

UNIVERSITY OF NAIROBI



SCHOOL OF LAW

**PROSECUTING TRANSNATIONAL ORGANIZED CRIME IN KENYA:  
IMPORTANCE OF ASSET TRACING AND RECOVERY**

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AWARD OF A MASTER OF LAWS DEGREE (LLM)

2016

BY

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## DECLARATION

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## APPROVAL

The thesis has been submitted for review with my approval as the university supervisor.

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Date: 19/09/2017

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## DEDICATION

I dedicate this research to my dad who met his untimely death on the 19<sup>th</sup> August 2016; dad you are forever in my heart.

## ACKNOWLEDGEMENT

I acknowledge the support of my supervisor Dr. Scholastica Omondi for her invaluable guidance and supervision throughout the course of conducting this research; I am forever grateful.

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## LIST OF LEGAL INSTRUMENTS

### International

1. Charter of the Egmont Group of Financial Intelligence Units 2013.
2. Charter of the United Nations 1945.
3. FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation.
4. United Nations Convention against Corruption 2003.
5. United Nations Convention against Transnational Organized Crime 2000.

### National

1. Anti-Corruption and Economic Crimes Act, Cap 65
2. Civil Procedure Act, 2010.
3. Constitution of Kenya, 2010.
4. Ethics and Anti-Corruption Commission Act, 2011.
5. Fair Administrative Action Act, 2015.
6. Leadership and Integrity Act, Cap 182.
7. Mutual Legal Assistance Act, 2011.
8. Penal Code, Cap 63.
9. Proceeds of Crime and Anti-Money Laundering Act, Cap 59B.
10. Public Procurement and Asset Disposal Act, 2015



## LIST OF ACRONYMS

<b>ACECA</b>	Anti-Corruption and Economic Crimes Act
<b>AML</b>	Anti Money Laundering
<b>ARA</b>	Asset Recovery Agency
<b>ARF</b>	Asset Recovery Fund
<b>Cap</b>	Chapter
<b>CA</b>	Central Authority
<b>COE</b>	Council of Europe
<b>CMS</b>	Case Management System
<b>CSOs</b>	Civil Society Organizations
<b>DNFBP</b>	Designated Non Financial Bodies and Professionals
<b>DPP</b>	Director of Public Prosecutions
<b>FATF</b>	Financial Action Task Force
<b>FBI</b>	Federal Bureau of Investigations
<b>FRC</b>	Financial Reporting Centre
<b>FIU</b>	Financial Intelligence Unit
<b>GAFILAT</b>	<i>Grupo de Acción Financiera de Latinoamérica</i> – Financial Action
<b>ICAR</b>	International Centre for Asset Recovery
<b>ICT</b>	Information Communication Technology
<b>IP</b>	Intellectual Property
<b>LIA</b>	Leadership and Integrity Act
<b>MLA</b>	Mutual Legal Assistance
<b>MOU</b>	Memorandum of Understanding
<b>PIU</b>	Performance and Innovation Unit
<b>POCAMLA</b>	Proceeds of Crime and Anti-Money Laundering Act

<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>STAR</b>	Stolen Assets Recovery Initiative
<b>TOC</b>	Transnational Organized Crime
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>UNTOC</b>	United Nations Convention against Transnational Organized Crime

## CHAPTER 1

### PROSECUTING TRANSNATIONAL ORGANIZED CRIME IN KENYA: IMPORTANCE OF ASSET TRACING AND RECOVERY

#### 1.0 Introduction

This chapter introduces the phenomenon that is Transnational Organized Crime by giving its definition, nature and effect. The definition and importance of prosecution is also set out. In addition, asset-tracing and recovery is defined and its importance in the fight against TOC given. The research then proceeds to set out the research background, problem statement, objectives, questions, hypotheses, theoretical framework and the methodology.

#### 1.0.1 Definition of TOC

Article 3 (2) UNTOC<sup>1</sup> provides that an offence is transnational in nature if it is committed in more than one State or if it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State or if it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State or, last but not least, if it is committed in one State but has substantial effects in another State.

Transnational crime is a criminological rather than a juridical term, conceived by the UN Crime Prevention and Criminal Justice Branch in an endeavour to identify certain criminal activities transcending national borders, violating the laws of several states or planned and executed in one country but having impact on another.<sup>2</sup> Many jurist, scholars, lawyers, and social scientists have attempted to define TOC and most have found that it is best defined by its attributes.<sup>3</sup> TOC includes inter alia crimes such as corruption, terrorism, drug trafficking,

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<sup>1</sup> United Nations Convention against Transnational Organized Crime and the Protocols thereto 2000.

<sup>2</sup>Neil Boister, 'Transnational Criminal Law?' (2003) 14 EJIL 953.

<sup>3</sup>CarrieLyn Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention' (2000) 18 Berkley Journal of International Law 53. *Berkley Journal of International Law* 18, No. 1 (2000): 53–101.

weapons smuggling, money laundering, IP theft, cybercrime and trafficking in women and children.<sup>4</sup>

There are many definitions of organised crime as there are analytical perspectives and political backgrounds.<sup>5</sup> Organized crime is defined as the planned transgression of the law for the purpose of realizing profit or to acquire power, which offences are of a major impact and are carried out by more than two participants who cooperate by division of labour for a long or undetermined time-span using at least one of the following mediums: commercial or commercial-like arrangements, violence or other means of intimidation or influence on politics, the media, public administration, the justice system and the legitimate economy in general.<sup>6</sup>

The main TOC offences in Kenya are corruption, trafficking in drugs, illicit trade in counterfeit goods, money laundering, piracy, trafficking in humans and wildlife products.<sup>7</sup>

Large volumes of narcotic drugs such as heroin from Pakistan and Iran and cocaine from Latin American countries are being transited through Kenya destined to Europe and North America. There are however no reliable estimates figures available, furthermore the UNODC figure of thirty to fifty tons of heroin trafficked into East Africa each year has been difficult to substantiate.<sup>8</sup> Cocaine from the South American countries and heroin from Asia's Golden Crescent and Golden Triangle are smuggled into Somalia through Kismayo and Bosaso ports and transported disguised as sugar or rice aboard trucks into Kenya.<sup>9</sup>

Kenya is the largest market for counterfeits and contraband in the East Africa region. The counterfeits are sourced mainly from India and China and are estimated to be worth about \$913.8 million, rivaling key foreign exchange earners for the country. The estimates of Kenya's annual revenue losses as a result of trade in counterfeits range from \$84 million to \$490 million.<sup>10</sup>

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<sup>4</sup> Samuel Musa, 'Combating Transnational Organized Crime: Strategies and Metrics for the Threat' 1 <[https://www.files.ethz.ch/isn/151387/DTP%2094\\_Combating\\_Transnational\\_Organized\\_Crime.pdf](https://www.files.ethz.ch/isn/151387/DTP%2094_Combating_Transnational_Organized_Crime.pdf)> accessed 9 October 2016.

<sup>5</sup> Philip Gounev and Vincenzo Ruggiero, *Corruption and Organized Crime in Europe: Illegal Partnerships* (1st edn, Routledge 2012) 12.

<sup>6</sup> Letizia Paoli, 'The Paradoxes of Organized Crime' (2002) 37 *Crime, Law and Social Change* 51, 60.

<sup>7</sup> Peter Gastrow, 'Termites at Work: Transnational Organized Crime and State Erosion in Kenya' 7 <[https://www.ipinst.org/images/pdfs/ipi\\_epub-kenya-toc.pdf](https://www.ipinst.org/images/pdfs/ipi_epub-kenya-toc.pdf)>.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.* 8.

<sup>10</sup> *ibid.*



Kenya's wildlife is under increasing threat due to the activities of TOC syndicates in the illicit wildlife trade. According to Kenya Wildlife Society the illegal wildlife trade involves organized crime networks of dealers, financiers, suppliers, brokers and merchants with ivory being the most sought after item.<sup>11</sup>

The International Organization for Migration estimates that up to 20,000 Somali and Ethiopian male migrants are smuggled from the Horn of Africa through Kenya to South Africa every year. Corrupt police and immigration officers allow for these smuggling of immigrants to thrive. These illegal smuggling activities generate annual revenues of about \$40 million. At least five to ten networks coordinate and organize this trade in northern Kenya and Nairobi. They tend to be respected and well-known figures in society who operate under the guise of legitimate businesses. Their connections with top government officials and political figures contribute to the relatively low-risk environment in which they operate.<sup>12</sup>

A US State Department report states that Kenya's financial system may be laundering more than \$100 million each year in addition to an undetermined amount of narcotics proceeds and Somali piracy-related funds. Other reports estimate that \$100 million in drug money is laundered through Kenya's financial system every year. It is claimed that in 2010 a staggering \$2.1 billion found its way into the Kenyan economy without the government being able to explain its source. These funds are in turn used to fund terrorist activities and other TOCs.<sup>13</sup>

### 1.0.2 Nature and Effect of TOC

The definition of organized crime has mutated overtime, reflecting the increasing complexity and transnational nature of the phenomenon. One of the first definitions of organized crime came from FBI which posits that organized crime is a continuing and self-perpetuating criminal conspiracy that has an organized structure, driven by fear and corruption and motivated by greed and profits.<sup>14</sup> However the workings of Organised Crime remain consistent: the main drive of Organized Crime has always been and will remain to be profit; profit through illegal and corrupt means. Organized Crime is now increasingly transnational in character i.e. in terms of an expansion in volume, geographical scope, and the complexity

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<sup>11</sup> ibid 9.

<sup>12</sup> ibid 10.

<sup>13</sup> ibid 11.

<sup>14</sup> Maryann Cusimano Love, *Beyond Sovereignty: Issues for a Global Agenda* (2nd edn, Wadsworth 2003) 145 <<https://petripuc.files.wordpress.com/2011/03/global-crime.pdf>>.

of the criminal process. Organised Crime is no longer an isolated issue of criminality in a single State, but is now a transnational phenomenon affecting the international community and the relations therein.<sup>15</sup> Many criminal organizations have not only become transnational in nature but in addition they also exhibit a degree of flexibility and adaptability in methods and modes of operation a characteristic that poses considerable challenges for intelligence, law enforcement agencies and society at large.<sup>16</sup> Organized crime consists of organizations or such like arrangements that have a hierarchy and are involved in a multiplicity of criminal activities. As such Organized Crime has become a synonym for illegal enterprise.<sup>17</sup>

The expression organized crime has, in fact, been used as a catchphrase to express the growing anxieties of national and supranational public institutions and private citizens in view of the expansion of domestic and world illegal markets, the increasing mobility of criminal actors across national borders, and their perceived growing capability to pollute the licit economy and undermine political institutions.<sup>18</sup> The FBI defines Organized Crime as a self-perpetuating, structured and disciplined association of individuals or groups, working together for the purpose of obtaining commercial gains or profits, either in whole or in part through illicit means, while at the same time protecting their activities through a pattern of bribery and corruption.<sup>19</sup>

Thinking of crime in a transnational perspective brings to focus the manner in which criminal organizations seek to operate outside of the state system and thus transgressing the sovereignty that organizes the modern state system whilst leveraging it for their own profit and gain.<sup>20</sup> As such therefore TOC refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, either wholly or in part by illegal means, while protecting their illegal activities through use of corruption and/or violence, or use of structures for the exploitation of transnational commerce or communication mechanisms. There is however no

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<sup>15</sup> Pankratz, Thomas/Matiasek and Hanns, 'Understanding Transnational Organised Crime: A Constructivist Approach Towards A Growing Phenomenon' (2012) 2 *Journal for Police Science and Practice* 41. *Journal for Police Science and Practice* 2 (2012): 41–50.

<sup>16</sup> Phil Williams and Roy Godson, 'Anticipating Organized and Transnational Crime' (2002) 37 *Crime, Law and Social Change* 311, 311.

<sup>17</sup> Paoli (n 6) 55.

<sup>18</sup> *ibid* 53.

<sup>19</sup> Bruce Bagley, 'Globalization and Transnational Organized Crime: The Russian Mafia in Latin America and the Caribbean' 1 <<https://www.as.miami.edu/media/college-of-arts-and-sciences/content-assets/international-studies/documents/publication>>.

<sup>20</sup> Love (n 14) 145.



single structure under which these criminals operate as the structures vary from hierarchies to clans, networks and cells, and may also evolve to other structures.<sup>21</sup>

In Kenya the criminal networks have penetrated the political class and there are growing concerns about their ability to finance elections and to exercise influence in Parliament and in the procurement process. Furthermore, due to corruption and impunity being rife political and government elites are hardly prosecuted for TOC. The criminal justice system, including the judiciary and prison department, has been perceived as corrupt and inept and has enjoyed low levels of public trust and legitimacy.<sup>22</sup>

Corruption, pilferage of public funds, graft and other forms of TOC are widespread in Kenya and this is majorly as a result of omissions rather than of acts of commission by the State.<sup>23</sup> Some types of corruption are aimed at influencing the non-implementation of existing laws and regulations either through the eroding of political will or the bribing of officials so as not to apply or overlook certain provisions.<sup>24</sup>

It is evident from the aforementioned definitions that although there is widespread agreement that TOC exists, there is less agreement on a common definition. Even though there is no common definition several general traits can be identified as being common among most transnational crimes. These are crimes whose inception, prevention and/or direct effect or indirect effects involves more than one State.<sup>25</sup>

### 1.0.3 Definition and Need for Prosecution

Section 2 ODPP Act<sup>26</sup> provides that prosecution is a proceeding in respect of any offence or the prospective prosecution which is under the jurisdiction of the Director and related to such a prosecution or proceeding and includes extradition proceedings and any appeal, revision or other proceeding related thereto. Article 157 (1) Constitution of Kenya 2010 (hereinafter the

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<sup>21</sup> The White House, 'Strategy to Combat Transnational Organized Crime' 3 <[https://www.whitehouse.gov/sites/default/files/Strategy\\_to\\_Combat\\_Transnational\\_Organized\\_Crime\\_July\\_2011.pdf](https://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf)> accessed 15 October 2016.

<sup>22</sup> Gastrow (n 7) 12.

<sup>23</sup> *ibid* 13.

<sup>24</sup> *ibid*.

<sup>25</sup> Caliber Associates, 'State and Local Law Enforcement Responses to Transnational Crime' (2005) 205921 5 <<https://www.ncjrs.gov/pdffiles1/nij/grants/209521.pdf>>.

<sup>26</sup> Office of the Director of Public Prosecutions Act 2013.

Constitution)<sup>27</sup> establishes the ODPP whilst Article 157 (6) (a) and (b) of the Constitution provides that the DPP may institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed, and take over and continue any criminal proceedings commenced in any court other than a court martial, that have been instituted or undertaken by another person or authority with the permission of the person or authority respectively.

Prosecution is defined as the institution and conducting of legal proceedings against someone in respect of a criminal charge.<sup>28</sup> Section 5 (4) (b) ODPP Act imposes the duty to implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime on the DPP.

