

# **ANALYSIS OF THE PROPOSED PROCEEDS OF CRIME LEGISLATIVE AND POLICY FRAMEWORK IN SRI LANKA**



**November 2019**

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# ABBREVIATIONS

APG	Asia Pacific Group on Money Laundering
CIABOC	Commission to Investigate Allegations of Bribery or Corruption
CISLAC	Civil Society Legislative Advocacy Centre
CSOs	Civil Society Organizations
FCID	Financial Crimes Investigation Division
FIU	Financial Intelligence Unit
GFAR	Global Forum on Asset Recovery
MOU	Memorandum of Understanding
PEP	Politically Exposed Person
RTI	Right to Information
SDGs	Sustainable Development Goals
START	Special Presidential Taskforce on Recovery of State Assets
TISL	Transparency International Sri Lanka
UNCAC	UN Convention Against Corruption
UWO	Unexplained Wealth Order

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# EXECUTIVE SUMMARY

This brief analysis of the Proposed Proceeds of Crime Legislative and Policy Framework in Sri Lanka highlights the need for a comprehensive law on the recovery of stolen assets and key elements that need to be incorporated in to such law on proceeds of crime. It also notes the importance of wider stakeholder dialogue prior to the enactment of the law, to ensure human rights concerns are adequately addressed preventing loopholes that could lead to the misuse of the law.

This analytical brief seeks to analyse the existing law in Sri Lanka, pertaining to the recovery of stolen assets, highlighting the gaps therein to effectively recover such proceeds of crime. Whilst there are several laws that address freezing, seizure and confiscation of these stolen assets in domestic cases, Sri Lanka lacks a comprehensive mechanism that can ensure the effective confiscation, return and subsequent management of these proceeds of crime, which have been removed from Sri Lanka and are hidden in offshore centres. The recently drafted Policy and Legislative Framework of the proposed Proceeds of Crime Act (the Policy) seeks to provide a mechanism for such return and management of recovered assets. This Policy will be analysed, highlighting key areas that should be considered when drafting and debating any future Proceeds of Crime Bill.

The report captures the research conducted by Transparency International Sri Lanka (TISL) on the recovery of stolen assets and draws on experiences gained from being a drafting committee member at the committee appointed to draft the Policy. This brief analyses the provisions proposed in the Policy, highlighting its positive features, whilst noting some of the contentious areas surrounding the recovery of stolen assets that the drafters of the law need to be mindful of in engaging relevant stakeholders.

Whilst the Policy includes several progressive provisions on recovery of stolen assets that are used in other countries seeking to recover stolen assets, the Report calls on to conduct multi-stakeholder dialogue at the drafting stage of the law, to ensure that such concepts are formulated, with adequate safeguards in place so that these are not misused by those who hold power. The Report calls on the legislators to enact the law without delay, after such consultations.

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# 1. INTRODUCTION

Recovery of stolen assets is a process that ensures that the assets which are lost to a country as a result of crime are seized, confiscated, returned to the country of origin and restored to their rightful owners.<sup>1</sup> This is a complicated process that requires the coordinated efforts of law enforcement agencies of multiple countries, identified as origin, transit and destination countries.<sup>2</sup> The two main principles that form the basis of this process is that crime should not pay and that the benefit of these stolen assets must ultimately compensate and benefit the rightful owners of it – the direct victims and the secondary victims of the crime, i.e. the society from which the assets have been taken away.<sup>3</sup>

Sri Lanka lacks a comprehensive framework that governs the recovery of stolen assets.<sup>4</sup> Whilst there are different mechanisms strewn across different laws for freezing of assets and confiscating and recovery of proceeds of crime<sup>5</sup> domestically, there is no process to confiscate and recover stolen assets located outside the country. Additionally, there is no mechanism for the management of recovered Sri Lankan assets, which are confiscated both domestically and internationally. Sri Lanka also lacks a comprehensive process for civil recovery of stolen assets.<sup>6</sup> The only mechanism available for the freezing of stolen assets from foreign jurisdictions is the Mutual Legal Assistance framework.

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1. Jean-Pierre Brun, Larissa Gray, Clive Scott, Kevin M. Stephenson, *Asset Recovery Handbook A Guide for Practitioners* (2011, the International Bank for Reconstruction and Development / The World Bank), Page 2

2. Ibid.

3. Dr. Juanita Olaya, Kodjo Attisso and Anja Roth, *Repairing social damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica*, < <http://14iacc.org.s3-website.eu-central-1.amazonaws.com/wp-content/uploads/SocialDamagePaper20.01.2011.pdf> > Page 20 - accessed on 30th August 2019

4. Sankhitha Gunaratne, Maheshi Herat and Asoka Obeyesekere CSO GFAR report on Sri Lanka < <http://www.tisrilanka.org/wp-content/uploads/2017/12/Sri-Lanka-Asset-Recovery-CSO-Report-final.pdf> > - accessed on 30th August 2019

5. For example, the Criminal Procedure Code of Sri Lanka Section 425 and 431

6. Civil recovery of stolen assets or non-conviction based asset recovery is a mechanism that is employed in countries to recover proceeds of crime, in addition to the criminal prosecutions. This generally has a lesser burden of proof requirement (the criminal conduct must be established on a balance of probabilities standard of proof). For more information refer footnote 33 page 13

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## 2. CURRENT LAW IN SRI LANKA AND ITS WEAKNESS

Different laws cover seizure, confiscation and restitution domestically in Sri Lanka. A comprehensive law on recovery of stolen assets is lacking.<sup>7</sup> Specific laws such as the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (Sec. 6 (1) (d)), the Financial Transactions Reporting Act, No. 6 of 2006 (Sec. 24, 25, 26), laws relating to banking (e.g. sec. 57, 67 of Banking Act No. 30 of 1988), Criminal Procedure Code and the Customs Ordinance 1870 (e.g. sec. 125 of Customs Ordinance) deal with the seizure of assets. For instance, the Criminal Procedure Code sections 60 and 61 allow the court to seize assets of a person against whom an arrest warrant has been issued and is absconding. In the case of the offence of money laundering, the Prevention of Money Laundering Act No. 5 of 2006 provides for the freezing of assets (Sec. 6 -12).<sup>8</sup>

Similar to seizure, there is no specific law on confiscation. Regarding the offence of money laundering, the Prevention of Money Laundering Act deals with the forfeiture of assets in relation to which the offence of money laundering has been committed (Sec. 13-16). Apart from the above, domestically the general provisions of the Code of Criminal Procedure Act (No. 15 of 1979) apply to confiscation of the proceeds of crime (e.g. Sec. 29, 426, 431, 433).<sup>9</sup>

Restitution in domestic criminal cases are dealt with under the Code of Criminal Procedure, but it does not directly address cross-jurisdictional restitution in the manner identified under the UN Convention Against Corruption (UNCAC).<sup>10</sup> Section 425 and section 431 of the Code deals with property that is the subject matter of a criminal prosecution to be returned to the rightful owner determined by the courts, during the pendency of the trial and thereafter.

The current law does not deal with a mechanism to manage recovered assets. The different laws that have been mentioned above have different schemes established.

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7. Stolen Wealth, the Potential for Asset Recovery in Sri Lanka, Daily News, < <http://www.dailynews.lk/2017/12/20/features/137783/stolen-wealth> > - accessed on 26th September 2019

8. Sankhitha Gunaratne, Maheshi Herat and Asoka Obeyesekere CSO GFAR report on Sri Lanka < <http://www.tisrilanka.org/wp-content/uploads/2017/12/Sri-Lanka-Asset-Recovery-CSO-Report-final.pdf> > - accessed on 30th August 2019. Under the Civil Procedure Code, section 217 the Court can order a person against whom it operates to order to pay money, deliver movable or immovable property. In the same Code, section 218 specifies items that are exempted from seizure by the judgment-creditor following the order under section 217 (e.g. necessary wearing-apparel, beds, and bedding of the judgment-debtor, or of his wife and children are not subject to seizure).

9. Sankhitha Gunaratne, Maheshi Herat and Asoka Obeyesekere CSO GFAR report on Sri Lanka <<http://www.tisrilanka.org/wp-content/uploads/2017/12/Sri-Lanka-Asset-Recovery-CSO-Report-final.pdf> > - accessed on 30th August 2019

10. Sankhitha Gunaratne, Maheshi Herat and Asoka Obeyesekere CSO GFAR report on Sri Lanka <<http://www.tisrilanka.org/wp-content/uploads/2017/12/Sri-Lanka-Asset-Recovery-CSO-Report-final.pdf> > - accessed 30th August 2019

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### 3. BACKGROUND TO THE POLICY AND LEGISLATIVE FRAMEWORK OF THE PROPOSED PROCEEDS OF CRIME ACT OF SRI LANKA (THE POLICY)

In drafting a law on proceeds of crime, Sri Lanka would need to ensure that a comprehensive mechanism that covers the seizure, confiscation, return, restitution and management of assets is set up, since Sri Lanka is a signatory to the UN Convention against Corruption and has taken the exceptional step of constitutionally recognizing this commitment<sup>11</sup>. UNCAC recognizes the return of stolen assets as a fundamental principle of the Convention<sup>12</sup> with most of the relevant articles requiring mandatory implementation.<sup>13</sup>

The Convention identifies varying degrees of obligations distinguishing them as mandatory and non-mandatory provisions. The mandatory provisions consist of obligations to legislate, either absolutely or where specific conditions have been met.<sup>14</sup> Non mandatory provisions are specified in two ways - obligations that the state “must consider” or “endeavour to adopt”, and provisions which are entirely optional, signified by terminology akin to “may adopt”.<sup>15</sup> The following is a summarized account of the mandatory provisions contained in UNCAC pertaining to the asset recovery theme under Chapter V:

- Permit another country to initiate civil action in its courts, so that proceeds of crime could be recovered directly by another state.
- Enable domestic courts to pay compensation to other States for harm caused through corruption.
- Permit domestic authorities to recognize foreign freezing, seizure and forfeiture orders.
- Return the confiscated property to its legitimate owners.
- Provide support to countries who request such assistance to recover proceeds of crime.
- Cooperate with other states to prevent and combat transfers of proceeds of crime and recover such proceeds.

