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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
PC-OC

PRELIMINARY STUDY ON THE POSSIBLE ADDED VALUE AND FEASIBILITY OF PREPARING A NEW BINDING INSTRUMENT IN THE COUNCIL OF EUROPE ON INTERNATIONAL CO-OPERATION AS REGARDS THE MANAGEMENT, RECOVERY AND SHARING OF ASSETS PROCEEDING FROM CRIME

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List of Abbreviations

CoE	Council of Europe
COP	Conference of the Parties
ECHR	European Convention on Human Rights
EU	European Union
FATF	Financial Action Task Force
MLA	Mutual Legal Assistance
NCBC	Non-conviction based confiscation
PEPs	Politically Exposed Persons
StAR	Stolen Asset Recovery Initiative
UNCAC	UN Convention against Corruption
UNODC	UN Office on Drugs & Crime
UNTOC	UN Convention on Transnational Organised Crime

SUMMARY OF RECOMMENDATIONS

1. It is appropriate and feasible that a new instrument (in the form of a Protocol to the Warsaw Convention) be considered in order to address a range of ongoing asset recovery issues.

2. Member States need the benefit of an international framework that encourages assistance for non-conviction based confiscation (NCBC), provides a more certain basis for co-operation and, nevertheless, both recognises differences in approach as between States and respects national legal norms

3. At the same time, it is premature to mandate all Member States to amend their national laws to embrace NCBC, whether domestically or solely from the standpoint of international co-operation. Rather, an obligation on Member States to consider whether to introduce regime for NCBC, is likely to be the most effective way of taking matters forward.

4. Having regard to the relative novelty and challenge of NCBC for some States, it is suggested then that the instrument provides that:
   - Each Party shall consider adopting such legislative and other measures as may be necessary to provide for NCBC;
   - Each Party shall, subject to its domestic legal system, use its best endeavours to recognise a non-conviction based confiscation order of another Party;
   - When determining whether a request for MLA relating to non-conviction based confiscation (including in respect of an interim measure) should be executed, each Party shall consider the nature, not the title, of the other Party's proceedings.
   - Each Party shall use its best endeavours to give the widest possible assistance to a request for MLA relating to non-conviction based confiscation.

5. In relation to assets falling with Article 57 of UNCAC (return of State assets etc.) consultation between States is key and should be made the subject of a formal obligation. At the same time, transparency and accountability should inform every stage of the process and States should be mandated to consult at an early stage on 'heads' of costs/expenses.

6. A number of formal measures should be introduced in respect of the matters currently addressed by Article 25 of the Warsaw Convention. In respect of Article 25(2), consideration should be given to placing a formal requirement on the Member State that holds the asset to engage proactively and spontaneously with another State Party where it is clear to the holding State Party that the confiscated assets belong to legitimate owners in that other State or that compensation is likely to follow. A complementary obligation should also be placed on that other State, requiring it to adhere to the principles of transparency and accountability in order to demonstrate to the holding State that, upon return, the confiscated assets are indeed disposed in line with the arrangement or agreement (in order restoration to legitimate owner(s) or compensation for victim(s)).

7. To maintain public confidence, Member States should be formally encouraged to inform the public how returned confiscated assets will be utilised, managed and monitored.

8. Greater certainty and consistency in asset sharing would be achieved if an instrument provision provides for asset sharing between Member States on similar lines to the EU model, but with an 'opt out' in any given case by agreement of the States involved.

9. In relation to Article 25(3), an obligation, rather than the present discretion, should be imposed on Member States to conclude agreements where it is clear/obvious (precise threshold to be agreed) that:
    - The confiscated assets will be required to satisfy any claim by the legitimate owner(s);
    - The confiscated assets will be required to compensate victims (individual or community).

    Additionally, a new discretionary provision should be considered to the effect that where a State has assisted the holding State in its asset recovery efforts and/or the investigation, notwithstanding there it is not a 'victim' State or legitimate owner in that State, it may be invited to share in the assets and become a party to a sharing agreement.

10. Asset management provisions (extending to post-confiscation assets pending disposal) should be developed for inclusion in the new instrument, in line with FATF's characteristics for an effective asset management framework. To avoid risks around depreciation or unduly high storage costs for certain assets, a provision in respect of pre-confiscation sale, not just of perishable goods, but to avoid asset depreciation and unduly high costs, should be included. In addition, a practical guidance document, as well as any Explanatory Report, should accompany any such provisions.

11. The above asset management provisions should be complemented by asset disposal provisions in order to create an overall body of minimum agreed standards.

12. Member States should be formally encouraged to consider whether to have in place the freezing/restraint order and, in the case of those Member States with a property-based confiscation framework, to consider whether value-based provisions should added to domestic law.

13. Direct transmission for urgent requests is adequately reflected in the Warsaw Convention (at Article 34); however, it should be supplemented by the production of a practitioner guidance document.

14. Extended confiscation should be a topic for ongoing discussion and sensitisation among Member States, with a view to re-visiting at a later date.

INTRODUCTION

This study seeks to consider whether an additional Council of Europe (CoE) instrument is appropriate and feasible in order to address issues and obstacles on international co-operation in relation to the management, recovery and sharing of assets that represent the proceeds of crime. In so doing, consideration will also be given to other, less formal, solutions and ways forward. Although the discussion has, as its focus, international co-operation, inevitably it will include examination changes needed in the domestic laws of Member States.

It should be noted that, at the 4th meeting of the Conference of the Parties (COP)[1] in June 2012, the COP heard from an expert on the gaps identified between the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the 'Warsaw Convention') and the FATF Recommendations 2012 (since updated in October 2018). The expert outlined his findings and it was decided that the Secretariat would conduct an internal review to assess if the gaps identified are likely to create difficulties and, if so, whether the Convention should be amended. In addition, the Secretariat was to examine the fast track amendment procedure in respect of extending the list of predicate offences contained in the Annex to the Warsaw Convention.

At the 5th meeting[2] of the COP in 2013, the Secretariat presented its conclusions, which were adopted by the COP. In summary, those were as follows:

- Recommended that the predicate offences in the Annex to the Warsaw Convention be updated under the fast track amendment procedure to include smuggling and tax crimes;
- Concluded that, as the Warsaw Convention had not yet been adopted by all the CoE Member States, a general review of it would delay the ratification process even further;
- The Warsaw Convention was never intended to replicate in detail the (soft law) FATF standards;
- The on-going review, and potential changes, within Europe on confiscation, for instance, the 4th EU Directive, are likely to go further than the 2012 FATF Recommendations and will require a review of the Warsaw Convention in any event;

- Furthermore, the Warsaw Convention, in some respects, goes further than the 2012 FATF Recommendations.

The COP concluded that the '*…time is not yet right to consider a more general review of the Convention's provisions on international cooperation as a whole, at least until a critical mass of Council of Europe States has ratified the existing Convention, and the outcome of negotiations on the 4th Directive and the Confiscation Directive are clear. A more general review of the Convention's provisions should be undertaken only at that time'*[3]

BACKGROUND & IMPETUS

In 2014, the CoE, at the request of the Committee of Ministers, brought together experts from Member States[4], as well as representatives from the seven monitoring bodies of the Council of

[1] https://rm.coe.int/summary-account-of-the-proceedings/168072b9fb
[2] https://rm.coe.int/conference-of-the-parties-council-of-europe-convention-on-laundering-s/168072b7a0
[3] Paragraph 35 of the Meeting Report, 5th Meeting, Strasbourg 12 – 14 June, 2013, Conference of the Parties, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no. 198): https://rm.coe.int/conference-of-the-parties-council-of-europe-convention-on-laundering-s/168072b7a0
[4] Convened as the 'Ad hoc Drafting Group on Transnational Organised Crime' (the 'Group') (PC-GR-COT))

Europe, to work through the continuing 'on the ground' challenges in addressing transnational organised crime and to consider why such challenges occur and how can they best be addressed. The Group focussed on five (5) main issues:

- the deployment of special investigative means (SIMs);
- witness protection;
- co-operation with the private sector;
- enhancing international co-operation and the widening of networks;
- asset recovery.

The findings were published in the White Paper on Transnational Organised Crime[5].

International co-operation

For present purposes, it should be noted that one of the Group's key findings in relation to international co-operation (extradition, MLA and transfer of sentenced persons) was that there are more than adequate legal frameworks in place, both at the regional and international level. Indeed, in 2014, there were some 30 CoE conventions relating to international co-operation, in addition to any other international instruments developed by, for instance, the UN Office on Drugs & Crime (UNODC).

The Group found that the real difficulty lies in the lack of implementation of the frameworks and their enforcement, which was found to be patchy and inefficient, leading to on-going difficulties in cross-border co-operation.

The Group concluded that focus should be on the ratification and implementation of existing conventions, rather than introducing new conventions. It came to the firm view that '*the Council of Europe should no longer see the drafting of new conventions or legal instruments on the phenomenon of TOC as a priority*'[6]

It is troubling that despite a 'common' international co-operation framework contained within each of these CoE instruments (agreed and ratified both by Member States and other special status States), such challenges continue. Moving forward to the present, international co-operation is still very often marred by delay and burdensome requirements. The White Paper suggests three steps in addressing the challenges:

a. International instruments should be available; however, States need to review the reservations that were entered at the time of ratifying/acceding to instruments and consider if these are still necessary.
b. Domestic law should give effect to the international legal framework; however, implementation of international conventions varies and despite the '*efforts towards harmonisation through international instruments, each State tends to implement conventions in a different way*'[7], which hampers, rather than promotes, international co-operation.
c. There should be efficient use of existing networks to speed up international co-operation and, where none exist, these should be set up. The use of networks also helps to promote mutual trust amongst practitioners. The report strongly urges that Recommendation (2001)11[8] of the CoE which, in turn, recommended the appointment of contact points at a national level, should be acted upon. In addition, the White Paper recommends establishing a judicial network at Council of Europe level (COEJN) level which would, in turn, be linked to Eurojust.