Prosecutors come in handy in TOC offences where the victims of these offences have to be compensated. It is for the prosecutor to represent the interests of the victims in court.<sup>29</sup>

A prosecutor is involved in the investigations of TOC offences by dint of section 61 POCAMLA which allows for the prosecutor to apply for confiscation orders, the prosecutor is involved in the availing of evidence to prove that the Defendant/Accused derived a benefit from the proceeds of crime under section 65 POCAMLA, the prosecutor will also be involved in the process for the application of a restraint and preservation orders as under sections 68 and 82 respectively of POCAMLA and a prosecutor will also be involved in process for the application of the forfeiture order.

It is worthy of note that UNCAC and UNTOC provide the guidelines to be incorporated in the States Parties' legislation in order to simplify the work of prosecutors and investigators when working on TOC cases.<sup>30</sup>

MLA which is a key facilitator in asset-tracing and recovery is offered in the purview of investigations, prosecutions and judicial proceedings in relation to criminal matters. As

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<sup>27</sup> Constitution of Kenya 2010.

<sup>28</sup> Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/prosecution>>.

<sup>29</sup> Basel Institute on Governance, International Centre for Asset Recovery, *Tracing Stolen Assets: A Practitioner's Handbook* (Basel Institute on Governance 2009) 25  
<[https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing\\_web-version\\_eng.pdf](https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing_web-version_eng.pdf)>.

<sup>30</sup> *ibid* 122.



provided for by article 157 of the Constitution criminal matters in Kenya fall within the purview of the ODPP.

Asset-tracing and recovery entails information-gathering powers and these powers are mostly used by law investigative agencies and prosecutors so as to get relevant information to assist in the asset-tracing and recovery process.<sup>31</sup> In addition, asset-tracing and recovery requires the coordinated efforts of individuals and agencies with different skill sets working together, including the prosecutors, police, financial analysts/FRC and the ARA.<sup>32</sup>

In light of the foregoing and on the backdrop of maintaining the rule of law and more so the protection of citizens against crime it is imperative that the ODPP in prosecuting TOC should consider undertaking asset-tracing and recovery.

#### **1.0.4 Definition of Asset Tracing**

Tracing is defined as an equitable remedy that allows a rightful owner to track their assets or monies after they have been taken away from them either by way of fraud, misappropriation or mistake.<sup>33</sup> In divorce proceedings, asset tracing is defined as an accounting process that traces and locates an asset from its separate property beginnings through all of its mutations and demonstrates that the resulting asset or proceeds in existence at the date of divorce proceedings is either separate, marital, or a combination of the two. The foregoing definition can be adapted for investigative processes into assets and proceeds of crimes. As such therefore, tracing assets and proceeds of crime involves identifying assets and proceeds of crime from their illicit origins, through all their mutations, if any, to their final form and state in which they exist at the point in time they are located.<sup>34</sup>

#### **1.1 Background of the Research**

Organized crime threatens the economy, national security and other interests of a country. This is through activities such as the penetration of the energy and other strategic sectors of the economy, provision of logistical and other support to terrorists, the trafficking of weapons and contraband goods, trafficking in women and children, the exploitation of both state and

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<sup>31</sup> Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (The International Bank for Reconstruction and Development / The World Bank 2011) 95.

<sup>32</sup> *ibid* 92.

<sup>33</sup> 'Tracing' <<http://legal-dictionary.thefreedictionary.com/Tracing>>.

<sup>34</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 23.

international financial systems in moving illicit funds, the manipulation of securities exchanges and perpetration of sophisticated frauds, the corrupting or seeking to corrupt public officials in a State and the use of or the threat of violence as a means of acquiring power.<sup>35</sup> Organized crime is mainly focused generally on economic profit and also on the acquiring of as much illegal market share as possible.<sup>36</sup>

Organized criminal groups in particular mafia groups no longer know borders and this is particularly true in terms of laundering and re-investing the proceeds of their crime.<sup>37</sup> If crime crosses borders, so must law enforcement. Therefore if the rule of law is undermined not only in one State, but in many, then those who defend it cannot limit themselves to purely national measures.<sup>38</sup>

It is of utmost importance that nations work together so as to ensure that corrupt officials do not retain the illicit proceeds of their corruption. Kleptocrats loot their nations' treasuries and steal its natural resources, embezzle development aid and as a result condemn their nations' citizens to starvation and disease. In light of this gross injustice, asset-tracing and recovery is a global imperative.<sup>39</sup> A truly international and cooperative response will enable State's to achieve success in recovering the assets and proceeds of crime. Asset recovery requires the dedication and expertise of investigators and prosecutors in both the State where the victims of such crimes and the rightful owners of the looted assets and monies are situated and the State in which the assets and proceeds have been secreted.<sup>40</sup> TOC not only condemns the citizens of a nation to disease and starvation but also brings about inter alia the undermining and breaking down of institutions and systems, undermining of the rule of law and dispensation of justice, it also brings about impoverishment and anarchy in a nation.

The effective combat of TOC requires the use of international money laundering laws to prosecute the perpetrators including the intermediaries, and to also seize, forfeit, and

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<sup>35</sup> Kristin M Finklea, 'Organized Crime in the United States: Trends and Issues for Congress' ii <<https://www.fas.org/sgp/crs/misc/R40525.pdf>> accessed 1 October 2016.

<sup>36</sup> Frank Bovenkerk and Bashir Abou Chakra, 'Terrorism and Organized Crime' (2014) 4 UNODC Forum on Crime and Society 3, 3.

<sup>37</sup> Alberto Perduca, 'Tracing, Seizing and Confiscating Criminal Assets. Achievements and Challenges in the Italian Experience' (2012) 3 <<http://www.osce.org/eea/93412?download=true>> accessed 3 August 2016.

<sup>38</sup> United Nations Convention against Transnational Organized Crime and the Protocols thereto (n 1).

<sup>39</sup> United States Department of Justice and United States Department of State, 'U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation' ii <<http://www.state.gov/documents/organization/190690.pdf>> accessed 7 January 2016.

<sup>40</sup> United States Department of State, 'U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation'.



repatriate back to the source countries the proceeds of the crime. The reasons that money laundering prosecution and asset recovery must be used is so as to deprive the perpetrators of the instrumentalities used in and the assets and proceeds from their criminal activities. In addition it provides for a means by which to channel some of the ill-gotten gains to the source countries.<sup>41</sup>

TOC is committed by persons willing to gain a benefit from their crime; to therefore deprive them of the assets and proceeds gained therefrom is key to the successful fight against TOC. When possible, assets and monies should be returned to their rightful owners and also compensate victims. A key to successful TOC investigations is to link the assets or proceeds of crime to the criminal activity. This is particularly challenging in cases involving indirect evidence. It is therefore important to integrate asset-tracing and recovery in the investigations and to also seek assistance by way of MLA requests.<sup>42</sup>

Transnational criminals are major beneficiaries of globalization. They move readily across borders, make full use of the anonymity provided by new forms of ICT and in some instances exploit the banking secrecy of international finance.<sup>43</sup> ICT innovation and globalization have proven to be an overwhelming force for good. However, transnational criminal organizations have capitalized on the increasingly interconnected world to increase and expand their illicit activities.<sup>44</sup> The globe has opened up due to the fading of borders or them no longer being as well guarded, the world market has been globalized and ICT is presenting unanticipated new technological possibilities and large-scale migration across the globe. As a result TOC has flourished in this age of accelerated global interconnectedness.<sup>45</sup>

Globalization and in particular the emergence and expansion of TOC confront all justice systems with new impediments. Criminals are mobile and often endeavour to escape detection, arrest and punishment by operating across international borders. They take

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<sup>41</sup>Bruce Zagaris, 'Creating Havens for the Anti-Corrupt: Tax Transparency and Financial Integrity' (2014) 4.

<sup>42</sup>OECD Anti-Corruption Network for Eastern Europe and Central Asia, 'Effective Means of Investigation and Prosecution of Corruption' (Secretariat of OECD Anti-Corruption Network for Eastern Europe and Central Asia 2010) 9.

<sup>43</sup>Louise I. Shelley and John T. Picarelli, 'Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism' (2002) 3 *Police Practice and Research: An International Journal* 305.

<sup>44</sup>The White House, 'Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to Security'.

<sup>45</sup>Frank Bovenkerk and Bashir Abou Chakra, 'Terrorism and Organized Crime' (2004) 4 *Forum on Crime and Society* 3.

advantage of the reluctance of law enforcement authorities to engage in complicated and expensive transnational investigations and prosecutions. The low capacity of any one State to effectively address the effects of TOC translates itself into an overall weakness in the international regime of criminal justice cooperation.<sup>46</sup>

Many criminal organizations and individuals alike have not only become transnational in scope but also exhibit a degree of flexibility and adaptability in methods and modes that poses considerable challenges for intelligence, law enforcement agencies and the society at large.<sup>47</sup> Globalization has provided criminals and terrorist organizations with an opportunity to expand and utilize international economic infrastructures such as Islamic banks, offshore tax havens some of which facilitate money-laundering.<sup>48</sup> As such therefore, organized crime robs economies of their wealth and is increasingly becoming a threat to security and the economies of States, in particular developing ones and those in transition, the safety of their citizens, the preservation of society's fabric and the viability and development of these economies.<sup>49</sup>

It is clear from the foregoing that the transnational nature of organized crime has massive, negative and far-reaching effects on society and presents a challenge to authorities in terms of its detection, investigation and prosecution. The transnational nature of organized crime therefore calls for international cooperation. TOC pervades through society and has damaging and far-reaching effects on the economy and people of a nation alike. It is therefore imperative that a State should put in place measures to detect, prevent, prosecute and suppress TOC.

State powers of prosecution are derived from the people and vest in and are exercised by the DPP and officers subordinate to him/her. In exercise of the powers of prosecution the prosecutors must uphold the supremacy of the Constitution and be guided by the national values and principles.<sup>50</sup> Article 10 (2) of the Constitution provides inter alia that the national

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<sup>46</sup> United Nations Office on Crime and Drugs, 'Cross Cutting Issues: International Cooperation Criminal Justice Assessment Toolkit' 1 <[http://www.poa-iss.org/KIT/4\\_International\\_Cooperation.pdf](http://www.poa-iss.org/KIT/4_International_Cooperation.pdf)> accessed 3 October 2016.

<sup>47</sup> Phil Williams & Roy Godson, 'Anticipating Organized and Transnational Crime' (2002) 37 Crime Law and Social Change 311.

<sup>48</sup> Loretta Napoleoni, 'The New Economy of Terror: How Terrorism Is Financed' (2004) 4 Forum on Crime and Society 31, 40.

<sup>49</sup> Paoli (n 6) 51.

<sup>50</sup> Office of the Director of Public Prosecutions, 'National Prosecution Policy'.



values and principles are the rule of law, social justice, good governance, integrity, transparency and accountability. The importance of the rule of law as hereinbefore mentioned is underscored in section 5 (4) of the ODPP Act which provides for the need to implement an effective prosecution mechanism so as to allow for the maintenance of the rule of law and contribute to fair and equitable criminal justice and effective protection of citizens against crime.

Criminal investigations are primarily focused on the investigation of the underlying criminality. It is still relatively rare for investigators, as a part of their investigation to 'follow the money' and establish what happened to the proceeds of the crime.<sup>51</sup> Proceeds of crime represent illegal income and they sometimes manifest themselves as assets. Tracing the assets and proceeds of crime is predicated on the premise that through transformation, the origin of assets as criminal income can be hidden, and they can be easily and speedily moved between locations, or across borders. They can also be mingled with others and converted into other forms.<sup>52</sup> Article 2 (e) UNCAC<sup>53</sup> defines proceeds of crime as any property derived from or obtained, directly or indirectly, through the commission of an offence.

Criminals are often forced to launder the proceeds of their crime so as to hide their origins and eventually profit from their crime. There is always a link between criminals' proceeds/assets and their crimes. Asset-tracing and recovery leads the investigator to evidence of criminal intent and wrongdoing which assists in the securing of convictions and also in identifying unknown accomplices. Furthermore, seizure of illegal proceeds and assets can be achieved through tracking the ownership trail under the process of asset-tracing.<sup>54</sup> It is undoubted therefore that asset-tracing and recovery is a promising strategy against TOC.<sup>55</sup>

Consensus has been built around some of the most promising measures of enhancing international cooperation in both investigating and prosecuting TOC. Some of these measures are now included in conventions such as the UNTOC, UNCAC and several other treaties at the global and regional levels, which provide a strong basis for cooperation.<sup>56</sup> The coming into force of the UNTOC was a clear indication by the international community that a global

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<sup>51</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 20.

<sup>52</sup> *ibid* 19.

<sup>53</sup> United Nations Convention against Corruption 2003.

<sup>54</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 19.

<sup>55</sup> *ibid* 7.

<sup>56</sup> United Nations Office on Crime and Drugs (n 46) 1.

challenge calls for a global response. That if crime crosses borders, so must law enforcement. This is because if the rule of law is undermined in one country it eventually affects many more and as such those who defend it cannot limit themselves to purely national means.<sup>57</sup>

International law is an effective and powerful tool for tackling the scourge of TOC. The most notable and recent instruments of international law that have set the course for how to define, prevent, and prosecute TOC are the UNTOC and UNCAC.<sup>58</sup> The UNTOC and the UNCAC provide a strong basis for cooperation and often suggest some of the elements that must be developed as part of enhancing national capacity for the effective investigation and prosecution of TOC and the tracing and recovery of proceeds of crime.<sup>59</sup>

## 1.2 Problem Statement

Kenya signed and ratified the UNCAC on the 9<sup>th</sup> December 2003.<sup>60</sup> She also ratified the UNTOC on the 16<sup>th</sup> June 2004.<sup>61</sup> Article 2 (5) and (6) of the Constitution provides that general rules of international law and any treaty or convention ratified by Kenya do form part of the law under the Constitution. As such conventions such as UNTOC and UNCAC do form part of Kenyan law.

Kenya has a number of statutes that are aimed at tackling criminal activities and the recovery of criminal assets; POCAMLA<sup>62</sup> is such an Act. It was enacted to provide for the offence of money laundering and also for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. Sections 21 and 53 of POCAMLA provide for the establishment of a Financial Reporting Centre (FRC) and an Asset Recovery Agency (ARA) respectively.

Despite Kenya having the foregoing laws in force and the said institutions in place, TOC cases with the estimated aforementioned figures in revenue of \$ 913.8 million in counterfeiting goods, \$ 40 million in trafficking in persons and \$ 100 million in money laundering are still ongoing and no asset-tracing and recovery is undertaken and even when it

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<sup>57</sup>United Nations Convention against Transnational Organized Crime 2000.

<sup>58</sup> Lindsey King, 'International Law and Human Trafficking' Topical Research Digest: Human Rights and Human Trafficking 88, 88.

<sup>59</sup> United Nations Office on Crime and Drugs (n 46) 1.

<sup>60</sup> 'United Nations Convention against Corruption Treaties Database' <<http://kenyalaw.org/treaties/treaties/129/United-Nations-Convention-against-Corruption>> accessed 20 October 2016.

<sup>61</sup> 'United Nations Treaty Collection' <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en)> accessed 20 October 2016.

<sup>62</sup> Proceeds of Crime and Anti Money Laundering Act 2009.



is undertaken it is not effective so as to ensure that criminals are deprived of all their assets and proceeds gotten from and the instrumentalities used in their criminal activities. The weak enforcement mechanism therefore results in the unconscionable position of allowing criminals to keep their assets and proceeds gotten from and instrumentalities used in their crime to persist a situation that cannot be allowed to continue. Criminals should not be brought to court to face trial but the proceeds or assets gotten from their criminal acts not face any kind of action; be it seizure, confiscation and/or forfeiture for the purposes of returning them to the rightful owners or to compensate victims. Such a situation is unconscionable and should not be allowed to obtain.

