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International Asset Forfeiture: Recovering the Proceeds from Illegal Elephant Poaching

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I. COUNTRY SUMMARIES

This report examines the money laundering prosecution and international asset recovery policies, laws, regulations and practice of five countries with respect to elephant poaching and ivory trafficking. Wherever possible it reviews the laws, regulations and practices with respect to the relevant 2003 FATF recommendations. In many cases, current and detailed information was not available.

A. Botswana

Botswana is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG). Most of this document is based on the assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) measures in Botswana conducted by ESAAMLG in 2007 and the U.S. Department of State Money Laundering Report of 2013.[1]

1. Executive Summary

Botswana has set up the key fundamental components of an AML regime through various legislative and regulatory instruments, though there are some inconsistencies between these instruments. Notwithstanding the fact that several of these components fall short of meeting the international standards, the key challenge for Botswana is to effectively implement its current regime. The legal and regulatory instruments encompass criminalization of money laundering, confiscation of proceeds of crime, preventive measures, and suspicious transaction reporting. However, the AML preventive regime does not cover some of the financial activities set out by FATF, nor any of the Designated Non-Financial Businesses and Professions. Transparency issues relating to legal entities, legal arrangements, and non-profit organizations are also of concern.[2]

The key components of the institutional framework for AML (law enforcement, prosecution, supervisory bodies) are in place. However, only the Central Bank has been enforcing the AML requirements. All actors need more training and enhanced resources to effectively play their role in the AML regime. Fostering domestic coordination and cross-fertilization is also central to achieving greater impact.[3]

The priority in the short run should be to significantly enhance the implementation of the current legal framework, which would enable it to better realize its potential. Only then will Botswana be in a better position to address the existing gaps in its AML framework and to

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[1] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism*, Republic of Botswana, Eastern and Southern Africa Anti-Money Laundering Group, August 2007.
[2] *Id.* page 3.
[3] *Id.* page 4.

customize it to the reality of the threat which it faces. In that respect, recent efforts by the authorities (preparation of a national strategy, set-up of a domestic coordination committee, preparation of draft AML/CFT law1) are going in the right direction and need to be deepened and enlarged.[4]

It would be helpful for international cooperation if Botswana would become a member of the Council of Europe Laundering Convention.

A key shortcoming is the fact that the money laundering law does not cover environmental groups or participation in an organized criminal group.

A non-conviction based asset forfeiture regime would be especially useful for asset recovery related to international ivory trafficking cases.

The government needs to establish an operational FIU and amend its Penal Code to address offenses related to money laundering, as required by the international enforcement conventions of which it is a member.

2. Legal Systems

The Proceeds of Serious Crime Act (PSCA) enacted in 1990 criminalizes money laundering in Botswana. Botswana has ratified the Vienna Drug, Palermo, and U.N. Anti-Corruption Conventions and implementation meets most of the requirements under these Conventions. Although drafted in a complex way, the offense of money laundering is broadly in line with international standards. All serious crimes – i.e. punishable by imprisonment of not less than two years - are predicate offenses for money laundering.

Botswana legal system falls slightly short of the list of designated offenses defined by the Financial Action Task Force on Money Laundering (FATF) as it does not criminalize participation in an organized criminal group, terrorism and terrorist financing, illicit arms trafficking, and environmental crime. Furthermore, a court decision is pending on whether self-laundering can be prosecuted. At present, there is no case law on whether the offense of money laundering is autonomous. The money laundering offense extends to legal persons.

Criminal sanctions for money laundering are not considered effective, proportionate, and dissuasive. Two prosecutions have been put forward so far, though no conviction has been achieved. This raises concerns about the effectiveness of the statute, considering that it has been on the books for a long time.[5]

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[4] *Id.* page 4.
[5] *Id.* page 4.

Botswana's confiscation framework, under the PSCA and the Criminal Procedure and Evidence Act (CPEA), is broadly satisfactory. Confiscation is conviction based, with freezing, seizing or restraining orders being provided for under the CPEA and the PSCA. Effective tools are available to identify and trace property. The confiscation regime has been used with success for offenses which are not the proceeds of serious crimes. The use of the freezing, seizing, and confiscation powers for the proceeds of serious crime has been limited, making it as a result premature to assess the effectiveness of the existing regime. Botswana is considering creating a civil forfeiture regime.[6]

Investigation and prosecution of the money laundering offense is shared between various investigative agencies which are equipped with the key investigation tools though there is insufficient coordination between these agencies. Investigations can be conducted by the Botswana Police Service (BPS), the Directorate for Corruption and Economic Crime (DCEC), and the Botswana Unified Revenue Service (BURS). Prosecutions are led by the Office of the Director of Public Prosecution (ODPP). Law enforcement agencies are empowered with the key tools to conduct effective investigations; however, the number of investigations for money laundering remains low as the focus of the investigative agencies remains predominately on the predicate offenses. This is compounded by the fact that DCEC is currently conducting all money laundering investigations regardless of the predicate offense whereas its mandate is focused on corruption and the cheating of public revenues. This situation creates coordination issues. Money laundering related to other predicate offenses needs to be more actively investigated. To this end, Botswana should clarify the mandates of law enforcement agencies to better facilitate the investigation of money laundering. The Customs and Excise Act creates a declaration of cross-border movements of currency. However, bearer instruments are not included in this framework. There is no capacity to restrain the funds for a reasonable period of time for the purposes of establishing whether there is evidence of money laundering or terrorist financing. Positive steps have been taken recently by BURS to raise awareness of the declaration requirement, the implementation of which has been too limited to date.[7]

3. *Money Laundering Vulnerabilities*

Botswana has not undertaken an assessment of its risk and vulnerability to money laundering. Statistical information is too fragmented to enable a sound assessment of risk at this stage. Crime seems to be gradually rising overall, with increasing evidence of the involvement of organized crime. The authorities are mobilized to address these developments, but are also confronted with a challenging environment due to its geographic location. Botswana has a good governance reputation and a low crime rate. Botswana's openness to international financial markets and its efforts to attract more foreign direct investment are also key opportunities for

[6] *Id.* page 5.
[7] *Id.* page 6.

growth, as well as risks. At this juncture, the money laundering risk seems limited, but it is likely to increase.[8]

Despite being a middle income country, Botswana still faces significant development challenges, particularly given the HIV/AIDS situation. The overall resources and budget constraints make it even more important for Botswana to mobilize efficiently and effectively the resources it can dedicate to AML. In this overall context, Botswana already has a good legal foundation for its fight against financial crime. The priority in the short run should be to significantly enhance the implementation of this legal framework, which would enable it to better realize its potential. This will also call for more proactive enforcement.[9]

Botswana is primarily a cash-based society. Organized criminal groups are growing in Botswana. The growing trade in second-hand car dealerships is an area of concern. In recent years, an increase in the amount and frequency of major frauds against large organizations (e.g., banks or government departments, typically with the collusion of an employee) has occurred. There has been an increase in the sophistication and level of organization of cross-border crime.[10]

The National Anti-Money Laundering Committee (NAMLC) is chaired by the Ministry of Finance and Development Planning (MFDP) and was established in 1999 and reformed in 2004, with the current members being the MFDP, the Ministry for Foreign Affairs and International Cooperation (MFAIC), BoB, DCEC, BPS, BURS, and, the Botswana Immigration Service. The committee, which is not established pursuant to any legal provision, meets on a quarterly basis and seeks to address policy issues relating to Botswana's AML/CFT framework.[11]

