in order to ensure any financial liability established in judicial proceedings and, of course, to guarantee forfeiture.”² Moreover, the presumption of innocence on the part of the asset owners still prevails and should be respected by LEAs and all actors who are involved in the asset recovery process. The fact that asset recovery process takes so long, the need for asset management cannot be underestimated altogether. Emphasis is on ensuring that the assets remain in their origin states and economic values are maintained for the benefits of both the state and owners of the assets. The discussion in this paper is based on the present asset management system in the country. It among other things attempts to appraise the legal-regulatory and institutional framework for managing the seized and recovered assets. In the course of discussion, the paper identifies key players who are involved in the whole asset management business.

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¹ Asset management system determines the extent to which illegally acquired assets are properly kept.

² International Centre for Asset Recovery, *Development Assistance, Asset Recovery and Money Laundering: Making the Connection*, Basel Institute on Governance, Basel, Switzerland, 2011, p.18.

Legal and practical limitations to the transparent, efficient and effective asset management are also looked on. The discussion also touches on international approach to asset management with a view to underscore the extent to which the enabling legal-regulatory provisions in Tanzania are compliant thereof.

2 Relevance of Asset Management in Asset Recovery Processes

Asset management is relevant in the whole asset recovery process in Tanzania, which is conviction based. It is one of the essential elements that should be considered in the asset recovery process. This stems from the fact that once assets have been secured through provisional measures, authorities will need to ensure the safety of the assets until they are eventually forfeited or released.³ Management of such assets subject to forfeiture is one of the controlling mechanisms through which safety and value of the assets can be assured. It ensures that the assets neither revert again to criminals nor change hands to dishonest public officials for their personal benefits. It needs to be underscored that asset recovery process involves four interdependent stages namely, asset identification and tracing, preservation, forfeiture and disposition. In all these stages, asset management features prominently and in fact forms an integral part such that any mismanagement thereof affects the entire process of asset recovery.⁴ Just to highlight, among the evidence that is required to prove predicate offences beyond reasonable doubt is production of illicit assets as exhibits. Also it is expected that at the time when forfeiture order is issued by the court, assets are in their original forms and economic values maintained. It is more disheartening to note at the end of forfeiture proceedings that assets are nowhere to be seen or they are carelessly mishandled to the extent that they are useless in any form. The bottom-line here is that assets that are seized and preserved pending criminal proceedings or forfeited need to be well managed. The management thereof pays much attention to, inter alia, maintenance and preservation of assets' physical features and economic values. Thus any mismanagement or misappropriation to those assets defeats the purpose of depriving criminals of proceeds and instrumentalities of crime.

2.1 Justification of Asset Management

In view of what is discussed above, there is justification of accommodating an asset management aspect in the legal-regulatory and institutional framework dealing with asset recovery processes and mechanisms. There are costs that are involved in maintenance of the assets. Those costs include taxes that are due during the seizure or the cost of up-keeping in storage while the seizure is pending forfeiture order and the depreciation that the asset may have during its storage.⁵ All these costs require proper management. More so, asset recovery, in many jurisdictions including Tanzania, is conviction based. Prosecution is required by law to prove predicate offences beyond reasonable doubt. Any shadow of doubt may render the accused acquitted. Eventually the accused will definitely claim back the seized and preserved assets claiming lawful ownership.

If the assets were mismanaged or misappropriated, that will risk the state to incur loss through compensating him to the extent of the damage or mishandling. This malpractice on the part of those who were entrusted to look after the assets has far reaching effects. Apart from occasioning loss to the state coffers to the risk of claims by property owners, it also leads to the loss of public confidence in the institutions of justice.⁶ In addition, the very objective behind asset recovery cannot be attained if upon the court issuing a forfeiture order it is learned that the assets subject to the order have been rendered worthless through mismanagement. It has been stated that the recovery of instrumentalities and proceeds of crime prevents such instruments and proceeds being used to commit further crime; the proceeds being reintegrated into society as legitimate assets, and also to serve as deterrent to potential criminals. All these are possible if the assets are properly managed.

³ Brun, J-P. *et al.*, *Asset Recovery Handbook: A Guide for Practitioners*, Stolen Asset Recovery Initiative, The World Bank and UNODC, Washington DC, 2011, p.91.

⁴ Diwa, Z.M., *Managing the Proceeds of Crime: An Assessment of the Policies of Tanzania, South Africa and Nigeria*, Thesis Submitted in Fulfilment of the Requirements for the PhD in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape, 2016, p.30.

⁵ International Centre for asset Recovery, *Development Assistance, Asset Recovery and Money Laundering: Making the Connection*, Basel Institute on Governance, Basel, 2011, p.18.

⁶ Soko, C., *An Evaluation of Zambia's Asset Recovery Laws*, Research Paper Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws (LL.M) in Transnational Criminal Justice and Crime Prevention – An International and African Perspective, Faculty of Law, University of the Western Cape, October, 2013, p. 38.