[5] https://rm.coe.int/168070afba
[6] Pg. 13 of the 2014 White Paper on Transnational Organised Crime
[7] Pg 22, ibid.
[8] European Committee on Crime Problems (CDPC): Recommendation (2001) 11 concerning guiding principles on the fight against organised crime: https://www.coe.int/en/web/cdpc/resolutions-recommendations

Asset Recovery:
The drive to deprive those benefiting from criminality has seen a shift in sentencing policy, at both national and international levels, away from the traditional sentencing policies, which centred on penal measures and not aimed at denying criminals of their ill-gotten gains. Although confiscation was traditionally available to courts, it only related to items such as the seizure and destruction of drugs or of weapons, if used as instrumentalities to commit crimes.

To address the modern trend of criminality, including transnational organised crime, the traditional approach was found to be insufficient, as the fruits of the criminality were still available for enjoyment at the end of a prison sentence. If the aim of sentencing policy was to be deterrence, then it needed to hit the ultimate aim of that criminality, profit. This has been addressed through a number of international conventions, such as UNTOC and UNCAC, and regional instruments, including the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the '1990 Convention') and the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the 'Warsaw Convention').

Any consideration of the sufficiency of the existing international co-operation landscape in respect of asset recovery should have in mind the key steps in recovery:

- Asset tracing: collecting intelligence and evidence; both domestic and in foreign jurisdictions (using MLA);
- Securing the assets: Domestic and in foreign jurisdictions (using MLA);
- Court proceedings: Securing conviction and confiscation etc.;
- Enforcing orders: Domestic and in foreign jurisdictions (using MLA);
- Return of assets: Asset sharing agreements.

Those steps may be further broken down to the following processes:

1. Asset tracing;
2. Freezing/restraint/seizure orders;
3. Enforcement of freezing/restraint/seizure orders at the domestic level and where assets are located abroad, enforcement in the foreign State;
4. Management of assets;
5. Final confiscation order;
6. Enforcement of confiscation order in domestic and foreign State;
7. Asset sharing/return.

The international co-operation thread runs through each of these stages and again, despite the frameworks in place, the Group found that '*seizure and freezing of assets in a transnational setting is lacking in efficiency and mechanisms to speed up co-operation at this level need to be further explored and implemented*'[9]. The White Paper, therefore, urged that direct contact among asset recovery bodies should take place and recommended[10] that the CoE undertake a review of existing central offices for the recovery and management of assets to determine if there is an 'ideal' model that can be adopted.

The Group also came to the view that, although there has been an increase in the ratification of international and regional instruments addressing transnational organised crime, barriers to asset recovery still continue as States define such crimes differently under domestic law, some States do not have any framework to address the liability of a legal entity and criminal procedure varies. Some might take issue with that conclusion, given that, whilst harmonisation may be desirable to overcome the obstacles to asset recovery, it is simply not realistic to expect full harmonisation of laws (including,

[9] Pg 35, ibid.
[10] Recommendation 4.6(2), pg 41, ibid

for instance, definitions, legal standards of proof, modes of liability and procedural requirements) amongst Member States, given the inevitable divergence between national legal systems and different legal traditions (even as between civil law States).

Notwithstanding the view reached by the Group as to the undesirability of additional instruments in the fight against transnational organised crime, in the areas of international co-operation and asset recovery, experience shows (as with the Asset Recovery chapter of UNCAC) that it is more likely that 'formal' encouragement, along with the creation of some additional and specific obligations, through an instrument will progress overall implementation and serve to build capability and, importantly, help to make asset recovery 'mainstreamed' into law enforcement and judicial thinking and its specialist institutions and bodies key national stakeholders (a position that is essential in any negotiation on asset sharing agreements).

CoE Action Plan (2016 – 2020)

Based on the recommendations set out in the White Paper, the CoE developed its Action Plan, which included the setting up of a study group to assess if a new CoE instrument/convention is needed to enhance asset recovery, especially in respect of the use of special investigation means in asset freezing/restraint/seizure; the introduction of non-conviction based confiscation (NCBC); and the increased use of new technologies. There was also a recommendation that a study be conducted to ascertain if those Member States that do not presently permit NCBC would be willing to grant MLA in such instance in any event, subject to being satisfied that such measures are in compliance with the ECHR and the case law of the European Court of Human Rights.

NON-CONVICTION BASED CONFISCATION

Non-conviction based confiscation ('NCBC'), sometimes referred to as 'civil forfeiture' or *in rem* confiscation) is the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated so as to deprive a person of ill-gotten gains. Importantly, it is an action against the property itself (hence, *in rem*), not against the person[11].

It has become an increasingly attractive tool globally and, in Europe, forms part of the proceeds of crime legal framework in Ireland, The Netherlands and the UK.

Usually, but not invariably, NCBC arises out of a criminal investigation and the instances where recourse will be had to it are where:

- the suspect has died;
- the suspect may have fled, following the dissipation of his assets;
- a claim is made of jurisdictional privilege (sometimes referred to as 'domestic immunity'), which may be a bar to criminal and civil *in personem* proceedings;
- there is insufficient evidence to mount a criminal prosecution;
- the criminal investigation has been obstructed or frustrated;
- the suspect is abroad and a request for extradition either cannot be made (due to lack of bilateral/multilateral arrangement) or the requested State refuses to extradite; or,
- the defendant has been acquitted following trial. (It is important to emphasise that civil forfeiture proceedings do not fall foul of the principle of *res judicata*.)

As mentioned above, the CoE Action Plan (2016-2020) addresses NCBC, implicitly recognises that efforts in this regard have been limited and invites Member States to either consider introducing NCBC (echoed by the 2018 Parliamentary Assembly Resolution, see below) or grant assistance in the absence of such measures in domestic law. To date, the response by Member States has been

[11] For further detail on NCBC, see Annex 1.

muted, with human rights considerations cited as a barrier to introducing NCBC into domestic law or granting assistance.

The CoE Parliamentary Assembly passed Resolution 2218 (2018): '*Fighting organised crime by facilitating the confiscation of illegal assets'*[12] to address the on-going concerns in relation to confiscation, in particular, ineffective co-operation to track, freeze and confiscate illicit assets as well as the onerous burden of proof imposed in some Member States.

With a view to improving the confiscation efforts, the Resolution invites Member States and other States holding a special status with the Council of Europe to provide for NCBC in their domestic laws, as well as introducing equivalent value confiscation and taxation of illegal gains with appropriate safeguards. The Resolution sets out the good practices and safeguards that will need to be adopted, including the creation of specialised bodies to deal with confiscation/asset recovery, granting such bodies adequate powers and investigation tools; in particular, special investigative means and compensation mechanisms.

The Resolution emphasises the need to promote international co-operation through a wide adoption of all relevant Conventions and providing assistance '*without excluding or otherwise placing at a disadvantage those States that have already introduced non-conviction-based confiscation regimes*'[13]. (It should also be noted that it goes on to ask States, as part of wider international co-operation, to introduce clear rules for asset sharing, in respect of which, see below.)

Making and executing MLA requests in respect of NCBC has been recognised as a challenge by some, but not all, CoE Member States[14]. Some States are unable to execute a request in relation to NCBC at whatever stage the case is, others are able to assist at the information-gathering and seizure stages, but not thereafter, while others still are able to provide assistance at every stage. Moreover, where assistance is capable of being rendered, a number of different rationales or bases are engaged in the requested state: for example, for some States, assistance may be given where the criminal procedure is still engaged, while, for others, the case and judgment on it must be of a penal nature or the property must be shown to have been obtained through crime.

The EU has experienced similar divergence between its Member States and considerable inconsistency, as demonstrated by the EU Directive 2014/42/EU[15], which confines confiscation to '*a final conviction for a criminal offence, which may also result from proceedings in absentia*'[16], despite the fact that a number of EU Member States recognise and have laws on NCBC. It is, then, perhaps no surprise that, on behalf of the EU, the European Commission is currently analysing NCBC within Member States[17].

Both the 1990 Convention and the Warsaw Convention[18] contain a definition of 'confiscation' as *"a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or*

[12] http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24761&lang=EN
[13] Paragraph 9.2.2 of Resolution 2218 (2018)
[14] Answers to the 2016 questionnaire on the use and efficiency of CoE instruments as regards international co-operation in the field of seizure and confiscation of proceeds of crime (PC-OC Mod (2015) 06Rev4 Bil.) https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680666607
[15] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN
[16] At Article 4
[17] March 2019 Security Progress Report, at p.7, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20190320_com-2019-145-security-union-update-18_en.pdf
[18] At Article 1(d) in each.

criminal offences resulting in the final deprivation of property". On an initial reading, some might understand this to mean it is confined to post-conviction confiscation and excludes NCBC, given the phrase, "…*in relation to a criminal offence or criminal offences resulting in..."* However, the Explanatory Report to the Warsaw Convention[19] helpfully sets out that:

The definition of "confiscation" was drafted in order to make it clear that, on the one hand, the 1990 Convention only deals with criminal activities or acts connected therewith, such as acts related to civil in rem actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the 1990 Convention and this Convention. For instance, the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity.

Turning to FATF, it has long been supportive of NCBC and its updated Recommendations[20] provide (at Recommendation 4) that:

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

FATF has also been clear in its Recommendations as to the importance of ensuring international co-operation for NCBC whenever possible, with its current Recommendation 38[21], imploring States to:

…ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.

In addition, the Interpretative Note (no.2) on Recommendation 38 states that:

With regard to requests for cooperation made on the basis of non-conviction based confiscation proceedings, countries need not have the authority to act on the basis of all such requests, but should be able to do so, at a minimum in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or the perpetrator is unknown.

Recommendation 38 first appeared in 2012 and, in the same year, it issued a 'Best Practice' document[22] that gave more detailed guidance that included the following:
It is best practice for countries to explore ways to recognise the non-conviction based confiscation orders of other countries, even if they do not have the same such orders.

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[19] At para. 39
[20] October 2018 https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf
[21] https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf
[22] http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf

When evaluating a request for mutual legal assistance or international co-operation relating to non-conviction based confiscation, countries are encouraged to look beyond terminology and labels to the substance of the proceedings with a view to substantively evaluating the request. This ensures that such requests are not unreasonably refused due to confusion caused by the use of different terminology. For example, some countries are able to enforce orders for non-conviction based confiscation provided that the confiscation procedure can be likened to a case of criminal character even in the absence of criminal proceedings. In such cases, a request should not be refused on the basis that the *requesting country uses the term 'civil forfeiture', provided that this pre-condition is met.*

As the above makes clear, confusion (and, hence, request refusal) is sometimes caused by different terms being used from State to State. In addition, even the nature of NCBC proceedings themselves vary, with some jurisdictions conducting NCBC as a distinct and separate proceeding in civil courts, on a lower standard of proof than in criminal cases ('the balance of probabilities' or 'preponderance of the evidence'), while in other States NCBC takes place in the criminal courts. Moreover, some in States, NCBC may only be engaged after criminal proceedings have ceased, while, in others, the authorities are able to mount NCBC in parallel proceedings to the criminal.