4. Compliance with International Anti-Money Laundering Standards

a. Recommendations 1 and 2: Scope of Criminalizing Money Laundering

Legal Framework: Section 14 and 15 of the PSCA; Section 21-23 of the Penal Code; and Section 3 of the CPEA.[12]

Criminalization of Money Laundering (c. 1.1 - Physical and Material Elements of the Offense): Under section 14 of the PSCA a person is "deemed" to commit the offense of money

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[8] *Id.* page 10.
[9] *Id.* page 10.
[10] US Department of State Money Laundering Report 2013.
[11] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Botswana, *supra.* at page 24.
[12] *Id.* page 27

laundering by, (a) engaging directly or indirectly in a transaction that involves money, or any other property that is proceeds of a serious offense or "some sort of unlawful activity"; or (b) receives, possesses, conceals, or brings into Botswana any money or property that are the proceeds of a serious offense. In addition, section 15 of the PSCA complementing section 14, provides for the concealment and disposing of money or property that is the proceeds of a serious offense. Concealment under subsection (2) of section 15 includes disguising the nature, source, location, disposition, movement, ownership, or any rights with respect to money or property. Moreover sub-section (2) further stipulates that disposing of money or property includes converting, transferring, or removing such money or property, as well as providing counsel or assistance in relation to disposing, converting, transferring or removing such money or property. However, although the provisions in sections 14(1)27 and 15(1)28 contain the essential elements of a money laundering offense, they are potentially ambiguous. For example, as discussed below under criterion 2.2 (the mental element of the money laundering offense), the standard articulated in the two provisions is different even though the physical elements are similar, if not the same.[13]

The Laundered Property (c. 1.2): The offense of money laundering extends to any type of property derived directly or indirectly from a serious offense or unlawful activity. It extends to property whether located in Botswana or outside Botswana. Pursuant to section 3 of the Criminal Procedure and Evidence Act (CPEA), property includes all types of property movable or immovable, money, and extends to any proceeds acquired as a result of the conversion or exchange of the original property.[14]

Proving Property is the Proceeds of Crime (c. 1.2.1): It is not necessary for a person to be convicted of a predicate offense to prove the property proceeds of a crime. There is currently no case law on this point.[15]

The Scope of the Predicate Offenses (c. 1.3): The predicate offenses for money laundering cover offenses under the Penal Code and other laws criminalizing various offenses and include the majority of the designated offenses as mentioned in the FATF Recommendations. These offenses fall within the definition of 'serious offenses' under the PSCA. However, the predicate offenses provided for under Botswana's law, do not cover participation in an organized criminal group, terrorism and terrorist financing, kidnapping and hostage taking, and environmental crime.[16]

Threshold Approach for Predicate Offenses (c. 1.4): Botswana has adopted a threshold approach to covering predicate offenses. Accordingly, serious offenses are those that are

[13] *Id.* page 27.
[14] *Id.* page 27.
[15] *Id.* page 28.
[16] *Id.* page 28.

punishable by imprisonment of not fewer than two years. To convict a person, the prosecutor must show that proceeds of a serious offense were involved and that the person knew or should have known that there were proceeds of some unlawful activity. Moreover, an offender need not know that they were proceeds of a serious offense (that is conduct of two years or more), only that there were proceeds of an unlawful activity.[17]

Extraterritorially Committed Predicate Offenses (c. 1.5): Under section 14(1) of the PSCA, a serious offense extends to those committed outside Botswana, provided that, if they had occurred in Botswana, it would have constituted an offense under the criminal or other applicable laws of Botswana.[18]

b. Recommendation 3: Provisional Measures and Confiscation

i. Legal Framework: Sections 3-11, 18-19 & 21 of the PSCA; Sections 56-58 & 319(2) of the Criminal Procedure and Evidence Act; Sections 37-38 of CECA; and Section 30 of the Penal Code.[19]

Confiscation of Property related to money laundering, terrorism financing or other predicate offenses including property of corresponding value (c. 3.1): The confiscation, freezing, and seizure of proceeds of serious offenses are primarily covered by the PSCA and the CPEA and secondarily by the Penal Code. The PSCA and CPEA provides for conviction based confiscation of the proceeds of serious offenses. Section 3 of the PSCA provides for the confiscation of property of persons convicted of a serious offense or if a person was convicted of more than one offense in respect of all the serious offenses. Confiscation covers all the proceeds of a serious offense obtained as a result of the commission of an offense or through aiding, abetting or counseling the commission of an offense. Specifically, the DPP can obtain a confiscation order or a pecuniary order.[20]

Confiscation of Property Derived from Proceeds of Crime (c. 3.1.1 applying c. 3.1): The scope of the property that can be confiscated extends to the proceeds of proceeds i.e. income, property, and other rewards, as well as property that is held indirectly by a third party both of which can be confiscated under section 4(2) of the PSCA.[21]

Provisional Measures to Prevent Dealing in Property Subject to Confiscation (c. 3.2): The freezing and seizure of assets (restraining orders under the PSCA) can be ordered under section 8(1). An application has to be supported by an affidavit of a police officer providing grounds for

[17] *Id.* page 29.
[18] *Id.* page 29.
[19] *Id.* page 33
[20] *Id.* page 33.
[21] *Id.* page 33.

the reasonable belief of the defendant's probable guilt. An order is made either when a person has been charged with a serious offense or, alternatively, where a person is about to be charged with a serious offense. The order is effective for as long as the proceedings against a defendant are still ongoing.[22]

Identification and Tracing of Property Subject to Confiscation (c. 3.4): The PSCA provides a wide range of specific powers by which the authorities are able to identify and trace property. This includes production orders, orders to banks to produce any records in their custody, and search warrants. These powers are provided for in sections 18-19 of the PSCA (production orders), and section 21 of the PSCA (search warrants). However, there is no provision for issuing of account monitoring orders.[23]

Analysis of Effectiveness: The powers provided under the PSCA and the CPEA are adequate. The system would be improved if the authorities had the ability to monitor bank accounts of individual suspected of engaging in money laundering activities. However, there has been very limited use of the powers for seizing, freezing, or confiscation of proceeds of serious offenses. The experience is not long enough to make a judgment of the effectiveness of the confiscation regime. Moreover, no statistical data on freezing, seizing, and confiscation cases was available to enable the assessors to make an informed assessment of the utility of the framework. Consequently assessing the money laundering application of these powers was not possible.[24]

c. Recommendations 24 and 25: Designated Non-Financial Businesses and Professions (DNFBPs)

There is no provision for AML/CFT measures to be applicable to DNFBPs.[25]

No guidelines have been provided for DNFBPs.[26]

d. Recommendation 26: Establishment of a Financial Intelligence Unit (FIU)

i. Legal Framework: Proceeds of Serious Crimes Act; Banking (Anti-Money Laundering) Regulations

Recently, through technical assistance, Botswana established a Financial Intelligence Unit (FIU). However the Botswana government has been slow in allowing the FIU to fulfill its mandate and it is not yet operational.[27]

[22] *Id.* page 33.
[23] *Id.* page 34.
[24] *Id.* page 35.
[25] *Id.* page 37.
[26] *Id.* page 37.