In addition to being a signatory to UNCAC, Article 156A (1) (c) of the Sri Lankan Constitution states that “Parliament shall by law provide for the establishment of a Commission to investigate allegations of bribery or corruption. Such law shall provide for measures to implement the United Nations Convention Against Corruption and any other international Convention relating to the prevention of corruption, to which Sri Lanka is a party.”<sup>16</sup>

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11. Art. 156A (1) (c) of the Constitution

12. Convention Against Corruption- Article 51 <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)> accessed on 18th November 2018 ; Division for Treaty Affairs United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption) (n 5) 196.

13. TISL Pledge Tracker <<http://www.tracker.tisrilanka.org/about/>> accessed on 18th November 2018

14. Division for Treaty Affairs United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption (Second Revised Edition, 2012) p.4

15. Division for Treaty Affairs United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption (Second Revised Edition, 2012) p.4

16. Article 156 A of the Constitution of the Democratic Socialist Republic of Sri Lanka

In 2017, Sri Lanka was a focus country at the inaugural Global Forum on Asset Recovery (GFAR).<sup>17</sup> The reason for this global attention emanated from the commitments made by Sri Lanka at the 2016 Anti-Corruption Summit held in London, UK, highlighting the intention to prioritize prosecutions of grand corruption, money laundering and recovery of stolen assets.<sup>18</sup> Apart from Sri Lanka; Nigeria, Tunisia and Ukraine were the other focus countries for the inaugural GFAR.

The purpose of this Forum was to “provide a platform to empower the investigators and prosecutors charged with identifying and tracing assets and getting necessary cooperation with financial centres in recovering and returning them. The deliverables for GFAR included achieving progress on cases by the four focus countries, increased capacity through technical sessions, renewed commitment to advancing asset recovery cases, and increased collaboration among involved jurisdictions.”<sup>19</sup>

At this Forum the Sri Lankan delegation renewed its commitment to advance asset recovery cases and to formulate a legislative framework on Proceeds of Crime.<sup>20</sup> It was recognized that Civil Society Organizations (CSOs) are key partners in the process and would be a part of the drafting of this framework.<sup>21</sup>

One of the significant outcomes of GFAR is the formulation of the GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases.<sup>22</sup> These 10 principles “address approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the processes involved” in asset return.<sup>23</sup> These principles are slowly gaining global recognition as best practices in the management of recovered stolen assets. For example, the Civil Society Legislative Advocacy Centre (CISLAC), a prominent CSO working on asset recovery in Nigeria has now developed a monitoring mechanism based on these GFAR principles to evaluate the compliance level of Nigeria’s asset recovery process against the GFAR principles.

In January 2018, the Special Presidential Taskforce on Recovery of State Assets (START) commenced drafting the Proposed Legislative and Policy Framework on Proceeds of Crime. The Drafting Committee consisted of representatives from the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Crimes Investigation Division (FCID), Financial Intelligence Unit (FIU), Ministry of Foreign Affairs, Attorney General’s Department, Bar Association of Sri Lanka and TISL. The drafting process was completed in June 2018. The Legislative framework was then handed over by START to the President of Sri Lanka to present it to the Cabinet of Ministers. At the time of writing, the Policy still requires cabinet approval, after which the Legal Draftsman’s Department will draft the Proceeds of Crime Bill.

In drafting this Policy, the Drafting Committee met each Wednesday between January and June 2018. START had the opportunity to call in experts, with the assistance of the World Bank StAR (Stolen Asset Recovery) initiative, when the need arose to clarify asset recovery concepts which are new to Sri Lanka. One such discussion was on the non-conviction-based asset recovery system which is a new concept to Sri Lanka, that will be examined in detail in subsection 4.3.

Between the time that this Policy has been prepared and the time that this report is being formulated, the management of START has undergone changes - the drivers of the drafting effort, the Chairman and the Secretary of START are no longer operating in the same positions. Whilst there appears to be limited political will on enacting this law before the general election in 2020, the new management of START remains committed to getting the law enacted.

It is noteworthy to see that this Policy has been included within the National Action Plan to Eradicate Corruption in Sri Lanka launched in 2019 by CIABOC, with an ambitious target for implementation by 2021.

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17. Stolen Asset Recovery Initiative, Global Forum on Asset Recovery (GFAR), < <https://star.worldbank.org/about-us/global-forum-asset-recovery-gfar> >

18. UK Anti-Corruption Summit 12th May 2016 Sri Lanka’s Commitments, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522731/Sri\\_Lanka.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522731/Sri_Lanka.pdf)> - accessed on 26th September 2019

19. Stolen Asset Recovery Initiative, Global Forum on Asset Recovery (GFAR), < <https://star.worldbank.org/about-us/global-forum-asset-recovery-gfar> >

20. GFAR Conference Videos: Press Conference, December 6th at 14.35sec - 15.00sec <<https://star.worldbank.org/content/gfar-press-conference-december-6>>

21. GFAR Conference Videos: Closing Round Table, December 6th, at 22.42sec <<https://star.worldbank.org/content/gfar-closing-round-table-december-6>> , GFAR Conference Videos: Press Conference, December 6 at 14.35sec - 15.00sec <<https://star.worldbank.org/content/gfar-press-conference-december-6>>

22. Global Forum on Asset Recovery Communique <[https://star.worldbank.org/sites/star/files/20171206\\_gfar\\_communique.pdf](https://star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf)>

23. GFAR Communique, < [https://star.worldbank.org/sites/star/files/20171206\\_gfar\\_communique.pdf](https://star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf) > p.4

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## 4. ANALYSIS OF THE KEY PROVISIONS IN THE LEGISLATIVE FRAMEWORK

This section provides detailed analysis of the legislative framework under 11 key areas. This amalgamates issues from across the Policy<sup>24</sup>, which is broken-down under the following 20 subsections:

- The purpose of the proposed law
- Scope of the proposed law
- An offence of Money Laundering
- Duty to Report
- Post-Conviction Confiscation / Forfeiture
- Extended Confiscation
- Scope of Confiscation Proceedings
- Non-conviction-based confiscation proceedings
- Seized Property not Confiscated
- Restraint, seizure, administration & management and preservation of proceeds of crime
- Apportionment of confiscated proceeds and transfer to a Trust Fund
- Proceeds of Crime Recovery and Management Authority of Sri Lanka ('the Authority') and institutional arrangements
- Powers of Investigation
- Unexplained Wealth Orders
- Legal Professional Privilege
- Power of the Authority to delegate functions
- Joint Investigation Teams
- The Authority and international co-operation and asset recovery
- Composition of the Authority
- Implementation of UNCAC
- Interpretation

### 4.1. THE PURPOSE AND THE SCOPE OF THE PROPOSED LAW<sup>25</sup>

This section recognizes the purposes of the law – this type of provision is quite common in Proceeds of Crime laws around the world. The purposes are as follows:

- a. Deprive criminals from the ill-gained assets (proceeds of crime),
- b. Compensate victims of crime,

- c. Undermine organized crime including terrorism and financial and economic crime,
- d. Create an economically viable proceeds of crime recovery system,
- e. Preserve the value of seized or confiscated assets for the benefit of the State, society and victims of crime, and
- f. Ensure accountability and transparency of and public confidence in the proceeds of crime recovery system.

It is noteworthy that the accountability and transparency of the asset recovery process is established in the first principle of the policy document itself.

It is progressive that the principle of confiscated assets needing to be utilized for the benefit of the society and victims is mentioned under purposes - utilizing the recovered assets for the benefit of the society is a best practice principle that has been recognized in the GFAR Principles<sup>26</sup>. Principle 5 notes that "Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct."<sup>27</sup>

Apart from the above purposes, it is also noted that enacting this law will satisfy the commitments contained in UNCAC, and the findings of the Peer Review of Sri Lanka conducted by the United Nations Office on Drugs and Crime under the UNCAC review mechanism<sup>28</sup> and it will also make Sri Lanka compliant at the outcome of the Mutual Evaluation carried out by the Asia Pacific Group on Money Laundering (APG). In both these evaluations the non-existence of a comprehensive proceeds of crime law to conduct the recovery of stolen assets have been highlighted.<sup>29</sup>

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24. Refer Attachment 01: The Policy and Legislative Framework of the proposed Proceeds of Crime Act of Sri Lanka

25. Refer Attachment 01 – Part I: Purpose of the Proposed law and Refer Attachment 01 – Part II: Scope of the proposed law

26. Ibid Foot Note 16

27. GFAR Communique, < [https://star.worldbank.org/sites/star/files/20171206\\_gfar\\_communique.pdf](https://star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf) > Page5

28. UNCAC Country Review Report of Sri Lanka <[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2018\\_09\\_03\\_Sri\\_Lanka\\_Final\\_Country\\_Report.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2018_09_03_Sri_Lanka_Final_Country_Report.pdf)> ; Section 56 of the Attachment 1.