Given the increasing recognition of the importance of NCBC in fighting organised crime and corruption and that such cases invariably have cross-border elements and financial flows, international co-operation in NCBC cases is likely to become more and more significant. The Warsaw Convention has gone further than many instruments in providing a framework; however, there are caveats. The extent to which an ordinary meaning of 'confiscation' encompasses NCBC is likely to be the subject of judicial scrutiny in the future, notwithstanding the helpful gloss provided by the Explanatory Report. Additionally, some States' own national legal framework has not kept pace with the impetus for NCBC and does not allow for assistance to be provided; at the same time, those States that are in a position to provide assistance may not be able to do so at every stage of the process and, when they can, their rationale for being able to co-operate noticeably varies.

In all those circumstances, the time appears right to create an international framework that encourages assistance for NCBC, provides a more certain basis for co-operation and, nevertheless, both recognises differences in approach as between States and respects national legal norms. By the same token, it would be premature, given the present variance in States' approach to NCBC and MLA requests relating thereto, actually to mandate all Member States to amend their national laws to embrace NCBC, whether domestically or solely from the standpoint of international co-operation. Rather, an obligation on Member States to consider whether to introduce regime for NCBC, is likely to be the most effective way of progressing the matter and taking national discussion, within States, forward.

As already highlighted, above, Resolution 2218 can only invite Member States (and other States holding a special status with the Council of Europe) to make provision for NCBC and to provide assistance even where a State does not have such a mechanism; however, if the 'invitation' is to have any force, that will be best achieved through a binding instrument. An encouragement for formal provisions is to be found from Member States themselves in the 2016 Questionnaire[23] , where, when asked for recommendations, one of those provided by States was that there should be an instrument addressing NCBC and that, without such an instrument, some States are unable to co-operate.

[23] Answers to Q11 of Questionnaire https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168 0666607

Taking into account the seeming willingness on the part of Member States, but also having regard to the relative novelty and challenge of NCBC for some, it is suggested then that, in the event of a new instrument being drafted, a provision is included to the effect that:

- Each Party shall consider adopting such legislative and other measures as may be necessary to provide for NCBC;
- Each Party shall, subject to its domestic legal system, use its best endeavours to recognise a non-conviction based confiscation order of another Party;
- When determining whether a request for MLA relating to non-conviction based confiscation (including in respect of an interim measure) should be executed, each Party shall consider the nature, not the title, of the other Party's proceedings.
- Each Party shall use its best endeavours to give the widest possible assistance to a request for MLA relating to non-conviction based confiscation.

ASSET RETURN, ASSET SHARING & COMPENSATION TO VICTIMS

Asset Return

It should be straightaway highlighted that asset return should not be confused with asset sharing. Asset sharing is typically brought about by an agreement (permanent or *ad hoc*) between States by which they co-operate in the investigation and prosecution of cross-border crime and agree to share the assets recovered on a percentage basis, usually 50:50.In contrast, the return of assets is generally understood as relating to the return of State assets and public funds looted by politically exposed persons (PEPs) and/or their family and associates. It follows, therefore, that different considerations for each apply to both requesting and requested State. For present purposes, however, it is apt to examine State needs in respect of instrument provisions and other solutions in respect of both asset return and sharing.

Turning first to return and the framework which is now essentially governed by Article 57 of UNCAC, large-scale plundering of State assets by PEPs came into sharp focus after the collapse of the regimes of Abacha, Marcos, Duvalier and others. Public funds and State assets had been removed to foreign jurisdictions and thus required innovative and proactive measures from the States where the assets were located in order to find ways to confiscate and return them to the 'victim' State, in the absence of any comprehensive international anti-corruption frameworks addressing asset recovery. Chapter V of UNCAC was the first concerted effort to address States entering into agreements for the return of assets. However, at the time of adoption, neither UNCAC, nor its accompanying Technical and Legislative Guides provided any steer to either requesting or requested State on how the asset return provisions, contained in Article 57, were to be given effect, owing largely to the lack of general State practice[24].

Consequently, the initial efforts to return assets were left to individual States, a practice which soon became the subject of adverse comment and criticism by 'victim' States as the actions of the requested State were viewed with suspicion and requests for conditions on return were seen as deliberately obstructive. However, States did put in place arrangements for the return of assets: including agreements for assets from UK, Jersey, Liechtenstein and Switzerland to be returned to Nigeria to the tune of US$1.2billion and for assets to be returned to the Philippines from the US

[24] Since then international efforts to consolidate lessons learnt as well as providing technical assistance has been at the forefront of the World Bank-UNODC StAR Initiative together with the work of the UNODC Open-ended Intergovernmental Working Group on Asset Recovery and other intergovernmental (e.g. FATF) and non-governmental (e.g. IREX and ICAR) bodies.

(US$50million) following NCBC and from Switzerland ($683million)[25]. A level of success had been achieved, despite the reservations.

Once the stolen assets have been secured, whether through post-conviction confiscation, NCBC or direct recovery, the return of the assets often raises concerns on the part of the requested State concerns, which may be summarised thus:

- The assets must not end up in the hands of the those (or their associates) who were responsible for the initial 'looting';
- The assets must not be dissipated once they have been returned; and
- The assets must be used for the benefit of the population and/or country.

The requested State will, therefore, typically want assurances from the requesting State that the assets will not meet the same fate and to that end it will, more likely than not, impose conditions to ensure transparency and accountability throughout the process. Such an approach is not often well-received by the requesting State and can be controversial. It is, therefore, essential that an agreement is reached at an early stage to decide on the model that will best serve the interests of the wider community in the requesting State and equally meet the concerns of the requested State. There are four (4) generally accepted models of asset return. They are set out at Annex 2.

Much consideration has taken place as to the challenges of, and solutions to, asset return. Of note, UNODC and the Stolen Asset Recovery Initiative (StAR) submitted a technical paper on '*Taking action on the management and disposal of seized, confiscated and returned assets*'[26] to the 2016 G20 Anti-Corruption Working Group (ACWG) meeting held in Beijing, China, which examined the challenges of:

- Asset management;
- Disposal of assets; and
- Asset return

It identified the challenges as follows:

- Although there exists a general 'policy' agreement at the international level on asset recovery (Chapter V of UNCAC), there is a divergence in the approach taken by each State (legislative, institutional and operational). The domestic policy drivers include, the need to minimise the financial and administrative burden on the State in managing seized assets.
- Technical complexities

The technical paper examined existing models of return based on cases in the past decade or so. The authors suggest that useful lessons and good practices may be drawn from past cases, but further work is needed. It suggested the following actions as the 'next steps':

1. Member States should share experiences on their respective legislative, institutional and operational frameworks on asset management, disposal and return of assets;
2. States have entered into special agreements and arrangements on the return and disposal of assets, however, there is very limited information available. It would be beneficial to draw out practices from the various approaches in order to develop an 'agreed' policy on how best to give effect to Chapter V[27] of UNCAC, in particular, Article 57.
3. Consider the feasibility of drawing up general principles for the management and disposal of recovered and returned assets in line with article 57 of UNCAC, if States agree that there is a need, and demand, for such an instrument/measures.

[25] http://assetrecoverywatch.worldbank.org/
[26] https://www.unodc.org/documents/corruption/AddisEGM2017/G20-Beijing-StAR_UNODC_note_on_asset_mgmt_Jan_2016.pdf

[27] Chapter V of UNCAC has been supplemented by a number of guidelines and tools (see Annex 3)

Focusing on the third of those actions, what is the feasibility for the CoE of adding to the framework set out in Article 57? In answer, regard must be had to the parameters or limitations of that framework. The return of assets obtained by corruption is a fundamental principle of UNCAC[28]. But the recognised risk is that returned assets will be once again improperly diverted or misapplied when back in the requesting State. It is suggested that, in many instances, the most feasible solution will be the establishment, by the State actually holding the assets, of a monitoring mechanism. An often cited example of this is the BOTA Foundation, set up by the US, Switzerland and Kazakhstan and mandated to distribute recovered sums to the Kazakhstan poor[29]. The Foundation itself is non-profit and administered by IREX and Save the Children. It has to be accepted, though, that a requesting State might decline such an arrangement and simply insist on return of what it regards as its lawful property. This begs the question of whether UNCAC permits conditions to be attached to return and/or an insistence by the State holding the assets that there should be an asset sharing agreement[30].

Of course, the creation of a foundation or similar entity will not be appropriate in every instance; the matter is truly one for case by case consideration. Consultation between the States involved is, as always, key and it is that process of dialogue that may properly be made the subject of an obligation within an instrument. Stating the obvious, the respective positions of the requesting State and requested State are likely to be markedly different and need to be addressed at an early stage. Experience shows that if the requesting State works closely with the requested State at the outset, the way will paved for a smoother recovery process.

With that need for consultation in mind, it should also be noted that, although Article 57 requires the return of stolen assets without pre-conditions if the confiscated proceed emanate from the embezzlement of State funds or if the requesting State is able to establish its prior ownership, the nature of the Article 57 obligation is actually more nuanced. A State is mandated to return assets if confiscation is on the basis of a final judgment obtained in the requesting ('victim') State and enforced in the State holding the assets. But in all other circumstances, the obligation on the holding State is to give priority consideration to

1. Return of the confiscated property to the victim State;
2. Return to any prior legitimate owner(s); and,
3. Compensating the victims.

In deciding whether any additional 'gloss' to Article 57 of UNCAC for CoE Member States, it is helpful to recall that for asset return (and, indeed, for asset sharing, as below), it has become generally accepted by States engaged in such negotiations and consultations that considerations of transparency and accountability at every stage (in both holding and requesting/'victim' States) should be overriding, along with the aim that assets in question should ultimately serve a public purpose. It would serve as an encouragement and reminder to States to have those imperatives set out in any new instrument addressing asset return.