Until recently when the FIU was established, Botswana had no single national center to receive, analyze, and disseminate STRs. Institutions report STRs to both the DCEC and the BoB in accordance with Section 17(15) of the PSCA and Section 14 of the Banking (AML) Regulations. The Banking Act requires suspicious transactions to be reported only to the BoB and it appears that this requirement is not widely known.[28]

e. Recommendations 27 and 28: Ensuring Responsibility in Money Laundering Investigations to Law Enforcement Authorities and Compulsory Powers to Obtain Evidence

i. Legal Framework: PSCA; Police Act; CECA, CEDA

Botswana has four agencies which either conduct the investigation and prosecution of money laundering cases or are empowered under current legislation to handle the investigation and prosecution of such cases: Office of the Director of Public Prosecutions, Botswana Police Service (BPS), the Directorate for Corruption and Economic Crime (DCEC), and the Botswana Unified Revenue Service (BURS). To date, no law enforcement agency has been specifically designated to conduct money laundering investigations.[29] However, an official who provided technical assistance to Botswana told me that in the last 18 months there was a successful money laundering and confiscation case against a businessman of Indian descent in Botswana.

Law enforcement agencies have sufficient powers to obtain records and to conduct investigations into allegations of money laundering.[30]

The legal authority of DCEC to conduct money laundering investigations beyond corruption and public revenue related cases as interpreted from the CECA is a significant issue, particularly in consideration of their power of arrest in such cases. The importance of this is considerable, especially when the authorities have stated that DCEC has been given the mandate to conduct all money laundering investigations and this is what is being conducted in practice. There is no policy rationale to exclude BPS from investigating money laundering, particularly as they have a mandate and the powers to investigate all crimes. The current practice appears to affect the effectiveness of the regime as i) it weakens the capacity of BPS and BURS to investigate cases; and ii) DCEC is anticipated to use its resources to investigate corruption related cases only.[31]

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[27] U.S. Department of State Money Laundering Report 2013, *supra*
[28] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Botswana, *supra*, at. page 37.
[29] *Id.* page 42.
[30] *Id.* page 48.
[31] *Id.* page 48.

Insufficient training in the concepts of AML/CFT and the investigation of money laundering and terrorism financing cases has been provided to the law enforcement and prosecutorial agencies to permit consistent effective investigation and prosecution of such cases.[32] Botswana law enforcement, intelligence, and customs services have little understanding or expertise in recognizing and combating money laundering.[33]

f. Recommendation 29: Adequate Financial Supervisory Authorities

A limitation is the lack of implementation and enforcement action, particularly for designated bodies other than banks and bureaux de change.[34]

As indicated in other sections of the report, the scope of the regulatory and supervisory framework applying to financial institutions is too narrow, even taking into consideration the industry specific laws and regulations. Money remittance is not covered when not undertaken by banks, bureau de change, or the post office. Money lenders are not registered or licensed and their activities do not fall under any oversight. The absence of some statutory banks in the AML framework is also a weakness.[35]

g. Recommendation 30: Adequate Financial, Human, and Technical Resources

Insufficient AML/CFT Training has been provided to MFDP, BoB, ODPP, DCEC, BPS and BURS. No STR analysis has been provided to staff of BoB, DCEC and BPS. No training on the investigating of money laundering cases has been provided to BPS; DCEC and BURS. Insufficient resources are available to DCEC and BoB to permit the secure and effective handling and processing of STR data. Other workloads significantly restrict the capacity of investigating and prosecuting authorities to handle money laundering cases.[36]

h. Recommendation 31: Effective Mechanisms to Cooperate & Coordinate Domestically

No effective cross-agency mechanism exists for coordination among relevant agencies.[37]

[32] *Id.* page 48.
[33] US Department of State Money Laundering Report 2013, supra.
[34] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Botswana, *supra*, at. page 104.
[35] *Id.* page 101.
[36] *Id.* page 129.
[37] *Id.* page 117.

i. Recommendation 32: Effective Review of Anti-Money Laundering System by Maintaining Comprehensive Statistics

There is no systematic collection of detailed statistics in respect of investigation, prosecution and conviction of money laundering cases; the receipt and dissemination of STRs; mutual legal assistance requests; extradition requests; and other forms of international cooperation

No detailed review has been conducted on the effectiveness of the AML/CFT regime within Botswana.[38]

j. Recommendation 35: Membership in International Enforcement Conventions

Insufficient implementation of criminal organization provisions of the Palermo, monitoring of cross border movement of cash and lack of an FIU[39]

k. Recommendation 36: Mutual Assistance and Extradition

There are potential impediments to providing mutual legal assistance.

No mechanism for determining the best venue for prosecuting a defendant.[40]

l. Recommendation 37: Rendering Mutual Assistance Without Dual Criminality

Dual criminality can be a ground for refusing to provide mutual legal assistance.[41]

The dual criminality restrictions may be a practical impediment.[42]

m. Recommendation 38: Authority to Act Expeditiously in Response to Foreign Requests to Freeze, Seize, and Confiscate Proceeds of a Crime

There is insufficient implementation of the provisions relating to money laundering cases.

No consideration for asset sharing and asset forfeiture fund.[43]

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[38] *Id.* page 129.
[39] *Id.* page 150.
[40] *Id.* pages 122-123.
[41] *Id.* page 123.
[42] *Id.* page 125.
[43] *Id.* page 123.

n. Recommendation 39: Recognizing Money Laundering as an Extraditable Offense

No flexible mechanism exists to expedite extradition requests. The scope of countries with arrangements with Botswana is limited.[44]

o. Recommendation 40: Ensuring Widest Possible Range of International Cooperation With Foreign Counterparts

There is no provision for DCEC to be able to exchange information with international law enforcement agencies.

The Bank of Botswana does not have capacity to engage in international cooperation with foreign supervisors that are not central banks.

The Registrar of the Stock Exchange does not have capacity to engage in international cooperation.[45]

B. Chad

1. Executive Summary

Much of this section comes from the IMF ROSC report on CEMAC dated August 2006, of which Chad is a member, supplemented by the U.S. State Department Money Laundering Report 2013. However, the IMF ROSC report did not include an on-site visit. The absence of any updated information and the absence of an on-site visit must make one somewhat skeptical of how current and accurate the report is with respect to Chad.

The 2003 CEMAC Regulation setting up a regional legal framework on Anti-Money Laundering and Combating the Financing of Terrorism (AML-CFT) constitutes a robust legal basis. The implementing regulation issued by the regional banking supervisor, Commission Bancaire de l'Afrique Centrale (COBAC), is a significant step forward, but the framework remains largely ignored outside of the banking sector. More emphasis needs to be placed on the benefits of an effective AML/CFT framework, in terms of good governance, the fight against corruption, and the trafficking of natural resources, so as to foster actions at the national level.

The unclear division of responsibilities between the regional agencies involved and the national authorities impede an effective implementation of the framework. While leadership

[44] *Id.* page 125.
[45] *Id.* page 128.

from regional agencies (i.e., BEAC and COBAC) is critical for momentum, the effectiveness of the AML/CFT framework requires a stronger commitment from national authorities. National action needs to be undertaken to establish the national Financial Intelligence Units (FIU) and build up their operational capacities, as well as to guarantee their independence and ensure the secure and confidential treatment of the information made available to them. In addition, the predominance of cash-based transactions in the region makes it all the more essential for national authorities to foster the implementation of AML/CFT obligations for the nonfinancial sector. Adequate resources need to be allocated by the national authorities to all agencies involved in AML-CFT, with specific attention to law enforcement and the judiciary, in order to properly investigate and prosecute AML-CFT cases. Capacity building and training are also of the essence.