Asset-tracing and recovery should be undertaken without fail. This is because perpetrators of crime should not be allowed to benefit from their criminal activities. It is on the strength of depriving criminals of their assets and proceeds gotten from and the instrumentalities used in or to be used in their crimes that this research is predicated.

### **1.3 Justification for the study**

Section 5 (4) (b) ODPP Act intimates that an effective prosecution mechanism allows for the maintaining of the rule of law and contributes to fair and equitable criminal justice and the effective protection of citizens against crime.

Asset Tracing and Recovery is a promising strategy against TOC since it takes away from the criminals the assets and proceeds of their crime.<sup>63</sup> Faith in the justice system, confidence in the rule of law and a sense of justice will not prevail if criminals are allowed to keep the proceeds of their crime at the detriment of the victims and rightful owners. Therefore in conducting prosecution of TOC crimes it is of utmost importance that asset-tracing and recovery is undertaken.

This study is therefore justified firstly as it will propose recommendations for the making of the Kenyan asset-tracing and recovery regime effective and efficient. Secondly, the study will provide scholarly literature to guide the said process in making it effective and efficient. Lastly, the study will contribute to the literature on asset-tracing and recovery in Kenya.

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<sup>63</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 8.

## 1.4 Research Objectives

The main objective of this study is to critically examine asset-tracing and recovery processes and procedures in the prosecution of TOC in Kenya. This is predicated on the importance of asset-tracing and recovery in the fight against TOC. The specific objectives are:

- i. To establish any challenges faced by the prosecution in prosecuting and undertaking asset-tracing and recovery of proceeds of TOC in Kenya.
- ii. To make recommendations so as to enhance asset-tracing and recovery in the fight against TOC in Kenya.

## 1.5 Research Questions

The research will seek to answer the following questions:-

- i. What procedures are adopted by Kenya to trace and recover assets and proceeds of crime in the prosecution of TOC?
- ii. How effective is the process of tracing and recovery of assets in the prosecution of TOC in Kenya?
- iii. What measures need to be put in place to allow for effective asset-tracing and recovery in preventing, prosecuting and suppressing TOC in Kenya?

## 1.6 Hypothesis

An ineffective asset-tracing and recovery regime undermines the efforts in the fight against TOC.

## 1.7 Theoretical Framework

This research will rely on one of the theories of the three pillars of the Opportunity Theories in criminology; the rational choice theory<sup>64</sup> and also on the social control theory.

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<sup>64</sup> Gennaro F Vito, Jeffrey A Maahs and Ronald M Holmes, *Criminology Theory, Research and Policy* (2nd edn, Jones and Bartlett Publishers 2007).



### 1.7.1 Rational Choice Theory

Rational choice theory starts with the idea that individuals have preferences and choose according to those preferences.<sup>65</sup> Sociologists and political scientists have attempted to formulate theories around the idea that any action is fundamentally 'rational' and that people calculate the likely costs and benefits of that action before deciding what to do. Rational choice theorists posit that individuals anticipate the outcomes of alternative courses of action and calculate that which will be rewarding for them. As such rational individuals choose the alternative that is most likely to give them the greatest satisfaction.<sup>66</sup>

What distinguishes rational choice theory from other forms of theory is that it denies the existence of any kinds of action other than purely rational and calculative. It contends that all social action can be seen as rationally motivated, as instrumental action, however much it may appear to be irrational or non-rational.<sup>67</sup>

Rational choice theory and its various assumptions on human behaviour have been integrated into many criminological theories and criminal justice interventions. Since the 18<sup>th</sup> Century when the rational choice theory originated, it has been expanded upon and enlarged to include other perspectives, such as deterrence, situational crime prevention, and routine activity theory. The perspective of rational choice has been applied to a wide range of crimes such as corruption and white-collar crimes which form part of TOC.<sup>68</sup>

George Homans was one of the proponents of rational choice theory. He sets out a basic framework of exchange theory which he predicated on assumptions drawn from behaviourist psychology. Even though these psychological assumptions have been rejected by many later writers, his formulation of exchange theory still remains the basis of all subsequent discussion. In the 1960s and 1970s this theory was developed into more formal and mathematical models of rational action.<sup>69</sup>

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<sup>65</sup> Jonathan Levin and Paul Milgrom, 'Introduction to Choice Theory' 3 <<https://web.stanford.edu/~jdlevin/Econ%20202/Choice%20Theory.pdf>> accessed 21 October 2016.

<sup>66</sup> Gary Browning, Abigail Halcli and Frank Webster, *Understanding Contemporary Society: Theories of the Present* (1st edn, Sage Publications Ltd 2000).

<sup>67</sup> John Scott, 'Rational Choice Theory' 2 <<http://www.soc.iastate.edu/sapp/soc401rationalchoice.pdf>> accessed 21 October 2016.

<sup>68</sup> John Paul Wright, 'Rational Choice Theories' (2009) <<http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0007.xml>> accessed 21 October 2016.

<sup>69</sup> John Scott, 'Rational Choice Theory' 2 <[www.soc.iastate.edu/sapp/soc401rationalchoice.pdf](http://www.soc.iastate.edu/sapp/soc401rationalchoice.pdf)>.

One of the strengths of the rational choice model that makes it relevant to this study emanates from the assumption that preferences are relatively stable and not too situation-dependent. This is the source of the theory's empirical content, because it allows the observation of choices in one situation and the drawing of inferences about those choices in related situations.<sup>70</sup>

A main criticism of the most fundamental rational choice model is that choices often appear to be highly situational or context-dependent. Choice behaviour will be influenced by the way in which a choice is posed, the social context of the decision, the emotional state of the decision-maker and the addition of seemingly extraneous items to the choice among others.<sup>71</sup>

A further criticism of the rational choice theory is that in reality, many choices are not considered and weighed; they are however based on intuitive reasoning, heuristics or instinctive desires.<sup>72</sup> The foregoing weaknesses notwithstanding, it is noteworthy that despite the shortcomings of the rational choice model, it remains a remarkably powerful tool for policy analysis.<sup>73</sup>

However, this theory does not provide the answer to the question why else would a criminal decide to engage in criminal activities other than purely for gain; thus the need to also use social control theory.

### **1.7.2 Social Control Theory**

Social Control Theory provides an explanation for how behaviour conforms to that which is generally expected in society. Some control theories emphasize the developmental processes during childhood by which internal constraints develop. However, social control theories focus primarily on external factors and processes by which they become effective; deviance and crime occur because of inadequate constraints. For social control theory the underlying view of human nature includes the conception of free will thereby giving offenders the capacity of choice and responsibility for their behaviour. As such social control theories aligned more with the classical school of criminology than with positivist or determinist perspectives. For the most part, social control theory postulates a shared value or belief in

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<sup>70</sup> Levin and Milgrom (n 65) 22.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid* 24.



social norms. Even those who break laws or violate social norms are likely to share the general belief that those rules should be followed. Crime and deviance are considered predictable behaviours that society has not curtailed. Explaining conformity, particularly the process by which people are socialized to obey the rules is the essence of social control theory. Therefore social control theory focuses on how the absence of close relationships with conventional others can free individuals from social constraints thereby allowing them to engage in criminal offenses.<sup>74</sup>

A large body of criminological research inspired by social control theory has focused on how variations in the strength of individuals' bonds to family, community, school, and other conventional groups and institutions relate to patterns of self-reported and officially recorded deviant behaviour. Social control theory has origins in the early works of the moral and utilitarian philosophers, the nineteenth-century writings of Émile Durkheim, and the early twentieth-century research of the Chicago School of sociology 1975. It is now counted among the leading sociological perspectives on crime and juvenile delinquency, largely because of the influence of Travis Hirschi's formulation and evaluation of control theory. Rather than focusing on an individual's personality as a source of criminality, he focused on social relationships which he referred to as social bonds. He contended that no motivational factors were necessary for one to commit delinquency; the only requirement was the absence of control that allowed an individual to become free to weigh the benefits of crime over the costs of those same delinquent acts.<sup>75</sup>

Despite there being research that supports the basic principles of social control theory, some scholars have questioned the validity of the theory. Questions as to whether the notions of self-control as advanced by Hirschi can be used to elucidate more serious offending behaviour have since arisen. Critics of the theory argue that the theory is better placed to explain minor offences but falls short in extensively accounting for more serious crimes.<sup>76</sup>

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<sup>74</sup> Kimberly Kempf-Leonard and Nancy A Morrison, 'Social Control Theory' (2012) <<http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0091.xml>> accessed 22 October 2016.

<sup>75</sup> 'The Social Control Theory of Crime' <<http://www.uniassignment.com/essay-samples/criminology/the-social-control-theory-of-crime-criminology-essay.php>> accessed 22 October 2016.

<sup>76</sup> Government of Ontario and Ministry of Children and Youth Services, 'Social Control and Self-Control Theories' <[http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/volume5/chapter12\\_social\\_control.asp](http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/volume5/chapter12_social_control.asp)> accessed 23 October 2016.

## 1.8 Literature Review

Literature review is conducted under the following thematic areas:

### 1.8.1 Procedures Adopted in Asset Tracing and Recovery

According to a study by Kwame Owino the gains that any person may derive from keeping property that has been accumulated through corrupt means must be taken away. At the same time, the law is clear that the right to property of any person should not be violated and therefore, requires that such confiscation be done after the institution of civil proceedings. It therefore means that Kenya's asset recovery regime is subject to judicial proceedings in a civil court.<sup>77</sup> Owino's study did not consider the criminal aspect of asset recovery in Kenya and this study therefore seeks to establish that this can also be done through proceedings in the criminal courts; whereupon conviction an order of confiscation is issued against the proceeds and assets of the accused got from his criminal activities.

Owino contends that asset recovery related to corruption is often predicated on the fact that a court convicted the person or persons in possession of that property.<sup>78</sup> This study seeks to establish that the scope of asset recovery is wide and entails not only a conviction based system but also a civil proceedings based system where there is no conviction but the state argues its case for confiscation of a person's assets on a balance of probabilities.

Surveys carried out by the PIU show that financial investigation is underused, undervalued and under resourced in the UK. Financial investigation is an essential tool in the fight against TOC. It is a prerequisite to effective asset-tracing and recovery, and it can provide valuable new avenues for traditional law enforcement investigations.<sup>79</sup>

The survey hereinabove was conducted in the United Kingdom and is not representative of the situation obtaining in Kenya. This study therefore seeks to establish whether financial investigation is used in Kenya and how effective it has been.

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<sup>77</sup> Kwame Owino, 'Asset Recovery in Kenya: Outstanding Questions' 2  
<<http://tikenya.org/phocadownload/adili103.pdf>> accessed 27 May 2016.

<sup>78</sup> *ibid.*

<sup>79</sup> Performance and Innovation Unit, 'Recovering the Proceeds of Crime' 8  
<<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf>> accessed 24 October 2016.



According to COE civil forfeiture has been in place for some time in a number of states around the world and that it has been used as an effective tool to counter organised crime, drug trafficking and other crimes in Italy since 1956 and in the USA since 1970. Over the years civil forfeiture has gained popularity in a number of other jurisdictions other than in Europe (Fiji, Malaysia New Zealand, South Africa). Each of the aforementioned States has in place laws that make provision for the forfeiture of assets derived from illicit activity without the 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.<sup>80</sup>

The asset recovery method of civil forfeiture as referred to hereinabove by COE is as it exists in the countries aforementioned and is not representative of Kenya. This research therefore seeks to bring out the civil forfeiture situation as it is in Kenya.

GAFILAT in its report states that the FIU of the Costa Rican Institute on Drugs (ICD) requests, collects and analyses suspicious transactions reports and forms, submitted by the supervision bodies and reporting entities, in order to centralize and analyse said information to investigate the money laundering or financing of terrorism activities. The said investigations are then communicated to the Public Prosecutor.<sup>81</sup>

The author hereinabove refers to the workings and mandate of the FIU in Costa Rica; however this research seeks to establish the existence, workings and mandate of an FIU in Kenya.

### 1.8.2 Effectiveness of Asset Tracing and Recovery in Prosecuting TOC

Owino contends that the legislature in Kenya provides a mechanism for the Kenya Anti-Corruption Commission (KACC) to seek to recover assets and property that belong to the people of Kenya and which were acquired in pursuit of or as a result of acts of corruption.

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<sup>80</sup> 'Impact Study on Civil Forfeiture' 8  
<[https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Publications/CAR/Impact%20Study%20on%20Civil%20Forfeiture\\_EN.pdf](https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Publications/CAR/Impact%20Study%20on%20Civil%20Forfeiture_EN.pdf)> accessed 24 October 2016.

<sup>81</sup> GAFILAT, 'Mutual Evaluation Report of the Republic of Costa Rica' 28 <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER-Costa-Rica-2015-ENG.pdf>> accessed 24 October 2016.

Lying behind this is the logic that whereas criminalization of corruption and the prosecution of the corrupt are necessary, it is equally important to complement the criminal law processes with efforts to reduce the financial gain that emanates from acts of corruption.<sup>82</sup>

The author does not mention the issue of recovery of instrumentalities used in or to be used in TOC. This research therefore seeks to set out and encourage the confiscation and forfeiture of instrumentalities used in or destined for use in TOC.

Knoetzl and Marsch state that the key success factor in the prevention of white-collar crime and corruption is new legislation for more effective asset-tracing, that is, the inter-jurisdictional tracing and recovery of funds and other property generated or misallocated through crime.<sup>83</sup>

Zagaris argues that the effective combat of wildlife crime and other TOC requires the use of international money laundering laws to prosecute the perpetrators, including the intermediaries, and seize, forfeit, and share with the source countries the instrumentalities and proceeds of the crime. The reasons that money laundering prosecution and asset recovery must be used are to deprive the perpetrators of the instrumentalities and proceeds to continue to perpetrate the criminal activities and to have a means by which to channel some of the ill-gotten gains to the source developing countries.<sup>84</sup>

The authors' hereinabove emphasize the enactment of laws as an effective measure to combat TOC. This study however seeks to argue that for there to be effective asset-tracing and recovery it is a pre requisite that there be put in place an array of measures such as an effective and efficient FIU, a well-equipped and financed investigation team, international cooperation, an efficient and effective prosecution and judiciary and political goodwill so as to effectively combat TOC.

The UK Home Department contends that the use of powers under the Proceeds of Crime Act 2002 has resulted in the recovery of over £150 million of criminal profits each year and

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<sup>82</sup> Owino (n 77) 1.

<sup>83</sup> Bettina Knoetzl and Philip Marsch, 'Challenges of Asset Tracing/Recovery' (*Who's Who Legal*, October 2012) <<http://whoswholegal.com/news/features/article/30067/challenges-asset-tracingrecovery>> accessed 11 August 2016.

<sup>84</sup> Bruce Zagaris (n 41) 4.



denied criminals access to even larger amounts. The foregoing sums are still negligible in comparison to the scale and cost of serious and organised crime to the economy of the UK.<sup>85</sup>

The sums recovered hereinabove are representative of the situation in the UK; as such this study seeks to establish what amounts are recovered in Kenya and its effect on the Kenyan economy.