29. Anti-money laundering and counter-terrorist financing measures Sri Lanka Mutual Evaluation Report, September 2015, pages 61 and 118 accessed on 30th October 2019 < <http://www.apgml.org/mutual-evaluations/documents/default.aspx?s=title&pcPage=8;>>

Country Review Report of Sri Lanka Review by Palau and Brunei Darussalam of the implementation by Sri Lanka of articles 5-14 and 51-59 of the United Nations Convention against Corruption for the review cycle 2016-2021, Page 109 – accessed on 30th October 2019 <[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2018\\_09\\_03\\_Sri\\_Lanka\\_Final\\_Country\\_Report.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2018_09_03_Sri_Lanka_Final_Country_Report.pdf)>

The proposed law will cover the following instances:

- Where any person commits any offence in Sri Lanka.
- Where a (i) Sri Lankan citizen, (ii) Sri Lankan dual citizen, (iii) a person domiciled or found in Sri Lanka, has committed any offence within or outside Sri Lanka and has derived proceeds of such offence (proceeds of crime) found in or outside Sri Lanka.
- Where proceeds of crime are found in Sri Lanka.
- Where proceeds of crime have come into, taken out of or passed through Sri Lanka.

The intention of this provision was to cover the instances where the jurisdiction of Sri Lanka is used to commit a crime, to hide the proceeds, or to use Sri Lankan soil to launder illicit assets by a citizen or otherwise. This section identifies the gap that exists in the law that was discussed earlier in the report, i.e. the international element of proceeds of crime where assets are hidden in offshore centres in the world.

Additionally, Part II of the Policy notes in brief the procedures that will be addressed in the law:

- Investigation of the acquisition, placement, layering, integration, use, control, and possession of proceeds of crime whether situated within or outside Sri Lanka,
- Identification, tracing and detection of such proceeds,
- Seizure, freezing (restraint), administration / management of such proceeds, including confiscated / forfeited proceeds of crime and realization of the monetary value thereof,
- Investigation of offences recognized by this law,
- Institution of legal proceedings relating to proceeds of crime and offences recognized by this law,
- Confiscation / forfeiture of proceeds of crime,
- Disposal of proceeds of crime,
- Provide reparation to victims of crime,
- Recognize the rights of bona-fide third parties,
- Provide for mutual legal assistance regarding proceeds of crime,
- Recognize the existing civil law remedy for individuals and foreign States to seek direct recovery of proceeds of crime located in Sri Lanka,
- Provide for annual reporting to Parliament and periodic public reporting, and
- Any other matter incidental thereto.

Proceeds of crime (term 'crime' used synonymous to 'offence') has been defined as "any property or part thereof or any income, service, advantage, benefit or reward or other economic gain which was derived, received, retained, intermingled, converted wholly or partly, or, directly or indirectly, in connection with or as a result of the committing of any offence carried on by any person whether in Sri Lanka or elsewhere, and would include instrumentalities of crime and value thereof".<sup>30</sup> The offences that are covered under this law are offences that would be punishable by imprisonment of two or more years.

The Policy also reiterates the offence of money laundering as specified under the Money Laundering Act of Sri Lanka.<sup>31</sup> It is noted that the purpose of including this offence is to bring it in line with the Financial Action Task Force Recommendations.

## 4.2 POST-CONVICTION CONFISCATION / FORFEITURE AND EXTENDED CONFISCATION<sup>32</sup>

The proposed law is intended to provide for a mechanism for recovering stolen assets post-conviction of the perpetrator. This is usually termed in personam proceedings and requires the criminal conviction of the offender of the underlying offence.<sup>33</sup> Due to the criminal burden of proof, this mechanism is time consuming and sometimes not adequate (e.g. death of perpetrator) to recover the money that has been lost due to crime. These issues are addressed under civil recovery mechanism (please refer in subsection 4.3.)

According to the Policy, post-conviction confiscation proceedings must be initiated after the conviction of the person to recover the benefit or the value of the proceeds of the crime. However, depending on the grounds of triviality or where the accused does not have identifiable assets, on concurrence of the victim of the crime, the institution that is established under the law has the discretion to waive proceedings to recover the assets. This is a practical provision, which ensures that trivial cases do not clog the justice system.

Extended confiscation<sup>34</sup> is a new process to Sri Lanka – this allows for the confiscation of assets that are unrelated to the crime for which a person has been convicted.<sup>35</sup> Upon prima facie satisfaction of the court that other property may have been derived out of unlawful means, the court shall make an assumption

30. Refer Attachment 01 – Section 57

31. Refer Attachment 01 – Section 9

32. Refer Attachment 01 – Part V & VI: Post-Conviction Confiscation / Forfeiture and Extended Confiscation

33. Theodore S. Greenberg Linda M. Samuel Wingate Grant Larissa Gray, A Good Practices Guide for Non-Conviction Based Asset Forfeiture, Page 13 In-rem can be translated as "against a thing." In personam refers to courts' power to adjudicate matters directed against a party. Legal Information Institute, Cornell University < [https://www.law.cornell.edu/wex/in\\_personam](https://www.law.cornell.edu/wex/in_personam) > -accessed on 21st November 2019

34. Refer Attachment 01 – Part VI: Extended Confiscation

35. For a brief explanation of the concept refer the Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, Page 84 <[https://www.un.org/ruleoflaw/files/Confiscation\\_Manual\\_Ebook\\_E.pdf](https://www.un.org/ruleoflaw/files/Confiscation_Manual_Ebook_E.pdf)>

that the property was derived from a course of criminal activity, during the 7 years preceding the commission of the offence of which the accused has been convicted.<sup>36</sup> The convicted is free to show on a balance of probability that the assets in question have been derived from legitimate sources – failing which the court can confiscate property unrelated to the specific crime where a conviction has been obtained.

The extended confiscation process is being used in several other jurisdictions to recover assets when the person has a known criminal lifestyle. In most of these jurisdictions the concept is used for serious crimes such as terrorism, organized crime, money laundering, or drug trafficking— and will apply only to assets belonging to the offender.<sup>37</sup> Whilst the Policy does not specify the crimes that this specific section will be applicable to, the section notes that applicable tests need to be put in place in determining the meaning attached to “course of criminal activity”. It was stressed by TISL that safeguards need to be put in place if recognizing this process, as it can be misused, especially ensuring this is limited to serious crimes - failing which trivial offences could be used as a tool for attacking individual’s assets. It was also stressed that this order needs to be appealable. This area could have significant consequences on fundamental rights considerations, and civil society consultation on the draft bill, prior to finalization, must address the “course of criminal activity” tests drafted by the Legal Draftsman’s department.

### 4.3 NON-CONVICTION-BASED CONFISCATION PROCEEDINGS<sup>38</sup>

The Policy recognizes the in-rem<sup>39</sup> process termed “non - conviction based asset recovery”. For this proceeding to commence, “ there is no requirement for criminal charges to have been instituted or a conviction obtained.”<sup>40</sup> This is a civil action and assists in the recovery of assets on the balance of probability standard, and these proceedings can be instituted

concurrently with criminal proceedings. This process is being used across many jurisdictions to overcome challenges that exist in recovering assets using the criminal mechanism – particularly the lack of evidence to match a criminal evidentiary standard or instances when the perpetrator is unreachable (e.g. deceased, fugitive from criminal justice or claiming immunity from criminal prosecution).<sup>41</sup>

Under the Policy, even if the accused has not been convicted, the institution set up under the law can commence non-conviction-based asset recovery proceedings seeking the confiscation of what is believed to be proceeds of crime. The burden of proof under this provision is balance of probability and the state does not have to prove a causal relationship between the committing of the offence and the identified asset. Whilst this may aid in asset confiscation, by side stepping the delays within the criminal justice system, TISL was concerned about the possibility of misuse of this process. This is one of the reasons that the guiding principles of necessity, proportionality and public interest were advocated for by TISL (please refer subsection 4.10) and should be consulted on with broader civil society. TISL also reiterated that alternative means of reversing burdens of proof, should not be viewed as an expedient solution to the much-required reforms of the criminal justice system.