2.2 The Role of Asset Management in Asset Recovery Processes

Asset management has a role to play in asset recovery processes and mechanisms. The main concern for authorities is to ensure that safety and value of the assets are maintained. It is thus pertinent that right from the time when assets are seized to the final stage of disposition, an analysis of the costs of managing the assets against the value likely to be realised on forfeiture should be undertaken.⁷ It is also within the ambits of managing the assets that records keeping in terms of detailed description of the assets and their conditions, including, where appropriate, photographs or video images should be properly kept. Moreover, it should be underscored that without proper management no one from LEAs or any other relevant institutions may be assured that there are appropriate limits placed to access to restrained assets. The role of asset management is conspicuously noticed during the forfeiture stage. In this stage asset management establishes the realisable value of the asset forfeited by deducting the costs of administration from actual value of the asset at the time of forfeiture.⁸

3. Basic Features of an Asset Management System

Properly so called asset management system has some basic features, which ought to be reflected in a legal-regulatory and institutional framework that is in place. They advocate high administrative integrity to institutions and individuals who manage seized or forfeited assets. Short of that there cannot be good administration in terms of preserving, managing and controlling of assets that are subject to forfeiture proceedings. Those basic features include the following:

3.1 Transparency

Transparency plays a key role in the asset management system. It has a double role to play. In the first place, it improves internal mechanisms of institutions, which are entrusted to take care, control and manage forfeitable assets that are managing assets by having close, constant and comprehensive supervision. In the second place, transparency creates an avenue through which interested asset recovery stakeholders and public as a whole are able to see or have access to what happens, if need be, in the asset management process. It eventually raises general public awareness regarding the extent to which seized assets or those which have been subsequently forfeited are managed. In order for transparency in the asset management regime to be underscored, an existing legal-regulatory and institutional framework on asset management should establish a mechanism through which records are properly kept. There should be databases for record keeping. Such records should comprise, among other things, assessed value of assets at the time of freezing/seizure, ultimate disposition; and in the case of a sale, keep records of the value realised.⁹ More so, there should be a room for independent auditors or similar experts in their capacities as oversight bodies to inspect and examine financial reports and asset inventories in order to determine compliance. Results of the examinations by oversight bodies should be made available to everybody, where appropriate.¹⁰ It is thus expected that the legal-regulatory and institutional framework in place should have provisions for all such.

3.2 Accountability

Applied to asset recovery, accountability forms one of the foundational pillars of a functioning asset management system. It ensures that officials, agencies or institutions charged with managing seized and forfeited assets do so in ethical, responsible and sustainable manner. As such, they are obliged to furnish information about their decisions and actions and to justify them to members the public or any interested stakeholders, including oversight bodies.¹¹ The information should enable them to know the manner in which the assets are handled throughout the forfeiture process.

⁷ Stephenson, K.M. *et al.*, *Barriers to Asset Recovery*, Stolen Asset Recovery Initiative, The World Bank and UNODC, Washington DC, 2011, p.96.

⁸ Diwa, Z.M., *op cit.*, p.33.

⁹ FATF, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery*, Best Practice Paper, October 2012, p.10, para.27(k).

¹⁰ European Union, *White Paper on Best Practices in Asset Recovery*, CEART Project, Published by Ministerio Del Interior, Madrid, Spain, 2009, p.43. Source: www.projectceart.org, accessed on 30th August, 2017.

¹¹ According to the G8 in its guide on *Best Practices for the Administration of Seized Assets* (2005), accountability can be enhanced by putting in place IT systems to track and manage inventory and costs. Source: http://www.coe.int/t/dgbl/monitoring/moneyval/web_resources/G8_BPAssetManagement.pdf.

As such the information should be denied only where it is deemed confidential. More important, beneficiaries of the proceeds of crime who are victims of the predicate offences should be availed all the information on what is the final order made regarding assets that were subject to forfeiture.

In the same vein, officials, agencies or institutions responsible for managing seized and forfeited assets are responsible and answerable for their decisions and actions and should suffer consequences thereof in the course of managing the assets. This implies that asset management is neither meant for self enrichment nor leaving room for any other malpractices by those who are entrusted to undertake it.

3.3 Efficiency

An efficient asset management system has an instrumental role to play in the asset recovery processes. The fact that economic value and original state of the assets are protected through efficient management system; final forfeiture stage can be meaningful through imposing a specific deterrence to criminals and effecting a restitution of criminally acquired assets to victims of the crime. The bottom-line is that it is impossible to achieve the main objectives of forfeiture if the economic value of the forfeitable assets is depreciated.