### 1.8.3 Hurdles Encountered in Conducting Asset Tracing and Recovery

Knoetzi and Marsch posit that generally, asset-tracing and recovery requires a lot of energy, commitment, technical know-how and allocation of resources in order to successfully recover damages caused by fraud and other forms of TOC. Asset and proceeds recovery efforts demand a remarkable amount of time and energy, on-site advice of experienced advisers, effective systems among others. An important element in pursuing the recovery of assets and proceeds of crime is the support provided to fraud victims by individual jurisdictions that are involved in the chain of transferring and hiding misallocated assets.<sup>86</sup>

The authors argue that the measure of an effective asset-tracing and recovery system is the support afforded to fraud victims. This research however argues that the hallmark of a successful asset-tracing and recovery system is the depriving of criminals of their ill-gotten gains and compensating victims and/or returning the assets/proceeds to the rightful owners.

Smith, Pieth and Jorge argue that asset recovery is a costly and time consuming enterprise. It requires lawyers, forensic accountants, expert opinions, translators and travel expenses. Private law firms often prove helpful in tracing and recovering assets abroad, as in the efforts of the Philippines against Ferdinand Marcos and Nigeria against the estate of Sani Abacha. Such firms are expensive, generally charging from \$200 to \$600 per hour.<sup>87</sup>

The authors' hereinabove have considered some of the hurdles encountered and what should be put in place in an asset-tracing and recovery venture; the authors however focused on

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<sup>85</sup>Home Department, UK, 'Serious and Organized Crime Strategy' 46 <<https://www.gov.uk/government/publications>>.

<sup>86</sup>Law Business Research Ltd <http://www.lbresearch.com>, 'Challenges of Asset Tracing/Recovery - The Latest Legal Features, Research and Legal Profiles' (*Who's Who Legal*) <<http://whoswholegal.com/news/features/article/30067/challenges-asset-tracingrecovery>> accessed 30 May 2016.

<sup>87</sup>Jack Smith, Mark Pieth and Guillermo Jorge, 'The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention against Corruption' 2 <<http://www.U4.no/themes/uncac/>>.

Philippines and Nigeria. This research however focuses on Kenya in terms of what obstacles are faced in asset-tracing and recovery and what measures need to be put in place to allow for its efficiency and effectiveness.

Knoetzi and Marsch contend that laws in the relevant jurisdictions need to provide powerful tools to freeze assets, which are potentially proceeds of crime. There are more than enough reasons to improve these systems, both at the national and supra-national levels.<sup>88</sup> Globalisation as well as the easy mobility of assets and funds allows individual perpetrators to transfer their illicit proceeds around the globe with ease, making it much more difficult for their victims to trace and recover their stolen funds and assets.<sup>89</sup>

The authors' hereinabove have focused on lack of laws, globalization and ease of mobility of assets as the major contributors in complicating the tracing and recovery of assets and proceeds of crime. This research however seeks to show that money-laundering and gatekeepers are also to blame for the difficulty in tracing and recovering of assets and proceeds of crime.

According to Nchito in fighting corruption the relevant agencies have to take the opportunities as they emerge. They also have to expect setbacks but must be ready to bounce back when opportunities re-emerge. He further argues that in the fight against corruption in general, the prosecution of offenders regardless of who they are is more likely to restore confidence and trust in the system.<sup>90</sup>

Although Nchito argues that the fight against corruption is based on opportunities, this research contends that the fight against corruption and TOC should not be based on opportunities when they arise but should focus more on preventing such crimes through monitoring before they arise. Measures should be put in place to ensure that the fight against TOC is proactive as opposed to reactive.

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<sup>88</sup><http://www.lbresearch.com> (n 86).

<sup>89</sup>ibid.

<sup>90</sup>Mutembo Nchito, 'Transnational Organized Crime ,Its Expnsion Into Diversw Areas of Criminality and the Role of the Prosecutor' 8 <[http://webcache.googleusercontent.com/search?q=cache:zIDskJCGhRgJ:www.iap-association.org/Conferences/Annual-Conferences/17th-Annual-Conference-and-General-Meeting,-Bangko/WS2C\\_speech\\_Mutembo\\_FINAL-\(1\).aspx+&cd=1&hl=en&ct=clnk](http://webcache.googleusercontent.com/search?q=cache:zIDskJCGhRgJ:www.iap-association.org/Conferences/Annual-Conferences/17th-Annual-Conference-and-General-Meeting,-Bangko/WS2C_speech_Mutembo_FINAL-(1).aspx+&cd=1&hl=en&ct=clnk)> accessed 31 May 2016.



## **1.9 Research Methodology**

The researcher will conduct a desk review in undertaking this research and in so doing will use secondary sources of data which include books, journals, articles, statutes, conventions and websites.

## **1.10 Scope and Limitation of Study**

The study limited its research to the importance of asset-tracing and recovery in prosecuting TOC in Kenya. It therefore focuses on the need for effective and efficient asset-tracing and recovery in the fight against TOC in Kenya. The study will therefore focus on the laws and policies, systems and bodies that allow for asset-tracing and recovery in Kenya and as such limits itself to Kenya.

## **1.11 Chapter Breakdown**

**Chapter 1 Introduction:** Here the research seeks to introduce the phenomenon that is TOC and further delves into the issue of why it is important to prosecute criminals engaging or having engaged in TOC and the crucial role that asset-tracing and recovery plays in that regard.

**Chapter 2 Asset Tracing and Recovery:** Here the research focuses on the importance of asset-tracing and recovery in prosecuting TOC. The research delves into the various legal mechanisms used both locally and internationally in fighting TOC with a view of critically evaluating the Kenyan asset-tracing and recovery regime.

**Chapter 3 Gaps in the Asset Tracing and Recovery Regime in Kenya:** Here the research sets out the legal, policy and administrative gaps present in the asset-tracing and recovery regime in Kenya.

**Chapter 4 Conclusion and Recommendations:** Here the research sets out the summary of the findings, conclusion and recommendations on the importance of asset-tracing and recovery in the prosecution of TOC in Kenya.

## CHAPTER 2

### ASSET TRACING AND RECOVERY

#### 2.0 Introduction

In this chapter the study sets out the importance of asset-tracing and recovery in prosecuting TOC. The research also delves into the various legal provisions both international and national that provide measures and mechanisms for combating TOC with a view of critically evaluating the Kenyan asset-tracing and recovery regime.

#### 2.1 Need and Importance of Asset Tracing and Recovery

There can be no confidence in the rule of law and criminal justice processes, proper and efficient governance, widespread sense of justice and modicum of faith that TOC does not pay, if the proceeds of crime are not taken away from the perpetrators so as to compensate victims and returned to the rightful owners. All spheres of societal life are interconnected and meet at the fundamental principle of asset recovery.<sup>91</sup>

Corruption, being one of the major forms of TOC, is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to prosper. Corruption hurts the poor disproportionately by diverting funds allocated for development, undermining a government's ability to provide services and as such fans inequality and injustice which in turn discourages foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.<sup>92</sup>

Article 12 and 31 of UNTOC and UNCAC respectively provide for freezing, seizure and confiscation and here States are to take such measures as to allow for the identification, tracing, freezing or seizure of proceeds of crime and also the property, equipment or other instrumentalities used in or destined for use in corruption or TOC.

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<sup>91</sup>United Nations Office on Drugs and Crime Division for Treaty Affairs, 'Legislative Guide for the Implementation of the United Nations Convention against Corruption' (United Nations Office on Drugs and Crime 2006) 261 <[https://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf)>.

<sup>92</sup>United Nations Convention against Corruption 2003 iii.

In an endeavour to asset-trace and recover and fight TOC Kenya has in place statutes such as ACECA and POCAMLA. These statutes provide for measures such as confiscation, forfeiture, fines and imprisonment terms all of which are in line with articles 12 and 31 UNTOC and UNCAC respectively.

## 2.2 International Cooperation in Fighting TOC

International law is an effective and powerful tool for tackling the scourge of TOC. The most notable and recent instruments of international law that have set the course for how to define, prevent and prosecute TOC are the UNTOC and the UNCAC.<sup>93</sup> It is now therefore widely accepted that measures to address TOC must go beyond domestic criminal justice systems. In a modern world, “no country is an island” and this is because no country can cordon itself off the impact of events elsewhere.<sup>94</sup>

Article 1 (3) UN Charter provides inter alia that one of the purposes of the UN is to achieve international cooperation in solving international problems of an economic, social and cultural character. To this end Conventions such as the UNTOC and the UNCAC have been instrumental in providing for measures and mechanisms aimed at achieving international cooperation in the fight against TOC. Article 1 (b) UNCAC provides that one of the purposes of the convention is to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery. Article 1 UNTOC provides that the purpose of the Convention is to promote cooperation for the purpose of preventing TOC.

Kenya is a signatory to the UN Charter and has ratified the UNCAC and UNTOC. Therefore, by dint of the provisions of article 2 (5) and (6) of the Constitution the general rules of international law and treaties ratified by Kenya do form part of Kenyan law. The UNCAC and UNTOC provide the international legal framework as regards cooperation in asset-tracing and recovery in the fight against TOC. In addition Kenya has several statutes such as the MLA Act, the Extradition (Commonwealth Countries) Act, Cap 77, the Extradition

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<sup>93</sup>Lindsey King, ‘International Law and Human Trafficking’ [2007] Topical Research Digest: Human Rights and Human Trafficking 88, 88.

<sup>94</sup>Petter Langseth and others, *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* (United Nations Office on Drugs and Crime 2004) 95 <<https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>>.



(Contiguous and Foreign Countries) Act, Cap 76 all of which allow for the offering of MLA and extradition; measures of which fall within the purview of international cooperation.

International cooperation is imperative for successful investigations and, in particular, for financial investigations. Financial investigations often reach beyond domestic borders and gathering of evidence abroad is a key element in many corruption and money laundering investigations. In complex cases involving many jurisdictions, where information possessed by one of the economies is usually not sufficient to establish an illegal scheme, contacting other relevant law enforcement agencies of other countries involved and the proactive exchange of information are fundamentally important factors of success in both the investigation and prosecution of a TOC case. In investigations ending with asset repatriation; international cooperation will also be fundamental. The combination of both informal and formal international cooperation mechanisms among law enforcement authorities has led to many successful TOC investigations worldwide.<sup>95</sup>

With enhanced international cooperation there can be a real impact on the ability of curtailing international criminals to operate successfully and this can help citizens everywhere in their often bitter struggle for safety and dignity in their countries.<sup>96</sup> A consensus is emerging around some of the most promising means of enhancing international cooperation in the investigation and prosecution of serious crimes. Some of them are now included in the international cooperation framework established by the UNTOC, UNCAC and several other multilateral instruments at the global and regional levels, which provide a strong basis for cooperation.<sup>97</sup>

Transnational criminal activities call for international cooperation during the investigation and proceedings aimed ultimately at the confiscation of the proceeds of crime. International cooperation should facilitate the provision of investigative assistance in identifying and tracing property, obtaining documents and enforcing provisional measures aimed at freezing or seizing the proceeds of crime. Knowing how to approach an investigation with a

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<sup>95</sup>APEC Anticorruption and Transparency Working Group, *Best Practices in Investigating and Prosecuting Corruption Using Financial Flow Tracking Techniques and Financial Intelligence* (2013) 25.

<sup>96</sup>United Nations Convention against Transnational Organized Crime and the Protocols thereto 2000.

<sup>97</sup>United Nations, 'Cross-Cutting Issues: International Cooperation Criminal Justice Assessment Toolkit' 1.

transnational component is a vital tool in the toolkit of any investigator tasked with asset tracing.<sup>98</sup>

The potential ramifications of organized crime in various countries are multifaceted and multi-layered. Globalization has allowed for easier and faster communication and movement between nations of money, people, goods and services. The movement of monies and international travel are used by criminal groups to carry out their illegal activities; as they take advantage of weaknesses in legal and regulatory regimes of States.<sup>99</sup>

The challenges brought about by TOC in exploiting globalization means that investigating, prosecuting and punishing organized crime have become more complex and involves more than one jurisdiction. Therefore in an endeavour by states to combat TOC, international cooperation in criminal matters has become increasingly important and indispensable.<sup>100</sup> It is therefore with enhanced international cooperation that we can have a real impact on curtailing the ability of international criminals to operate successfully and help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities.<sup>101</sup>

Traditional forms of international cooperation involving bilateral treaties alone do not always allow for swift responses to the needs of fighting modern-day organized crime.<sup>102</sup> The preamble of the UNTOC depicts the importance of international cooperation where it provides that the General Assembly having been deeply concerned by the negative economic and social implications related to organized criminal activities, and convinced of the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels and also underscores the effectiveness of the Convention in combating TOC.<sup>103</sup>

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<sup>98</sup>Phyllis Atkinson, *Tracing Stolen Assets: A Practitioner's Handbook* (Basel Institute on Governance 2009) 21.

<sup>99</sup> United Nations, 'International Cooperation, With Particular Emphasis on Extradition, Mutual Legal Assistance and International Cooperation for the Purpose of Confiscation, and the Establishment and Strengthening of Central Authorities' (2012) 1  
<[https://www.unodc.org/documents/treaties/organized\\_crime/COP6/CTOC\\_COP\\_2012\\_9/CTOC\\_COP\\_2012\\_9\\_E.pdf](https://www.unodc.org/documents/treaties/organized_crime/COP6/CTOC_COP_2012_9/CTOC_COP_2012_9_E.pdf)> accessed 31 October 2016.

<sup>100</sup> United Nations (n 99).

<sup>101</sup> United Nations (n 96) iv.

<sup>102</sup> United Nations (n 99).

<sup>103</sup> United Nations (n 96).



The international community demonstrated the political will to respond to a challenge that transcends nations by a global response i.e. the signing of conventions such as UNCAC and UNTOC. As aforementioned in the preceding paragraphs, “if crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime and corruption...”<sup>104</sup>

International cooperation takes two forms i.e. formal and informal assistance.

### **2.2.1 Formal Assistance in International Cooperation**

Formal assistance in International Cooperation can be achieved by the establishment of better legal bases which is a prerequisite. The development of stronger bilateral and multilateral agreements on MLA is also part of the solution. UNTOC and UNCAC provide a strong basis for cooperation and often suggest some of the elements that must be developed as part of a national capacity for effective investigation and prosecution of TOC.<sup>105</sup> It is indeed true that the establishment of legal bases and the use of multilateral and bilateral agreements go a long way in international cooperation. However this alone is not enough if there is no political goodwill and the zeal to fight the scourge that is transnational organized crime. States may enter into MLA treaties but if one of the parties is not keen on seeing the same through all these efforts will be in vain.

The successful prosecution of civil and criminal forfeiture cases often requires evidence from the source country that the importer acted in violation of the source country’s laws.<sup>106</sup> And this is where bilateral and multilateral agreements and also mutual legal agreements come in handy. The main mechanisms supporting international cooperation are mutual legal agreements, extradition, transfer of sentenced prisoners, transfer of proceedings in criminal matters, international cooperation for the purposes of confiscation of criminal proceeds and asset recovery as provided for under conventions such as the UNCAC and UNTOC as well as a number of less formal measures, including measures in the area of international law enforcement cooperation. These mechanisms are based on bilateral or multilateral agreements

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<sup>104</sup>ibid iii.

