

Zilina Model United Nations conference 2016



# UNITED NATIONS OFFICE ON DRUGS AND CRIME

The future of White-collar Crimes: Asset forfeiture

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## Letter from the Chair

Dear Delegates,

It is truly my absolute honor to welcome you to the UNODC committee of the Zilina Model UN Conference 2016. My name is Nastaran A.Motlagh, and I am a political science student in Bratislava, Slovakia. My MUN career started back in 2011, when I was a sophomore in High School and UNODC was my first committee, now 5 years later I have the distinct pleasure of chairing the UNODC committee, while dutifully guiding you through this MUN experience.

In this particular committee, my aim is to try and explore the theme of White-Collar crimes, particularly Asset Forfeiture which is considered to be one of the main sources of Money-Laundering and the Financing of Terrorism. Asset forfeiture is one of the more complex crimes of the 21<sup>st</sup> century which in many cases has left the innocent branded as guilty; while the real criminals manage to escape the government's outlook. Why we wish to have better organization in the case of this particular crime is that if not properly controlled on national terms, it may lead to an international atrocity opening various other loopholes for other crimes to be committed.

What I ask of you, my dear delegates, is to first read through the ZAMUN 2016 rules of procedure, then proceed to read this study guide to then through thorough research understand your country's position as well as you can, in order to comprehend the significance of co-operation and transparency. I look forward to your debates!

If you have any further questions, please do not hesitate to contact me at [nastaran.alaghemandan@gmail.com](mailto:nastaran.alaghemandan@gmail.com), with the subject "UNODC2016".

Sincerely,

Your UNODC Chair,

Nastaran A.Motlagh

## Introduction to the Committee and the Topic

Pursuant to article 32 of the United Nations Convention against Transnational Organized Crime, a Conference of the Parties to the Convention was established to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention.

UNODC promotes and facilitates formal and informal cooperation between different types of authorities of countries. UNODC also acts as a liaison between States and international organizations and facilitates regional networks of cooperation against organized crime around the world (Networks fighting criminal Networks). Specifically, UNODC is supporting the establishment and implementation of regional network of Central Authorities and of Prosecutors, such as the West African Network of Central Authorities and Prosecutors (WACAP) and the Network of Prosecutors against Organized Crime (REFCO).

The broad objective of the Global Program is to strengthen the ability of Member States to implement measures against money-laundering and the financing of terrorism and to assist them in detecting, seizing and confiscating illicit proceeds, as required pursuant to United Nations instruments and other globally accepted standards, by providing relevant and appropriate technical assistance upon request.

Money laundering and the use of the proceeds of organized crime have been repeatedly identified as an issue for the South Eastern European countries/territories. Some of the countries/territories from the region have legislation in relation to these issues, while others are in the process of drafting legislation. Asset forfeiture and asset recovery are new modalities to combat money laundering and there is a need for regional exchange of experience and knowledge in order to optimize their effect. UNODC will provide assistance in reviewing and aligning legislation with international standards at both regional and national level. Further assistance will be provided for strengthening the capacity of the law enforcement and judiciary institutions responsible for investigating crime and freezing, seizing, confiscating and disposing of unlawfully gained proceeds as well as prosecuting and sentencing.

The UNODC will organize trainings to increase specialized knowledge on financial investigation techniques related to money laundering and terrorism financing. The training will enable authorities to better detect and investigate suspicious transactions and to better prosecute individuals and organizations involved in criminal activities and seize their assets. (United Nations office on drugs and crime)

The International Money-Laundering Information Network (IMoLIN), a one-stop anti-money-laundering/countering the financing of terrorism (AML/CFT) research resource, was established in 1998 by the United Nations on behalf of a partnership of international organizations involved in AML/CFT. The Law Enforcement, Organized Crime and Anti-Money-Laundering Unit (LEOCMLU) of the United Nations Office on Drugs and Crime (UNODC) now administers and

maintains IMoLIN on behalf of the Asia Pacific Group on Money-Laundering (APG), Caribbean Financial Action Task Force (CFATF), Commonwealth Secretariat, Council of Europe - MONEYVAL, Eurasian Group (EAG), Eastern and Southern Africa Anti-Money-Laundering Group (ESAAMLG), Financial Action Task Force (FATF), Financial Action Task Force on Money-Laundering in South America (GAFISUD), Inter-governmental Action Group Against Money Laundering and Terrorist Financing in West Africa (GIABA), INTERPOL and the Organization of American States (OAS/CICAD). In the first half of 2004, AMLU relaunched IMoLIN, after completing an extensive renovation of the site's 'look and feel' and its content, in collaboration with UNODC's IT Section.