However, in order to have an efficient asset management system there should be appropriate legal-regulatory framework that enables the preservation of the economic value of assets in an efficient, transparent, and flexible manner.¹² Sufficient and appropriate resources should also be allocated, including a reliable source of funding,¹³ skilled staff¹⁴ and a sound system of monitoring and reporting work performance. An allocation of such resources is a sure way of attaining efficient asset management; hence achieving the main objective of asset forfeiture namely, depriving criminals of assets deriving from criminal activities.

3.4 Effectiveness

Asset management system must be effective in order to enable authorities responsible for managing forfeitable assets to do so as a matter of concern. The authorities are expected to take appropriate decisions and actions as part and parcel of the asset recovery process. For instance, the moment the authorities take their responsibilities effectively and timely especially where the assets are perishable or rapidly depreciating, they not only sustain the asset recovery process as a whole, but also minimise chances for damage or loss to such kind of forfeitable assets. It needs to be underscored that if recovered or seized assets are mismanaged or misappropriated, asset recovery will be rendered ineffective and it will lead to the loss of public confidence in the institutions of justice.¹⁵ Mismanagement of preserved assets will also expose state coffers to the risk of claims by property owners.¹⁶ It is therefore important that comprehensive and effective asset management provisions are incorporated in the legal-regulatory framework.

4. International Approach to Asset Management

It is internationally well settled that during the investigative process, proceeds and instrumentalities of crime subject to forfeiture must be secured to avoid dissipation, movement and destruction. Therefore when a court has ordered the freezing, seizure or forfeiture of assets, steps must be taken to enforce the order, using mutual legal assistance request for assets located in a foreign jurisdiction.¹⁷ In every case authorities need to consider how the targeted assets will be managed from the moment of seizure or freezing to beyond the issuance of a forfeiture order.¹⁸ Assets should be managed in order to ensure their safety and value.

¹² Brun, J-P., *et al.*, *Asset Recovery Handbook: A Guide for Practitioners*, StAR Initiative, Washington DC, 2011, p.91.

¹³ FATF, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery*, *op cit.*, Para 27(b).

¹⁴ *Ibid*, Para 27(e) and (f).

¹⁵ Soko, C., *op cit.*

¹⁶ *Ibid*.

¹⁷ See UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime*, Publishing and Library Section, United Nations Office, Vienna, September 2012, p.16, para.22.

¹⁸ *Ibid*.

The recognition for the management thereof stems from the importance attached to asset recovery in, among other things, efforts to combat transnational organised crime.¹⁹ It is thus necessary to avoid and manage some of the risks and liabilities involved in handling the assets because any attempt to tamper with them defeats the purpose.

4.1 The Role of International Community

In view of the above, the international community has a role to play in ensuring that asset management is effected both at domestic and foreign jurisdictions. It should assume facilitative and enabling roles in terms of capacity building, by developing global knowledge and providing guidance on effective ways of managing the seized and forfeited assets. That is so owing to the challenging situations that abound many jurisdictions, especially in developing economies. There are absent or inadequate measures to facilitate asset management. Those efforts are achieved through improving regional and international cooperation among states in respect of asset management orders issued by foreign courts; measures to maintain safety and value of seized or forfeited assets; enhancing institutional frameworks and specialised agencies dedicated to management of seized and forfeited assets and the creation of multi-stakeholder partnerships around management of seized and forfeited assets.

As such, states should be engaged to the extent of walking along what is expected by most of regional and international conventions and other instruments, including the United Nations Convention against Corruption, that dealing with asset recovery generally and asset management in particular is a shared responsibility among states and other stakeholders.²⁰ States should feel that apart from standing at their own feet under the spirit of self-help and empowerment, they have a collective responsibility to manage assets within and outside national boundaries. All in all, regional and international bodies should take up the leading roles.

4.2 International Conventions

The international community has been in a forefront in the fight against transnational organised crime, most of which generate enormous amounts of illicit assets. Its efforts to that effect have been witnessed through several conventions drafted and endorsed in this respect by the United Nations. The following discussion addresses some of the conventions, which have bearing either directly or indirectly on asset recovery generally and asset management in particular.

4.2.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which is considered to be the first international instrument to provide for asset recovery, was adopted in order to enhance international cooperation in the fight against narcotics.²¹ The adoption of the Convention was prompted by the unbearable situation where international narcotics trafficking has reached a point under which drug dealers had extensive ties in foreign countries with less possibilities of apprehension and prosecution. The Convention, which focuses on drug-related crimes, is the first international instrument to provide for asset recovery through creating a framework for international cooperation to bring to justice those persons who profit from drug trafficking. It requires each party to enact far-reaching domestic laws providing for the forfeiture of proceeds and instrumentalities of drug-related crimes.²² Despite the fact that the Convention does not explicitly provide for asset management, it is necessarily implied that by requiring each state party to enact domestic laws that provide for the forfeiture of proceeds and instrumentalities of drug-related crimes, asset management provision is included.