<sup>105</sup>United Nations (n 97).

<sup>106</sup>Bruce Zagaris (n 41) 10.



or arrangements or, in some instances, on national law. For all these to be achieved there has to be put in place measures to allow for the same, and more so there has to be political goodwill.

Article 1 UNTOC provides that the purpose of the Convention is to promote cooperation so as to prevent and combat TOC more effectively. Article 13 (1) UNTOC provides that a State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities situate in its territory shall, to the greatest extent possible within its domestic legal system submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it or may also submit to its competent authorities, with a view to giving effect to it to the extent requested. Article 13 (9) UNTOC provides that States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation.

Article 14 (1) UNTOC provides that States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

Article 16 UNTOC provides that extradition requests may be made in respect of offences provided for in the Convention or cases where an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested State Party.

Article 16 (4) UNTOC provides that if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies. Nevertheless Article 16 (17) provides that States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 17 UNTOC provides for the transfer of sentenced persons and here States are to consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

Article 18 UNTOC provides that States Parties shall afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. MLA may be requested for any of the following purposes inter alia taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures, and freezing; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes and facilitating the voluntary appearance of persons in the requesting State Party.

Article 19 UNTOC provides that States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies.

Article 21 UNTOC provides that States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 27 UNTOC provides for States Parties to cooperate closely to enhance the effectiveness of law enforcement action to combat offences envisaged under the Convention; States Parties to use modern technology in this endeavour.

Article 30 UNTOC provides that States Parties shall take measures conducive to the optimal implementation of the Convention to the fullest extent possible, through international



cooperation, taking into account the negative effects of organized crime on society in general and in particular on sustainable development.

UNCAC marks a major step forward in international cooperation against corruption and is a demonstration of near universal concern at the challenges corruption poses to countries around the world and in every stage of development.<sup>107</sup> The UNCAC provides for international cooperation in the fight against TOC. Article 43 UNCAC provides that State parties shall cooperate in criminal matters and also that State parties should consider assisting each other in investigations of and proceedings in civil and administrative matters involving corruption. Article 44 provides that State parties to assist each other in the event of receiving an extradition request both when the offence is an offence under domestic law or only provided for under the Convention. Article 45 UNCAC provides for the transfer of sentenced persons; here States to consider entering into bilateral and multilateral agreements and arrangements for the transfer of sentenced persons to serve sentences in the other territories. Article 46 UNCAC provides for MLA; here the States are to assist each other in investigations, prosecutions and judicial proceedings in relation to offences under this Convention. Article 47 UNCAC provides for the transfer of criminal proceedings; here State parties shall consider inter alia the possibility of transferring to one another proceedings for the prosecution of offences established under the Convention. Article 48 UNCAC provides for the cooperation of law enforcement in terms of communication between or among authorities, the conduct of inquiries and exchange of information and supply of items or substances for the purposes of analytical or investigative purposes. Article 49 UNCAC provides for joint investigations; here States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies.

Article 23 UNCAC provides for the offence of laundering of proceeds of crime and encourages State parties to adopt such legislative and other measures necessary for the creation of this offence.

In line with the foregoing provisions of the UNTOC and UNCAC Kenya has in place statutes such as POCAMLA and MLA Act which provide for issuance of formal international

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<sup>107</sup>Petter Langseth and others (n 94) 3.



assistance in fighting TOC. Part XII POCAMLA provides for inter alia the requesting and receipt of requests by Kenya as regards transfer of persons to assist in investigations or proceedings, to assist in obtaining of evidence and also obtaining or execution of search warrants. Section 6 (2) MLA Act provides for the formal assistance that Kenya will offer and they include examining of witnesses, identifying, freezing and tracing assets, recovery and disposal of assets. To this extent Kenya has complied with the international standards of formal cooperation.

### **2.2.2 Informal Assistance in International Cooperation**

Informal Assistance in international cooperation is an important means for asset recovery, investigating and prosecuting TOC. The most common channels for informal assistance include counterpart practitioners, FIUs, and regulatory authorities. FIUs sometimes can facilitate assistance, especially if FIUs have networked with one another through the Egmont Group. Regulatory authorities, such as banks, securities, anti-trust, customs, and company regulators may also be a source of information cooperation, even though these authorities only have MOUs providing for limited assistance and restrictions in sharing for law enforcement purposes.<sup>108</sup>

Article 7 (1) (b) and 58 UNTOC and UNCAC respectively provide that States should consider setting up FIUs so as to serve as a national centre for the receiving, analysis and dissemination of information to the competent authorities regarding potential money laundering and suspicious financial transactions.

Integrated financial investigation is an essential element of any plan/strategy targeting assets or proceeds of crime. The investigative phase forms the basis for any asset recovery effort. A jurisdiction where funds have been hidden will not confiscate or repatriate the assets or proceeds to the country of origin unless evidence is presented, linking them to an illegal activity. This evidence must, in addition, be admissible in court proceedings. As a preliminary activity to the recovery of stolen assets, the identification and tracing of the proceeds of crime and securing the property for final confiscation is an essential and integral part of the process. This is a demanding task which should be conducted in parallel with the investigation of the criminal offence generating material benefit. It requires effective

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<sup>108</sup>ibid 18.

cooperation between law enforcement agencies or those tasked with the tracing of assets and proceeds.<sup>109</sup>

Informal assistance is very important for asset recovery and investigating and prosecuting TOC cases. The most common channels for information assistance include counterpart practitioners, FIUs and regulatory authorities. FIUs sometimes can facilitate assistance, especially if FIUs have networked with one another through the Egmont Group now headquartered in Toronto.<sup>110</sup>

The gathering and exchange of information by Member States to detect financial networks linked to organized crime groups and terrorist actors, including exchange of information between law enforcement and regulatory bodies, are necessary to a strategic approach to combating TOC. Establishing FIUs is essential for financial investigations and international cooperation. It is also important to identify innovative and technologically advanced methods of direct cooperation between FIUs, as well as cooperation between FIUs and prosecution services across national borders. Therefore for successful investigations and prosecution of financial and economic crimes and money laundering offences to be undertaken, it is of paramount importance that there be quick identification and communication of information from banks and other financial institutions.<sup>111</sup>

Regulatory authorities, such as banks, securities, anti-trust, customs, and company regulators may also be a source of information cooperation, even though these authorities have only MOUs providing for limited assistance and restrictions in sharing for law enforcement purposes.<sup>112</sup>

In light of the important role that banks and non-bank financial institutions play and also owing to the fact that such institutions are highly susceptible to be used to further TOC; article 7 UNTOC provides that each State party shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall

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<sup>109</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 19.

<sup>110</sup> Bruce Zagaris (n 41) 18.

<sup>111</sup> United Nations (n 97) 13.

<sup>112</sup> Bruce Zagaris (n 41) 18.



emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions.

It is indeed true that the foregoing informal measures may only allow for limited assistance but are essential in the fight against TOC. However all these measures listed hereinabove can only be achieved if the States involved have the right systems and mechanisms in place. There also has to be laws providing for the establishment of these institutions such as FIUs which will in turn allow for such an institution to network with such other institutions through the Egmont Group. There has to be laws in place allowing for the sharing of information by financial institutions with the FIU and eventually with the investigating agencies.

Since TOC cases are by definition multijurisdictional, MLA is essential to ensure that investigators from different jurisdictions can access the necessary information to investigate and allow for prosecution of these cases. MLA is particularly relevant to developing countries, as they often lack investigatory capacity and could greatly benefit from the result of investigations conducted in other countries.<sup>113</sup> Joint Investigations is one of the best ways to empower developing countries with low capacities to successfully investigate, freeze, seize, and confiscate instrumentalities and proceeds of crime. It is in this regard that State Parties should consider concluding bilateral or multilateral agreements so as to establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis.<sup>114</sup>

Technical Assistance is another mechanism for international cooperation in the fight against TOC. It comes in handy in areas such as preventing and combating the transfer of, detecting and freezing the transfer of, surveillance and movement of and the facilitating of return of such illicit proceeds.<sup>115</sup>

In many States, criminal investigations are primarily directed towards the investigation of the underlying criminality. It is still relatively rare for investigators, as a routine part of the investigation of major proceeds-generating offences, to 'follow the money' and establish what happened to the proceeds. Such investigations undoubtedly need resources, expertise

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<sup>113</sup>ibid 19.

<sup>114</sup>ibid 22.

<sup>115</sup>ibid.



and effective international cooperation. Securing evidence abroad often provides the key to success in TOC investigations and results in the successful recovery of proceeds of such offences. In many instances, it also results in the successful prosecution of those involved in TOC.<sup>116</sup>

From the foregoing therefore it is indubitable that an anti-money laundering structure without the capacity to track proceeds of crime is incomplete.<sup>117</sup> Asset-tracing and recovery is mandatory in the fight against TOC since it is unconscionable and should not be allowed for a situation where criminals are allowed to keep or benefit from the proceeds or assets of their crime.

As stated hereinbefore in light of globalization the international community now recognizes international cooperation in criminal matters as an urgent necessity. This is because criminal offenders are mobile and often seek to evade detection, arrest, and punishment by operating across international borders both in terms of their persons and more so the assets and proceeds realized from engaging in TOC.

Imprisonment and fines fail to act as a deterrent measure where the potential rewards are substantial. The enormity of revenues derived from some criminal activities diminishes the deterrence capacity of traditional criminal sanctions. Therefore, criminal sanctions are akin to the cost of doing business; an expense that is easily absorbed by the profits made.<sup>118</sup> As such it is imperative that asset-tracing and recovery is undertaken to ensure criminals do not benefit from the proceeds of crime nor are they allowed to keep the instrumentalities used in conducting their criminal activities.

It is evident that in an endeavour to effectively combat TOC it goes without saying that it is of utmost importance that the tracing and recovery of proceeds and assets of crime is undertaken. It is also apparent from the aforesaid that most countries Kenya included only focus on the prosecution of the perpetrator but are lax or turn a blind eye, albeit inadvertent, to the issue of tracing and recovery of proceeds and assets gotten from and instrumentalities used in TOC. To only prosecute the criminals but let them enjoy the assets or proceeds

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<sup>116</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 20.

<sup>117</sup> *ibid* 31.

<sup>118</sup> Mary Michelle Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*. (Edward Elgar Publishing 2005) 3  
<<https://books.google.co.ke/books?id=4ijkMxfmZg8C&printsec=frontcover#v=onepage&q&f=false>>.

realized from their criminal acts is tantamount to running half the race. As such there is no gainsaying the fact that it is of utmost importance that not only is the criminal prosecuted but also that tracing, identifying, seizure and returning of the assets and proceeds to the rightful owners/victims or originating State is done.

Kenya has made efforts in complying with the provisions of the UNTOC and UNCAC as regards informal cooperation in an endeavour to asset trace and recover. Section 21 POCAMLA provides for the setting up of the FRC which is Kenya's FIU, section 36A POCAMLA provides for the mandate of FRC in supervising reporting institutions which include banks, financial institutions and DNFBPs. Kenya has in place a MLA Act which allows for the offering of assistance to requests from other States in an effort to fighting TOC.

For Kenya to ensure that it has an effective system that anticipates TOC; a system that is proactive as opposed to reactive it is imperative that a TOC strategy/plan is put in place. This will allow for monitoring of new trends and also effectively combating and suppressing TOC in Kenya.

### 2.3 Stages of Asset Tracing and Recovery

The process which leads to recovery of assets or proceeds of crime is divided into four basic phases:<sup>119</sup>

- i. **Pre-investigative phase:** Here the investigator verifies the source of the information initiating the investigation and determines its authenticity. If there are inconsistencies in the story or incorrect statements and assumptions, then the true facts must be established.
- ii. **Investigative phase:** Here the proceeds of crime are identified and located; the whole concept of follow the money. Evidence as regards ownership is collated through various means such as MLA requests to obtain information relating to offshore bank accounts and other records of ownership of property, the directors of companies and owners of DNFBPs.

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<sup>119</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 20.

- iii. **Judicial phase:** Here the accused person/defendant is convicted or acquitted and the decision on confiscation is made.
- iv. **Disposal phase:** Here the property is actually confiscated and disposed of by the State in accordance with the law i.e. return of assets and monies to the rightful owners and compensating the victims.

As aforementioned, Kenya has the FRC which is tasked with the mandate of receiving and disseminating information useful in the conducting of financial investigations. FRC therefore comes in handy in the pre-investigative and investigative phases of asset-tracing and recovery. The ODPP is heavily involved in the judicial phase as it is the prosecutors that present the case before court with a view of securing a conviction and also having the accused person's assets or proceeds got from their criminal acts forfeited or confiscated. The Asset Recovery Agency (ARA) is involved in the disposal phase as it is the agency tasked with the managing of the Asset Recovery Fund (ARF) where confiscated or forfeited assets and proceeds are directed for further action.

The phases of asset tracing notwithstanding it is imperative that States have in place measures to anticipate TOC. Anticipating TOC involves developing information and analysis that enables governments and non-state agencies to be prepared for new directions in organized crime, and in so doing to have an enhanced capacity to take precautionary or defensive measures in order to gain an advantage and in some cases to forestall or pre-empt these new directions or initiatives. Effective anticipation requires an effective knowledge base, makes good use of underlying warning indicators and requires intelligence that is both timely and actionable. While this might seem obvious, what is striking about strategy to counter organized crime in the past is that it has rarely succeeded in moving beyond the reactive. Usually, it has been running to catchup with the criminals; their proceeds, assets and instrumentalities.<sup>120</sup> The United Kingdom in an endeavour to address the issue of reactivity have a Serious and Organized Crime Strategy 2013 which has four components: prosecuting and disrupting people engaged in serious and organised crime (Pursue); preventing people

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<sup>120</sup>Phil Williams & Roy Godson (n 47).



from engaging in this activity (Prevent); increasing protection against serious and organised crime (Protect); and reducing the impact of this criminality where it takes place (Prepare).<sup>121</sup>

The foregoing notwithstanding Kenya has no TOC plan/strategy allowing for the monitoring of new trends in TOC and also to cater for issues of reactivity. In the disposal phase, Kenya has no victim identification policy to allow for the identification of victims or rightful owners for the purposes of compensation or return of assets and monies respectively.

#### **2.4 Asset Tracing in Countering Money Laundering**

Money laundering entails an array of activities that range from simple money transfer to complex transactions that rely on shell banks and undisclosed trusts mostly set up by gatekeepers such as lawyers and accountants. The money laundering process involves three key stages i.e. placement, layering, and integration.<sup>122</sup>

Money laundering is intended to conceal the proceeds of crime by various methods. Conventional measures to combat money laundering rely on the identification of the most common methods and the avenues used. As these measures expand in scope and coverage, so apparently do the innovative concealment mechanisms. Responses to money laundering tend to lag behind typologies of money laundering.<sup>123</sup>

Criminals can be relied upon to spare no expense to keep their ill-gotten gains.<sup>124</sup> Many criminal organizations and individuals alike are adept at concealment and disguise; at presenting a moving and evasive target for both law enforcement agencies and rivals in the criminal world.<sup>125</sup> When trying to anticipate organized crime and TOC, the problems are compounded by the capacity of criminal organizations and individuals to conceal their activities, proceeds and assets within a variety of licit transactions and by acting rapidly in order to exploit new opportunities in response to law enforcement successes.<sup>126</sup> Transnational organized criminals employ specialists who are experts in ICT to conduct intelligence operations and money laundering. The specialists may be knowing accomplices or may be

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<sup>121</sup> Home Department, UK (n 85) 7.