### 4.4 UNEXPLAINED WEALTH ORDERS<sup>42</sup>

The Policy provides for a new evidence gathering tool used in countries like the UK, namely the Unexplained Wealth Order (UWO).<sup>43</sup> In the proposed Policy, the Authority is empowered to require any person who, on the basis of reasonable grounds, has committed an offence punishable with imprisonment for 5 years or more, or has been transacting with proceeds of crime, to make sworn declarations on the manner in which the assets were derived. “The proposed law would also empower the Authority to issue a Notice on any person to make a sworn declaration of the

36. Refer Attachment 01 – Section 13

37. Jean-Pierre Brun Larissa Gray Clive Scott Kevin M. Stephenson, Asset Recovery Handbook A Guide for Practitioners, Page 117

38. Refer Attachment 01 – Part VIII: Non-conviction-based confiscation proceedings

39. In-rem can be translated as “against a thing.” In-rem jurisdiction refers to the power of a court over an item of real or personal property. Legal Information Institute, Cornell University < [https://www.law.cornell.edu/wex/in\\_rem](https://www.law.cornell.edu/wex/in_rem)> -accessed on 30th October 2019

40. For a brief explanation of the concept refer the Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, page 20 -accessed on 30th October 2019 <[https://www.un.org/ruleoflaw/files/Confiscation\\_Manual\\_Ebook\\_E.pdf](https://www.un.org/ruleoflaw/files/Confiscation_Manual_Ebook_E.pdf)>; See also International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, the FATF Recommendations, page 122, accessed on 30th October 2019 <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>>

41. For a brief explanation of the concept refer the Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, page 20 accessed on 30th October 2019 [https://www.un.org/ruleoflaw/files/Confiscation\\_Manual\\_Ebook\\_E.pdf](https://www.un.org/ruleoflaw/files/Confiscation_Manual_Ebook_E.pdf)

42. Refer Attachment 01 – Part XIV: Unexplained Wealth Orders

43. Criminal Finances Act 2017, Chapter 1, Unexplained wealth orders, accessed on 30th October 2019 <<http://www.legislation.gov.uk/ukpga/2017/22/part/1/chapter/1/crossheading/unexplained-wealth-orders-england-and-wales-and-northern-ireland/enacted?view=interweave>>

manner in which such person acquired assets owned by him". Noncompliance with an UWO has punitive consequences.

By way of comparison in the UK, a high court can issue an UWO only if the judge is satisfied that the person in question is "likely an owner of suspicious wealth beyond his means and if all the following tests are met:

1. The respondent is a Politically Exposed Person (PEP) outside of the European Economic Area; or there are reasonable grounds to suspect that the respondent is or has been involved in serious crime
2. The respondent's known income is insufficient to obtain the asset
3. The value of the asset is greater than £50,000".<sup>44</sup>

The Policy allows the following Sri Lankan law enforcement institutions to issue UWOs:

- a. Police (including the CID and the FCID)
- b. CIABOC
- c. Sri Lanka Customs
- d. Excise Department of Sri Lanka
- e. Forest Department Sri Lanka
- f. Department of Wildlife Conservation
- g. Securities and Exchange Commission
- h. Proceeds of Crime Recovery and Management Authority of Sri Lanka

The order can **only** be used for:

- Gathering 'Investigational material' in the conduct of criminal investigations into the possible committing of serious crimes or
- As a possible basis to commence non-conviction-based confiscation proceedings.

The contents of such sworn declaration shall not be admissible as evidence in subsequent judicial proceedings against the maker of the affidavit. A proposal of TISL was to ensure that UWOs would only be permissible in the instance of serious crime - not any offence and not against any person, which could have allowed for UWOs to be issued for minor offences. Nonetheless, concerns remain about the potential for misuse of such power, and tests will need to be established to check law enforcement institutions in determining what constitutes a reasonable ground for determining that an offence carrying over a 5-year sentence has been committed.

#### 4.5 DUTY TO REPORT<sup>45</sup>

There is a duty placed on specified persons who have knowledge of the existence of proceeds of crime to divulge that information to the institution set up under the proposed law. This duty is a reiteration of the duty to report under the Money Laundering Act and the Financial Transaction Law. It was noted that the specified persons will be defined under the new law and will at least include the group of individuals and institutions recognized under the Money Laundering Act and the Financial Transaction Law. Any further individuals or groups that are to be added, should only be added with a strong documented rationale for inclusion.

This Policy also recognizes the common law position that when a person communicates with a lawyer in furtherance of a criminal act, the professional privilege that is usually attached to the lawyer - client communications cannot be claimed.<sup>46</sup> Properly implemented, these measures could be instrumental in preventing professionals from facilitating crime.

#### 4.6 SAFEGUARDING ONGOING INVESTIGATIONS - RIGHT TO INFORMATION VS. THE SECRECY PROVISION

One of the main proposals from the state officials was the need for secrecy provisions, that are found in Sri Lankan legislation, to be included into this law, in order to safeguard data relating to ongoing investigations. As TISL highlighted in their Civil Society shadow report on asset recovery, published prior to the Global Forum on Asset Recovery (GFAR), one of the main concerns in Sri Lanka is the lack of information with regard to the amount of assets that are lost, seized, and the geographical location of the same.<sup>47</sup> TISL advocated against the inclusion of a secrecy provision into this law and invited the members to subject this law to the existing Right to Information (RTI) framework that provides sufficient safeguards to stop information of ongoing investigations. In light of these protections, the final Policy document has not included secrecy provisions. In fact, it recognizes that this law could be subjected to the RTI law when it notes that "No law enforcement officer empowered under this Act, shall unless ... (b) acting in compliance with any law, or ..., reveal to any person any information collected or received in the course of any investigation."<sup>48</sup>

44. Unexplained Wealth Orders: A Brief Guide < <https://www.transparency.org.uk/unexplained-wealth-orders-a-brief-guide/> > accessed on 30th October 2019; Criminal Finances Act 2017, Chapter 1, Unexplained wealth orders, accessed on 30th October 2019 <<http://www.legislation.gov.uk/ukpga/2017/22/part/1/chapter/1/crossheading/unexplained-wealth-orders-england-and-wales-and-northern-ireland/enacted?view=interweave>>

45. Refer Attachment 01 – Part IV: Duty to Report

46. Refer Attachment 1 - Section 44

47. CSO GFAR report on Sri Lanka, < <https://www.tisrilanka.org/wp-content/uploads/2017/12/Sri-Lanka-Asset-Recovery-CSO-Report-final.pdf>>

48. Refer Attachment 01 - Section 40

#### **4.7 PROCEEDS OF CRIME RECOVERY AND MANAGEMENT AUTHORITY OF SRI LANKA AND INSTITUTIONAL ARRANGEMENTS<sup>49</sup>**

This institution is envisaged as one which should develop into a centre of excellence for matters concerning the recovery of stolen assets. The Authority will be managed by a Board comprising of the following persons:

- a. Attorney General or his nominee
- b. Inspector General of Police or his nominee
- c. Director General or nominee of the Commission to Investigate Allegations of Bribery or Corruption
- d. A senior officer each appointed by the Constitutional Council from the following institutions, on a nomination by the respective head of institution:
  - i. Sri Lanka Customs
  - ii. Department of Inland Revenue
  - iii. Securities & Exchange Commission
  - iv. Financial Intelligence Unit of Sri Lanka
  - v. Ministry of Justice
  - vi. Ministry of Finance
  - vii. Ministry of Foreign Affairs

In addition to the Chairman, the Constitutional Council shall also appoint four individuals with expertise in the following fields:

- a. criminal justice,
- b. proceeds of crime administration and management,
- c. economics, finance and auditing, and,
- d. related civil society activism.

The Authority is a law enforcement body with a wide range of powers including the responsibilities to:

- Coordinate between other law enforcement agencies.
- Maintain a database relating to the seizure, transfer, management and confiscation / forfeiture of proceeds of crime.
- Institute legal proceedings in court, for the commencement of non-conviction-based confiscation proceedings.
- Conduct research into enforcement aspects relating to provisions of this law.
- Enter into Memorandums of Understandings and other work arrangements with other statutory bodies and law enforcement agencies.

One of the significant powers of the Authority is the ability to delegate powers to other law enforcement authorities including the below institutions:

- a. Police (including the CID and the FCID)
- b. CIABOC

- c. Sri Lanka Customs
- d. Excise Department of Sri Lanka
- e. Forest Department Sri Lanka
- f. Department of Wildlife Conservation
- g. Securities and Exchange Commission

Further it also has the power to form joint investigation teams including external experts who will contribute when dealing with assets which require specific skills to trace and seize.

Once the property has been seized, the Proceeds of Crime Recovery and Management Authority of Sri Lanka will be responsible to manage the said assets until the conclusion of legal proceedings. Apart from temporary administration of assets, this body is responsible for conducting investigations into proceeds of crime and disposing of them based on judicial orders. In discharging their mandate, they are empowered to enter into Memorandum of understanding (MOU) and other work arrangements with other statutory bodies and law enforcement agencies.

When an authorized law enforcement body seizes proceeds of crime under the proposed law, that institution is required to notify the Authority of such seizure within 3 working days. They are given 7 working days to file a report about the seizure in a Court of law. These provisions have been included as safeguards to ensure that seizures are not conducted ultra vires and to make sure that an accountability mechanism is in place safeguarding the rights of those who have had assets seized.

Whilst the authority is comprised of representatives from high level law enforcement agencies, it is encouraging that the state actors recognized the need for civil society representation on the committee, reflecting the evolving global practice of civil society playing a key role in monitoring.

#### **4.8 TRUST FUND FOR CONFISCATED PROCEEDS OF CRIME (THE FUND)**

Following legal proceedings, if proceeds have been confiscated, the law provides that victims are required to be compensated for their loss. After this, the Authority is to receive a reimbursement of actual expenditure incurred in the administration and management of the seized property or up to 10% of the proceeds whichever is higher.