This multi-faceted website serves the global anti-money-laundering community by providing information about national money-laundering and financing of terrorism laws and regulations and contacts for inter-country assistance. Inter alia, it identifies areas for improvement in domestic laws, countermeasures and international co-operation. Policy practitioners, lawyers and law enforcement officers all regularly use IMoLIN as a key reference point in their daily work. The information on IMoLIN is freely available to all internet users, with the exception of AMLID, which is a secure database. (United Nations office on drugs and crime)

## Asset forfeiture

From the late 1980s onwards, the imperative for those (at both international and national levels) seeking to combat serious organized crime and other transnational offences (including corruption, economic crime and drug trafficking) has been to deprive those benefiting from such criminality of the financial rewards that they thereby obtain. As a result, one of the key changes in approach has been a shift in sentencing policy both nationally and as expressed in international instruments from the traditional aim which centered on penal measures up to and including imprisonment, rather than denying criminals of their illicit gains. Although confiscation had been available to courts in a number of jurisdictions from much earlier on, it tended to relate to confiscation of items such as seizure and destruction of drugs, or to weapons if used as instrumentalities to commit crimes. To address the modern trend of increasingly acquisitive (and very often cross-border) criminality the traditional approach was found to be insufficient as the fruits of the offending were still available for a criminal's enjoyment at the end of a prison sentence. The criminal justice sector across regions came to recognize that, if the aim of sentencing policy was to be effective deterrence, then it needed to hit the true aim of such criminality: making a profit (ON CIVIL FORFEITURE IMPACT STUDY , 2013)

Asset forfeiture falls into white-collar crime category of transnational organized crime. White-collar crimes are defined as:” *White-collar crime refers to financially motivated nonviolent crime committed by business and government professionals. Within criminology, it was first defined by sociologist Edwin Sutherland in 1939 as "a crime committed by a person of respectability and high social status in the course of his occupation".*” There are two types of forfeiture actions: criminal and civil. The criminal forfeiture action is referred to as an in personam action, meaning

that the action is against the person, and, that upon conviction, the punitive effect of forfeiture can be used against the convicted offender. (Asset forfeiture, 2010)

### Civil Asset Forfeiture

A civil forfeiture action is effected through either a summary, administrative, or judicial procedure.

There are instances when prosecution, and confiscation consequent on conviction, may not be available to the prosecuting agencies of a state.

Those circumstances may be one or more of the following:

- 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 has been obstructed or frustrated;
- The suspect is abroad and a request for extradition either cannot be made (due to lack of bilateral/multilateral treaty or arrangement), or

The requested State refuses to extradite;

- The defendant is acquitted following trial. (It is important to emphasize that civil forfeiture proceedings do not fall foul of the principle of double jeopardy or res judicata.)

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 organized crime, drug trafficking and certain other crimes in Italy since 1956 and in the USA since 1970. Over the past ten to fifteen years, it has gained (UNCAC, Art 54(1)(c)) popularity in a number of other jurisdictions (Australia, Canada, Fiji, Malaysia New Zealand, the Republic of Ireland, South Africa, –UK) and although very much a common law favorite initially, it has, more recently, come to be adopted by civil law countries (including Italy, the Netherlands, Columbia and the Philippines) 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. Indeed, the latest state to adopt civil forfeiture is Mauritius (with its mixed civil law/common law system), which saw its law come into force in February 2012. 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 criminal offence (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. (ON CIVIL FORFEITURE IMPACT STUDY , 2013)

### Criminal Asset Forfeiture

A criminal forfeiture action must be judicial. The property subject to forfeiture is named in the same indictment that charges the defendant with a criminal violation. The jurisdiction of the court over the defendant provides the court with jurisdiction over the defendant's property interests. While there is some disagreement among the appellate courts, generally, the government must meet the legal standard of proof, beyond a reasonable doubt, necessary to convict the defendant in order to forfeit the property. The property may be forfeited in this manner only if the defendant is convicted of the underlying offense charged, and the trier of fact finds that the property named in the indictment was illegally tainted. As a general rule, the seizure of the property through criminal forfeiture may not occur until after the property has been forfeited. (Asset forfeiture, 2010)

What about third parties?

Criminal forfeiture only severs the defendant's interest, so the property rights of third parties (co-owners, banks, and the like) are theoretically unaffected. However, third parties may be unaware of the forfeiture and the property's subsequent disposal. To protect third party interests, the government must provide notice and a hearing to all interested parties. At the hearing, the party must assert and prove their interest by preponderance of the evidence.

What defenses exist?

Since the forfeiture acts "against the person" and requires conviction of a crime, the first line of defense is against the conviction. A convicted defendant must shoulder the burden of proving the property did not have the necessary relationship to the crime in order to avoid the penalty. (forfeiture, 2015)

### UN's role

In our committee we should follow a very important convention in order to pursue the right measures, UNCAC (United Nations Convention against Corruption), in order to facilitate international cooperation in confiscation, the United Nations Convention against Corruption encourages state parties to consider taking the necessary measures to allow confiscation of the

proceeds of corruption without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

International asset recovery is any effort by governments to repatriate the proceeds of corruption hidden in foreign jurisdictions. Such assets may include monies in bank accounts, real estate, vehicles, arts and artifacts, and precious metals. As defined under the United Nations Convention against Corruption, asset recovery refers to recovering the proceeds of corruption, rather than a broader term such as asset confiscation which refers to recovering the proceeds or instrumentalities of crime in general.