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[28] See Article 51, UNCAC

[29] See the discussion in 'The Ownership of the Proceeds of Confiscated Proceeds of Corruption Under UNCAC', Anton Moiseienko, ICLQ, July 2018, p. 669ff

[30] M Perdriel-Vaissiere, 'IsThere an Obligation under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' UNCAC Coalition (5 September 2014) http://uncaccoalition.org/en_US/is-therean-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries/ ; M Stephenson, 'A Different Kind of Quid Pro Quo: Conditional Asset Return and Sharing Anti-Bribery Settlement Proceeds' Global Anticorruption Blog (28 June 2016) https://global anticorruptionblog.com/2016/06/28/a-different-kind-of-quid-pro-quo-conditional-asset-returnand-sharing-anti-bribery-settlement-proceeds/

An issue that has caused much international contention is that of expenses and costs. Article 57(4) provides for the requested State to deduct reasonable investigative, prosecutorial and judicial expenses. However, there is also the distinct matter of asset management and disposal costs. It is suggested that States be mandated to consult at an early stage on these 'heads' of costs/expenses.

Asset Sharing, Compensation to Victims and Return to Legitimate Owners

The White Paper recommended the development of '*international standards and procedures for asset sharing among states ….using a holistic cost-effective approach. To this end, ad hoc arrangements, memorandums of understanding or bilateral co-operation agreements should be signed*'[31]

At its 9th meeting in 2017, the Conference of Parties (COP) agreed to introduce a horizontal thematic monitoring mechanism to assess the implementation and use of the Warsaw Convention in Member States[32]. The first phase would examine the implementation and application of Article 11 (Previous decisions) and Article 25 (Confiscated Property); in particular, paragraphs 2 and 3.

In conducting the Thematic Review on Article 25, paragraphs 2 and 3, a questionnaire was sent to 34 Member States (See Annex 4), asking what legislative or other measures Member States had in place in respect of:

- Article 25(2), by which a Requested State has, subject to domestic law, the obligation to give priority consideration where, following a request for the enforcement and execution of a confiscation order under Articles 23 and 24, the Requesting State also seeks the return of the confiscated property in order to compensate victims or return the property to its legitimate owners

- Article 25(3), by which a Requested State has, subject to domestic law, the option to give special consideration where, following a request for the enforcement and execution of a confiscation order under Articles 23 and 24, the Requesting State, to conclude asset sharing agreements either through a general or 'permanent' arrangement or on a case-by-case basis.

The responses received from the Member States revealed a diverse approach to both Article 25(2) and (3). Some Member States had no provision for either measure; some relied on the Convention (incorporated into domestic law), whilst others had specific domestic laws. In those States that are both EU and CoE Member States, reliance was, of course, firmly placed, in intra-EU cases, on the relevant EU Framework Decisions and Directives. This has, in turn, created a confused landscape across the CoE region, leading to divergent approaches with a risk that little, or no regard, is paid to asset sharing and asset return. In all these circumstances, it is suggested that having asset sharing and related provisions within an instrument for all Member States is more appropriate than a purely MoU or bilateral approach.

A number of measures appear to be needed and feasible in respect of the areas addressed by Article 25. In respect of Article 25(2) consideration should be given to placing a formal requirement on the Member State that holds the asset to engage proactively and spontaneously with another State Party where it is clear to the holding State Party that the confiscated assets belong to legitimate owners in

[31] Pg 37, ibid

[32] Thematic Monitoring Review of the Conference of the Parties to CETS No.198 (Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism) on Article 25, paras. 2-3 ("Confiscated Property"), 21 November https://rm.coe.int/c198-cop-2018-1-hr-ii-horizreview-article-25-en-final/16808f0fcb

that other State or that compensation is likely to follow (given the particular nature of the underlying crime/conduct). A complementary obligation should also be placed on that other State, requiring it to adhere to the principles of transparency and accountability in order to demonstrate to the holding State that, upon return, the confiscated assets are indeed disposed in line with the arrangement or agreement (i.e. restoration to legitimate owner(s) or compensation for victim(s)).

To maintain public confidence, there should, at least, be an encouragement formally given to Member States to make it clear how returned confiscated assets will be utilised, managed and monitored. This would include, for instance, whether the assets are integrated into the public finance system, given to law enforcement agencies or intended for 'social re-use'. As an aside, where assets are to be given to law enforcement agencies or asset recovery/judicial bodies, States should also be encouraged to introduce audit requirements.

Turning to Article 25(3) and, in particular, asset sharing agreements; the current approach by Member States is that those Member States that are also EU States have (in intra-EU cases) the benefit of Article 16 (on Disposal of Confiscated Property) in the EU's Framework Decision[33] , which establishes that:

- If the confiscated amount is a monetary sum below €10,000, it accrues to the Member State where the confiscation order is executed and, if above that figure, 50% of it is transferred to the issuing (i.e. requesting) State.
- In relation to property other than money, it is disposed of in one of the following ways, to be decided by the executing State: (a) the property may be sold. In that case, the proceeds of the sale shall be disposed of in accordance with the monetary provisions, above; (b) the property may be transferred to the issuing State. If the confiscation order covers an amount of money, the property may only be transferred to the issuing State when that State has given its consent;(c) when it is not possible to apply (a) or (b), the property maybe disposed of in another way in accordance with the law of the executing State.
- Member States may not claim from each other the refund of costs. But, where the executing State has had costs which it considers large or exceptional, it may propose to the issuing (requesting) State that the costs be shared (and that State shall take into account any such proposal on the basis of detailed specifications given by the executing State).

Other Member States and those joint Member and EU States concluding agreements with non-EU States variously rely on national templates, *ad hoc* agreements and one or other of the two model bilateral agreements: the G8 Model Asset-Sharing Agreement (1999)[34] and the UNODC Model Bilateral Agreement on Disposal of Confiscated Proceeds of Crime (2005), which is restricted to UNTOC and UN Vienna Convention (Drug Trafficking cases)[35].

Given the case by case imperative in asset-sharing, it would be unhelpful to provide CoE Member States with a further model agreement for the purposes of asset sharing with non-Member States. However, it is suggested that, for asset sharing between Member States it would be helpful and would make for greater certainty and consistency if an instrument provision is drafted to provide for asset sharing on similar lines to the EU approach. In other words, having:

- A threshold for monetary assets below which assets are retained by the holding State;
- Having a 50:50 split above the threshold for monetary assets;
- Disposal of property in similar terms to the EU model

[33] Council Framework Decision 2006/783/JHA of 6 October 2006
[34] Set out at p44, https://rm.coe.int/pc-oc-mod-2017-08bil-rev-practice-and-legislation-on-asset-sharing/16807650e4
[35] https://www.unodc.org/pdf/crime/ieg_crime_2005-01-26_draft_model_agr_01.pdf

- The ability of the holding State to propose sharing of exceptional costs.

It is further suggested that an 'opt out' clause be added that would provide States with the capability to agree between them an alternative percentage split.

Additionally, in relation to Article 25(3), it is suggested that an obligation, rather than the present discretion ('shall' rather than 'may'), be imposed on Member States to conclude agreements where it is clear or obvious (precise threshold to be agreed) that:

- The confiscated assets will be required to satisfy any claim by the legitimate owner(s);
- The confiscated assets will be required to compensate victims (individual or community).

It might also be appropriate to include a new discretionary provision that, where a third State) has assisted the holding State in its asset recovery efforts and/or the investigation, notwithstanding there is no victim or legitimate owner in that State, the holding and 'victim'/requesting State may invite that third State to share in the assets and become a party to the sharing agreement. This could also apply, of course, in cases where, although an international element, there is no 'victim'/requesting State and would be similar to an approach taken by US law enforcement/prosecutorial agencies in order to encourage foreign governments to co-operate in joint investigations on drug trafficking and money laundering.

Asset Management

Globally, the management of seized and confiscated assets (i.e. at the interim stage, as well as the final disposal and return of assets) poses a number of challenges for States. Recognition of this led to the adoption of Resolution 5/3 in 2013 at the Conference of the States Parties to the United Nations Convention against Corruption (COSP) and subsequently a second resolution in 2015 (Resolution 6/3) at the 6th COSP session. The resolutions provided the basis for States Parties and UNODC to share their experiences on '*the management, use and disposal of frozen, seized, confiscated and recovered assets*'[36] in order to identify good practices that would form the basis of guidelines for States.

One of the main underlying difficulties is that asset management is very often not in the mainstream of thought of those with actual responsibility for it, especially where they are existing law enforcement and prosecutorial bodies with a range of other concurrent competences. As below, there are aspects of asset management that should, therefore, be reflected in an instrument in greater particularity than hitherto; at the same time though, the creation of formal State obligations should be part of a broader picture, encompassing practical guidance-giving, expertise-building and ongoing mentoring.

The Warsaw Convention contains an express asset management provision, which provides:

Article 6: Management of frozen or seized property
Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.

The obligation is an appropriate one, but the experience of States from most regions is that the particular challenges that arise in asset management need to be met with a more comprehensive

[36] Pg 3 of the 'Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets': https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf

framework and that, to ensure, asset administration and management gets the attention and resources it requires, that framework should be a formal, instrument-based, one. Article 6 leaves it to Member States to devise their own measures for the 'proper management' of frozen or seized assets. However, global experience has shown that asset management has been found to be challenging and States have tried to 'fine tune' their asset management through a gradual process based on lessons identified in domestic cases. This has led, understandably, to a fragmented approach when it comes to international co-operation, either during the life of a case or in the final stages of asset sharing agreements. The CoE should, therefore, develop formal provisions within an instrument addressing asset management.

A useful starting point is to determine what a Member State (subject to the norms of its domestic law) needs to have in place in order to have an effective framework for the management of restrained, seized or confiscated assets in order to safeguard the integrity of its proceeds of crime framework, ensure that MLA requests and asset return or sharing to the fullest extent can take place, and, at all times, prevent the deterioration, loss or dissipation of assets or to the value those assets represent.

The challenge is to address the administration and costs of managing assets in advance of confiscation proceedings, while ensuring that criminal justice policy (i.e. deprivation of ill-gotten gains) is achieved and the rights of property owners respected.