Chad is a member of the Economic and Monetary Community of Central Africa (CEMAC). It is made up of the six members of this community: Cameroon, Central African Republic, Chad, Congo Equatorial Guinea and Gabon. It was established in 2000 with the mandate to combat money laundering and terrorist financing, assess the compliance of its members against the FATF Standards, provide technical assistance to its Member States and facilitate international co-operation.

In February 2012, the FATF welcomed the Groupe d'Action Contre le Blanchiment d'Argent en Afrique Centrale (GABAC), which was established in 2003,[46] as a new FATF observer organization. The cooperation between the FATF and GABAC will help to extend the FATF global network on money laundering and terrorist financing into this region of the world.[47] Chad is a member of GABAC.[48]

Chad needs to ratify the UNCAC and become a member of the CoE Convention on Laundering, Search, Seizure and Forfeiture.

Chad's capacity for money laundering prosecutions and AF would be strengthened by technical assistance.

It needs to develop arrangements for asset sharing and a system for identifying and forfeiting assets.[49]

[46] GABAC was established as part of CEMAC and is a specialized institution of CEMAC. See report of a meeting of the African Partnership Forum, in Cotonou, Benin on Dec. 3, 2012
http://www.africapartnershipforum.org/fr/06_Session_III_blanchiment%20argent_FR-FINAL.pdf
[47] FATF, GABAC becomes an FATF Observer, http://www.fatf-gafi.org/topics/fatfgeneral/documents/outcomesoftheplenarymeetingofthefatfparis15-17february2012.html, accessed June 27, 2013
[48] U.S. Department of State, Money Laundering Report 2013.
[49] *Id.*

2. Legal System

Initial work to establish a regional framework to combat money laundering and the financing of terrorism within CEMAC was started at the 2000 meeting of heads of state of the sub-region. CEMAC Regulation 01/03 of April 2003 underpins this framework. It criminalizes money laundering and the financing of terrorism, establishes the appropriate criminal sanctions, and lists the professions (financial institutions and DNFBPs) that fall under the mechanism for preventing and detecting money laundering and the financing of terrorism. It also defines the related preventive obligations (due diligence, obligation to establish internal policies and procedures, reporting of suspicious transactions), provides for the establishment by each Member State of a financial intelligence unit (National Agency for Financial Investigation—ANIF), and outlines procedures for verifying and enforcing obligations by the aforementioned professions. Several provisions of the CEMAC regulation, particularly in the area of detection, provide for thresholds, which are to be established by the ministerial committee. To date, none have been established. It is important for them to be established in the very near future.

According to the 2013 INSCR, Chad received STRs during January 1 – August 31, 2012. It received no Currency Transaction Reports during this period. There were five prosecutions.

3. Money Laundering Vulnerability

Chad has a small and relatively weak financial services sector. It does not serve as a regional financial center. The banking system is underdeveloped and the economy is largely cash-based with few transactions passing through formal financial institutions.

Contraband and smuggling vary by region in Chad. Along the southern and western borders, the contraband goods market consists largely of foodstuffs, cigarettes, fuel, and household items smuggled to avoid import duties. Across Chad's northern desert, which is sparsely populated and transected by Sahelian trade routes, smuggled items include drugs and weapons. Some of these items transit through Chad rather than remain in the domestic market.

Chad's business climate is widely perceived as unfavorable to the development of the private sector. The IFC ranks Chad 184th among 185 countries classified in its Doing Business 2013 report, with particularly low marks for starting a business, resolving insolvency, and paying taxes. Transparency International's 2011 Corruption Perception Index ranks Chad 168th out of a total of 183 countries. The 2011 Mo Ibrahim index, which summarizes the assessment of governance performance in 53 African countries, puts Chad at the 52nd place.[50] Two of the

[50] IMF, 2012 Article IV Consultation, 18 (March 2013) http://www.imf.org/external/pubs/ft/scr/2013/cr1387.pdf.

recent recommendations of a business group in Chad are: "adopt an anti-corruption law"; and "professionalize customs services and eliminate the pseudo-official customs brigade."[51]

The financial sector in both Chad and CEMAC is still very small, although sharp differences exist from one country to another and in practice, financial integration remains limited. The banking sector constitutes the lion's share of the region's financial sector. The insurance sector is in a fledgling phase, and the life insurance market in particular accounts for only a marginal portion of the zone's GDP. A regional stock exchange is on the verge of starting its operations. It will supplement the Douala stock exchange, on which so far only one transaction has been undertaken (public offering of securities by the Douala urban community). The stock exchange market is therefore all but nonexistent. The informal sector accounts for a significant portion of the economic activity of the region, a characteristic common to the six-member countries. Apart from the impact of this situation on the public finances of member countries, the size of the informal sector—coupled with low usage of banking services and a reluctant attitude toward the banking system in some countries—is reflected in the very high volume of paper money and a strong preference for cash in economic transactions. Although the regional central bank is making a noteworthy effort to encourage the use of bank money and to establish an efficient regional payments system (and thus foster use of debit/credit cards), paper money remains by far the preferred form of payment and savings in the zone.

In addition, the countries of the zone have informal pooled savings systems. These mechanisms pose a dual challenge from the standpoint of combating money laundering. They exist in parallel with the formal financial system, sometimes to the detriment of the development of the latter, and potentially facilitate recycling of a portion of the proceeds derived from crime as theirs dealings with the formal financial sector are cash-based, even for legitimate transactions. They can also shield identification of the source of funds, lending a veil of legality to what are sometimes very significant resources. In addition, when they are structured as formal associations, *tontines* can establish business relationships with credit institutions, thereby making it difficult to ascertain the beneficial owner.

The authorities view the risk of money laundering in Chad and the region as a whole as high, particularly the risk of money laundering tied to corruption, embezzlement of public funds, and fraud linked to oil production, in addition to criminal activities such as smuggling, counterfeiting, and trafficking (precious stones, weapons, and narcotics). Although organized criminal activity differs from one CEMAC country to another, the very porous nature of borders not only among member states but within the region, and among neighboring states (Democratic Republic of Congo, Nigeria, Sudan, and other Great Lakes region states) poses additional risk.

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[51] *Id.* at 20, citing White Book of National Council of Employers (CNPT).

Little precise and quantitative information is available in the zone regarding the scope of criminal activity or corruption and embezzlement of public funds. Both the community and national authorities or private agents recognize the importance of these activities in the criminalization of economies. The size of the informal sector and the circulation of cash make it difficult, if not impossible, to distinguish clearly between the informal economy and financial flows tied to criminal activity, and to quantify this phenomenon. The conjunction of weak states and widespread corruption also hampers the effective implementation of mechanisms to combat money laundering and the financing of terrorism.

4. *Compliance with International Money Laundering Standards*

a. *Recommendation 1 (Scope of Criminalizing Money Laundering)*

CEMAC Regulation 01/03 of April 2003 criminalizes money laundering and the financing of terrorism, establishes the appropriate criminal sanctions.

CEMAC regulation 01/03 is of direct and immediate application in all the countries of the region, including its criminal component (criminalization of money laundering and the financing of terrorism, establishment of the appropriate criminal sanctions). In fact, the Treaty establishing CEMAC, the additional Treaty on the institutional and legal system, and the two conventions on the Central African Economic Union (UEAC) and the Central African Monetary Union (UMAC), provide for the possibility to transfer monetary, economic, and financial sovereignty. It foresees, in particular, the adoption by the UMAC ministerial committee of regulations that directly have the force of law and do not require to be transposed into the national laws of each Member State.