<sup>122</sup> World Bank, 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities and Action Plan' 13 <<https://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf>> accessed 9 October 2016.

<sup>123</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 26.

<sup>124</sup> Jack Smith, Mark Pieth and Guillermo Jorge (n 87) 2.

<sup>125</sup> Ibid 311.

<sup>126</sup> Ibid 314.

contracted through intermediaries to do work and as such may not be aware of the criminal activities they may be involved in.<sup>127</sup> Criminal organizations almost always blend their activities with legitimate structures and processes. The organizational blending of legitimate and illegitimate activities is a hallmark of how TOC networks conduct their operations; a characteristic that poses great difficulty in both detecting these criminal activities and also in terms of establishing where criminal funds and assets end and the legitimate ones begin.<sup>128</sup> Money laundering and the veil of legitimate businesses allow for individual criminals and organizations to remain secreted within business activities while leveraging the funds in their possession to achieve their illegal ends.<sup>129</sup>

It is imperative for authorities combating TOC and in particular money laundering to be alive to the fact that the range of underlying criminal activities from which laundered funds are derived is broad and continually expanding. Illicit income does not have a single source; it may start off as legitimate income, as is the case with proceeds of tax evasion or misappropriated funds.<sup>130</sup>

To benefit from crime, criminals are usually forced to launder the proceeds to hide the origins thereof. Therefore if an investigator knows how and where to look then he is always likely to establish a connection between a criminal's proceeds and assets and the crime committed. In addition to often providing evidence of criminal intent and identifying otherwise unknown accomplices, tracking the ownership trail may also lead to the seizure of property constituting illegal proceeds. To trace money and property successfully, the investigator must be equipped to uncover and identify ownership interests often camouflaged by changes in the form and nature of the ownership, and know how to unravel accurately cleverly disguised control over, and interest in property. He or she must also know who to approach for information, where such information can be found, what can be used to create a financial profile and how to manage the collated information in the most efficient and effective manner.<sup>131</sup>

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<sup>127</sup>Louise I. Shelley and John T. Picarelli, 'Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism' (2002) 3 *Police Practice and Research: An International Journal* 307.

<sup>128</sup>ibid 308.

<sup>129</sup>ibid 311.

<sup>130</sup> Basel Institute on Governance, *International Centre for Asset Recovery* (n 29) 27.

<sup>131</sup> ibid 19.



Asset-recovery provisions supports the efforts of countries to redress some of the worst effects of grand corruption among other TOCs while sending at the same time, a message to criminals who may be tempted to move illicit assets off-shore that there is no place where they are safe.<sup>132</sup>

Proceeds of crime represent criminal income; it manifests itself as assets and monies. Tracing the proceeds of crime is predicated on the assumption that through transformation, the origin of assets as criminal income can be hidden, and they can be easily and speedily moved between locations or across borders. They can also be mingled with other assets or monies and converted into other forms.<sup>133</sup>

Kenya has a statute, POCAMLA, which provides for the offence of money laundering and introduces measures for combating the offence. This statute also provides inter alia for the tracing, freezing and confiscation of the proceeds of crime. To this extent Kenya has complied with the need for putting in place a law that provides for the offence of money laundering.

## **2.5 Gatekeepers in Asset Tracing and Recovery**

Asset-tracing and recovery is a promising strategy against TOC. Effective asset recovery starts much earlier and in most cases, the decisive steps determining success or failure are taken in the very first moments of asset tracing. Ample experience with money laundering shows how easy it is to obscure the traces of looted assets and proceeds. In most cases where ‘gatekeepers’ (lawyers, international business corporations, banks) are used to set up structures, incorporate corporations and even accept questionable deposits this coupled with client confidentiality, non-disclosure policies, lack or poor due diligence standards results in complicating and making the asset-tracing and recovery process likely to fail.<sup>134</sup> Lawyers, financial advisors, notaries, accountants and such like professionals are increasingly used in cases where criminals seek to hide their ill-gotten gains as they are well-placed to facilitate money laundering and the concealment of assets generally due to their knowledge and expertise. This therefore requires the investigator to know and understand the type of assistance provided by such professionals, being the gateway through which criminals often

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<sup>132</sup>Petter Langseth and others (n 94) 9.

<sup>133</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 29) 19.

<sup>134</sup> *ibid* 8.



pass to achieve their objectives of laundering proceeds of crime. The investigator needs to understand the manner in which the secrecy offered by legal privilege is exploited and how legal persons are manipulated and misused in the process.<sup>135</sup>

Banking institutions act as obvious gatekeepers for the legitimate financial system. It is usually through their vigilance that the system can be protected from providing criminals with the mechanism for hiding the proceeds of illicit activities. Although banking institutions play a crucial role in the prevention, detection and reporting of money laundering, they are also used as gatekeepers by the criminals. This is also true for DNFBPs as they too are also used by money launderers, seeking to invent ingenious means of enjoying their ill-gotten gains; this therefore calls for increased focus and monitoring of such institutions.<sup>136</sup>

In light of the gigantic and intricate process of asset-tracing and recovery it is of utmost importance that there is undertaken the process of piercing or lifting the veil with a view of establishing the 'gatekeepers'. In addition, co-operation both locally and internationally among FIUs, law enforcement agencies and forensics experts coupled with the use of technology and employing proven techniques during investigations and constructing the money trail should be employed.<sup>137</sup>

It is for the foregoing reason that POCAMLA creates the FRC and provides the obligation for reporting of financial transactions. FRC monitors financial institutions; these institutions and DNFBPs also have a duty to report suspicious transactions. To this extent Kenya is better placed to monitor gatekeepers who are used in facilitating money laundering.

## **2.6 Role of ICT in Asset Tracing and Recovery**

Information plays a critical role in the four phases of asset-tracing and recovery. It is information that will prompt the investigator to initiate investigations, the prosecutor to prefer charges and the court to pass a sentence.

Technology forms a key element of the three essential components: human competencies, processes and technology, in the formulation and implementation of a successful asset tracing strategy. First, the human competence element is essential since the investigating team must

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<sup>135</sup> *ibid* 21.

<sup>136</sup> *ibid*.

<sup>137</sup> *ibid* 7.

have personnel with the requisite expertise and skills required to conduct financial investigations with a view of asset-tracing and recovery.<sup>138</sup>

Second is the process element which requires that high level processes be designed with the task in mind. Checklists also have to be formulated and availed to the investigating teams. This process oriented way of doing investigations enhances institutional knowledge that can be recorded, developed and put into use as statistics and also trainings.<sup>139</sup>

Third is the technology element which is essential in the developing of processes, systematizing and storing them. The storage should be done in an ICT system that is easily accessible and provides essential and reliable information to the investigators and other law enforcement agencies.<sup>140</sup>

## **2.7 Case Management and ICT in Asset Tracing and Recovery**

Law enforcement agencies and bodies involved in asset-tracing and recovery use a Case Management System (CMS) in a number of ways. The CMS facilitates the recording of case proceedings and the storage of evidentiary documents within an ICT database. This allows for sharing of information both internally in an agency and externally among agencies that comprise the criminal justice system. A basic requirement of a CMS is to facilitate tracking and reporting of court cases. In the case of an investigative body, a CMS provides an overview of the number and status of cases being investigated, those currently ongoing in court and also those that have been concluded.<sup>141</sup>

CMS and ICT play a crucial role in the process of detecting, investigating and prosecuting TOCs. ICT plays an equally important role during the investigation process aimed more specifically at tracing and recovering proceeds and assets of crime. More often than not the investigative process of TOC cases involves the collection and analysis of huge volumes of data. As such, a good ICT tool is imperative when it comes to matters of financial investigation. It therefore goes without saying that without an ICT system, the financial investigator will be searching for the proverbial 'needle in a haystack' while conducting his

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<sup>138</sup> *ibid* 72.

<sup>139</sup> *ibid*.

<sup>140</sup> *ibid*.

<sup>141</sup> *ibid* 74.

investigations.<sup>142</sup> For a successful investigation to be carried out, the investigator must have proper tools and processes so as to detect and conduct investigation.<sup>143</sup>

Some of the benefits of using a good ICT tool is that the employment of a CMS allows for use of systematic and repeatable processes in the identification, location and recovery of proceeds and assets of TOC. ICT systems also come in handy in matters of cooperation and information sharing between law enforcement and regulatory agencies on the one hand and financial institutions that have a reporting obligation on the other. Technology is a critical component of such cooperation.<sup>144</sup>

It is evident from the foregoing that a good CMS together with the requisite policies and procedures will enhance the accountability and efficiency of an asset-tracing and recovery regime. It is however not evident whether Kenya uses a CMS and has in place policies such as an asset recovery and victim identification policies.

## **2.8 Asset Tracing and Recovery in Kenya**

### **2.8.1 Right to Property**

Article 40 of the Constitution provides for the protection of the right to property, however under article 40 (6) the Constitution provides that this protection does not extend to any property that has been found to be unlawfully acquired. Article 40 (2) of the Constitution provides that parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property or to limit or in any way restrict the enjoyment of the right to property either directly or indirectly predicated on inter alia grounds of ethnic or social origin, race, sex, religion, belief, language or birth.

Article 47 of the Constitution provides for the right to fair administrative action which is inter alia lawful and procedurally fair. And that if a right or fundamental freedom of an individual has or is likely to be adversely affected by administrative action the person has the right to be given written reasons for the action.

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<sup>142</sup> ibid 21.

<sup>143</sup> ibid 71.

<sup>144</sup> ibid.



The Fair Administrative Action Act<sup>145</sup> under section 2 defines administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

The right to property as provided for hereinabove provides safeguards to property under the Constitution of Kenya. Property lawfully acquired will not be deprived arbitrarily and if at all the same is to be done then there has to be fair administrative action.

### **2.8.2 Definition of Property and Proceeds of Crime**

Article 260 of the Constitution defines property to include any vested interest or contingent right to, or interest in or arising from land or permanent fixtures on or improvements to land, goods or personal property, intellectual property or money, choses in action or negotiable instruments.

Section 2 POCAMLA defines property to mean all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property.

Section 2 Leadership and Integrity Act (LIA)<sup>146</sup> defines an asset to mean a thing, tangible or intangible, owned, whether wholly or in part, or controlled by a person, which has an actual or determinable economic value and can be sold, exchanged or otherwise used or applied to meet an obligation or acquire something else in return.

Section 2 POCAMLA defines proceeds of crime to mean any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and irrespective of whether committed before the commencement of the Act and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property from the time the offence was committed.

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<sup>145</sup>Fair Administrative Action Act 2015.

<sup>146</sup>Leadership and Integrity Act 2012 (Chapter 182).

Section 2 POCAMLA defines tainted property to mean any property used in, or in connection with, the commission of the offence; any proceeds of the offence; or any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.

From the foregoing definitions of property it is evident that tainted property, assets and proceeds of crime have been sufficiently provided for and defined in the Kenyan laws in comparison to the definitions under UNCAC and UNTOC.

### **2.8.3 Institutions**

The institutions tasked with the mandate of asset-tracing and recovery in Kenya includes:

#### **2.8.3.1 Ethics and Anti-Corruption Commission**

Article 79 of the Constitution provides for the enactment of legislation for the establishment of an independent ethics and anti-corruption commission which shall ensure compliance with Chapter six of the Constitution on leadership and integrity and is also tasked with the mandate of enforcement of the provisions under Chapter 6.

Ethics and Anti-Corruption Commission (EACC) Act<sup>147</sup> was enacted pursuant to article 79 of the Constitution so as to establish the EACC and to provide for the functions and powers of this Commission.

Section 11 EACC Act provides for the additional functions of the Commission and they are inter alia the investigation and recommendation to the DPP for the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the EACC Act or any other law enacted pursuant to Chapter Six of the Constitution. EACC also has the function of instituting and conducting proceedings in court for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

EACC has four directorates; Directorate of Investigation and Asset Tracing, Directorate of Legal Services, Directorate of Prevention Services and the Directorate of Finance and

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<sup>147</sup>Ethics and Anti-Corruption Commission Act 2011.



Administration. The Directorate of Investigation and Asset Tracing is tasked with the following responsibilities inter alia; receiving, processing and analysing reports, investigating any matter that raises suspicion that conduct constituting corruption or economic crime has occurred or is about to occur, investigating any person's conduct that is deemed to be conducive to corruption or economic crime, assisting any law enforcement agency of Kenya in the investigation of corruption or economic crime, investigating the extent of liability for the loss of or damage to any public property for purposes of recovery or compensation, recommending cases for prosecution or any other appropriate action upon completion of investigations and availing witnesses and generally liaising with the prosecutors to ensure effective prosecution of corruption or economic crimes.<sup>148</sup>

The Directorate of Investigation and Asset Tracing has four departments key among them is the Forensic Investigation Department which is made up of two divisions, namely: Forensic Investigation and Asset Tracing. The Asset Tracing Division is charged with the mandate of tracing assets suspected to have been acquired corruptly or those assets that are related to any matter under investigation by the Commission or other agencies. It also analyses declarations made to EACC by suspects in the course of investigations. This division also deals with asset-tracing and realization of value or liquidation of corruptly acquired assets.<sup>149</sup>

EACC plays a crucial role in the fight against corruption which is one of the major forms of TOC. EACC investigates and recommends for prosecution and it also has the powers to apply for freezing, confiscation and compensation orders all functions of which allow for asset-tracing and recovery.

### **2.8.3.2 FRC**

Section 21 POCAMLA provides for the establishment of the FRC tasked with the following functions as provided for under section 24 POCAMLA as being inter alia: to receive and analyse reports of unusual or suspicious transactions made by reporting institutions; to send reports received under this Act to the appropriate law enforcement authorities, any intelligence agency, or any other appropriate supervisory body for further handling if, having considered the report, the Director also has reasonable grounds to suspect that the transaction

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<sup>148</sup> 'Ethics and Anti-Corruption Commission' <<http://www.eacc.go.ke/default.asp?pageid=7>> accessed 5 June 2016.

<sup>149</sup> *ibid.*



is suspicious, to send to the appropriate law enforcement authorities, intelligence agency, or supervisory body any information derived from an inspection carried out; to instruct any reporting institution to take such steps as may be appropriate to facilitate any investigation undertaken or to be undertaken by the FRC, including providing documents and other relevant information, compile statistics and records, disseminate information within Kenya or elsewhere, and make recommendations arising out of any information received; issue guidelines to reporting institution; consult with any relevant person, institution or organization for the purpose of exercising the powers or duties under the Act; to create and maintain a database of all reports of suspicious transactions, related Government information and such other materials as the Director may from time to time determine to be relevant to the work of the FRC; to provide information relating to the commission of an offence to any foreign FIU or appropriate foreign law enforcement authority, and may, on the basis of mutual agreement and reciprocity, enter into any agreement or arrangement, in writing, with a foreign FIU which the Director considers necessary or desirable for the discharge or performance of the functions of the FRC.