It would be inappropriate for an instrument to be unduly prescriptive as to the precise institutional framework for asset management within a Member State; instead, the model chosen should be that best fitting the particular national context. As to the alternatives, there are essentially four (4) possible structures for asset recovery institutions that Member States are likely to have or be considering:

1. A dedicated assets recovery body or agency (ARB) having the competence to address asset recovery (criminal & confiscation in rem) in relation to all acquisitive crime/unlawful activity and at all stages of the process (including asset management).
2. A dedicated ARB, having the competence to address only NCBC; with individual prosecutorial/law enforcement entities having the conduct of post-conviction confiscation proceedings.
3. A dedicated ARB with competence confined to managing assets that have been restrained or frozen; with individual prosecutorial/law enforcement entities having the conduct of both post-conviction and NCBC proceedings. Alternatively, having all asset management responsibility, but no other competence.
4. Powers of asset recovery (including asset management) given to each existing law enforcement or prosecutorial entity to be used in accordance with present areas of competence.

In August 2017[37], the UNODC's Open-ended Intergovernmental Working Group on Asset Recovery published its 'Study on Effective Management and Disposal of Seized and Confiscated Assets', which paved the way for the development of the *Draft Non-Binding Guidelines on the Management of Frozen, Seized and Confiscated Assets*[38], issued in June 2018. The 14 Guidelines, developed from

[37] Open-ended Intergovernmental Working Group on Asset Recovery, Vienna, 24 and 25 August 2017, 'Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets': https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf
Now published at https://www.unodc.org/documents/corruption/Publications/2017/17-07000_ebook_sr.pdf

[38] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1801801e.pdf

lessons identified across a range of States, set out measures States may put in place when giving effect to Article 31(3)[39] of UNCAC address three main areas:

- Part A (Guidelines 1 – 4): Administration of assets and, where possible, their disposal prior to a final confiscation;
- Part B (Guidelines 5 – 10): Enforcement of confiscation orders and the use of confiscated assets;
- Part C (Guidelines 11 – 14): The institutional structure for asset management.

Each Part further develops detailed guidance for States to consider when developing their legislative and institutional frameworks, as well as operational considerations. A summary of the Guidelines are set out in Annex 5. However, it is not suggested, for the purposes of this study, that there should be reflected by the CoE within a formal instrument. As their name suggests, the Guidelines provide valuable guidance on a range of policy, legislative and strategic/operational matters, but they do not purport to be of a content or nature that could appropriately form the basis or body of a formal instrument. Therefore, Member States will be better served by having the Guidelines set out within a CoE asset management guidance document.

Looking across the range of available materials internationally, it is the FATF Best Practice Paper (2012)[40] that arguably provides the most helpful and relevant set of characteristics needed for an effective overall asset management framework:

1. There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.
2. There are sufficient resources in place to handle all aspects of asset management.
3. Appropriate planning takes place prior to taking freezing or seizing action.
4. There are measures in place to: (i) properly care for and preserve as far as practicable such property; (ii) deal with the individual's and third party rights; (iii) dispose of confiscated property; (iv) keep appropriate records; and (v) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
5. Those responsible for managing (or overseeing the management of) property have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
6. Those responsible for managing the property have sufficient expertise to manage any type of property.
7. There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
8. There is a mechanism to permit the sale of property with the consent of the owner.
9. Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety.
10. In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.

[39] (3). Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

[40] 2012 FATF Best Practices on Confiscation (Recommendations 4 and 38) and Framework for ongoing work on Asset Recovery: http://www.fatfgafi.org/media/fatf/documents/reports/BestPracticesonConfiscationandaFrameworkforOngoingWork on Asset Recovery.pdf

11. To ensure the transparency and assess the effectiveness of the system, there are mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realised.

If it is accepted, for the reasons above, that detailed asset management provisions should be reflected within a formal instrument, the FATF characteristics provide an appropriate template, addressing, as they do, the principal requirements and, at the same time, offering sufficient flexibility in implementation to ensure that each Member State's national context may be properly met.

Pre-confiscation sale/disposal: It will be noted that the FATF characteristics include a power of sale. To avoid risks around depreciation or unduly high storage costs for certain assets, it would be important to include a provision stating that a State may undertake pre-confiscation sale not just of perishable goods, but to avoid asset depreciation and circumstances where the costs of managing a seized asset are likely to exceed its value. The EU, for its part, has already pre-confiscation sale, with Article 10 of Directive 2014/42/EU calling upon EU member States to ensure the adequate management of restrained property by including the option to sell or transfer property where necessary.

As to when a pre-confiscation sale should be permitted, the power might best be expressed in relation to the following:

- Perishable assets;
- Rapidly depreciating property;
- Storage or maintenance costs disproportionate to an asset's value;
- Assets too difficult to administer, or where their management requires special conditions or expertise not readily available (examples might include fragile assets, hazardous items, assets requiring storage in specific conditions in order to preserve their value, and difficult to manage animals/livestock).
- Goods that are easy to replace;
- Where legal representation needs to be paid for and expenses incurred for other seized assets met;
- When the owner has absconded.

A safeguard should also be provided, reflecting the practice in most jurisdictions with a power of sale, where sale or disposal is permitted with the consent of the owner and the relevant agency responsible for enforcing the seizure order, with the court intervening only where the owner is dissatisfied with the terms of the sale. Additionally, pre-confiscation sale or disposal of assets should only take place without the consent of the owner when a court or other competent authority has authorised the sale and a right to challenge that decision is also provided for.

It is suggested that, given the complexity of asset management issues and practice, a practical guidance document, in addition to an Explanatory Report, should accompany any asset management provisions that appear in a new instrument. Such guidance might also usefully assist States in considerations of matters which will fall outside of strict instrument provisions, such as the need for states to give thought to insurance coverage for restrained property and to ensuring that legal expenditure available for the defence of criminal and property confiscation proceedings does not result in the value of seized or restrained assets being exhausted. Another recurring challenge that the guidance would usefully meet is in relation to the provision of legal services for the agency or body managing an asset. This might involve funding its own lawyers or funding representation by a government lawyer from another agency or department. In any event, States might consider meeting this expenditure either from a fund from previously confiscated property or other sources.

Asset Disposal & Asset Management

Asset disposal and asset management are inextricably linked. Depending on the nature of the asset, it may (usually) be disposed of in the holding State (with proceeds of sale returned to the requesting State) or may (occasionally) be disposed of following return. Article 25 of the Warsaw Convention leaves it to Member States to dispose confiscated assets in accordance with their domestic law. As asset recovery was relatively new at the time (2005), it left the States with little guidance on the types of measures that can be adopted to dispose confiscated assets. Consequently, different practices have arisen across the region. Within the EU Member States, a 2014 study[41] found the following to be the main 'disposal' mechanisms:

- Sale of confiscated assets (by far the most widely used);
- Transfer of property for re-use (either to the state budget or to law enforcement agencies, asset recovery body etc.);
- Renting of property (used sparingly);
- Destruction of property (only applies to harmful, dangerous, banned, or valueless property);
- Re-use of confiscated assets for social purposes ('social re-use').

With the above in mind, the asset management provisions in any new instrument need to be complemented by disposal provisions in order to create an overall body of minimum agreed standards so that Member States are better able to address this sometimes overlooked phase of asset recovery.

Management of Assets Returned to a State

It is suggested that the asset management framework suggested, above, should extend to post-confiscation assets pending disposal. The principles of transparency and accountability will be particularly important in such circumstances.

Seizure or Freezing/Restraint?

Relevant to the topic of management, but a distinct issue is whether Member States that presently have pre-conviction or interlocutory seizure should be encouraged or even required to introduce freezing orders. Seizure is regarded as the interim measure of choice by many States, with some having the use of freezing orders reserved for circumstances where seizure is not possible or impracticable. However, internationally, more and more States are recognising the difficulties inherent in maintaining deteriorating assets or those that require special management skills, while actions for damages against governments are on the increase where seized items have been poorly managed. As a result, seizure is becoming less attractive, unless absolutely necessary, with States looking to alternatives, including allowing the asset to remain under the control of the owner, subject to restrictions on use, and introducing and placing greater reliance on freezing.

The overriding consideration for States is, of course, whether the asset will still be available and of value if a confiscation order is made. Against this background, Member States should be encouraged to consider whether to have in place the freezing or restraint order. With that in mind, it is suggested that an obligation is imposed on Member States to consider whether freezing or restraint should be introduced into domestic law.

Although a freezing order is often equated with bank accounts and financial instruments, there is scope for wider practical application of restraint powers, such as ordering that a non-monetary asset not be disposed of or otherwise dealt with by any person except as ordered by the court. Additionally,

[41] Disposal Of Confiscated Assets in the EU Member States: Laws and Practices (2014): https://www.files.ethz.ch/isn/185046/Disposal-of-confiscated-assets-report.pdf

there is scope for a State to permit the imposition of both prohibitions and positive obligations. Thus, as an example, a court might be asked to impose a requirement that the owner of an item of property takes out insurance on it or that instalments on ongoing loans secured against a property are regularly being paid.

There will be cost advantages in many instances as well, since placing an asset in the custody and control of the owner or person in possession, subject to restrictions on use and maintenance, will generally be more cost-effective than seizure. The cost of storage, maintenance and security associated with seizing movable assets may be considerable. Of course freezing or restraint brings with it some cost: staff will be required to monitor compliance with court orders, ensure that insurance on a restrained vehicle is maintained, that rates, taxes and mortgage payments on immovable or real property are kept up to date and that assets are inspected periodically to ensure that they are being preserved in a proper condition. However, to mitigate even those costs, a State might make provision for the person retaining custody or control of an asset to bear the ordinary maintenance costs.

Basis of Confiscation: Property or Value?

It is noted that, in respect of value-based confiscation requests, by and large, Member States did not have any difficulty in executing requests relating to value based confiscation, even where the requested State had property-based confiscation. However, there is a 'drive' for property-based States to consider whether to introduce value-based provisions in addition to their existing framework, thereby creating a 'hybrid' of the two bases. The advantage for Member States in being able to rely on a value-based approach is that, where specific proceeds cannot be located or traced back to criminality, confiscation to an equivalent value may still be ordered. It is suggested that, in the event of a new instrument, Member States are encouraged or obliged to consider whether value-based provisions should be inserted into domestic law where not already present.