The crime of money laundering covers all crimes and offenses. However, a small number of primary offenses are not covered in national laws (among them, offenses involving financial markets).

Overall, the two criminal charges of money laundering and of terrorism financing and the penalties associated therewith, as defined by CEMAC Regulation 01–03, are consistent with international standards.

Chad uses the list approach to criminalizing underlying offenses. The money laundering legislation covers legal persons both criminally and civilly.[52]

[52] U.S. Department of State Money Laundering Report 2013.

b. Recommendation 3 (Provisional Measures and Confiscation)

The mechanisms for freezing, seizure, and confiscation under community law are derived from national law. The information compiled in the countries visited suggests that the legal framework of CEMAC member countries as a whole is appropriate. Moreover, the legal provisions of CEMAC Regulation 01/03 allow for the possibility of additional penalties in the area of confiscation.

c. Recommendation 23 (Necessary Legal or Regulatory Measures to Prevent Criminals from Holding or Being a Beneficial Owner or Manager in a Financial Institution

It appears that the Banque des Etats d'Afrique Centrale (BEAC) and Commission Bancaire de l'Afrique Centrale (COBAC) have the authority to prevent criminals from holding or being a beneficial owner or manager in a financial institution. We have insufficient information about the implementation of their regulatory authority in Chad.

d. Recommendation 24 (Regulating Designated Non-Financial Businesses and Professions)

Although the CEMAC regulation was drafted before the revision of the FATF recommendations, it includes the FATF designated nonfinancial businesses and professions (DNFBP) in the AML-CFT framework (including lawyers). The regulation outlines their due diligence and STR obligations. Loopholes identified in the CEMAC regulation for nonbank financial professions also apply to the DNFBPs. Three main weaknesses must be noted: regulations do not include provisions dealing with beneficial owners, DNFBP are not required to have internal policies and procedures appropriate to their activities, and reporting requirements are not waived for lawyers when they come across information while discharging duties covered by professional confidentiality (in the case of legal proceedings only). While, by and large, the CEMAC regulation appears to exclude these situations, some ambiguity persists and should be removed so that this situation cannot be used as a pretext for rejecting, on principle, the entire policy.

Although the regulations are generally satisfactory, their implementation is still limited at best. No awareness-building programs for these professions have been conducted. Their supervisory authorities or self-regulatory organizations have not implemented any actions to date, and both the professionals themselves and their self-regulatory authorities seem to be unfamiliar with the CEMAC regulation. Furthermore, on a more general basis and beyond AML-CFT, many of the regulatory policies of these professions have not been implemented, even

when they are formally of good quality; this does not create an environment conducive to the efficient and effective implementation of CEMAC Regulation 01/03.

Moreover, information gathered by the mission during its visits to Member States indicates that the supervisory framework for casinos (and other forms of gambling) needs to be strengthened, including for AML-CFT purposes, particularly to ensure that CEMAC provisions on casinos are successfully implemented.

This situation is even more important given that, as previously indicated, the "gatekeepers" have an even more significant role to play in the zone with regard to AML-CFT. Illicit financial flows appear to be regularly invested directly into the real economy, without passing through the financial sector. These schemes include the establishment of front companies, real estate investments, and trafficking in precious stones and metals. For these reasons, the mobilization of the supervisory authorities and self-regulatory organizations of these professions and the professionals themselves must be stepped up and accelerated as soon as possible, in order to initiate implementation in these sectors.

e. Recommendation 26 (Establishing an FIU)

Chad's National Financial Investigative Agency (ANIF), Chad's financial intelligence unit, faces serious resource constraints and law enforcement and customs officials need training in financial crimes enforcement. Financial intelligence reporting and analysis is limited.[53]

f. Recommendation 27 (Ensuring Law Enforcement Is Responsible for Money Laundering Investigations)

The framework for investigation and prosecution exists in Chad and at the member state level; the CEMAC regulation does not contain any provision in this regard. In the context of Interpol in particular, coordination does exist between the police services and *gendarmerie* in the zone (meeting of police chiefs), although operational coordination still seems to be limited. Despite the fact that the regional customs code (CEMAC customs code) provides a common legal framework for the zone, implementation takes place at the national level exclusively. Judicial institutions are at the national level. Consequently, this evaluation cannot provide a full assessment of the zone in these areas.

[53] U.S. Department of State, Money Laundering Report 2013.

g. Recommendation 29 (Supervisory Powers to Monitor and Ensure AML Compliance

Although the Banking Commission of Central America (COBAC) is charged with enforcing customer due diligence and other AML procedures, Chad's banking sector is under-regulated.[54]

h. Recommendation 30 (Providing Adequate Financial, Human and Technical Resources to AML Officials)

Chad does not have a coordinated and structured criminal policy on money laundering and the financing of terrorism or the main offenses that occur in the zone (among them, corruption, embezzlement of funds, and smuggling), even though the legal mechanism needed exists. In this regard, it seems critical that the political commitments undertaken be specifically reflected in the definition of a criminal policy. Such a policy should then be supported by the mobilization of resources and, in particular, of the appropriate expertise. Great attention should be paid, among other things, to linking the mechanisms for combating corruption and embezzlement of public funds and the mechanisms for combating money laundering, in order to capitalize on synergies and ensure that they are mutually reinforcing (see, for instance, the role of the reporting obligation to detect corruption and embezzlement).

Generally speaking, the investigative services (police, *gendarmerie*, and customs) have the necessary legal and investigative tools. While training in the area of financial crimes is essential, some expertise already exists. However, law enforcement and customs officials need training in financial crimes enforcement.[55]

Nearly all Chadian law enforcement agencies and officers are poorly resourced and under-trained, especially in the areas of complex investigations and border security, particularly along the Chari River, bordering Nigeria and Cameroon, and Lake Chad.[56]

i. Recommendation 31 (Ensuring Effective Mechanisms for Domestic Cooperation)

As of the August 2006 assessment, only the Central African Banking Commission (COBAC) has enacted a regulation to implement the community legislative framework, applicable to the credit institutions that it supervises. It contains numerous provisions reflecting the 2003 FATF recommendations, while the community regulation preceded their adoption.

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[54] *Id.*
[55] U.S. Department of State, Money Laundering Report 2013.
[56] U.S. Department of State, Terrorism Report 2012.

Better coordination at the national and regional levels is critical from the outset in order to use scarce resources more effectively (in particular, budgetary and human resources) and thus improve the results of the investigation and prosecution.

The judiciary also has expertise on which they can draw. This expertise should be strengthened in the economic and financial areas. Once again, the challenge here is more effective use of this expertise, as well as of current resources (which are too scant).

Consideration should be given, among other things, to the establishment of centers of expertise. Overall, the resources allocated to the justice system and police remain scant. This problem should be addressed in the more general context of budgetary constraints in the countries of the zone.

The 2006 IMF ROSC report states that the limited progress made to date with regard to the establishment of ANIFs and, consequently, the absence of a trigger for the implementation of the AML/CFT framework, did not allow for an assessment of the quality of domestic cooperation in countries of the zone. Nevertheless, the regional legislative framework does not establish a frame of reference for this purpose, and the lack of ongoing cooperation among the various AML-CFT actors appears to persist to this day.

j. Recommendation 32 (Maintenance of Comprehensive Statistics)

Overall, neither regional nor national authorities have, to date, introduced basic statistical tools (collection, analysis, and dissemination) on major offenses or money laundering and the financing of terrorism, in any area (prevention, detection, suppression, international cooperation). The annual reports of ANIF and GABAC (Central African Task Force against Money Laundering) can serve as a useful platform to initiate data collection, going beyond the mere reporting of suspicious transactions, where necessary. In the same vein, the selection by each Member State of a "leader" at the country level should help establish a framework for this purpose, by ensuring that statistical tools are well used to monitor progress and effectiveness in implementing the regional regulation.

k. Recommendation 35 (Membership in International Conventions).