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49. Refer Attachment 01 – Part XIII: Proceeds of Crime Recovery and Management Authority of Sri Lanka ('the Authority') and institutional arrangements

In establishing the mechanism for the management of recovered funds some members of the Committee noted the need for the assets to be deposited into the general state centralized consolidated fund. TISL strongly advocated for an independently monitored/controlled Fund. TISL highlighted examples where money deposited with limited oversight have been re-stolen.<sup>50</sup> TISL noted the importance of subjecting the Fund to the monitoring mechanism of the Parliament, with periodic evaluation from the National Audit Office. TISL also noted the importance of having an independent Board of Trustees to monitor the proper management of recovered assets. The Committee agreed that there should be a Trust Fund for Confiscated Proceeds of Crime overseen by a Board of Trustees.

Thereafter the remaining funds are to be in a Fund. This Fund will consist of seven members “who are persons with expertise in the fields of administration of justice, law enforcement, public finance, financial management, business management, auditing and related civil society activism. These persons will be appointed by the Constitutional Council”. The Fund is expected to be transparent and amenable to public inspection. It is to be audited by the National Audit Office and the audited accounts are to be made publicly available and will be tabled in Parliament annually.

It is encouraging to note that the proposal to make CSOs part of managing assets from the very initial stages of the process was accepted and included into the Policy. The involvement of CSOs in the management and disposition of returned assets has been accepted as a best principle in the GFAR Principles.<sup>51</sup>

#### 4.9 MANAGING SEIZED AND CONFISCATED ASSETS<sup>52</sup>

State representatives on the committee insisted that the following purposes for the use of confiscated assets are included (a-f and g added later following TISL submissions):

- a. To strengthen law enforcement in its efforts to recover proceeds of crime.
- b. To strengthen administration of justice.
- c. To promote and protect rights and entitlements of victims of crime and witnesses.
- d. For development and maintenance of crime prevention measures.

- e. To provide lawful incentives to law enforcement officers associated with enforcing provisions of this law.
- f. To strengthen a fund to be entitled ‘Informants Reward Fund’.
- g. To achieve targets of the Sustainable Development Goals.

TISL noted that the proposed was more slanted towards crime prevention and the strengthening of the criminal justice system and less focused on ensuring that recovered assets are utilized for the benefit of victims in Sri Lanka, from whom the funds have been stolen. TISL insisted that the Committee adopt best practices from around the world that have used the funds for social development schemes. One well known instance of using recovered assets for the benefit of people – to achieve social goals – is the BOTA foundation model where the funds were utilized for the benefit of children and youth in Kazakhstan.<sup>53</sup>

It is a recognized principle that victims of corruption need to be compensated.<sup>54</sup> Crimes including bribery and corruption can cause damage to identifiable individuals, groups of individuals and wider society. Whilst recognizing that the former two groups are identifiable as victims and need to be compensated, it is important to also repair the damage done at societal level. This type of damage can impact on collective fundamental rights like health, education and security. It was brought to the attention of the Committee that since it is difficult to measure this type of damage, it is often disregarded as unimportant and not feasible.

One of the notable ways of ameliorating the damage caused to society is to have a mechanism in place to achieve sustainable development goals (SDGs). TISL noted that even though the term SDGs has not been expressly used, the trend universally in managing recovered assets is to use them in projects that enhance welfare to communities in the origin countries.

For example, under Italian law the recovered assets can be utilized for achieving social purposes, beyond the ability to use them for law enforcement and civil protection purposes.<sup>55</sup> The European Union Directive 2014/42/EU encourages its member states to use confiscated assets for public interest and social purposes.

50. Tracking Nigeria's Recovered Assets, CiFAR, <<https://cifar.eu/tracking-nigeria-assets/>>

51. See footnote 22, Principle 10

52. Refer Attachment 01 – Part IX: Seized property not confiscated, Part XI: Apportionment of confiscated proceeds and transfer to a Trust Fund

53. The BOTA Foundation <<https://www.irex.org/resource/bota-foundation-final-report>> accessed on 10th September 2019

54. UNCAC article 32, article 57 (3) (c) and GFAR principles

55. Italian law 109/1996

On this premise TISL insisted on the need for recognizing priority targets under the SDG Goals as possible areas for which returned funds could be utilized. The discretion to decide which purpose requires priority consideration is to lie with the Board of Trustees of the Fund. This proposal was accepted by the drafting Committee and incorporated into subsection (g) above.

Under the Policy, assets which are seized, but against which proceedings are not instituted (post-conviction confiscation, non-conviction based recovery or extended confiscation proceedings), need to be returned by judicial order to the person(s) who can satisfy the court as deserving to be the recipient of such return. This was included as a safeguard against possible invasion of property rights. Whilst these steps for mitigation have been included, consultation with broader civil society on the final rights and powers of the authority, particularly in any extensions in seizure power that could be included in a draft Bill, must be considered closely, to ensure conformity with Sri Lankan fundamental rights as enshrined in the Sri Lankan Constitution.

#### 4.10 INTERNATIONAL COOPERATION

The Policy notes that the Authority has the power to convene joint investigation teams that can also include foreign law enforcement agencies and experts.<sup>56</sup> The Authority will also be empowered to make applications to foreign judicial and law enforcement authorities, seeking seizure, confiscation and return of the value of proceeds of crime, to receive similar requests from other countries when proceeds of crime are found in Sri Lankan soil belonging to other countries, and to enter into agreements with foreign States or organizations for the transfer and/or sharing of proceeds of crime with the consent of the Fund.<sup>57</sup>

All of these provisions provide the basis for international cooperation which is crucial in the effective recovery of stolen assets. The timely and effective flow of such requests are key in commencing the recovery of proceeds of crime. The importance of international cooperation has been highlighted in UNCAC, Article 55.<sup>58</sup>

#### 4.11 FUNDAMENTAL RIGHTS CONCERNS AND THE VICTIM CENTRED APPROACH TO ASSET RECOVERY

A key principle underpinning the TISL engagement in the drafting committee, was the need for the adoption of a victim centred approach to the recovery of stolen assets. In order to ensure this approach is adhered to at all stages of the asset recovery process TISL proposed that three guiding principles of the law are identified, namely necessity, proportionality and public interest apart from achieving the objectives of criminal justice.<sup>59</sup> Further, TISL proposed that the extended victims, i.e. the citizens of Sri Lanka are also considered and compensated using the Trust Fund (please refer above under managing recovered assets).

There are some other provisions that have been included into the law that could preserve the rights of the victims. For example, in instances of waiving the post-conviction based confiscation proceedings (e.g. on grounds of triviality of the identified proceeds of crime or its value or where the accused does not have identifiable assets), the Authority is expected to get the concurrence of the victim. Additionally, in order for the victim to know about possible confiscation, the Authority is legally obligated to issue a Notice containing information of such confiscation. The victim has the right to also seek compensation through civil proceedings even if he/she has already received damages from confiscated proceeds of crime.

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56. Refer Attachment 01 - Section 46

57. Refer Attachment 01 - Sections 47,48 and 49

58. Refer Attachment 01 - Article 55

59. Refer Attachment 01 - Section 7

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## 5. CONCLUSION

The drafting process of the Proceeds of Crime legislative framework was a new dynamic area of work for TISL and it is hoped that this analytical brief will be a useful tool for those wanting to both appraise themselves of vital considerations and understand the nature and content of policy deliberations in 2018.

The drafting of the Policy with at least some civil society participation is a good illustration of state policy being stronger through CSO engagement in policy formulation. Whilst there were disagreements on certain aspects of the proposals, it ensured that many factors and alternative views were provided and deliberated. At times TISL was the voice of moderation when the discussion was slanted towards the law enforcement angle, instead of a victim centred and transparent approach to asset recovery. However, some of the concepts that will be introduced by this law (e.g. extended confiscation, non-conviction-based asset recovery), still have the potential to be misused if not properly formulated after bona fide consultations with wider CSO and other stakeholders including professionals who are working in the human rights field. Therefore, TISL reiterates the importance of, going forward, such organizations and individuals being consulted in the drafting process of the actual provisions of the law, in order to further mitigate possible misuse of the law. Additionally, for this law to be effectively implemented wider criminal justice system reforms would be crucial.

In order to ensure transparency, accountability and responsible asset return, TISL notes that the following are some of the key elements to be incorporated in to a law on proceeds of crime, that will be drafted based on the Policy:

- Subjecting the law to the Right to Information framework
- Ensuring civil society presence in the composition of the Authority and the Board of Trustees of the Fund
- Utilizing recovered assets in realizing SDGs
- Accounts of the Fund to be audited by the National Audit Office, publicly available and tabled in Parliament
- Ensuring that the management and administration of the Fund is transparent and amenable to public inspection.
- Ensuring that principles of necessity, proportionality and public interest are accepted as guiding principles in the enforcement and interpretation of the proposed law

The political will to enact a future Proceeds of Crime Bill may not galvanize in the near future, however TISL hopes that if the Proceeds of Crime Bill is taken forward, this brief will inform legislators and policy makers. This will in turn ensure that Sri Lanka complies with its international and domestic commitments in combatting illicit financial flows.