¹⁹ Centre for the Study of Democracy, *Management and Disposal of Confiscated Criminal Assets*, Policy Brief No.33, February 2012, p.1. Source: <https://www.files.ethz.ch/isn/142751/Policy33.pdf>; accessed on 20th December, 2017.

²⁰ Claman, D., "The Promise and Limitations of Asset Recovery under the UNCAC," in Pieth, M. (Ed.), *Recovering Stolen Assets*, Peter Lang, Oxford, 2008, pp.333-352, p.335.

²¹ The Convention was adopted in Vienna, Austria, on 19th December, 1988 and came into force on 11th November, 1990.

²² Art. 5(1). See also See Gurule, J., "The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?", *Fordham International Law Journal*, Volume 22, Issue 1, 1998, Article 2, pp.74-121, p.80. Source: <http://ir.lawnet.fordham.edu/ilj-all-issues/>; accessed on 24th December, 2017.

4.2.2 The United Nations Convention against Transnational Organised Crime (2000)

The United Nations Convention against Transnational Organised Crime (also known as Palermo Convention) is the main international instrument in the fight against transnational organised crime.²³

The Convention contains a wide range of provisions to combat organised crime and obligates member states to implement its provisions through enacting domestic legislation to that effect.²⁴ Regarding asset recovery, the Convention has forfeiture provisions. The provisions require member states to adopt measures that enable forfeiture of both proceeds and instrumentalities of crime within their domestic jurisdictions.²⁵ The Convention, however, does not have specific provisions on asset management. It leaves the matter for member states to develop their own mechanisms to manage the assets.

4.2.3 The International Convention for the Suppression of the Financing of Terrorism (1999)

The International Convention for the Suppression of the Financing of Terrorism (1999) requires ratifying states to criminalise terrorism, terrorist organisations and terrorist acts. Under the convention, it is unlawful for any person to provide or collect funds with the intent that the funds be used for, or knowledge that the funds be used to, carry out any of the acts of terrorism defined in the other specified conventions that are annexed to this convention.²⁶ The Convention seeks to prevent such acts by suppressing their sources of financing.

Concerning recovery of proceeds of crime, the Convention commits each state party to in addition to the prosecution of offenders, adopt appropriate measures for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth as well as the proceeds derived from such offences in order to permit their forfeiture where appropriate of such funds.²⁷ However, the Convention does not have express provisions on the management of the seized or forfeited funds. It leaves for state parties to develop their appropriate mechanisms for the administration of such assets.

4.2.4 The United Nations Convention against Corruption (2003)

The United Nations Convention against Corruption (UNCAC) is a very important international instrument in the fight against corruption throughout the world.²⁸ The Convention, which was adopted in Merida, Mexico in 2003, acknowledges the fact that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.²⁹ A key aspect of the Convention is that it obliges states to cooperate with one another in every aspect of the fight against corruption, including asset recovery, which is recognised as a fundamental principle of the Convention. It requires States Parties, in accordance with their domestic laws, to adopt “legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property.”³⁰

5. Asset Management System in Tanzania: The Legal and Institutional Framework for Managing Seized and Recovered Assets

The discussion has so far indicated that asset management is a fundamentally important aspect in the whole asset recovery at both national and international levels. As such, states are urged to establish legal and institutional frameworks for proper management of the assets.

²³ It was adopted by UN General Assembly resolution 55/25 of 15 November 2000 in Palermo, Italy and came into force on 29th September, 2003. It is also known as Palermo Convention for the city in which it was signed, i.e. Palermo, Italy.

²⁴ Schott, P.A., *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, The International Bank for Reconstruction and Development/World Bank, Washington DC, 2006, p.III-3. Source: www.siteresources.worldbank.org/.../ReferenceGuide...2ndSupplement.pdf; accessed on 26th December, 2017.

²⁵ See Art.12 of the Convention.

²⁶ Schott, P.A., *op cit.*, p. III-4. The Convention was adopted in 1999 and came into force on 12th April, 2002.

²⁷ Art.8. See also Klein, P., *The International Convention for the Suppression of the Financing of Terrorism*, United Nations Audiovisual Library of International Law, United Nations, New York, 2009, pp.1-5, p.4. Source: www.legal.un.org/avl/pdf/ha/icsft/icsft_e.pdf; accessed on 26th December, 2017.

²⁸ The Convention entered into force on 14th December, 2005.

²⁹ Para. 4 of the Preamble to the UNCAC.

³⁰ Art. 31(3) of the UNCAC.

Tanzania being part of the globe has also asset recovery legal-institutional regime, whereby asset management is an integral part. Whether asset management is given its due treatment or not, this part of the discussion attempts to inquire into.

5.1 The Legal Framework in Managing the Assets

Tanzania has a legal framework for managing the assets, which is provided for under the Proceeds of Crime Act,³¹ hereinafter referred to as POCA for ease of reference.