Chad ratified the 1988 Vienna Drug Convention and Palermo Convention, but has not ratified the 1990 or 2005 Council of Europe Conventions on Laundering or the UN Convention against Corruption.

Chad joined a joint border commission with Sudan to better control its eastern border. It also started talks with Niger and Libya to form a tripartite border commission, and with Cameroon and Nigeria to form a bilateral border commission.[57]

In May 2013, Chad participated in the Global Counterterrorism Forum's (GCTF's) Sahel Region Capacity Building Working Group meeting in Niamey, Niger and served on a committee that made recommendations to strengthen the capacity building of Member States.[58]

l. Recommendations 36 and 37 (Mutual Assistance and Extradition)

The CEMAC regulation establishes the procedures for mutual legal assistance and supplements existing bilateral agreements between Member States and third states. The establishment of the *Pacte de solidarité d'entraide et d'extradition entre les pays de la CEMAC* [Solidarity Pact for mutual assistance and extradition among CEMAC member countries] (signed and currently being ratified) is a noteworthy step forward. Overall, the CEMAC zone therefore has a satisfactory framework for international criminal cooperation.

The CEMAC regulation does not contain any provisions on extradition; these issues are instead addressed at the national level, while awaiting the entry into force of the Pact. Examples in Cameroon, Congo, and the Central African Republic indicate that states in the zone appear on a whole to have a satisfactory legal framework for extradition, except in the case of prosecuting nonextraditable nationals for offenses committed overseas.

Chad has no MLAT with the U.S., but does have them with other countries. It is not known how many and what level of response Chad makes when it receives an MLAT request.

m. Recommendation 40 (Giving Competent Authorities Widest Bases to Cooperate)

Administrative authorities (COBAC, CIMA, ANIFs) in particular have the latitude required to solicit international cooperation and to respond to requests.

C. Democratic Republic of the Congo

1. Executive Summary

Money laundering is regulated by the A NO. 04/016 July 19 on Money Laundering and the Financing of Terrorism promulgated by the Head of State.

[57] U.S. Department of State, Terrorism Report 2012.
[58] *Id.*

This Act applies to a legal person who, in his profession, carries out, controls or advises transactions involving deposits, exchanges, investments, conversions, or any other capital movements, in particular: Central Bank (BCC), credit institutions, financial companies, microfinance institutions, insurance and reinsurance companies, or other financial intermediaries (lottery companies, casino managers, notaries, lawyers involved in independent legal profession, etc.).

The law provides for protective and repressive measures both for the money laundering and the financing of terrorism. Such measures include the seizure of property and assets belonging to the persons involved to offenses this act. Among others: penal servitude, criminal fine, and confiscation of property.

Regarding the detection, the legislator establishes a financial unit of information CENAREF - "*cellule des renseignements financiers*", in charge to collect, analyze, and process the declarations of suspicion under the conditions and according to the conditions laid down by this Act.[59]

Through the DRC desk at the State Department, the U.S. Embassy talked to Mr. Augustin Ngumbi Amuri who is the Director and Chief of Staff to the office of the CEO of the DRC's Conservation body (Institut Congolais pour la Conservation de la Nature—ICCN). Mr. Ngumbi reported that there's no existing formal law that criminalizes poaching, but the following other laws implicitly relate to poaching:

1) Law of 1982 related to fauna regulates hunting and criminalizes poaching.
2) Law of 1969 related to conservation, criminalizes poaching inside the protected areas.
3) Law of 1935 related to fishing, criminalizes the poaching of fish inside the parks.

Mr. Ngumbi expects to defend his PhD thesis on poaching one month from now. That would be important documentation worth purchasing once published.

The DRC should join one of the FATF-style regional bodies (FSRB). It should become a member of the Council of Europe Convention on Laundering, Search, Seizure and Forfeiture.

Better training, capacity building, and political will are required to improve the ability of the DRC to successfully initiate and prosecute money laundering and recover assets from elephant poaching and ivory trafficking.

[59] Summary of DRC Money Laundering Law from U.S. Embassy in Kinshasa.

2. Legal Systems

The DRC has a relatively recent money laundering law. It is a member of the Vienna Drug Convention, the Palermo Convention, and the UNCAC.

A limitation in its AML cooperation internationally is that the DRC is not a member of any FATF-style regional body (FSRB).

In 2012, CENAREF, the DRC's FIU, received 157 STRs. There was one money laundering prosecution in 2012.

The 2004 money laundering law requires covered entities as follows to Know Your Customer: Congolese Central Bank, banks, credit institutions, money transfer institutions, financial companies, microfinance institutions, money exchangers, insurance companies, leasing companies, financial intermediaries, postal checking systems, transferable securities and stock exchange market operations, gaming companies, notaries, independent legal advisors, real estate agencies, funds conveyors, travel agencies, auditors, accountants, tax consultants, sellers of works of art, antiques, and precious stones.

3. Money Laundering Vulnerabilities

The Democratic Republic of Congo (DRC) is not considered an important regional financial center, but its porous borders and weak law enforcement capability make it an important money laundering conduit. Due to its large geographic size, lack of a functional judicial system, and dominant informal sector, the DRC is particularly vulnerable to money laundering. The DRC covers nearly a million square kilometers (400,000 sq. mi) and has 7,000 km of porous borders with nine countries. State authority and administration are weak because of the country's vast geographic territory and dilapidated infrastructure, among other challenges. Most economic activity in the DRC takes place in the informal sector, estimated to be up to ten times the size of the formal sector, with most transactions, even those of legitimate businesses, carried out in cash. The accurate reporting of revenues is thus very difficult.

Inefficient and burdensome customs and tax policies and chronically low public sector salaries encourage a climate of bribery and clandestine transactions, especially in import/export activities and mineral sales.

Customs and tax fraud, tax evasion, misappropriation of public funds, the sale of prohibited products and services, and illegal exploitation of minerals and other valuable materials are common. Casinos and smuggling of gold, diamonds, and weapons also are

important sources of untracked money. Gold and diamonds are extensively mined in and routinely smuggled out of the DRC and most of those cash transactions take place in dollars. The DRC's economy remains highly dollarized and its parallel foreign exchange market is large and tolerated by the government. There is a preponderance of currency in all financial transactions.[60]

4. *Compliance with International Money Laundering Standards*

a. *Recommendations 1 and 2 (Criminalizing Money Laundering)*

The following acts are considered money laundering offenses: conversion, transfer or handling of goods in order to conceal or disguise the illicit origin of the property or of assisting anyone who is involved in the commission of the offense to evade the legal consequences of his actions; the concealment or disguise of the true nature, origin, location, disposition, movement or ownership of property; the acquisition, possession or use of property by a person who knows, who suspects or should have known that such property is a product of an offense.[61]

For the purposes of this Act:

1. The term "proceeds of crime" means any property or any economic benefit derived directly or indirectly of one or more offenses.
2. the term "property" refers to all types of assets, tangible or incorporeal, movable or immovable, tangible or intangible, fungible or non-fungible and legal documents or documents proving the ownership of the assets or rights are related, including electronic or digital form;
3. The term "instrument" means any property used or intended to be used in any manner whatsoever, in any or part, to commit one or more offenses;
4. "criminal organization" means any agreement or structured to commit association offenses of money laundering and financing of terrorism;
5. the term "original offense" means any criminal offense, even if committed abroad, having allowed its author to purchase products within the meaning of this Act;
6. the term "beneficial owner" means the principal, that is to say the person on whose behalf the agent is or whose behalf the transaction is conducted;
7. "trade manual exchange" means immediate exchange of banknotes and coins denominated in different currencies, directed by assignment or delivery of cash, against payment by another means of payment denominated in a different currency;
8. the term "terrorism" means the acts in relation to an individual or collective undertaking the purpose of disturbing serious public order by intimidation or terror, namely:

[60] U.S. State Department, Money Laundering Report 2013.
[61] Law N ° 04/016 of 19 July 2004 Combatting Anti-Money Laundering and Financing of Terrorism, Art. 1.

a. voluntary damage to life or physical integrity the person, the kidnapping of the person as well as the hijacking of ships or any other means of transportation;
b. theft, extortion, destruction, degradation and deterioration;
c. manufacture, possession, stockpiling, acquisition and sale of machines, dangerous, explosive or other biological, toxic or war;
d. other acts of the same nature and goal of introducing into the atmosphere, on the floor, in the basement or in the waters of the Republic, a substance likely to endanger human health or animals or the environment;

9. the "freezing" or "seizure" means the temporary prohibition of transfer, conversion, disposition or movement of property or temporarily assuming the custody or control of property by order of a court or other competent authority;
10. the term "funds" means assets of every kind, whether tangible or intangible, movable or immovable, tangible or intangible acquired by any means whatsoever, and documents or legal instruments in any form whatsoever, including electronic or digital, evidencing a right to property or interest in such property, including but not limited to banking credits, money orders, shares, securities, bonds, drafts, and letters of credit.[62]

b. Recommendation 3 (Provisional Measures and Confiscation)

Art. 30 authorizes judicial authorities and relevant officials of the detection and prosecution of money laundering and related offenses to seize property in relation to the offense under investigation and all evidence to identify the offense.

Under Art. 47 of Law 2004 on money laundering, in the case of conviction for money laundered or attempted, it will be ordered the confiscation of property of the offender, including income and other benefits that have been acquired, from whomever it is receives, unless the owner establishes that it has been acquired by actually paying a fair price or exchange benefits equal to their value or any other lawful title and he was unaware of the illicit origin; property owned, directly or indirectly, to a person convicted of money laundering.

Moreover, in case of infringement by the court, when a sentence cannot be executed against its author, it nevertheless may order the confiscation of the property on which the offense focused.

The forfeiture of the condemned level of income achieved by him since the date of the oldest facts justifying his conviction may also be imposed, unless he can establish the absence of link between the income and the offense.

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[62] *Id*., Art. 3.

When there is confusion over property derived directly or indirectly of the offense and any property acquired legitimately, confiscation of the property is ordered only up to the value estimated by the court, resources and the above property.

The confiscation order includes the property and gives the particulars necessary for identification and location. When goods cannot be confiscated, confiscation may be ordered in value.

Art. 48 allows a prosecutor to apply for an order for the confiscation of the seized goods as a security measure.

Under Art. 50, confiscated property is vested in the state so as to allocate funds to the fight against organized crime and trafficking drugs. They remain encumbered, up to the value of the rights actual lawfully established in favor of third parties. In case of confiscation issued by default, if the court, acting on opposition, relives the accused, it shall order restitution by the state of confiscated property, unless it is established that such property is the proceeds of an offense.

c. Recommendations 24 and 25 (Applying AML to Designated Non-Financial Businesses and Professions - NFBPs)

Art. 4 makes the anti-money laundering law applicable to a range of DNFPBs, including managers and owners of casinos, notaries, independent legal professions, real estate agents and other real estate trading advisors, the CIT, travel agencies, auditors, accountants, auditors, external tax advisors, merchant works of art, antiques and/or valuable materials.

d. Recommendation 26 (Establishing an FIU)

Pursuant to Art. 17 of the 2004 Law on Money Laundering, CENAREF, a Financial Intelligence Unit (FIU), with financial autonomy, under the supervision of Minister of Finance, was created and organized under the conditions set by a presidential decree. The mission of the FIU is to collect and process financial information systems of money laundering and terrorist financing. [63]The FIU works with the Department of Justice, and is responsible for: receiving, analyzing and processing the statements which are required of individuals and organizations and referred to in Article 4; receiving other useful information, including those provided by the judicial authorities. The unit may also, on request, obtain from any public authority and any person or entity referred to in Article 4, the communication of information and documents within investigations undertaken following a declaration of suspicion; making periodic studies on the evolution of techniques used for money laundering and financing of terrorism in the country; issuing opinions on the state policy in the fight against money laundering and terrorist financing

[63] IMF, Democratic Republic of the Congo: Poverty Reduction Paper, July 25, 2013.

and its implementation. As such, it proposes reforms appropriate to strengthen the effectiveness of the fight against money laundering; reporting to the Public Prosecutor.

e. Recommendation 27 (Ensuring Law Enforcement Is Responsible for Money Laundering Investigations) and Rec. 28 (Compulsory Authority to Obtain Records)

Art. 23 of the 2004 Law on money laundering provides that, if there appears serious evidence to constitute a money laundering offense, the FIU transmits a report on the facts with its opinion to the prosecutor. This report is accompanied by all useful information, with the exception of the suspicious transaction itself. The identity of the author of the statement and that of the agent of the FIU in charge should, in any case, be included in the report.

Under Art. 25, to obtain evidence of the original offense and the evidence of offenses provided in this Act, the prosecutor may, by reasoned decision of a competent judge in chambers, use the special investigative techniques below entry for monitoring of bank accounts and accounts related to bank accounts; access to systems, networks and servers; placement under surveillance or interception of lines telephone, fax or electronic means of transmission or communication; audio and video recording of the actions and conversations; authentic communication instruments and private deeds of bank, financial and commercial.

The judicial authorities may also order the seizure of documents.

These operations are possible only when there are serious indications to suspect that these accounts, telephone lines, systems and computer networks, or documents are used or likely to be used by persons suspected of involvement in offenses in paragraph 1 of this Article.

f. Recommendation 29 (Supervisory Powers to Monitor and Ensure AML Compliance)

Art. 19 of the 2004 Law on money laundering gives the Central Bank of Congo authority to control and discipline within its sphere of competence. It collaborates with the FIU and judicial authorities by regular exchange of information and advises the FIU on disciplinary procedures taken against credit institutions and other financial intermediaries that have failed in their obligations to fight against money laundering and terrorist financing.

g. Recommendation 30 (Providing Adequate Financial, Human and Technical Resources to AML Officials)

Limited resources hamper the GDRC's ability to enforce anti-money laundering (AML) regulations and local institutions and personnel lack training and capacity to fully enforce the law and its attendant regulations. Lack of funding continues to prevent CENAREF from fully carrying out its responsibilities. A weak judicial system also impedes enforcement of AML regulations. There is a strong perception that CENAREF is not empowered to investigate businesses and transactions if the investigations might adversely impact the economic interests of high-level Congolese officials and ruling elites. The DRC is ranked 160 out of 176 countries surveyed in Transparency International's 2012 Corruption Perception Index.[64]

h. Recommendation 31 Ensuring Effective Mechanisms for Domestic Cooperation)

There exist laws on paper, as mentioned in sections d, e, and f above.

i. Recommendation 32 (Maintenance of Comprehensive Statistics)

The DRC has statistics for STRs in 2012, the number of money laundering prosecutions and convictions.

j. Recommendation 35 Membership in International Conventions

The DRC is a member of the UN Convention against Corruption and the UN Palermo Convention.

k. Recommendations 36 and 37 (Mutual Assistance and Extradition)

Articles 51 and 52 of Law 2004 on money laundering enable the Minister of Justice under the supervision of the Attorney General to give mutual assistance subject to reciprocity. Art. 52 provides eleven grounds for refusing a request for mutual assistance.