# ATTACHMENT 1

## POLICY AND LEGISLATIVE FRAMEWORK OF THE PROPOSED PROCEEDS OF CRIME ACT OF SRI LANKA

### Part I: Purpose of the proposed law

1. The purpose (policy objectives) of the proposed law would be as following:
  - a. Deprive criminals from the ill-gained assets (proceeds of crime),
  - b. Compensate victims of crime,
  - c. Undermine organized crime including terrorism and financial and economic crime,
  - d. Create an economically viable proceeds of crime recovery system,
  - e. Preserve the value of seized or confiscated assets for the benefit of the State, society and victims of crime, and
  - f. Ensure accountability and transparency of and public confidence in the proceeds of crime recovery system.
  
2. Adoption of the proposed law will fulfill recommendations pertaining to 'stolen asset recovery' of the Peer Review conducted by United Nations Office Drugs and Crime in terms of the United Nations Convention Against Corruption (UNCAC) relating to Sri Lanka<sup>1</sup>, as well as the outcome of the Mutual Evaluation carried out on Sri Lanka by the Asia Pacific Group on Money Laundering (APG)<sup>2</sup>.

### Part II: Scope of the proposed law

3. This law will apply to the following situations:
  - a. Where any person commits any offence in Sri Lanka.
  - b. Where a (i) Sri Lankan citizen, (ii) Sri Lankan dual-citizen, (iii) a person domiciled or found in Sri Lanka, has committed any offence within or outside Sri Lanka and has derived proceeds of such offence (proceeds of crime) found in or outside Sri Lanka.
  - c. Where proceeds of crime are found in Sri Lanka.
  - d. Where proceeds of crime have come into, taken out of or passed through Sri Lanka.
  
4. The proposed law will provide for an effective and expeditious procedure for the following:
  - a. Investigation of the acquisition, placement, layering, integration, use, control, and possession of proceeds of crime<sup>3</sup> whether situated within or outside Sri Lanka,
  - b. Identification, tracing and detection of such proceeds,
  - c. Seizure, freezing (restraint) administration / management of such proceeds, including confiscated / forfeited proceeds of crime and realization of the monetary value thereof,
  - d. Investigation of offences recognized by this law,
  - e. Institution of legal proceedings relating to proceeds of crime and offences recognized by this law,
  - f. Confiscation / forfeiture of proceeds of crime,
  - g. Disposal of proceeds of crime,
  - h. Provide reparation to victims of crime,
  - i. Recognize the rights of bona-fide third parties,
  - j. Provide for mutual legal assistance regarding proceeds of crime,
  - k. Recognize the existing civil law remedy for individuals and foreign States to seek direct recovery of proceeds of crime located in Sri Lanka,
  - l. Provide for annual reporting to Parliament and periodic public reporting, and
  - m. Any other matter incidental thereto.
  
5. The proposed law will also:
  - i. Relate to, inter alia, proceeds of crimes owned or possessed by natural persons and corporate entities.
  - ii. Make provision for the establishment of a statutory body for the accomplishment of the objectives of the proposed law and name such statutory authority as the Proceeds of Crime Recovery and Management Authority of Sri Lanka (hereinafter, 'the Authority').
  
6. Persons who own / are legally entitled to possess property subjected to criminality during their period of ownership / legal entitlement, shall be entitled to, following necessary investigations and judicial inquiry during which proof of such ownership / legal entitlement shall be established by such owner / person claiming legal entitlement to possess, to expeditious regaining of possession and control of such property, without being

subjected to the scheme contained herein relating to the confiscation / forfeiture of such property. Provided however, if such investigation and judicial inquiry is to take time, following judicial inquiry, be entitled to, pending the completion of the investigation, to the possession of such property on security to be provided by such claimant.

7. The following shall serve as guiding principles in the enforcement and interpretation of the provisions of the proposed law:

- (a) Achieving the objectives of criminal justice
- (b) Necessity
- (c) Proportionality
- (d) Public interest

8. (a) Where applicable, provisions of the proposed law relating to seizure, freezing, management and confiscation of proceeds of money laundering contained in the Prevention of Money Laundering Act, Bribery Act, and the Code of Criminal Procedure Act will be repealed and replaced by provisions of the proposed law.

(b) The proposed law will not have the effect amending or repealing such provisions of any other law, such as the Customs Ordinance, Excise Ordinance, Banking Act and the Inland Revenue Act.

(c) Law enforcement officers empowered by other statutes such as the Police Ordinance, Code of Criminal Procedure Act, Bribery Act, Commission to Investigate Allegations of Bribery or Corruption Act, Customs Ordinance, etc. shall be entitled to use provisions of the proposed law for the seizure, freezing, management and confiscation of proceeds of crime. Provided however, if proceeds of crime are seized in terms of the proposed law, ensuing steps relating to the management of seized proceeds of crime and confiscation of such proceeds shall be affected in terms of this law.

### **Part III: An offence of Money Laundering**

9. It shall be an offence to possess, control, transfer, invest, receive, gift, make arrangements, disguise, have beneficial control or ownership, hide, or dispose of proceeds of crime, or engaged in any other transaction, knowing or having reasons to believe that such property is, or represents, the proceeds of crime.<sup>4</sup> This offence shall carry the same punishment as the offence of Money Laundering attracts in the Prevention of Money Laundering Act.

### **Part IV: Duty to Report**

10. It shall be the duty of specified persons<sup>5</sup> who have knowledge of the existence of proceeds of crime or property derived out of such proceeds of crime, to convey such information to the Authority. Violation of such duty shall constitute an offence.

### **Part V: Post-Conviction Confiscation / Forfeiture**

11. The proposed law will provide for the confiscation /forfeiture of the benefit / value of the proceeds of crime, following the prosecution and conviction of any person for having committed an offence.

12. Following conviction of a person for having committed an offence, it shall be mandatory to commence confiscation proceedings (pertaining to the proceeds of crime in respect of the crime relating to which the accused was convicted) connected to the trial relating to the committing of the offence, unless such proceedings are waived by court on application by the Authority (on grounds of triviality of the identified proceeds of crime or the value thereof<sup>6</sup> or where the accused does not have identifiable assets;) having obtained the concurrence of the relevant victim of crime (if any and if available) and the relevant law enforcement agency. An order for confiscation shall be appealable.

### **Part VI: Extended Confiscation**

13. Following the conviction of a person for an offence, the proposed law will also provide for (in addition to confiscation of the proceeds of the crime he was convicted of, referred to in the preceding paragraph) the conduct of a judicial inquiry based on an application by the Attorney General, for the confiscation of other property owned by such convicted person. Upon prima-facie satisfaction of the court by the Attorney General, that such property may have been derived out of unlawful means, the court shall assume that such property was derived from a course of criminal activity<sup>7</sup> during the 7 years preceding the commission of the offence in respect

of which the accused has been convicted. In such proceedings for extended confiscation, the convicted accused shall have the right to show, on a balance of probabilities, that the court should not assume that it would otherwise be entitled to make and therefore such property should not be confiscated. This order shall also be subjected to an appeal.

### **Part VII: Scope of Confiscation Proceedings**

14. Confiscation proceedings may take place even with regard to cases instituted in terms of sec. 136(1)(a) (Private Plaints) of the CCPA8. In such proceedings, post-conviction confiscation proceedings shall be handled by the complainant who instituted criminal proceedings.

### **Part VIII: Non-conviction based confiscation proceedings**

15. The proposed law will provide for an effective and expeditious judicial procedure for non-conviction based confiscation / forfeiture of property (sometimes referred to as in rem confiscation) of the proceeds of crime. Such proceedings may be initiated only by the Authority and its authorized agents (such as law enforcement authorities – police, customs, excise, forest, etc.), and will not be conditioned upon a prosecution or conviction of any person for having committed an offence. Even in situations where a person is prosecuted for having committed an offence, notwithstanding the accused having not been convicted, it shall be possible to commence non-conviction based proceeding seeking the confiscation of what is believed to be proceeds of crime or value / benefit thereof. Such order for confiscation shall be appealable.

16. The proposed law will recognize that any property or beneficial interest in any property which can be shown on a balance of probabilities to have been unlawfully obtained, will be liable to be confiscated by way of ‘non-conviction based confiscation proceedings’. (For avoidance of doubt, it is recognized that, this burden does not require the State to prove a causal relationship between the committing of a particular offence and the identified asset.)

### **Part IX: Seized Property not Confiscated**

17. Following seizure of property and completion of connected criminal investigations and prosecutions (if any), if for the purpose of securing the confiscation of such property, proceedings are not instituted within a reasonable period of time in terms of one out of the three mechanisms contained herein (i.e. post-conviction confiscation, extended confiscation and non-conviction based confiscation) such property on application by the person from whose custody such property was seized, shall after judicial inquiry be returned in terms of a judicial order to such person, or to any other person who would be capable of satisfying court that such property should be returned to such third party.

### **Part X: Restraint, seizure, administration & management and preservation of proceeds of crime**

18. The proposed law will provide for effective and expeditious law enforcement and judicial procedures for restraint, seizure, temporary administration / management (pending confiscation / forfeiture) and preservation of proceeds of crime.