From the aforementioned functions it is evident that FRC is Kenya's FIU. The functions of FRC are crucial in the financial investigations as relates to money laundering which is one of the main predicate offences in TOC. It is evident that the functions of FRC hereinabove are in line with the provisions of Article 7 (1) (b) and 58 UNTOC and UNCAC respectively.

### **2.8.3.3 ARA**

Section 53 POCAMLA establishes the ARA as a semi-autonomous body under the office of the Attorney-General (OAG). Its functions include inter alia criminal and civil forfeiture, preservation of already forfeited property, facilitate in the issuance of production orders and other information gathering powers, administration of the Criminal Asset Recovery Fund (ARF) and providing assistance in international investigations and proceedings.

The ARA therefore plays a crucial role in the tracing, recovery and administration of forfeited or confiscated assets and proceeds of crime. As such it is an integral body in the fight against TOC in Kenya.

### **2.8.4 Procedures of Asset Tracing and Recovery in Kenya**

The procedures employed in asset-tracing and recovery regime in Kenya are inter alia:

#### **2.8.4.1 Forfeiture and Compensation**

Section 49 LIA provides for forfeiture and compensation where it is proved that a state officer has obtained any property in breach of the Act.

Section 24 (f) and (g) Penal Code<sup>150</sup> provides for forfeiture and payment of compensation as some of the punishments that the courts can mete out.

#### **2.8.4.2 Enforcement of Foreign Judgments and Institution of Civil Suits by Foreign States**

Asset-tracing and recovery in Kenya allows for the enforcement of foreign judgments and the institution of civil suits by foreign States; direct asset recovery. Section 9 Civil Procedure Act (CPA)<sup>151</sup> provides for the enforcement of foreign judgments by Kenyan courts and also gives conditions as to when enforcement of such a judgment will not be allowed. Section 57 CPA allows for foreign states to institute civil proceedings in any Kenyan court provided that that State is recognized by Kenya and the object of the suit is to enforce a private right vested in the head of that State or in any officer of that State in his public capacity.

#### **2.8.4.3 Criminal Forfeiture**

Part VII POCAMLA provides for criminal forfeiture of proceeds of crime. Section 56 POCAMLA provides that proceedings brought under that part on an application for confiscation or a restraint order are civil in nature and the rules of evidence applicable in civil proceedings shall apply therein.

Section 57 POCAMLA provides that confiscation or restraint orders may issue against realizable property which is any property held by the defendant concerned or any property held by a person to whom that defendant has directly or indirectly made any affected gift.

Section 61 POCAMLA provides that whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Director ARA or of its own motion, inquire into any benefit which the defendant may have derived from that offence; any other offence of which the defendant has been convicted at the same trial; and any criminal activity which the court finds to be sufficiently related to that offence,

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<sup>150</sup>Penal Code.

<sup>151</sup>Civil Procedure Act 2010.



and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

Section 68 POCAMLA provides that the Director ARA may apply to a court *ex parte* for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. The court may issue a temporary restraint order and shall at the same time make an order authorising the seizure of all movable property concerned and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

#### **2.8.4.4 Civil Forfeiture**

Part VIII POCAMLA provides for civil forfeiture and section 81 of the said Act provides that the proceedings under this part shall be civil in nature and as such the rules of evidence applicable in civil proceedings shall apply.

Section 82 POCAMLA provides for the issuance of preservation orders upon an *ex parte* application by the Director ARA prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

Section 90 POCAMLA provides that if a preservation order is in force, the Director ARA may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

In light of the proceedings under both civil and criminal forfeiture being civil in nature; the provisions of Order 39 and 40 of the Civil Procedure Rules 2010 i.e. arrest and attachment before judgment (Mareva Injunction) and temporary injunctions and interlocutory orders respectively shall apply.

#### **2.8.4.5 Production Order**

Section 103 POCAMLA provides that a police officer may make an *ex parte* application with a supporting affidavit to a court for an order against the person suspected of having possession or control of a document where a person has been charged with or convicted of an offence, and a police officer has reasonable grounds for suspecting that any person has



possession or control of a document relevant to identifying, locating or quantifying property of the person, or to identifying or locating a document necessary for the transfer of property of such person; or a document relevant to identifying, locating or quantifying tainted property in relation to the offence, or to identifying or locating a document necessary for the transfer of tainted property in relation to the offence.

#### **2.8.4.6 Search Warrant**

Section 106 and 107 POCAMLA provides for the making of an application for a search warrant by a police officer so as to search and seize documents relevant to locating property of a person either charged or convicted of an offence under the said Act.

In *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] Ch. 55 (C.A.) the court issued the *Anton Piller* orders which are now commonly known as civil search warrants.<sup>152</sup>

#### **2.8.4.7 Mutuality**

Part XII POCAMLA provides for the recognition of the principles of mutuality and reciprocity in the realm of investigations and proceedings in international matters as pertains to proceeds of crime and money laundering.

The foregoing procedures of asset-tracing in Kenya provide for both civil and criminal measures. This allows for both conviction and civil based forfeiture of assets and proceeds of crime; procedures of which form part of the best practices in asset-tracing and recovery.

### **2.9 Conclusion**

There are a number of bodies and agencies tasked with different functions all aimed at ensuring asset-tracing and recovery in Kenya is done. There are also different mechanisms provided for under the law that allow for both conviction and civil based forfeiture of assets and proceeds of crime. It is however noteworthy that in light of the provisions of Article 40 of the Constitution the processes of depriving criminals of the assets and proceeds of crime in Kenya cannot be done arbitrarily. Issues of fair administrative action and the right to fair hearing as under articles 47 and 50 of the Constitution respectively have to be adhered to by the aforesaid institutions and the courts the aforementioned procedures notwithstanding.

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<sup>152</sup> Anton Piller Order | Irwin Law' <[https://www.irwinlaw.com/cold/anton\\_piller\\_order](https://www.irwinlaw.com/cold/anton_piller_order)> accessed 5 June 2016.

## CHAPTER 3

### GAPS IN THE ASSET TRACING AND RECOVERY REGIME IN KENYA

#### 3.0 Introduction

Criminals capitalize on the gaps obtaining both within and between individual jurisdictions so as to create their own systems for illicit activities. They utilize the gaps in the systems so as to hide the illegitimately acquired assets and proceeds to the detriment of their victims and the rightful owners. The victims and owners are always at second position chasing after the criminals who are always at home in the gaps. Such gaps in any asset tracing regime have the effect of creating opportunity for illicit activities and more often than not complicate the efforts for tracing and recovery of illegally acquired assets and proceeds.<sup>153</sup>

This chapter therefore seeks to set out the gaps present in the asset-tracing and recovery regime in Kenya with an aim of having the same addressed. These gaps are divided into legal, administrative and policy gaps.

#### 3.1 Legal Gaps

The legal gaps present in the asset-tracing and recovery regime in Kenya are inter alia:

##### 3.1.1 Liability of Legal Persons

Kenya does not have adequate measures addressing different kinds of TOC especially where legal persons are involved. Section 41 Public Procurement and Asset Disposal Act<sup>154</sup> provides for disqualification from procurement of persons involved in corrupt practices and also the termination of contracts by procuring entities.<sup>155</sup>

Section 16 POCAMLA provides for penalties in the form of fines where legal persons are found guilty of money laundering. The aforesaid measures are not adequate since they do not allow for administrative measures in line with article 10 (2) UNTOC. This section does not

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<sup>153</sup> Knoetzl and Marsch (n 83).

<sup>154</sup> Public Procurement and Asset Disposal Act 2015.

<sup>155</sup> UNODC, 'Kenya Country Review Report' (2015) 7  
<[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015\\_09\\_28\\_Kenya\\_Final\\_Country\\_Report.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_09_28_Kenya_Final_Country_Report.pdf)> accessed 7 September 2016.

provide for the winding up of such legal persons and as such allowing the criminals to keep the instrumentalities used in the commission of their crimes.

### **3.1.2 Victims**

Sections 51 to 55 ACECA provides for the compensation of victims of corruption and economic crimes. Section 61 POCAMLA provides that whenever an accused person is convicted of an offence the court may in addition order for payment of such monies as it deems appropriate to the government.

There is therefore a general tendency of payments being made to the government even though the government may not have been the victim. This gap is exacerbated by there being no victim identification policy in place.

### **3.1.3 Confiscation Order**

Section 61 and 66 POCAMLA does not provide for the finality of the confiscation order and as such room for appeal to the highest court may defeat the purpose of the order.

### **3.1.4 Recovered Assets and Monies**

Section 56C ACECA provides for the payment of any recovered funds to the Consolidated Fund. Furthermore any recovered assets or property be surrendered to the Permanent Secretary Treasury.

Section 112 POCAMLA provides that all monies derived from concluded confiscation and forfeiture orders shall be paid into the Consolidated Fund and that all property derived from concluded confiscation or forfeiture orders shall vest in the Government. The situation as provided for under this section is unconscionable as it neither allows for identification of victims nor the retention of monies or property by the ARF for purposes of funding its operations and capacity building endeavors.

From the foregoing sections therefore, there is a presumption by the law that the government is or will always be the victim of these offences.



### **3.1.5 Extradition**

Extradition in Kenya is governed both by statute and by agreement/treaty. The Extradition (Commonwealth Countries) Act, Cap. 77, the Extradition (Contiguous and Foreign Countries) Act, Cap. 76 and the MLA Act, 2011 are the main acts in this regard. Kenyan law generally requires the existence of a bilateral extradition treaty between Kenya and another State. This therefore brings to the fore the principles of dual criminality and reciprocity and as such making them prerequisites in the extradition process in Kenya. Kenya does not consider UNCAC or UNTOC as a legal basis for extradition and therefore limits the extent of extradition since not all UNCAC or UNTOC offences have been criminalized.<sup>156</sup> Furthermore, not all UNCAC or UNTOC offences are recognized under Kenya's extradition laws.<sup>157</sup>

### **3.1.6 MLA**

Section 3 MLA Act provides that MLA may be offered to a requesting State or international entity to which Kenya is obligated to based on an agreement or not. Even though this Act provides room for offering of MLA even where there is no treaty, in practice Kenya has insisted on a treaty being in place.<sup>158</sup>

Section 40 MLA Act provides for the adoption of measures by Kenya so as to afford requesting States or international entities a wider scope of assistance in the absence of dual criminality and reciprocity.

### **3.1.7 Bribery of Foreign Public Officials**

Article 16 UNCAC provides for the offence of bribery of foreign public officials and officials of public international organizations. There is however no law in Kenya criminalizing the said offence. In addition there is also no law in Kenya criminalizing the solicitation and acceptance of bribes by such officials.<sup>159</sup>

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<sup>156</sup> *ibid* 11.

<sup>157</sup> *ibid* 171.

<sup>158</sup> *ibid* 12.

<sup>159</sup> *ibid* 9.

### 3.1.8 Central Authority

Section 5 MLA Act designates the OAG as the Central Authority (C.A) in terms of MLA requests. MLA is however offered in relation to the investigations, prosecutions and judicial proceedings as regards criminal matters. Under article 157 Constitution of Kenya the institution and undertaking of criminal proceedings is within the purview of the ODPP and not the OAG.

### 3.1.9 Declaration under Article 46 (13) UNCAC

Kenya filed a declaration under Article 46(13) UNCAC on the 14<sup>th</sup> August 2008, notifying the UN Secretary General that the C.A responsible for affording MLA shall be the OAG.<sup>160</sup> It is however the mandate of the ODPP to institute and conduct criminal proceedings and matters related thereto as is provided for under article 157 Constitution of Kenya.

### 3.1.10 ARA

Section 53 POCAMLA establishes the ARA as a semi autonomous body under the OAG. The functions of the ARA are inter alia criminal and civil forfeiture, administration of the ARF and international assistance in criminal investigations and proceedings all which fall squarely within the mandate of the ODPP

### 3.1.11 Transfer of Proceedings

Even though Kenya has received a number of requests for the transfer of criminal proceedings to other jurisdictions, none has been accepted as there is no legal basis for the transfer of legal proceedings.<sup>161</sup>

## 3.2 Administrative Gaps

One of the most prevalent shortcomings in asset recovery is that capacities, especially in developing nations, remain low. It is imperative, as a prerequisite, that these capacities be developed for asset-tracing and recovery to succeed.<sup>162</sup> The low capacities in Kenya are

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<sup>160</sup> ibid 208.

<sup>161</sup> ibid 223.

<sup>162</sup> Basel Institute on Governance, International Centre for Asset Recovery, 'Capacity Building in Asset Recovery' <sup>5</sup>  
<[https://www.baselgovernance.org/sites/collective.localhost/files/publications/capacity\\_building\\_in\\_asset\\_recovery.pdf](https://www.baselgovernance.org/sites/collective.localhost/files/publications/capacity_building_in_asset_recovery.pdf)>.

brought about by administrative gaps present in the asset-tracing and recovery regime and they include:

### **3.2.1 FRC and ARA**

The FRC is established under section 21 POCAMLA whilst the ARA is established under section 53 POCAMLA and both face many challenges inter alia limited capacity, lack of expertise and the putting in place of operational guidelines.<sup>163</sup> The limited capacity is both in terms of personnel and technology. The lack of operational guidelines has curtailed the realization of full operationalization and capacity building of the recently established FRC and ARA.<sup>164</sup>

### **3.2.2 Data Collection and Reporting**

Due to the recent enactment of POCAMLA there are no comprehensive statistics on money laundering and other forms of TOC.<sup>165</sup>

### **3.2.3 Limited Police Capacity**

The police and other investigative bodies face challenges of limited capacity in forensic investigations and the detecting of emerging trends in TOC.<sup>166</sup>

### **3.2.4 Non-membership of FRC to the Egmont Group**

The preamble of the Charter of the Egmont Group allows for co-operation between and among FIUs across national borders, through the exchange of information and as such increasing the effectiveness of individual FIUs. This contributes to the success of the global fight against money laundering and the financing of terrorism.<sup>167</sup> However, FRC which is Kenya's FIU is not a member of the Egmont Group.<sup>168</sup>

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<sup>163</sup> UNODC (n 155) 8.

<sup>164</sup> *ibid* 66.

<sup>165</sup> *ibid* 58.

<sup>166</sup> *ibid* 136.

<sup>167</sup> Egmont Group of Financial Intelligence Units Charter 2013.

<sup>168</sup> UNODC (n 155) 13.



### **3.2.5 Financial Reporting Centre**

The FRC which is Kenya's FIU reports administratively to the ministry of finance.<sup>169</sup> This should not be the case as the functions of FRC as under section 21 POCAMLA fall within the scope of assisting in the identification of crime proceeds and the fight against money laundering and as such should not report to the said ministry.

### **3.2.6 Asset Recovery Departments**

The ARA was recently established as is provided for under section 53 POCAMLA. There are also other independent agencies which undertake asset-tracing and recovery functions. These include the asset tracing department in the OAG and also the asset tracing department in the EACC.<sup>170</sup> There is therefore a multiplicity of asset recovery bodies a situation that allows for duplication of roles.