To start with management of assets that are under restraint, practice shows that the duty to manage them may be vested in a registered institution, the suspect himself or a trustee. The reason behind is that, following a restraining order issued by court upon application by the Director of Public Prosecutions, preservation of assets under restraining order does not normally involve physical control by LEAs. Circumstances will determine on whom one out of these should management of the proceeds or instrumentalities of crime suspected to be tainted property be placed.

As regards vesting the duty of managing assets under restraint in the registered institution, this is applicable where the institution has been dealing with the assets before the restraint order. Such assets include bank accounts, shares, stocks, bonds, treasury bills and any other assets which the suspect has been operating through the offices of such institution.³² The institution to which the assets will be entrusted will bar the suspect and other interested persons from the usual dealings with them.³³

Managing of assets under restraint may also be put under custody of a suspect or any other person whose custody the assets are found.³⁴ This happens when the court is satisfied that the suspect or any other person so found with the assets is trustworthy such that he will abide by conditions specified in the order. While the restraining order is still in force, the court may at any time make an additional order which it may consider necessary, including varying any conditions to which the restraining order is subject.³⁵

The court may as well put assets that are under restraint into the custody and control of a trustee appointed for that purpose by it [the court] if it is satisfied that the circumstances so require.³⁶ Among the circumstances that the court addresses its mind to them include nature of assets that are under restraint and some special or unique skills that may be required in the course of custody and control.

It would be noted that management of assets under restraint is somehow presumed to be simple and smooth. The fact that restraining order is normally an interim measure that does not involving depriving the suspect of his assets does away with management expenses and care of the assets. The only assignment is to ensure that conditions put by the court in the administration of assets under restraint are complied with.

The legal framework has also provisions on management of assets that have been seized and that are pending forfeiture. This is a means of preserving assets mainly where there are reasonable grounds to believe that it will not be safe for the assets to be under control of the suspect. He may dissipate the assets or tamper or deal with them in a manner that harms their evidential value or economic value, thereby defeating the whole purpose of asset recovery process. Thus seizure of such assets is effected in order to protect the assets and eventually maintaining their evidential value or economic value.³⁷ This explains why as opposed to management of assets under restraint where owners still maintain control thereof, management of seized assets involves physical control of the assets by LEAs or other responsible officials and institutions. The implication is that human and financial resources are involved to that effect.

³¹ CAP 256 R.E. 2002.

³² See Diwa, Z.M., *Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework*, Research Paper Submitted in Partial Fulfilment of the Degree of Masters of Laws: Transnational Justice and Crime Prevention – An International and African Perspective, University of the Western Cape, South Africa, 2013, p.50.

³³ *Ibid.*

³⁴ S.38 (2)(a) of POCA [CAP.256 R.E.2002].

³⁵ S.43 (b) of POCA [CAP.256 R.E.2002].

³⁶ S.38 (2)(b) of POCA [CAP.256 R.E.2002].

³⁷ S.31 of POCA [CAP.256 R.E.2002].

5.2 Key Players in Asset Management: LEAs and Institutions that are involved in Managing the Assets and their Roles

In view of what has been stated above, it is apparent that there are key players to facilitation of asset management. However, much as asset management is a shared responsibility whereby several institutions are involved, one of fundamental issues is the extent to which they play their respective roles to that effect. It is on this premise that this part of the paper goes into some details. Looking at the provisions of POCA, it is apparent that institutions responsible for asset management include the Inspector General of Police, the Director of Public Prosecutions, the Court and the trustee.

5.2.1 The Inspector General of Police

According to POCA, the administration of seized assets is vested in the Inspector General of Police (IGP) or other officers authorised by him.³⁸ It means that the IGP or officers so authorised by him should arrange for proper keeping of the seized assets and ensure that reasonable steps are taken to preserve them throughout the asset recovery process.³⁹ In practice it is through officers of different ranks who perform police duties under the instructions of the IGP in and throughout the country. Such duties include investigation of cases that are reported at police stations. In fact the Tanzania Police Force [TPF] is the lead investigative organ. It is the only law enforcement agency mandated by different laws to conduct investigation of all kinds falling under the Penal Code and other laws. TPF is therefore an institution charged with the duty of investigating most of predicate offences. As such a lot of proceeds and instrumentalities of crime believed to be tainted assets are seized in the course of investigation. Other law enforcement agencies have been conferred powers to duly conduct investigation but to specific areas in accordance with specific laws. On this note, Tanzania Police Force under general command, superintendence and directions of the IGP is the custodian of the seized assets subject to recovery throughout the asset recovery process and thereafter in respect of managing them.⁴⁰