The recovery process agreed upon, based on UNCAC is defined as:

1. Tracing
2. Freezing
3. Forfeiture
4. Repatriation/monitoring

(Crime, 2012)

### UN Activity

#### UN Convention against Corruption

Article 31: Each State to take measures

To enable tracing, freezing, seizure, and confiscation of proceeds of corruption, and property obtained with such proceeds.

Articles 54 and 55: Each State to take

Measures to provide mutual legal assistance through:

- The enforcement of foreign orders to freeze, seize and confiscate proceeds of corruption,
- The freezing, seizing and confiscation of proceeds of foreign crimes of corruption through the requested State's own civil, criminal processes.

(B., 2006)

### Current situation

#### International initiatives for Civil Forfeiture

Internationally there is an increasingly widespread recognition that, in many circumstances, civil forfeiture is one of the most effective tools against acquisitive crime. At the same time, though,



there are relatively few formal international initiatives on the point; those that there, it must be said, are nonetheless significant. It should be noted that there is no international convention or multi-national treaty either requiring or forbidding Civil Forfeiture. (ON CIVIL FORFEITURE IMPACT STUDY , 2013)

Key challenges that we face when it comes to resolving the issue of Criminal Asset forfeiture, specifically those that have developed over time are:

#### Lack of political will to enforce recoveries

Lack of political will has been identified repeatedly as one of the stumbling blocks to effective international asset recovery. In several cases, mutual legal assistance requests have not been honored in spite of treaty obligations. There are many examples of cases where international asset recovery would have been possible, if there had been political will.

#### Repatriation of assets

The exact terms of repatriation are still unclear. Without specific mutual legal assistance agreements, they are done on a case by case basis. For instance, Switzerland confiscated US 600 million of former Nigerian President Abacha's loot, but worked out an agreement to use the money for development purposes, monitored by the World Bank. Other potential agreements are not so generous. When Indonesia originally approached Hong Kong to repatriate Indonesian banker Hendra Rahardja's assets, the Hong Kong authorities offered to assist for a 20% commission, and then splitting the remaining money evenly.

#### Other impediments to asset recovery

- Lack of funding
- Lack of sufficient information
- Lack of technical capacity
- Lack of Remedial Procedures

Remedial procedures are necessary in situations where a defendant has died, absconded, or the statute of limitations has expired. Should any of these conditions apply, a traditional criminal process is not possible and assets cannot be recovered. Therefore, the UNCAC promotes the creation of remedial procedures to deal with such cases, such as Non-Conviction Based Forfeiture.

There are several organizations that have prioritized asset recovery and created initiatives to enable further international cooperation while bringing the issue to the forefront of political and public discussion. These initiatives also include providing technical assistance, research and capacity development to developing countries.

These organizations include but are not limited to:

Stolen Asset Recovery Initiative (World Bank) (StAR)

International Centre for Asset Recovery (ICAR)

The International Association for Asset Recovery (IAAR)

Organization for Economic Cooperation and Development (OECD)

Transparency International (TI)

Financial Action Task Force (FATF)

Organization for Security and Co-operation in Europe (OSCE)

U4 Anti-Corruption Resource Center (U4)

(Smith, 2013)

## Conclusion

I would like to end this study guide on an inquisitive note and leave you with some questions that you could contemplate on and answer within your Policy Papers. What has your country achieved so far in terms of both Civil and Criminal Asset Forfeiture? How are we to distinguish the difference between various cases of Asset Forfeiture based on UNODC standards? How do we increase international cooperation on the case of Criminal Asset forfeiture's prosecution? Please note that this study guide is meant to give you a basic introduction to an understanding of Asset Forfeitures and UN activity in this particular area, therefore I expect you to attempt to have a more intense research done beyond this study guide, in order for you to be prepared for the debates and the committee sessions.

## Bibliography

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## RECOMMENDED READING:

United Nations Treaty Collections: 11. International Convention for the Suppression of the Financing of Terrorism:

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-11&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en)

G20 Anti-Corruption Working Group: REPORT OF DELEGATIONS' RESPONSES REGARDING INTERNATIONAL COOPERATION IN CIVIL AND ADMINISTRATIVE PROCEDURES RELATING TO CORRUPTION

<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/EMInternationalCooperation/9-10October2014/V1406736e.pdf>

FATF Special Recommendation III: Freezing and confiscating terrorist assets

<http://www.un.org/en/sc/ctc/docs/bestpractices/fatf/9specialrec/9special-rec3.pdf>