19. The proposed law will also provide for the following:

- a. Manner in which proceeds of crime may be seized,
- b. Law enforcement personnel who would be authorized to seize property,
- c. The manner in which seized proceeds of crime shall be managed / administered (including the use of external expertise) pending and during judicial proceedings, including due diligence and good faith in which seized property shall be administered / managed,
- d. Pre-confiscation sale / disposal of certain proceeds of crime such as perishable goods,
- e. Discharge of such property not confiscated, and
- f. The manner in which claims for possible loss caused as a result of or associated with the seizure of property shall be adjudicated upon.

20. The proposed law would include adequate safeguards to protect bona-fide interests of third party claimants.

## **Part XI: Apportionment of confiscated proceeds and transfer to a Trust Fund**

21. Proceeds of crime or value thereof confiscated following post-conviction confiscation, extended confiscation and non-conviction based confiscation proceedings, including proceeds of crime transmitted to Sri Lanka following confiscation and forfeiture by foreign judicial / law enforcement authorities, shall notwithstanding anything to the contrary in any other law, following applications being made by the Authority to court and claimants if any, be apportioned by such court to provide reparation to the relevant victims of crime (including the government). The Authority shall be entitled to receive reimbursement of actual expenditure incurred in the administration and management of the seized property or up to 10% of the proceeds confiscated property, whichever is higher. If thereafter, there are any proceeds remaining, such proceeds shall be forfeited and transferred to an independent Trust Fund ('Trust Fund for Confiscated Proceeds of Crime'), which shall report to and come under the supervision of the Parliament.

22. In order to facilitate victims of crime to present claims to court in terms of the preceding paragraph, following the confiscation of proceeds of crime by a court in Sri Lanka or the return of proceeds of crime from a foreign country, the Authority shall cause the publication of a Notice containing information of such confiscation and its possible causal link to identified proceeds of crime and the committing of crime that resulted in the deriving of such proceeds, enabling victims of crime to take cognizance of such confiscation or return of proceeds of crime to Sri Lanka, and if they so wish present claims to court.

23. That a victim of crime has received reparation from confiscated proceeds of crime, shall not deprive such victim of crime from claiming in civil proceedings damages and compensation with regard to the original loss of the relevant property which was subjected to criminality.

24. The Trust shall utilize its funds for the following purposes:

- a. To strengthen law enforcement, in particular, in its efforts to recover proceeds of crime.
- b. To strengthen administration of justice.
- c. To promote and protect rights and entitlements of victims of crime and witnesses.
- d. For development and maintenance of crime prevention measures.
- e. To provide lawful incentives to law enforcement officers associated with enforcing provisions of this law.
- f. To strengthen a fund to be entitled 'Informants Reward Fund'.
- g. To achieve targets of the Sustainable Development Goals.

25. The Board of Trustees of the Trust shall be seven in number, and shall comprise of persons of repute having expertise in the fields of administration of justice, law enforcement, public finance, financial management, business management, related civil society activism, and auditing. The trustees of trust fund including its chairman shall be appointed by the Constitutional Council.

26. The management and administration of the Trust Fund shall be transparent and amenable to public inspection.

27. The accounts of the Trust Fund shall be audited by the Auditor General. Audited accounts shall be made publicly available and tabled in Parliament annually.

## **Part XII: Proceeds of Crime Recovery and Management Authority of Sri Lanka ('the Authority') and institutional arrangements**

28. A statutory body (to be called 'Proceeds of Crime Recovery & Management Authority of Sri Lanka' – PCRMASL) will be created by the proposed law, for the enforcement of provisions of this law, including in particular (a) conduct of investigations into proceeds of crime, (b) detection, seizure, temporary administration, transfer and (c) disposal of proceeds of crime based on authority received from a judicial order.

29. The Authority shall be entitled to sue and be sued under its own name.

30. The Authority shall be empowered to coordinate (a) matters relating to enforcement of the law relating to proceeds of crime, and (b) the seizure, transfer, and management of seized proceeds of crime.

31. The Authority shall have the same powers as a law enforcement agency with regard to identification, detection, seizure and investigation of proceeds of crime. It will not restrict the existing powers of other law

enforcement agencies referred to herein. In addition, the Authority shall be authorized and mandated to :

- a. Be a centre of excellence in respect of proceeds of crime and engage in knowledge and best practices transfer relating to the identification, detection, investigation, seizure, administration and management of proceeds of crime.
- b. Coordinate between other law enforcement agencies.
- c. Maintain a data-base relating to the seizure, transfer, management and confiscation / forfeiture of proceeds of crime.
- d. Institute legal proceedings in court, for the commencement of non-conviction based confiscation proceedings.
- e. Conduct research into enforcement aspects relating to provisions of this law.
- f. Enter into Memorandums of Understandings and other work arrangements with other statutory bodies and law enforcement agencies.

32. Unless generally or on a case by case basis authorized by the Authority, the Authority shall be the only agency of the State empowered with legal authority in terms of the proposed law to administer and manage seized proceeds of crime, pending final judicial order on the confiscation / forfeiture of proceeds of crime.

33. Prior to commencement of non-conviction-based confiscation proceedings (for reasons to be recorded), the Authority shall consult the relevant law enforcement agency which caused the seizure of the relevant proceeds of crime.

34. The following law enforcement agencies of the State will be empowered by this law to exercise the powers and functions contained herein relating to the identification, detection, investigation, seizure of proceeds of crime, and issue orders seeking declarations relating to assets (Unexplained Wealth Orders):

- a. Police (including the CID and the FCID)
- b. CIABOC
- c. Customs
- d. Excise
- e. Forest
- f. Wildlife
- g. Securities and Exchange Commission

35. Law enforcement authorities referred to in the preceding paragraph would also be entitled to (with the assistance of the Attorney General and following notification given to the Authority) move court (following conviction) for post-conviction confiscation and non-conviction based confiscation of proceeds of crime seized by such agency. However, during the interim period, such proceeds of crime shall be managed / administered by the Authority.

36. Following seizure of proceeds of crime by a law enforcement agency authorised by this law to do so, it shall within 3 working days of such seizure convey such information to the Authority, which will serve as the central database, and facilitate the Authority to commence the management / administration of such proceeds of crime. It shall also within 7 working days file a Report in a Court of competent jurisdiction of such seizure.

37. The Authority shall be liable for any act or omission done in willful disregard of the law, or with malice, or for a collateral purpose or negligently.

38. No officer, other employee, advisor or consultant of the Authority shall be liable for any action engaged in by him in compliance with the law, a judicial order or otherwise in good faith.

### **Part XIII: Powers of Investigation**

39. The Authority and other law enforcement authorities recognized by the proposed law, shall in terms of the proposed law, possess the following powers:

- a. Law enforcement officer authorized in terms of the proposed law, shall be entitled to exercise the following powers, having obtained a magisterial order:
  - i. Conduct search of premises, unless the custodian of such premises gives consent.
  - ii. Conduct of search of premises, without revealing such search to the custodian of such property, for a period of time specified in the judicial order.
  - iii. Interception of live telephone communications, with due regard to privacy and confidentiality.
  - iv. Conduct of controlled deliveries.
  - v. Imposition of travel restrictions.

- vi. Recording of communications between parties.
- vii. Prohibit / Retrain the transfer of property, funds or any interest.
- viii. Freezing of bank accounts.
- ix. Conduct surveillance in a manner that would have a bearing on the privacy of persons.
- b. Law enforcement officers authorized in terms of the proposed law, shall be entitled to directly exercise the following powers:
  - i. Cause the arrest of any person suspected or have been concerned in the committing an offence in terms of this law.
  - ii. Search any person at the time of arrest.
  - iii. Require any person to submit an affidavit containing information specified in a Notice issued to him. Non-compliance and the provision of false information to be an offence. The contents of such affidavit shall not be 'evidence' in subsequent judicial proceedings against the maker of the affidavit, save for the purpose of proving a charge of submitting an affidavit in terms of this provision containing false information.
  - iv. Call for bank records of every description, income tax records, declarations of assets and liabilities, notwithstanding anything in the Inland Revenue Act or the Declaration of Assets and Liabilities Act.
  - v. Call for telecommunication records.
  - vi. Call for any record from any statutory authority or other record keeping entity.
  - vii. Summon any person for an interview.
  - viii. Interview and record the statement of any person.
  - ix. Any other item that is required for the purpose of the investigations.
  - x. Access to computer and other automated systems.
  - xi. Conduct general surveillance.

40. No law enforcement officer empowered under this Act, shall unless (a) acting in terms of a judicial order, (b) acting in compliance with any law, or (c) for the purpose of giving effect to the objectives of this law, reveal to any person any information collected or received in the course of any investigation. Violation of this prohibition, shall amount to an offence.

