The International Tracing, Freezing and Forfeiture of Criminal Profits

THE INTERNATIONAL TRACING, FREEZING AND FORFEITURE OF CRIMINAL PROFITS

A memorandum by the Government of Ghana

There is no doubt that big profits are often derived from illicit drug dealings and other frauds especially Commercial Crimes which transcend International boundaries. It is for this reason that there should be international cooperation in finding solutions for tracing and forfeiture of criminal profits.

2. In Ghana under our Criminal Law the aim is not only to punish Criminal offences but to order restitution to any person harmed by such crime, namely making restitution orders, compensation orders and confiscation of property acquired through criminal activity. Under Section 145 of the Criminal Procedure Code where upon the apprehension of the person charged with an offence any property is taken part thereof be restored to the person who appears to the court to be entitled thereto, and if he is the person charged that it be restored either to him or to such other person as the court may direct or that it be applied to the payment of any costs or compensation directed to be paid by the person charged. Section 146 also provides that where a person is convicted of having obtained property by fraud, or stealing or by false pretences the Court may order the property involved to be restored to the person who appears to be entitled to it.

Section 147 provides:

> "Where any money or other property in respect of which any person has been charged before a court with an offence involving dishonesty is in the custody or possession of a person other than the accused, the trial court of its motion or on the application of the prosecutor or the alleged victim of the offence, may order that the person in whose custody or possession the money or property is shall not part with or dispose of the money or property until otherwise directed by the court".

Section 137 provides:

> (i) Where a person convicted of an offence involving dishonesty has, since the commission of the offence, made payments of money or transferred any property to any person, such payments or transfers shall be deemed to have been made out of the proceeds of the offence and accordingly any court may, on the application of the prosecutor or the victim of the offence, order the person to whom the payments or transfers have been made to return the money or property to such person as may be specified by the court unless it is shown to the satisfaction of the court by the person in respect of whom the order has been made -
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> (a) that he gave valuable consideration commensurate to the payments of money or transfer of property made to him; or
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> (b) that he is a dependant of the person convicted and that the payments of money were his reasonable living expenses made to him as such dependant.
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> (ii) An order under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the person in whose favour the order has been made as plaintiff and the person against whom the order has been made as

defendant and shall be enforceable in the same manner and be subject to the like appeal as are orders for the return of money.

(iii) The court shall have jurisdiction under this section notwithstanding that the value of the money or property exceeds the limits of the civil jurisdiction of the court."

Section 147B provides:

" (i) Where the sentence is imposed for an offence involving dishonesty and any property including money is not recovered, the court on sentencing the offender, on its own motion or on the application of the prosecutor or the victim of the offence, may make an order for the return by the offender to victim of the offence of the property not recovered and for payment, in default, of the value of any property not returned.

(ii) An order under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and offender as defendant and shall be enforceable in the manner and be subject to the like appeal as are orders for the return of chattels or of money.

(iii) In case of dispute as to the value of the property the issue shall be tried by the court in the same manner as in a civil action.

(iv) The Court shall have jurisdiction under this section notwithstanding that the value of the property involved exceeds the limits of the civil jurisdiction of the court.

(v) An order under this section may be enforced either during the term of the sentence imposed, or at any time within ten years after the expiry thereof".

Section 148 provides:

" (i) Any person who is convicted of felony or misdemeanour may be ordered by the Court to make compensation to any person injured by his offence.

(ii) Any person who is convicted of an offence on summary conviction may be ordered by the Court to make compensation, not exceeding twenty-five pounds, to any person injured by his offence.

(iii) Any such compensation may be either in addition to or in substitution for any other punishment".

3. There is one criticism however of the provision that any order for refund of property acquired as a result of the offence, be deemed to be a civil judgement and those in whose favour the order was made have to enforce them in accordance with the civil procedure. This is a tedious procedure and has not proved effective because the victim of the crime has not always been able to identify the property of the convicted person to the Civil Court. There is therefore need to change the law to make forfeiture of the convicted persons property automatic without going to the Civil Court again.