Transmission of Urgent Requests

Concern is often and generally expressed at the length of time taken to execute time-sensitive requests, especially those relating to freezing/restraint and to financial enquiries where electronic transfer or dissipation is suspected to be imminent. A recognition of time-sensitivity is one of the principal reasons for the imperative, internationally, towards greater use of direct communication (in other words, competent authority to competent authority). The Warsaw Convention provides for direct communication in cases of urgency (at Article 34[42]) and also enables Interpol assistance in

[42] **Article 34 – Direct communication**
1The central authorities shall communicate directly with one another.
2In the event of urgency, requests or communications under this chapter may be sent directly by the judicial authorities, including public prosecutors, of the requesting Party to such authorities of the requested Party. In such cases a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party.
3Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organisation (Interpol).
4Where a request is made pursuant to paragraph 2 of this article and the authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform directly the requesting Party that it has done so.
5Requests or communications under Section 2 of this chapter, which do not involve coercive action, may be directly transmitted by the competent authorities of the requesting Party to the competent authorities of the requested Party.
6Draft requests or communications under this chapter may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it

communication (by virtue of 34(3)). Helpfully, it also makes express provision for direct investigative assistance in non-urgent cases where no coercive measures are required (at 34(5)).

In matters of urgency, therefore, the international legal framework is there; however, experience shows that awareness, understanding and practical expertise on the part of competent authorities is, perhaps, lacking. In those circumstances, and given that much work has been undertaken by the CoE, the EU and UNODC to create cadres of national experts and build the very networks that underpin and facilitate the auctioning of urgent requests, it might be felt that a missing component is a practitioner guidance document that focuses the mind of both issuer and executor of an urgent request and 'walks through' the process in accurate and practical detail (covering everything from preliminary administrative contact in advance of a letter being issued through transmission and receipt to steps to ensure timely execution).

Extended Confiscation

Extended confiscation is the ability to confiscate assets which go beyond the direct proceeds of a crime so that there is no need to establish a connection between suspected criminal assets and a specific criminal conduct[43]. On the one hand, those States that have extended confiscation find it valuable in combating transnational organised crime in circumstances where the criminal charges proved in a criminal trial do not reflect, in themselves, the full extent of lifestyle criminality; on the other, it is regarded as contentious by some. It is suggested that, at the present time, this topic is one for ongoing discussion and sensitisation among Member States, with a view to re-visiting at a later date.

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can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party.

[43] https://ec.europa.eu/home-affairs/content/extended-confiscation_en

Annex 1: Note by present author on Non-conviction Based Confiscation (civil forfeiture or confiscation in rem)

It may assist to examine what civil forfeiture, or confiscation *in rem,* means and how it differs from criminal confiscation proceedings and civil proceedings.

Civil forfeiture is the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated so as to deprive the person of ill-gotten gains. Readers may be more familiar with the established mechanisms for asset forfeiture through criminal proceedings, where, at the end of a criminal trial, the Court may, upon the application of the prosecution, or as a requirement of law, consider whether property derived from such criminal activity should be forfeited so as to deprive the convicted person from enjoying the fruits of his criminality. This is the usual course of events and will generally speaking be the preferred option where the accused is found in the territory of a State and there is sufficient evidence to support a criminal prosecution.

However, there are instances when such a course of events may not be available to the prosecuting agencies of a State:

- the suspect has died;
- the suspect may have fled following the dissipation of his assets;
- jurisdictional privilege (sometimes referred to as 'domestic immunity') may be a bar to proceedings;
- there is insufficient evidence to mount a criminal prosecution;
- the investigation is obstructed or frustrated;
- the suspect is abroad and a request for extradition either cannot be made (due to lack of bilateral/multilateral arrangement) or the requested State refuses to extradite;
- the defendant is acquitted following trial. It is important to emphasise that civil forfeiture proceedings do not fall foul of the principle of *res judicata*.

It then begs the question whether, in such circumstances, it would be sufficient to say 'nothing can be done' and allow the proceeds of the criminal activity to be enjoyed by the suspect (and his associates) abroad or permit its 'inheritance' by successors.

Looking wider than corruption, organised crime more often than not yields high returns, which make it a lucrative proposition to those engaged in such cartels. Equally, access to swift banking, the internet and accompanying technological advances all lend themselves to the quick removal of assets and disposal of property, wherever it may be located.

It is from this recognition by the international community and the desire to remove the profit incentive for organised crime, that the idea of civil forfeiture gained currency.

Confiscation *in rem*, therefore, provides the ability to confiscate without the need for a criminal conviction; the action is aimed at the property derived from unlawful activity rather than the individual, and the usual standard of proof for civil forfeiture is the balance of probabilities.

It is important to emphasise that confiscation *in rem* should <u>not</u> be used as a mechanism of first resort where there is clear evidence of criminality and the suspect can be prosecuted. The advantages of the civil forfeiture regime are, in brief as follows:

- As a criminal conviction is not a condition precedent, it cannot be thwarted by immunities, inability to extradite, the suspect who is beyond reach and the non-availability of sufficient evidence to the criminal standard.

- It allows for asset recovery where, because of the death or absence of the suspect(s), confiscation and return would not otherwise be possible.

- It allows for confiscation where an individual(s) has been tried before a criminal court but acquitted, perhaps through a perverse verdict or because the evidence, although probative, fell short of the criminal standard of proof.

- Where difficulties have been encountered in trying to mount a criminal prosecution (or in trying to secure extradition) because of political or high level interference in the criminal justice system. It is much more difficult to sabotage an application which only needs to be proved on the lower, civil standard.

- It complements the system of post-conviction confiscation and completes a comprehensive approach to asset recovery and repatriation.

Experiences from other jurisdictions

Civil forfeiture has been in place for some time in a number of States around the world; indeed it has, generally, been used as an effective tool to counter organised crime, drug trafficking and certain other crimes in Italy since 1956 and in the USA since 1970 and as a means of recovering assets and instrumentalities (and in order to compensate victims for losses) where it is not possible to prosecute an individual for the underlying criminal conduct itself. Over the past ten to fifteen years, it has gained popularity in a number of other jurisdictions, including:

- Australia and its individual States (New South Wales being the first in 1990 (Criminal Assets Recovery Act 1990))
- Antigua and Barbuda and other Caribbean jurisdictions
- Canadian Provinces of Ontario (the first province, with its Remedies for Organised Crime and Other Unlawful Activities Act 2001) Alberta, Manitoba, Saskatchewan and British Columbia
- Columbia
- Fiji
- Ireland (Proceeds of Crime Act 1996)
- Malaysia
- Mauritius
- The Netherlands
- New Zealand (Criminal Proceeds (Recovery) Act 2009)
- The Philippines
- South Africa (Prevention of Organised Crime Act 1998)
- United Kingdom (Proceeds of Crime Act 2002)

Each of the States mentioned above has put in place laws that make provision for the forfeiture of assets derived from criminal/unlawful activity or conduct without any requirement for a criminal conviction; such laws require the authority exercising the power (typically the public prosecutor, a dedicated assets recovery or an anti-corruption commission) to bring a case to establish that, on the balance of probabilities, the assets claimed derives from such activity or conduct. In doing so, that authority must also prove that a criminal offence was committed, and that the property derives from that offence. Evidence of a specific offence is unnecessary, but the authority must, at least, prove the class of crime said to constitute 'unlawful conduct' (for example theft, fraud, bribery etc.). Civil forfeiture is not a civil variant of the crime (in some jurisdictions) of illicit or unjust enrichment: Thus, it is not enough for the authority simply to demonstrate that a defendant has no identifiable lawful income.

Any law addressing civil forfeiture/confiscation *in rem*, must address each of the following issues and topics within its law:

- Definition of the proceeds to be forfeited
- Provision for forfeiture of instrumentalities
- Whether a predicate offence is necessary
- Forfeiture of proceeds of crimes committed outside the jurisdiction
- Proof of the underlying criminality and removal of the need to prove the crime
- Retrospectivity
- Time limits in which civil proceedings must be commenced
- Tracing, following and mixing of proceeds
- Standard of proof
- Freezing of assets and duration of order
- Powers of investigation following a freezing order
- Powers to secure evidence for investigation such as production orders etc.
- Extra-territorial application in respect of property located abroad
- International co-operation – direct enforcement/indirect enforcement
- Information/intelligence sharing nationally and internationally
- Appointment of receivers
- Enforcement of order

Helpfully for a State considering the introduction of civil forfeiture, there are both good practices to be drawn and lessons learnt from those jurisdictions that already have the legal and institutional framework in place. Moreover, those frameworks, and the legal challenges encountered in implementation (in particular human rights challenges) have tended to be very similar whether the jurisdiction has a common law or civil law tradition.

It might then be worth setting out the human rights challenges that have been made before national courts[44] as well as before the regional human rights bodies, in particular, the European Court of Human Rights (ECtHR)[45] in respect of both conviction and non-conviction based confiscation. Of course, there are other human rights bodies; for example, the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights and the African Commission and African Court on Human and Peoples' Rights (AfCHPR), and the Human Rights Committee. However, the ECtHR has considered and developed jurisprudence more extensively than the other bodies within the context of confiscation (both conviction based and non-conviction based confiscation).

Confiscation (both conviction based and *in rem*), by its very nature, involves an interference with the owner's property rights; a right that is protected under the various international and regional human rights instruments, but one that human rights jurisprudence makes clear is a restrictive, and not an absolute, right. At the same time, all confiscation proceedings, including conviction based, are usually civil rather than criminal proceedings (even though the underlying conduct is criminal in nature), which has itself raised challenges.