#### **Part XIV: Unexplained Wealth Orders**

41. The proposed law will provide for the issuance of orders requiring persons found in possession of assets which appears to a law enforcement officer authorized in terms of this law to be unexplainable, to be obligated to make a sworn declaration, on the manner in which such assets were derived.
- a. The law will also provide for consequences for non-compliance and for making false declarations.
  - b. The proposed law would empower the Authority to require any person against whom reasonable grounds exist that such person has committed or having been concerned in committing an offence punishable with a term of imprisonment of either description of 5 years or more (serious criminal offences), or has been transacting with proceeds of crime, to make a sworn declaration (in accordance with the stipulated form) of his assets.
  - c. The proposed law would also empower the Authority to issue a Notice on any person to make a sworn declaration of the manner in which such person acquired assets owned by him.
  - d. The Authority can require the respondent to provide evidence of the manner in which certain assets were acquired or transactions effected.
42. The Authority or any law enforcement officer authorized in terms of this law, shall not be obliged to accept the truth of a declaration made in terms of the preceding section, if the contents therein are found by the Authority or law enforcement officers empowered in terms of this Act, to be false or having reason to be that the contents therein is not true or improbable.
43. The information contained in such a declaration may be used for the following purposes :
- a. As 'investigational material' in the conduct of criminal investigations into the possible committing of serious crimes,
  - b. As a possible basis to commence non-conviction based confiscation proceedings, or
  - c. The contents of such sworn declaration shall not be 'evidence' in subsequent judicial proceedings against the maker of the affidavit, save for the purpose of proving a charge of submitting a sworn declaration containing false information.

## **Part XV: Legal Professional Privilege**

44. For the avoidance of doubt, the proposed law will highlight the common law position that a person who communicates with a lawyer, with such communication being in furtherance of a criminal act, then privilege cannot be claimed.

## **Part XVI: Power of the Authority to delegate functions**

45. The Authority will be empowered to delegate either on a generic or case by case basis, some of its functions and withdraw such delegation for reasons to be recorded, to law enforcement agencies including the following, enabling such law enforcement agencies to carry out such delegated functions under the guidance and supervision of the Authority:

- a. Police (including the CID and the FCID)
- b. CIABOC
- c. Customs
- d. Excise
- e. Forest
- f. Wildlife
- g. Securities and Exchange Commission  
Joint Investigation Teams

46. The Authority will be empowered to constitute joint investigation teams including designated foreign law enforcement agencies and experts appointed by the Authority to act on its behalf.

## **Part XVII: The Authority and international co-operation and asset recovery**

47. The Authority, with the consent of the 'Trust Fund for Confiscated Proceeds of Crime' will be empowered to enter into agreements with foreign States and organizations similar to the Authority for the transfer and / or sharing of proceeds of crime or value thereof.

48. The Authority will be empowered to make applications to foreign judicial and law enforcement authorities, seeking seizure, confiscation and return of the value of proceeds of crime situated in such countries pertaining to the committing of crime in Sri Lanka. The Authority will be empowered to access and receive any material from other jurisdictions in respect of any investigation coming within its purview.

49. The Authority will be empowered to receive requests from another State (with whom Sri Lanka has reciprocal or multilateral agreements) pertaining to the seizure, confiscation and return to such State the proceeds of crime situated in Sri Lanka pertaining to the committing of crime in such foreign countries or non-conviction based forfeiture requests.

## **Part XVIII: Composition of the Authority**

50. The Chairman of the Authority shall be appointed by the Constitutional Council. The Chairman shall hold office for a period of 5 years.

51. The Authority shall have a Board of Management. It shall be the principle decision making body of the Authority. The Board of Management shall comprise of the following :

- a. Attorney General or his nominee
- b. Inspector General of Police or his nominee
- c. Director General or nominee of the Commission to Investigate Allegations of Bribery or Corruption
- d. A senior officer each appointed by the Constitutional Council from the following institutions, on a nomination by the respective head of institution :
  - i. Sri Lanka Customs
  - ii. Department of Inland Revenue
  - iii. Securities & Exchange Commission
  - iv. Financial Intelligence Unit of Sri Lanka
  - v. Ministry of Justice
  - vi. Ministry of Finance
  - vii. Ministry of Foreign Affairs

52. In addition to the Chairman, the Constitutional Council shall also appoint four individuals with expertise in the following fields:

- a. criminal justice,

- b. proceeds of crime administration and management,
- c. economics, finance and auditing, and,
- d. related civil society activism.

53. The Authority shall have a Chief Executive Officer, who shall be appointed by the Board of Management.

54. The Authority will have authorized officers to enforce provisions of this Act, and they shall possess police powers.

55. The finances of the Authority shall be audited by the Auditor General.

### **Part XIX: Implementation of UNCAC**

56. The proposed law will, inter alia, give statutory effect to norms contained in the United Nations Convention against Corruption (UNCAC), relating to Chapter V of the Convention.

### **Part XX: Interpretation**

57. Proceeds of Crime - The term 'proceeds of crime' shall mean any property or part thereof or any income, service, advantage, benefit or reward or other economic gain which was derived, received, retained, intermingled, converted wholly or partly, or, directly or indirectly, in connection with or as a result of the committing of any offence carried on by any person whether in Sri Lanka or elsewhere, and would include instrumentalities of crime and value thereof. The term 'crime' is used synonymous to the term 'offence' and would relate to all offences recognised by Sri Lankan law and wrongdoing committed outside Sri Lanka which constitutes offences recognised by Sri Lankan law, punishable with a term of imprisonment of two years or more. The term offence shall carry the same meaning as is found in the Penal Code.

## ATTACHMENT 2

### GFAR PRINCIPLES FOR DISPOSITION AND TRANSFER OF CONFISCATED STOLEN ASSETS IN CORRUPTION CASES

The co-hosts and four focus countries at GFAR reaffirmed their commitment to the return and disposition of confiscated stolen assets as articulated in UNCAC. They highlighted the importance of technical assistance towards successful asset recovery and disposition. They reflected further on their experiences, and emerging lessons, from previous instances of returns. Cognisant of the work already going on under the auspices of UNODC, and the call in the Addis Ababa Action Agenda<sup>1</sup> for the international community to develop good practices on asset return, GFAR participants offered the following considerations for principles that would promote successful asset return. These Principles address approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the processes involved. Nothing in these Principles is intended to infringe national sovereignty or domestic principles of law. GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases

**PRINCIPLE 1: PARTNERSHIP** It is recognised that successful return of stolen assets is fundamentally based on there being a strong partnership between transferring and receiving countries. Such partnership promotes trust and confidence.

**PRINCIPLE 2: MUTUAL INTERESTS** It is recognized that both transferring and receiving countries have shared interests in a successful outcome. Hence, countries should work together to establish arrangements for transfer that are mutually agreed.

**PRINCIPLE 3: EARLY DIALOGUE** It is strongly desirable to commence dialogue between transferring and receiving countries at the earliest opportunity in the process, and for there to be continuing dialogue throughout the process.

**PRINCIPLE 4: TRANSPARENCY AND ACCOUNTABILITY** Transferring and receiving countries will guarantee transparency and accountability in the return and disposition of recovered assets. Information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country. The use of unspecified or contingent fee arrangements should be discouraged.

**PRINCIPLE 5: BENEFICIARIES** Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.

**PRINCIPLE 6: STRENGTHENING ANTI-CORRUPTION AND DEVELOPMENT** Where possible, in the end use of confiscated proceeds, consideration should also be given to encouraging actions which fulfill UNCAC principles of combating corruption, repairing the damage done by corruption, and achieving development goals.

**PRINCIPLE 7: CASE-SPECIFIC TREATMENT** Disposition of confiscated proceeds of crime should be considered in a case-specific manner.

**PRINCIPLE 8: CONSIDER USING AN AGREEMENT UNDER UNCAC ARTICLE 57(5)** Case-specific agreements or arrangements should, where agreed by both the transferring and receiving state, be concluded to help ensure the transparent and effective use, administration and monitoring of returned proceeds. The transferring mechanism(s) should, where possible, use existing political and institutional frameworks and be in line with the country development strategy in order to ensure coherence, avoid duplication and optimize efficiency.

**PRINCIPLE 9: PRECLUSION OF BENEFIT TO OFFENDERS** All steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence(s).

**PRINCIPLE 10: INCLUSION OF NON-GOVERNMENT STAKEHOLDERS** To the extent appropriate and permitted by law, individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, should be encouraged to participate in the asset return process, including by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition and administration of recovered assets. Washington, D.C. • December 2017 1. Financing for Development conference, July 2015, para 25

# ATTACHMENT 3

## UNCAC CHAPTER ON ASSET RECOVERY – CHAPTER 5

**Article 51.** General provision the return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

**Article 52.** Prevention and detection of transfers of proceeds of crime 1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer. 2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall: (a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and recordkeeping measures to take concerning such accounts; and (b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify. 3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate 43 records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner. 4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group. 5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention. 6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

**Article 53.** Measures for direct recovery of property Each State Party shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention; (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and 44 (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

**Article 54.** Mechanisms for recovery of property through international cooperation in confiscation 1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party; (b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. 2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; (b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and (c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

**Article 55.** International cooperation for purposes of confiscation 1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system: (a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party. 2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party. 3. The provisions of article 46 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain: (a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law; (b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final; (c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based. 4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party. 5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations. 6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis. 7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does

not receive sufficient and timely evidence or if the property is of a de minimis value. 8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure. 9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

**Article 56.** Special cooperation Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences 47 established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

**Article 57.** Return and disposal of assets 1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law. 2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties. 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall: (a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party; (b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property; (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime. 4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article. 5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by case basis, for the final disposal of confiscated property.

**Article 58.** Financial intelligence unit States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions. Article 59. Bilateral and multilateral agreements and arrangements States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.





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