In view of what has been stated above, it is expected that assets so seized should be well managed for the purposes of maintaining their evidential value as well as economic value. Any mismanagement arising out of mishandling or any other cause has far reaching effects in the whole asset recovery process. With that responsibility of managing assets bestowed on the TPF, it would be expected that legal-regulatory framework is in place to ensure effective, accountable and transparent performance. However, practice shows that there are a number of drawbacks that prevent such. It is so far apparent that despite that there is law, which requires TPF to be responsible for asset recovery; no regulations are in place to provide regulations detailing proper management of forfeitable assets and those that have been recovered as required under the UN Convention against Corruption to which Tanzania is a signatory. Such regulations would lay down procedure on how to maintain economic value of the assets instead of concentrating much on looking at the evidential value. Another notable drawback is lack of or inadequate storage facilities at most of police stations where assets are kept under custody mainly as exhibits. The asset management regime is not friendly; and not cost effective. There are no designated areas, which are conducive for safe keeping of seized assets and easy monitoring. For instance, some assets like vehicles are not parked under sheds. As such they are exposed to rains and strong and direct sunlight the result of which their economic value deteriorates at fastest rates.

This is a clear manifestation that there is inadequate or absence of storage or custody facilities coupled with less caring of state of assets so seized and put under custody of the Police Force. This is a reflection of what transpires to most of police stations the countrywide. With pressure of rapid population increase, emerging transnational organised crime, budget constraints, inadequate or absence of training/capacity building programmes to police officers on proper asset keeping and administration, absence of specific areas designated for safe keeping of assets, which are subject to forfeiture upon conviction of the accused, and the like, it is no wonder why quite a number of assets under police custody pending determination of cases in court are in haphazard conditions. The bottom-line is that there are no effective mechanisms to enable state agencies to manage forfeitable assets.

³⁸ S.35 of POCA [CAP.256 R.E.2002].

³⁹ *Ibid.*

⁴⁰ As regards general powers of the IGP, see s. 7 of the Police Force and Auxiliary Service Act, CAP 322 R.E.2002.

5.5.2.2 The Director of Public Prosecutions

The law confers power to the Director of Public Prosecutions (DPP) to apply in court for a restraining order in respect of assets believed to be tainted.⁴¹ The DPP performs the functions of public prosecutions in accordance with the Constitution and any other law; and controls all criminal prosecutions in the country. Within the DPP's office there is the Assets Forfeiture and Recovery Section [AFRS] to deal with matters on asset recovery. AFRS has a role to play especially in deciding whether assets believed to be tainted should be restrained, seized or otherwise. Such decision requires a pre-restraining or pre-seizure planning. The planning determines whether the assets should be restrained or seized in the first place and second, if seizure has to be effected, which resources should be mobilised in order to have effective asset management. It should be noted that its decision marks the beginning of asset management. The AFRS has an advantage of accessing any required information from investigative organs at this stage concerning the assets at issue through exercising the coordination of investigation powers vested in the DPP.⁴²

However, it is argued that AFRS is only concentrated at the DPP's office headquarters in Dar es Salaam. Its services are not effectively felt in upcountry. Moreover, its performance is still at initial stage as the law is not effectively implemented.

5.2.3 The Court

According to the Proceeds of Crime Act, an appropriate court that has jurisdiction to deal with offences leading to asset recovery is any court other than a Primary Court.⁴³ That is to say District and Resident Magistrates' Courts are courts with original jurisdiction, whereas the High Court and Court of Appeal are appellate courts as far as asset forfeiture cases are concerned. The High Court can act as both a court of first instance and an appellate court in respect of the cases originating in the subordinate courts while exercising its concurrent and appellate jurisdictions, respectively. However, the law confers the High Court exclusionary jurisdiction in respect of issuing a forfeiture order upon application by the DPP where a person cannot be brought before the court.⁴⁴ It is also within the exclusive jurisdiction of the High Court to appoint a trustee to manage assets.⁴⁵

It should as well be noted that not every offence that generates proceeds or involve the use of instrumentalities of crime are covered. It is only serious offences that are covered under the Proceeds of Crime Act.⁴⁶ By serious offence it is meant a money laundering offence and includes all predicate offences a list of which is contained in the Anti-Money Laundering Act, 2006.⁴⁷

Courts have role to play in not only asset recovery process generally but also asset management in particular. Apart from conducting full criminal trials of predicate offences that generate proceeds of crime as well as entertaining applications for confiscation orders,⁴⁸ courts are involved in preliminary stages during investigation. At the preservation stage where assets should be secured and kept under custody in order to maintain their evidential value and economic value, courts come in through granting restraining order or search warrant, which leads to seizure upon application of the DPP.⁴⁹ It is upon the court to grant the application or not; and impose conditions as it may deem fit in order to ensure preservation. To say the least, courts set in motion management of assets believed to be tainted.

⁴¹ S. 38(1) of POCA [CAP.256 R.E.2002].