The nature of confiscation hearings has been the subject of appeal on the grounds that the safeguards usually available under the rubric of fair trial[46] are not available to confiscation hearings. The ECtHR considered the nature of post-conviction confiscation in *Engel v The Netherlands* (1976) 1 EHRR 647 and *Van Offeren v The Netherlands* (Application No 19581/04) and came to the view that confiscation proceedings will usually flow from a conviction after trial and are, therefore, part of the

[44] Examples of national decisions: US v Ursery (1996) 135 L Ed 2D549 (confiscation in rem), In the Republic of Ireland: Gilligan v CAB [2001] IESC 82 (confiscation in rem), R v Briggs Price [2009] UKHL 19 (Confiscation is part of the penalty/sentence process and so the usual safeguards of a criminal trial may not be present); Chatterjee v Ontario 2009 SCC 19 (Canada) (Confiscation in rem).
[45] Engel v The Netherlands (No 1) (1976) 1 EHRR 647 (Confiscation in rem).
[46] Article 14 ICCPR; Article 6 European Convention on Human Rights.

sentencing process to which neither Article 6(1) or (2) ECHR is applicable. It has also confirmed that the right to property[47] is a restricted right and capable of being subject to interference (through both conviction based confiscation and confiscation *in rem*) provided such interference meets the principles of legality, necessity (it pursues a legitimate aim) and proportionality.

The overarching consensus by national courts and regional human rights bodies is that both conviction based confiscation and civil forfeiture is compatible with property protection but that the right to property (under international and regional human rights instruments and many constitutions) is a restricted right and capable of being subject to interference, provided such interference is:

- provided by law (legality);
- pursues a legitimate aim (i.e. is necessary);
- proportionate.

Legality: The guidance from the ECtHR, in *Sud Fondi srl and Others –v- Italy (No 75909/01),*[48] follows the same principles it has developed when considering the nature of 'legality' in respect of other restrictive rights; namely, that there must be a basis in law for confiscation, such law must be sufficiently clear and must accessible to those person(s) liable to be affected.

Legitimate aim and proportionality

In determining the legitimate aim, the measure (i.e. confiscation) must achieve a fair balance between the wider public interest and the right of an individual to peaceful enjoyment of property. Both the national courts (through the margin of appreciation) and regional human rights bodies must, therefore, decide on a case by case basis whether the interference, by means of a confiscation order, is justified and pursues a legitimate aim, that of depriving the person convicted of illegitimate property (ECtHR: *Raimondo v Italy[49]).*

In *TAS –v- Belgium* (No 44614/06)[50], the Court found that a confiscation order extending to 'all the rooms and premises' owned by the applicant pursued a legitimate aim and was proportionate. The applicant owned properties which he rented at exorbitant rent to foreign nationals who were in particularly vulnerable situations. Following his conviction, the court sentenced him to a term of imprisonment and made a confiscation order in respect of the property. On appeal, the Court of Appeal increased his sentence and under the special confiscation provided in the Criminal Code it ordered the confiscation of '*the rooms and other premises that were rented out by the defendant to the foreign nationals listed in the case file*" to reflect the seriousness and '*particularly heinous nature of the offence which reflected, on the part of the defendant, an inadmissible disregard for human values and dignity, the purely mercenary nature of his conduct, the length of time over which the offences had been committed, and the defendant's substantial criminal record.'*

The ECtHR, in ruling the complaint inadmissible, found the interference pursued a legitimate aim, namely combating human trafficking and '*the exploitation of foreigners in a precarious situation*' and was proportionate.

Conversely, a confiscation order that puts an individual in an unnecessarily difficult and adverse position is punitive in nature and falls foul of the principle of proportionality. The ECtHR was extremely critical of the decision of the national court in *Apostolakis v. Greece*, 39574/07[51] where the applicant, a 69 year old civil servant was convicted of one offence aiding and abetting the falsification of paybooks; his first offence since being employed with Fund at the age of 18. He was sentenced to

[47] Article 1 of Protocol 1 (ECHR)
[48] Judgment 20.1.2009
[49] 12954/87, 22nd February 1994.
[50] ECtHR: Decision 12.5.2009 [Section II]
[51] Judgment 22.10.2009 [Section I] ((see also: Case of Ismayilov v Russia, Application No. 30352/03, 2009)

eleven years' imprisonment, forced to resign and his retirement pension was revoked for the rest of his life.

The Court in finding that there had been a violation observed, '*Whilst the applicant's conduct had been criminally culpable, it had had no causal link with his retirement rights as a socially insured person….The margin of appreciation available to States allowed them to make provision in their legislation for the imposition of fines as a result of a criminal conviction. However, penalties of that kind, which would involve the total forfeiture of any right …., amounted not only to a double punishment but also had the effect of extinguishing the principal means of subsistence of a person, such as the applicant, who had reached retirement age.*

Such an effect was compatible neither with the principle of resocialisation governing the criminal law of the Contracting States nor with the spirit of the Convention. Accordingly, the applicant had been obliged to bear an excessive and disproportionate burden which, even if account was taken of the wide margin of appreciation to be afforded to States in the area of social legislation, was not justified on the grounds relied on by the Government, namely, the proper functioning of the administration or the credibility and integrity of the public service.'

Turning to civil forfeiture, in addition to the challenges set out above, some specific concerns surrounding civil forfeiture can be summarised as follows:

- Proceedings *'in rem'* are a return to a notion which had largely disappeared from the common law by the end of the 18th century (namely civil recovery based on property and not the individual); it is an archaic notion and lacking in the modern protections afforded to property holders.
- The proceedings are essentially criminal in nature and contravene the spirit of 'innocent until proved guilty' and do not provide the safeguards usually available to the defendant in the criminal court.
- There is a danger that a person whose assets are confiscated via the civil route will be viewed as 'convicted' by the public and the media, even though the finding will be that the property is 'probably' criminal property or proceeds.
- As a measure, it is in fact punitive and not proportionate in the sense recognised by the European Convention on Human Rights (ECHR) and other international instruments which address human rights and fundamental freedoms.

It must be remembered that confiscation *in rem* is an action against property rather than an individual and the effect of such an order is to essentially remove from circulation the proceeds of crime or instrumentality in question. The nature of such proceedings has been examined by the ECtHR and before the national courts of those States that permit *in rem* proceedings, and the consensus across the tribunals is that although criminality is at the core of this type of proceedings, they do not amount to criminal proceedings but rather civil proceedings. The ECtHR in *Engel v The Netherlands (No 1) (1976) 1 EHRR 647* laid down 3 principal criteria for determining how a State classifies *in rem* proceedings guidance:

a) the manner in which the domestic state classifies the proceedings (this is a starting point and not a determinative one);
b) the nature of the conduct in question classified objectively; and
c) the severity of any possible penalty.

In the US, the legality of civil forfeiture has been long recognised by US courts and held by the Supreme Court to be a proceeding against property rather than an individual. Such proceedings are, therefore, civil proceedings and do not possesses the character of punishment In *US v Ursery (1996) 135 L Ed 2D549* the Supreme Court in its Opinion stated '*the legal fiction of in rem allows one to*

proceed against the property, rather than the person…..Thus, no punishment exists against any individual[52].

The challenge to proportionality can also arise in cases involving instrumentalities, where high value assets are the subject of an order despite a tenuous or weak connection to the criminal conduct, for example, an order forfeiting a factory running a legitimate business simply because unlicensed gaming machines were in the rest-room used by the workers *(Mohunram v NDPP [2007] 2 ACC 4* (South Africa) was found to be disproportionate. Equally, it can arise in value based confiscation systems where the benefit must be calculated on whether the benefit arose from particular or general criminal conduct and the need to ensure that the confiscation order is proportionate '*to the achieve the object of the legislation of removing from the defendant his proceeds of crime*'. Therefore, an order that had the effect of requiring a defendant to pay twice '*amounts simply to a further pecuniary penalty – in any ordinary language a fine. It is for that reason disproportionate'*[53]: *R v Waya (Appellant) [2012] UKSC 51* (UK).

[52] http://www2.law.mercer.edu/lawreview/getfile.cfm?file=48313.pdf
[53] Pg. 16 of the judgment

Annex 2: Models of Asset Return

Having in mind the '*Discussion guide for the thematic discussion on article 57 (Return and disposal of assets)'* [54], the main models currently in use for the return of assets are:

Model 1: In straightforward cases where the return is not uncontroversial and the assets can be returned in full (minus any reasonable costs where that is applicable), it is achieved by channelling the assets through the public financial management system.
However, where concerns of transparency & accountability remain, the following models have been used:

Model 2: Enhanced country systems: This model aims to introduce additional control systems to the public financial management systems either through monitoring by the partner development agency (e.g. Tanzania/UK; Angola/Switzerland) or by an international organisation such as the World Bank (e.g. Nigeria/Switzerland whereby Nigeria was required to strengthen its public financial management systems with the assistance of the World Bank).

Model 3: Autonomous funds: This involves the creation of an independent dedicated national fund for the administration of the returned assets.
This model was adopted for the return of money to Peru from Switzerland. The fund was overseen by FEDADO, a body comprised of representatives from 5 Peruvian government agencies, was created to oversee the funds and their allocation across the various government departments.

However, the model suffered a number of drawbacks as it did not deliver the level of accountability and transparency expected of FEDADO. According to the International Centre for Asset Recovery (ICAR) report[55], the funds were used to augment the annual fiscal budget of agencies that had a member on the FEDADO board, or misused to finance leisure activities for the police. The single country based monitoring body had failed to deliver.

Conversely, the US based the return of the assets to Peru on an agreement that the funds would be used to further the anti-corruption efforts in the country.

Model 4: Management by a 3rd party (an NGO): Based on co-operation with civil society/NGO in the Requesting State

The BOTA Foundation created in Kazakhstan to return the proceeds of bribery (approximately US$116m) from the US and Switzerland which had been paid by a US businessman to the President and former Prime Minister and Oil Minister in order to secure oil deals in Kazakhstan.

An initial agreement was reached between the 3 countries (Switzerland, US and Kazakhstan) and the World Bank to create an independent organisation that would deploy the funds for the most vulnerable in Kazakhstan (children and young people from the poor communities).

BOTA Foundation was established as an independent body and an MOU was agreed between the 3 countries as to its monitoring, supervision and administration. IREX (an international non-profit organisation) was asked to manage the set-up of the Foundation and provide on-going institutional development support, and an international charity, Save the Children helped to design the program and provide technical assistance where appropriate.

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[54] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2015-September-3-4/V1504891e.pdf

[55] "Returning Stolen Assets - Learning from past practice: Selected case studies" by Gretta Fenner Zinkernagel and Kodjo Attisso.