However section 16(6) of the Public Tribunals Law 1984 PNDCL 78 provides that "any person found by a Public Tribunal under this Law of having illegally or dishonestly acquired any property shall be liable on conviction to forfeit the property to the State". This provision has enabled the State to recover monies stolen from public coffers and also private persons who have lost property through crime.

4. There is an increasing interest among nations in enacting laws and providing effective measures to ensure that illegal proceeds of an convicted offender are not enjoyed by himself or his family and friends. Unless this is done the deterrent effect of punishment would be lost and such persons can after paying any fines or their crimes and in some case even serving terms of imprisonment enjoy afterwards the fruits of their crimes and in some case even become millionaires. The issue demands seizure and confiscation of property and effective enforcement of powers. How to trace ill gotten assets is a big problems however.

5. The problem can be solved by confiscating any property of a convicted person to the value of the amount stolen etc. without necessarily tracing such monies. This is what is done in Ghana under Section 16(6) of PNDCL 78. Part of such monies could be used partly to pay fines, costs, compensations etc. and in the end the offender would be left with nothing, and would not have benefitted in any way from his crime.

6. The procedure also adopted in Ghana is by freezing the assets and bank accounts of a person suspected of having committed frauds, stealing etc. This is done by Government even before investigation or prosecution and it is an effective way of preserving property acquired by crime. If after investigation the person suspected is cleared then his assets are at once defrozen by Legislative Instrument. This compares with the case in Civil Law where a plaintiff could get an order of interim injuction or preservation of property the subject matter of a dispute before the trial of the case.

7. Unless the assets of a suspected criminal is frozen he may tamper with and dissipate property acquired as a result of the offence before any order of forfeiture could be made against him after his trial. He would thereby have been able to enjoy the proceeds of his crime.

8. It means in effect that in Ghana freezing of assets and Bank accounts takes care of tracing of assets and makes tracing merely complementary. Once the account belongs to the offender it can be frozen so that even if the actual proceeds of the particular crime has already been squandered his other monies could be forfeited. To adopt only the procedure of tracing actual proceeds of crime would be difficult and even impossible. Freezing of assets and automatic confiscation and seizure is an easier way of dealing with this matter (See Appendix 1 of proposed draft clause for inclusion in Draft Scheme for Mutual Assistance).

9. Assets of a person charged with Drug trafficking should be dealt in the same way as other crimes because there is really no reason why the proceeds of Drug Trafficking should be treated in any different way, it being also a criminal offence.

10. There should be international cooperation in the effort for the recovery of unlawful criminal gains. Member States may wish to agree to pass laws freezing assets of criminals found in their countries when the request is made by a member country to this effect pending further action, e.g. extradition or return of such stolen property to the country from where it was stolen. There should be provided power by states to order the preservation of property pending the outcome of a foreign prosecution and also power to transfer the preserved property to the state entitled, but this should be based on reciprocity. Unless there is international cooperation in these matters the criminal is at liberty to transfer property and assets of crime out of one jurisdiction to another with impunity and succeed in avoiding laws of member countries dealing with forfeiture matters.

Appendix 1

PROPOSED CLAUSE BY GHANA ON INTERNATIONAL TRACING, FREEZING AND FORFEITURE OF CRIMINAL PROFITS

To be included in the Draft scheme for Mutual Assistance in Criminal matters.

1. (a) A court before which a person is accused of any crime may order the freezing of the Assets and Bank accounts of the offender pending the trial and final determination of the case.

   (b) If after the trial the accused is found guilty of the offence charged then such frozen assets could be used to settle any order for forfeiture or confiscation of property, fine order of costs or compensation which would be made against the convicted person.

   (c) The court can also make an order for freezing the assets and Bank accounts of any person suspected or accused of crime in any member country when the request is made by the property authorities.

   (d) An order of transfer of such assets could also be made to a member Country when a proper order of Court of such requesting country is produced in court directing transfer after trial and conviction of the offender against whom a restitution order is made.

2. Any person who invests directly or indirectly any income or proceeds derived from any crime wheresoever committed shall be guilty of an offence and punishable by a fine.................. and such business or income shall be liable to be forfeited to the State.