⁴² See sections 16, 17 and 24 of the National Prosecutions Service Act, 2008, Act No.27 of 2008. See also Feleshi, E.M., "Prosecution-led Investigation in Tanzania: The Role of the National Prosecutions Service in Criminal Investigations," *National Prosecutions Service (NPS) Journal*, Issue No.002, April-June 2013, pp.4-8, pp.6-7.

⁴³ S.8 of POCA [CAP.256 R.E.2002].

⁴⁴ S. 30 of POCA [CAP.256 R.E.2002]. For some critical analysis of provisions of the law dealing with forfeiture of assets of a person who cannot be called in court, see Amani, N.P., "Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?," *Eastern Africa Law Review*, Issue No. 2, Vol.41, December, 2014, pp.125-155, pp.137-142.

⁴⁵ S. 3 of POCA [CAP.256 R.E.2002].

⁴⁶ Ss.3 and 6 of POCA [CAP.256 R.E.2002].

⁴⁷ S. 3 of Act No.12 of 2006.

⁴⁸ See Ss. 8 and 9 of POCA [CAP.256 R.E.2002].

⁴⁹ Ss. 32 and 38 of POCA [CAP.256 R.E.2002].

5.5.2.4 The Trustee

The trustee is another important key player in the management of assets believed to be tainted. According to Michael Leonetti, a trustee is the person or institution named in a trust agreement to carry out the objectives and follow the terms of the trust.⁵⁰ A trustee can be a nonprofessional individual, a professional individual (such as an attorney, an accountant or an investment adviser), or a corporate fiduciary (such as a bank or corporate advisory firm).⁵¹ The law vests power of appointing a trustee in the High Court to appoint a trustee to manage assets.⁵² It is only the High Court which has exclusive jurisdiction to appoint a trustee in this regard. The court appoints a trustee if it is satisfied that the circumstances so require. For instance, it may transpire that management of the assets requires special skills and that LEAs or any institution having responsibility to preserve the assets does not have such skills. Trustee's powers and duties as well as conditions attached thereto should be contained in the order granted by the court upon application by the DPP. A trustee may take physical control of the assets or any other reasonable action necessary for the purpose of preserving the assets.⁵³ Furthermore, a trustee may take control of assets in relation to registered foreign restraining order.⁵⁴ He is protected against personal liability for any loss or damage arising from his having taken custody or control of the asset.⁵⁵ The protection is not available for him where he acts negligently thereby causing the loss or damage.⁵⁶ Furthermore, a trustee is entitled to remuneration and expenses he incurs in the course of performing his duties in relation to assets in his custody or control.⁵⁷ There should be regulations made by the Minister for the time being responsible to legal affairs in place to that effect.⁵⁸ So far no such regulations have been provided.

However, with all these wide powers given to a trustee, the law does not prescribe minimum qualifications of a trustee; neither does it set out rules to regulate his conduct while discharging his duties. An absence of rules creates possibilities for him to conduct himself in such a manner that is contrary to what is expected of him. His conduct might be abused by his corrupt minds in order to enrich himself or to conspire with criminals to the detriment of the state. With such state of affairs, it may be difficult to measure transparency, effectiveness and accountability on trustees in the course of managing proceeds and instrumentalities of crime.

5.6 Limitations to the Effective Asset Management System

It is well settled that apart from having a law authorising the seizure and forfeiture of illicitly acquired assets, it is important for jurisdictions to have organisational and administrative infrastructures to preserve, manage and dispose of forfeited assets in a secure and accountable manner.⁵⁹ The whole asset recovery process is meaningful if assets that are subject to forfeiture are available, properly managed, well kept and maintained. Every successful recovery of criminally acquired assets represents a victory in the battle against crime. Apart from the recovery signaling a message that crime does not pay; it also raises rays of hope that the much-needed resources for national development and poverty reduction shall be used optimally. It is on this line of argument that asset management is said to be effective and profitable. Short of that the whole legal battle aiming at recovering the assets under consideration is doomed to a dead end. More so, recovered assets are additional resources for development activities. As such any neglect, which depreciates their economic value, diminishes their economic contribution to the nation's prosperity.

⁵⁰ Leonetti, M.E., "What to Look for When Selecting a Trustee For Your Estate Plan," *American Association of Individual Investors Journal*, January 1998, pp.28-31, p.28. Source: <https://www.aaia.com/journal/article/2-what-to-look-for-when...>, accessed on 9th January, 2018.

⁵¹ *Ibid.*

⁵² Ss. 3 and 38(2)(b) of POCA [CAP.256 R.E.2002].

⁵³ S. 38(5) of POCA [CAP.256 R.E.2002].

⁵⁴ S. 55 of POCA [CAP.256 R.E.2002].

⁵⁵ S. 49(1)(a) of POCA [CAP.256 R.E.2002].