At the end of the project, IREX identified the following best practices and recommendations[56] when using such a model:

1) Align real social needs and political priorities.
2) Collaborate with but maintain independence from government.
3) Create an oversight structure robust enough to provide legitimacy but not so burdensome to prevent progress.
4) Engage civil society at each stage of the asset-return process.
5) Add to development investments — don't replace them.
6) Allocate resources to asset recovery and return to ensure justice and deter corruption.

[56] https://www.irex.org/sites/default/files/node/resource/bota-case-study_0.pdf

Annex 3: Key Guidelines & Tools Supplementing Chapter V (Asset Recovery) of UN Convention Against Corruption (UNCAC)

Chapter V of UNCAC has been supplemented by a number of guidelines and tools, including:

- G8 Best Practices for the Administration of Seized Assets (2005)[57]
- G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets[58]
- G8 Principles and Options for Disposition and Transfer of Confiscated Proceeds of Grand Corruption (2006)[59]
- OAS, Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets (2011)[60] based on a study by the Organization of American States (OAS) which examined the asset management models in the region.
- UNODC Study on effective management and disposal of seized and confiscated assets[61]
- Target 16.4 of the Sustainable Development Goals: *By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime*[62]
- 2012 FATF Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for ongoing work on Asset Recovery[63]
- Module 5: Asset Recovery Process and Avenues for Recovering Assets (adopted from the Handbook for Practitioners on Asset Recovery under StAR Initiative)[64]
- Returning Stolen Assets - Learning from past practice: Selected case studies (ICAR)[65]
- Lausanne Seminars: a joint initiative between Swiss Federal Department of Foreign Affairs and the Basle Institute on Governance that hosts regular seminars addressing asset recovery[66].

[57] http://docplayer.net/16960901-G8-best-practices-for-the-administration-of-seized-assets.html
[58] https://www.justice.gov/sites/default/files/ag/legacy/2004/06/03/G8_Best_Practices_on_Tracing.pdf
[59] The principles are set out in the UNODC/StAR Draft Concept Note – Proceeds of Corruption: Frameworks for the Management of Returned Assets: http://siteresources.worldbank.org/INTSARI/Resources/ManagemntReturnd.pdf or it can be accessed at http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/G8_BPAssetManagement.pdf.
[60] http://www.cicad.oas.org/Main/Template.asp?File=/lavado_activos/pubs/bidal_eng.asp
[61] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf
[62] https://sustainabledevelopment.un.org/sdg16
[63] http://www.fatf-gafi.org/media/fatf/documents/reports/BestPracticesonConfiscationandaFrameworkforOngoingWorkon Asset Recovery.pdf
[64] http://pubdocs.worldbank.org/en/824561427730120107/AML-Module-5.pdf
[65] https://www.baselgovernance.org/sites/collective.localhost/files/documents/131024_selected_case_studies.pdf
[66] https://www.baselgovernance.org/icarforum/blog/lausanne-seminars

Annex 5: Present Author's Summary of the Draft Non-binding Guidelines on the Management of frozen, seized and confiscated assets (issued in June 2018).

In summary, the Guidelines[67] provide as follows:

Guideline 1: States should build capacity in, and dedicate the necessary resources to, pre-seizure planning

The emphasis of Guideline 1 is on the operational decisions to be made when planning the asset recovery strategy as part of the overall investigation and prosecution strategy. Such a strategy should consider, *inter alia*, whether or not to apply for a restraint/seizure order, the timing of the application, risk assessment (legal, institutional and reputational) and risk management, the nature and value of the assets and the costs of managing the assets.

At the strategic level, States must have legislation setting out procedures and appropriate safeguards (e.g. third parties) as well as institutional capacity and skills to deal with such cases. (It is suggested that this should include multi-disciplined dedicated asset recovery bodies.)

Guideline 2: States should permit pre-confiscation sale with the owner's consent or without the owner's consent in defined scenarios.

Assets subject to seizure are likely to come in many guises (money, cash, business, perishable commodities, expensive luxury items, etc.) With that in mind, Guideline 2 recommends that States have in place powers to sell or dispose assets pre-confiscation where the nature of the asset, for instance, perishable commodities, 'demands' such a course of action. The sale or disposal, should be with the owner's consent unless circumstances dictate otherwise, for example, the owner has absconded.

Guideline 2 reminds States that where assets have been sold or disposed, it must ensure that the proceeds of such sale/disposal are secured, protect the identity of the purchaser and be mindful of legal, and other costs that may arise.

(It might be said that Guideline 2 does not go far enough: It should perhaps include provisions to safeguard the asset manager/ARB if it sells the asset and to cover reasonable the legal expenses of the defendant.)

Guideline 3: States should provide for a range of choices for interim measures, including (a) retaining the asset in the possession of the owner or possessor; (b) potentially, the interim use of assets; and (c) the destruction of unsafe, hazardous property.

Certain assets (for example, an on-going business concern) can be resource- intensive, such that the value of maintaining the asset may exceed the final confiscation order, States should, therefore, consider making provision for each of the measures identified in Guideline 3.

This Guideline cautions against the interim use of assets, as there has been controversy surrounding the use of seized assets by law enforcement particularly as such use will undoubtedly lead to a depreciation of the asset. (Note: Although the Guideline does not say so expressly, a duty of care on the part of the State to maintain the value is likely to arise. A breach might risk of legal action.)

***Guideline 4: States should notify third parties of the interim measures and give them the opportunity to challenge them before a judicial authority*.**

[67] https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1801801e.pdf

Guideline 4 echoes the requirement in Article 31(9) of UNCAC to have in place legislative provisions that safeguard the interests of third parties through notification when an application is made for an interim order and that also provide the third party the opportunity to challenge such an order. The Guideline recognises that there may well be instances where it is difficult to identify a genuine innocent party from those that are known associates or closely associated with a suspect. The guideline offers some lines of enquiry that may be pursued in order to assess the claims of the third party.

Guideline 5: States should provide a range of choices for confiscation, so that practitioners can take into account the most cost-efficient and productive method for the disposal of assets when ordering confiscation.

The encouragement in Guideline 5 is for States to have both object-based ('tainted' property) and value-based confiscation to allow for confiscation in every case. Practitioners would then decide which model best fits the case and proceed accordingly. The confiscation models should be supported by effective enforcement mechanisms. In those cases where it is object based ('tainted' property), and provision is made for the asset to be sold or disposed, States need to put in place transparency and accountability measures for both the decision to sell/dispose and the consequent actions.

Guideline 6: States should articulate in their legislation their fundamental policy preferences for the allocation of confiscated assets.

States should as a matter of policy decide how the confiscated assets are to be used and reflect the policy in domestic law. Following the grant of a final confiscation order, States have disposed the confiscated assets in one of two ways:

a. allocated to the national revenue fund to meet general government priorities; or
b. allocated to specific objectives, such as crime prevention.

The guideline does not endorse a specific model; however, the overriding considerations (as reflected Guideline 8) must be:

- Transparency & accountability at every stage;
- Asset should serve a public purpose.

Guideline 7: When States allocate confiscated proceeds to specific objectives, they should establish clear rules for determining the beneficiaries.

Guideline 7 builds upon the requirements of that must be introduced where a State opts to allocate assets to a specific objective (see Guideline 6). It requires States to introduce *'clear and detailed rules on how the beneficiaries of confiscation orders are determined'*[68]

The types of beneficiaries that States have identified include:

- designated asset recovery fund established by law;
- fund the asset management office;
- specific law enforcement purposes outside of the ordinary budgetary process;
- compensate victims;
- Social reuse initiatives (i.e. those communities that have been directly affected and efforts are being made to *restore compliance with and confidence in the rule of law*[69])

Guideline 8: Disposal of assets must be managed with transparency and accountability, in particular when specific funds or programmes are used.

[68] Guideline 7, pg 6 of the Draft Guidelines
[69] Ibid

Asset recovery measures, at each stage (including final disposal) must be underpinned by processes and procedures to promote and enhance transparency and accountability in order to promote confidence in a State's asset recovery efforts.

Guideline 9: States should have procedures for the prompt return of confiscated assets if the order is not granted.

The asset recovery law of a State must provide for the prompt return of assets (subject to any recovery of costs or debts owed by the defendant to the State) where a defendant is acquitted, the case is not proceeded with or the confiscation order is refused. The legislative provisions should extend to circumstances when the owner of the asset may seek compensation.

Guideline 10: All persons having an interest in the assets should have an opportunity to make their claim known

The confiscation law must provide third parties the ability to challenge an interim or final confiscation order along with mandatory notification when such proceedings are started.

Guideline 11: When establishing their asset management offices, States should take into account the volume of assets being seized and confiscated, the skill set already available in their public institutions and the requirements for autonomy and accountability of the asset management office, and ensure that it may participate in pre-seizure planning.

Guideline 11 focuses on the institutional structure and capacity of asset management offices. It refers to the three existing models:

- Asset management offices located within an existing law enforcement agency or responsible ministry;
- Asset management offices located within public service entities with additional property management-related functions;
- Self-standing asset management offices.

Guideline 12: States should equip their asset management offices with the skills and capacities, as well as empower them to enter into any necessary agreements, as required for their effective functioning.

Having decided on the asset management office (AMO) model that would best suit a State, Guideline 12 emphasis the need for the AMO to be properly resourced (personnel, equipment, budgetary) and also be given appropriate powers under domestic law to carry out its functions, including capacity to enter into any contractual agreements in order to deal with the asset.

Guideline 13: States should invest in the resources necessary for central asset registration, databases and data management.

One of the essential components of transparency and accountability is the need to have a proper database to:

- track frozen/seized property;
- record where the asset is located
- record its value at the time of freezing/seizure;
- record any costs and expenses incurred in respect of the asset
- keep records of its ultimate disposition; and,
- in the event of a sale, keep a record of the value realised.

Where there is more than one domestic agency engaged, the State should maintain a centralised structured database.

Guideline 14: States should ensure that, over time, asset management offices become economically viable, and should assess whether the offices should be allowed to fund their operations wholly or partially from confiscated proceeds.

As asset management offices (AMO) will require general operating costs, specialist skills and expertise, IT databases, legal expenses as well as costs for the maintenance of an asset, a State will need to decide on the budgetary requirements of such an office. It is anticipated that as asset recovery matures, a State may consider allocating funds from the sale/disposal of confiscated assets to meet the operating costs of the AMO (in line with Guidelines 6 and 7).