### **3.2.7 ODPP Incapacities**

Prosecutors have inadequate specialized training to handle TOC such as corruption, money laundering and even offer MLA.<sup>171</sup>

### **3.2.8 International Cooperation**

There are numerous challenges relating to the capacity of the institutions responsible for facilitating international cooperation more so in the area of offering MLA.<sup>172</sup>

### **3.2.9 Central Authority Incapacities**

The C.A has limited capacity both in terms of personnel and technology. This is aggravated by the limited resources available for the implementation and execution of MLA requests.<sup>173</sup>

## **3.3 Policy Gaps**

The policy gaps present in the asset-tracing and recovery regime in Kenya are inter alia:

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<sup>169</sup> ibid 134.

<sup>170</sup> ibid 129.

<sup>171</sup> ibid 133.

<sup>172</sup> ibid 166.

<sup>173</sup> ibid 222.

### **3.3.1 Asset Tracing and Recovery Policy**

There is no asset-tracing and recovery policy in place to guide anti-corruption experts, prosecutors, the police and other investigative bodies in the tracing and recovery of assets and proceeds of crime.

### **3.3.2 Victim Identification Policy**

There is no victim identification policy that allows for the identification with a view of compensating victims of TOC. The laws that are in force, inter alia, sections 51 to 55 and 56C ACECA and sections 61 and 112 POCAMLA, are aimed at making payments to the Consolidated Fund of any recovered monies of TOC and the vesting of any recovered properties in the government. There is however no intention expressed under the said provisions for the restitution of victims.

### **3.3.3 TOC Policy/Strategy**

The ODPP has no TOC plan/strategy in place so as to guide all the bodies and agencies mandated in the fight against the scourge that is TOC.

### **3.3.4 MLA Policy**

There is no MLA policy in place which provides for guidelines on issues of receiving and offering MLA so as to allow for effective and efficient international cooperation.<sup>174</sup>

### **3.3.5 Government and CSO Policy**

There is no policy or strategy in place allowing for the coordination and working together of the government and CSOs. Such a policy allows for joint efforts both from the government and the private sector in the fight against TOC and enhances the cultivation of political will.

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<sup>174</sup> *ibid* 195.

## CHAPTER 4

### CONCLUSION AND RECOMMENDATIONS ON THE IMPORTANCE OF ASSET TRACING AND RECOVERY IN THE PROSECUTION OF TOC IN KENYA

#### 4.0 Introduction

This chapter seeks to sum up the research by highlighting the research objectives and findings and by consequently making recommendations for reforms based on the findings. It is the hope and belief of the researcher that the findings and recommendations will contribute to the body of knowledge and stimulate reforms in the prosecuting of TOC in general and asset-tracing and recovery regime in particular. These reforms should allow for depriving criminals of their proceeds of and instrumentalities used in or destined for use in their criminal activities. This should in turn allow for the compensating of victims and the return of assets or monies to the rightful owners. Such a scenario would prevent and suppress TOC while increasing confidence in the rule of law.

#### 4.1 Summary of Study Findings

The study seeks to establish the importance of asset-tracing and recovery in the fight against TOC. The study endeavoured to show that to prosecute the criminals and let them keep the proceeds of their crime is akin to running half the race. That for the fight against TOC to be effective asset-tracing and recovery must be undertaken and the said assets and monies returned to their rightful owners and/or compensate the victims.

The study's first objective is to critically examine asset-tracing and recovery processes and procedures in the prosecution of TOC in Kenya. The second objective is to establish any challenges faced by the prosecution in undertaking asset-tracing and recovery of proceeds of TOC in Kenya. The third objective is to make recommendations so as to enhance asset-tracing and recovery in the fight against TOC in Kenya.

The study's hypothesis is that an ineffective asset-tracing and recovery regime undermines the efforts in the fight against TOC.



The study extensively evaluates the Kenyan asset-tracing regime and established that there are gaps in the asset-tracing and recovery regime in terms of inadequacy of the laws, policies and administrative incapacities which have contributed to the ineffective and inefficient regime in Kenya. Kenya has also not been keen on depriving criminals of the instrumentalities used in or destined for use in TOC. It is evident from the laws in force that they are not keen on returning the assets or monies to the rightful owners but to have the same forfeited to or vest in the government. The laws provide for compensation of victims yet there is no policy or guidelines to this effect.

Due to the low capacities of the bodies and agencies tasked with the mandate of asset-tracing and recovery, there is minimal or no use of ICT and CMS in investigating and prosecuting TOC cases. In addition there is no comprehensive data or statistics as relates to TOC cases, asset-tracing and recovery or cases where instrumentalities have been confiscated or forfeited.

## **4.2 Recommendations for Reforms**

The following recommendations are made as per the themes of study:

### **4.2.1 Legal Recommendations**

The following legal amendments are recommended:

#### **4.2.1.1 Administrative Measures against Legal Persons**

In line with articles 10 (2) and 34 (1) UNTOC and FATF recommendation 35 it is recommended that section 16 POCAMLA be amended so as to allow for the winding up of shell companies, striking of the roll of advocates, deregistering of accountants among other administrative measures for companies, advocates and accountants respectively found guilty of money laundering.

#### **4.2.1.2 Return of Assets and Compensation of Victims**

It is recommended that section 56C ACECA, sections 61 and 112 POCAMLA be amended and consequently a victim identification policy be formulated. This will allow for the realization of the return phase in the asset-tracing and recovery process. This entails the

actual return of recovered monies and/or assets to their rightful owners and/or the compensation of the victims.<sup>175</sup>

#### **4.2.1.3 UNCAC and UNTOC as Basis for Extradition and MLA**

It is recommended that Kenya amends the MLA Act, the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act to allow for offences provided for under the UNCAC and UNTOC but not under Kenyan laws to be recognized as extraditable under Kenyan law. In addition, since Kenya has not entered into extradition treaties with all States and also not all States are designated countries under the extradition statutes in force in Kenya, then it is imperative to have the aforesaid conventions as one of the basis for extradition.<sup>176</sup>

It is further recommended that Kenya considers using the UNCAC and UNTOC as a basis for offering MLA in instances where the request sought, for example transfer of legal proceedings, is not provided for under statute.

#### **4.2.1.4 Create Offence of Bribery of Foreign Public Officials**

It is recommended that ACECA be amended so as to provide for firstly, the offence of bribery of foreign public officials and officials of public international organizations and secondly, for the offence of soliciting and/or accepting of a bribe by such officials.

### **4.2.2 Administrative Recommendations**

In line with article 31 (1) & (4) UNTOC the following administrative measures are recommended:

#### **4.2.2.1 Enhancing Capacities**

With a view of enhancing capacities of the ODPP and the investigative agencies it is recommended that:

##### **4.2.2.1.1 Technical Assistance Action Plan**

In line with article 29 UNTOC it is recommended that ODPP, EACC, ARA, FRC and the investigative agencies in consultation with development and technical assistance partners

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<sup>175</sup> Arab Forum on Asset Recovery, 'Guide to the Role of Civil Society Organizations in Asset Recovery' 5 <[http://star.worldbank.org/star/sites/star/files/afar\\_guide\\_to\\_the\\_role\\_csos\\_in\\_asset\\_recovery\\_english.pdf](http://star.worldbank.org/star/sites/star/files/afar_guide_to_the_role_csos_in_asset_recovery_english.pdf)>.

<sup>176</sup> UNODC (n 155) 171.

such as STAR and ICAR undertake a comprehensive regime audit with a view of developing a country-led and focused technical assistance action plan and to conduct training of personnel.<sup>177</sup>

#### **4.2.2.1.2 Increased Funding for Capacity Building**

It is recommended that the government increases the resources devoted to ODPP, ARA and the investigative agencies dealing with TOC with a view of enhancing and building capacities.<sup>178</sup>

#### **4.2.2.2 Data Collection and Availability**

Data/statistics are the cornerstones of any investigation and prosecution. Therefore in light of the importance of data/statistics and in line with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (FATF Recommendation)<sup>179</sup> 33 it is recommended that:

- ❖ Kenya enhances and strengthens its data-collection, availability and reporting mechanisms that are involved with the reporting of TOC offences, their investigations, prosecutions, adjudications and convictions.<sup>180</sup>
- ❖ Kenya should maintain and make available statistics relating to the freezing, seizing and confiscation of instrumentalities used in or destined for use in TOC.<sup>181</sup>
- ❖ It is recommended that the OAG and ODPP maintain comprehensive statistics on the number of MLA requests received and rejected including the reasons therefore, the nature of such requests, and status of completion. It is imperative to also have statistics on the time limits for responding to received MLA requests.<sup>182</sup>

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<sup>177</sup> *ibid* 11.

<sup>178</sup> *ibid* 10.

<sup>179</sup> Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation' <<http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>>.

<sup>180</sup> UNODC (n 155) 8.

<sup>181</sup> *ibid* 9.

<sup>182</sup> *ibid* 14.



- ❖ It is recommended that the ODPP together with EACC, ARA, FRC and other investigative agencies to maintain and make available comprehensive statistics on both present and future law enforcement cooperation.<sup>183</sup>

#### **4.2.2.3 Utilizing CMS and ICT**

In light of the crucial role that ICT and a good CMS play in asset-tracing and recovery endeavors, it is recommended that ODPP, EACC and the investigative bodies such as the FRC and the police invest in ICT and have a CMS put in place for purposes of investigations and exchange of data and statistics.

#### **4.2.2.4 Strengthening FRC**

It is recommended that FRC considers ratifying the Charter of the Egmont Group so as to enable it to network and exchange information at a global level and to in turn put measures in place so as to allow for a more streamlined reporting structure from the FRC to law enforcement agencies.<sup>184</sup> It is further recommended that the FRC should report administratively to ODPP and not the ministry of finance since the functions of the FRC fall within the mandate of ODPP.<sup>185</sup>

#### **4.2.2.5 Secondment and Exchange of Staff**

In line with article 29 UNTOC is recommended that there be secondment of technical staff, such as prosecutors and anti corruption experts, to the FRC and ARA so as allow for focused investigations and on-site assistance.<sup>186</sup>

#### **4.2.2.6 Sensitization and Awareness Raising**

In line with article 31 (5) UNTOC it is recommended that Kenya should consider putting in place measures so as to ensure that there is massive sensitization of the public in matters as to the effects of and the prevention of the vice that is TOC.

In addition, it is recommended that Kenya should consider inter-institutional arrangements and awareness raising involving prosecutors, investigators and judicial officers.<sup>187</sup>

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<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid* 134.

<sup>186</sup> *ibid* 66.

<sup>187</sup> *ibid* 10.

#### **4.2.2.7 CSOs in Asset Tracing**

In light of the fact that the fight against TOC is a shared responsibility, it is recommended that in line with article 13 UNCAC, Kenya should actively promote the participation of CSOs in the asset recovery process and generally in the fight against TOC.<sup>188</sup>

#### **4.2.2.8 X-ray Machines at Border Entry Points**

In line with FATF Recommendation 32 and UNTOC article 7 (2) it is recommended that border entry and exit points and airports be fitted with x-ray machines that allow for the scanning of both persons and cargo so as to detect and confiscate cash being smuggled in or out of the country.

#### **4.2.3 Policies**

In line with FATF recommendation 34 and article 31 (1) UNTOC it is recommended that the following guidelines and policies be put in place:

##### **4.2.3.1 Asset Tracing and AML Policy**

In line with FATF recommendation 34 and 1 it is recommended that ODPP in conjunction with the FRC, ARA and the EACC should put in place a policy to provide guidelines for the effective and efficient asset-tracing and recovery and AML regime in Kenya. The policy should incorporate critical elements such as ICT, human expertise and processes which will allow for a reliable and viable strategy.

##### **4.2.3.2 Victims and Owners Identification Policy**

ODPP in conjunction with the ARA and EACC should come up with a victims and rightful owners identification policy that allows for the identification with a view of compensating and returning of assets and monies to the victims of TOC and rightful owners respectively.

##### **4.2.3.3 TOC Strategy**

In line with FATF recommendation 1 Kenya should consider formulating a TOC strategy which focuses on a risk-based approach. The strategy should as such have four key elements i.e. preparatory, preventive, pursuing and protective elements which allow for a risk-based approach to TOC.

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<sup>188</sup> Arab Forum on Asset Recovery (n 175) 7.

#### **4.2.3.4 MLA Policy**

In line with Section 52 MLA Act and FATF recommendation 37 (b) it is recommended that the ODPP in consultation with EACC and OAG put in place regulations or a policy for the effective and efficient offering of MLA by Kenya. This will allow for certainty and the meeting of specific timelines.

#### **4.2.3.5 Reporting Policy for DNFBPs**

In line with recommendation 22 FATF it is recommended that the FRC in conjunction with the ODPP puts in place a reporting policy for DNFBPs. This will provide for the mandatory reporting requirement of suspicious transactions and the procedures to be followed in the event of DNFBPs such as legal professions, accountants and auditors are found guilty of non-reporting or engaging in money laundering as under section 16 POCAMLA.

#### **4.2.3.6 Evaluation of Asset Recovery Regime Policy**

In line with article 28 (3) and 31 UNTOC it is proposed that the foregoing policy recommendations notwithstanding Kenya should continuously evaluate the asset- tracing and recovery regime with a view of developing policies and projects and in turn adopting and promoting best practices and policies with a view of punishing, preventing and suppressing TOC.

#### **4.2.3.7 Political Will**

All the foregoing recommendations will be implemented if there is sufficient political will to have the said measures put in place. To this end it is recommended that both the CSOs and government agencies alike to ensure that the political will is cultivated so that it allows for the efficient and effective asset-tracing and recovery policies and processes.<sup>189</sup>

### **4.3 Conclusion**

The hypothesis is confirmed by the findings of the study since due to the frailties of the law, laxity in operationalization and low capacities of the bodies and agencies mandated to investigate and undertake asset-tracing and recovery, lack of use of ICT and CMS the asset-tracing and recovery regime is ineffective and thus has undermined the efforts in the fight against TOC.

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<sup>189</sup> Basel Institute on Governance, International Centre for Asset Recovery (n 162) 5.



The study's main objective is to critically examine asset-tracing and recovery processes and procedures in the prosecution of TOC in Kenya. It was evident from the findings that there is need for amendments to the laws and for the building of capacities of the bodies and agencies mandated to undertake asset-tracing and recovery so as to ensure that there are enough social controls to protect the public, prevent and prosecute TOC and in turn take away from the criminals the assets and proceeds of their crime.

The second objective is to establish any challenges faced by the prosecution in undertaking asset-tracing and recovery of proceeds of TOC in Kenya. The study established inter alia that bodies and agencies such as the ARA and the CA are not under the ODPP where they should be. It was further established that there are a number of policies and guidelines which the ODPP has not put in place to make the asset-tracing process efficient and effective. Due to lack of good ICT and CMS there is also no data or statistics available on the cases in court or the convictions passed, the forfeiture of assets or instrumentalities and the timeframe as regards management of TOC cases.

The third and final objective is to make recommendations so as to enhance asset-tracing and recovery in the fight against TOC in Kenya. The recommendations include legal amendments to POCAMLA, administrative and policy recommendations whose effect will be to transform the asset-tracing and recovery regime in Kenya into one that is effective and efficient.

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