⁵⁶ *Ibid.*

⁵⁷ S. 50(1) of POCA [CAP.256 R.E.2002].

⁵⁸ S. 50(2) of POCA [CAP.256 R.E.2002].

⁵⁹ Premabhuti, P., "Asset Management Measures in Thailand," in Greenberg, T.S. *et al.*, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Bases Asset Forfeiture*, Stolen Asset Recovery (StAR) Initiative and The World Bank, Washington DC, 2009, pp.167-175, p.175.

The reason behind is that asset recovery is first and foremost an important law enforcement tool for achieving the broader ends of justice, accountability and the rule of law.⁶⁰ It is a powerful deterrent measure because it removes the incentive to commit crime and can help towards incapacitating the means by which criminals ply their trade.⁶¹ To achieve all these, the legal-institutional framework should be in place and operative to the extent that these policy considerations are realised.

However, the discussion has so far indicated that there are some limitations to effective asset management system. It is apparent that there are some aspects which are not covered in the legal framework but ought to be in place. The fact that so far no provisions that require proper maintenance of records or statistics of management of assets that are subject to forfeiture or forfeited assets and their use, it is very difficult to make follow-ups and assessment on how asset management as a whole is fairing. It is so far apparent that there are no effective mechanisms to ensure accountability in the managing of confiscated assets due to the fact that there are no statistics, any database on such assets and identified officers dealing with such assets in the LEAs. Even the chain of managing the assets is not well known.

At times it is difficult to trace the assets that are in the hands of the LEAs that are entrusted to keep custody of such assets subject to forfeiture! Some mishandling arising out of misuse or negligence cannot be ruled out altogether. Putting it in other words, management of chain of custody from seizure of assets, keeping them under custody pending tendering them in court as exhibits to disposal of cases is not that good. There is some mismanagement in the process. Moreover, most LEAs and institutions lack capacity to manage and dispose of seized assets that are subject to forfeiture and those that are subsequently forfeited. This can be exhibited by absence or lacking of designated or allocated asset management offices. Such offices would provide for storage facilities and procedures for storage administratively. In short the law so far does not provide for procedural ways for effective management of seized assets to maintain their evidential and economic values, hence avoid damage. Only traditional ways of handling exhibits at most of police stations are still used even to asset recovery cases.⁶² It should be noted that the absence of clear and comprehensive provisions on the management of confiscated assets and the conduct of trustees might be abused by corrupt trustees to enrich themselves or to conspire with criminals/accused persons. So far the asset management regime is not friendly; and not cost effective in the country. There are no designated areas, which are conducive for safe keeping of seized assets and easy monitoring. For instance, some assets like vehicles are not parked under sheds. As such they are exposed to rains and strong and direct sunlight the result of which their values deteriorate at fastest rates. Neither functions of such offices, if they were there, are defined. It is obvious that in the absence of all these important aspects, nobody should expect transparency and accountability on the part of those who exchange hands with those assets to be guaranteed. In addition, asset management requires availability of resources and cost-control measures. The asset recovery legal regime in Tanzania lacks all these.

On the other hand, it appears that even those relevant provisions that are provided for by the asset recovery legal regime are not enforced to their entirety by those LEAs, institutions and actors mentioned herein in order to fully manage the assets. This paper has indicated that the IGP, the DPP, the Court and the trustee are key players in asset management.

All these actors are involved in managing assets that are subject to forfeiture and a minimum shade of light with regard to each of their respective roles is provided under the Proceeds of Crime Act.⁶³ A lot need to be done in terms of training. Otherwise all these limitations put into consideration; they pose a threat to effective asset management the result of which asset recovery legal regime will go on be under-utilised.

⁶⁰ UNODC, *Effective Management and Disposal of Seized and Confiscated Assets*, United Nations, Vienna, October 2017, p.7

⁶¹*Ibid.*

⁶² So far exhibits are kept as per the rules provided for under the Police Force and Auxilliary Services Act [CAP 322 R.E. 2002] and the Police General Orders, both of which require major reforms/reviews or total overhauling to take pace with current and future situations.

⁶³ [CAP. 256 R.E.2002].

7. Conclusion

In conclusion, this paper has attempted to a great deal and critically examine the present asset management in the country. It brought to the limelight on what is mainly provided for by the legal-institutional regime with regard to management of assets that are subject to forfeiture. Looking at the legal-institutional regime on proper asset management processes, there are no minimum qualifications of a trustee; neither does it set out rules to regulate his conduct while discharging his duties; no provisions to provide for specific areas designated for safe keeping of the assets, which are subject to forfeiture upon conviction of the accused on predicate offences, the result of which, there is poor custody of the assets; and lack of solid provisions on accountability and transparent on the asset management system; just to mention a few. It was also noted that the legal-institutional regime is not adequately enforced due to absence of strong commitment by some LEAs, institutions and other actors at times due to legal loopholes.