[64] US State Department Money Laundering Report on the DRC- 2013, as reprinted in Know Your Country, http://www.knowyourcountry.com/congodr1111.html.

l. Recommendation 40 (Giving Competent Authorities Widest Bases to Cooperate)

It seems that, at least under the law, the government has wide powers to cooperate internationally. Under Art. 55 in the case of a request for assistance in a confiscation decision, the court rules on referral by the public prosecutor. The confiscation order must be for a property that is the product or instrument of an offense, and in the territory of the Democratic Republic of Congo, or consist of the obligation to pay a sum of money corresponding to the value of the property. The court hearing an application for the enforcement of a confiscation pronounced abroad is bound by the findings of fact on which the decision is based.

Art. 56 provides that the government has the power to dispose of confiscated property in the country at the request of foreign authorities, unless an agreement with the government of the requesting state is otherwise.

D. Kenya

1. Executive Summary

The AML system in the Republic of Kenya is still in an early stage of development and much work needs to be done with regard to the implementation of the AML measures, capacity building and awareness-raising within the reporting community and the general public.[65]

The Proceeds of Crime and Anti-Money Laundering Act 2009 (the POCAMLA) is the primary enactment which supports the AML legal framework in Kenya. The POCAMLA which was enacted in December 2009 became effective immediately after the onsite visit on June 28, 2010. Terrorist financing is not criminalized in Kenya.[66]

The major profit generating crimes in Kenya include robbery and thefts, economic crimes, corruption, and drug offenses. The Kenyan authorities are not aware of proceeds being laundered in any particular sector. However there is a general perception in the press that proceeds are being laundered in Kenya but this is not supported by any evidence or statistics.[67] Despite Kenya's high-level political commitment to work with the FATF and ESAAMLG to address its strategic AML/CFT deficiencies, Kenya has not made sufficient progress in implementing its action plan within the agreed timelines, and certain strategic AML/CFT deficiencies remain. With respect to the non-terrorist financing deficiencies, FATF has stated that Kenya should continue to work on implementing its action plan to address these

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[65] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism*, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011.
[66] *Id.* page 12.
[67] *Id.* page 12.

deficiencies, including by: (1) ensuring a fully operational and effectively functioning Financial Intelligence Unit; and (2) implementing an adequate and effective AML/CFT supervisory program for all financial sectors.

Kenya should expand coverage of money laundering to participation in organized criminal groups and racketeering.

Kenya should implement more effectively the provisions to prosecute money laundering.

2. *Legal Systems*

The money laundering offense is criminalized under the POCAMLA in a manner that is broadly consistent with the Vienna Convention and the Palermo Convention. The POCAMLA defines the term "property" in wide terms consistent with the standards and when proving that property is the proceeds of crime an underlying conviction for the predicate offense is not necessary. Kenya determines the underlying predicate offenses for money laundering by reference to all offenses. However, participation in an organized criminal group and racketeering, terrorist trafficking in human beings and migrant smuggling, are the categories of the designated predicate offenses that are not criminalized in Kenya.

Predicate offenses for money laundering under the POCAMLA extend to conduct that occurred in another country. The offense of money laundering also applies to persons who commit the predicate offense. Ancillary offenses to the money laundering offense are broadly covered under the Kenyan Penal Code. Liability for money laundering applies to both natural and legal persons.[68] The fact that participation in an organized criminal group and racketeering is not a money laundering offense is a problem since, increasingly, such groups are responsible for elephant poaching and ivory trafficking.

The provisions for criminalizing money laundering have not yet been implemented effectively. No money laundering investigation or prosecution has been undertaken under the POCAMLA.[69]

The POCAMLA provides for both criminal and civil forfeiture. The proceedings relating to forfeiture are civil, with rules of evidence applicable in civil proceedings applying. Criminal forfeiture only applies upon conviction whilst civil forfeiture is not dependent upon a conviction.[70]

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[68] *Id.* page 13.
[69] *Id.* page 13.
[70] *Id.* page 13.

Provisional measures to prevent dealing in property pending an investigation or court proceedings are available. The POCAMLA allows the initial application to freeze or seize property subject to confiscation to be made ex-parte. Police officers and other law enforcement officers have adequate powers to access information that may assist in the tracing of property that may be subject to forfeiture. The forfeiture regime recognizes the rights of bona fide third parties. It was not possible to obtain an accurate picture of the effectiveness of these measures as the forfeiture provisions have not been applied in practice.[71]

The POCAMLA provides for establishment of the Financial Reporting Center (FRC) as a national center to receive, analyze and disseminate financial intelligence and information. The FRC is the custodian of the implementation of AML programs in the country under the Act. Presently, the Central Bank of Kenya receives suspicious transaction reports from banks and other financial institutions falling under its supervisory mandate.[72]

The Kenya Police Force is the main agency that has the responsibility to investigate criminal matters, including money laundering offenses. In terms of section 14 of the Police Act, it is mandated to maintain law and order, preserve peace, protect life and property, prevent and detect crime, apprehend offenders and enforce all laws and regulations with which it is charged. Investigations relating to economic crimes fall under the Criminal Investigation Department (CID). The police in Kenya have a broad range of investigative powers and may compel the production of documents, search persons or premises, and seize and obtain relevant documents or information held by financial institutions or other persons. However, the effectiveness of these powers in relation to money laundering investigations could not be assessed as no money laundering investigation had been initiated at the time of the onsite visit.[73]

3. *Money Laundering Vulnerabilities*

As of August 1, 2013, FATF named Kenya as one of the jurisdictions with strategic AML/CFT deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies. The FATF calls on its members to consider the risks arising from the deficiencies associated with Kenya, as described below.

As mentioned above, Kenya has taken steps towards improving its AML/CFT regime, but still has work to undertake in order to remedy those deficiencies.[74]

[71] *Id.* page 13.
[72] *Id.* page 14.
[73] *Id.* page 14.
[74] FATF Public Statement - 21 June 2013

Money laundering activity derives from both domestic and foreign criminal activity. Kenya is a transit point for international drug traffickers. Trade-based money laundering is a problem in Kenya, though the Kenya Revenue Authority has increased its internal monitoring and collection procedures. A black market exists for smuggled goods in Kenya, which serves as a major transit country for Uganda, Tanzania, Rwanda, Burundi, eastern Democratic Republic of Congo, and South Sudan. Goods marked for transit to these northern corridor countries avoid Kenyan customs duties, but authorities acknowledge they are often sold in Kenya. Many entities in Kenya are involved in exporting and importing goods, including nonprofit entities. Trade goods are often used to provide counter-valuation in regional hawala networks.

The laundering of funds derived from corruption, smuggling, illicit trade in counterfeits, drugs, wildlife trafficking and other financial crimes is a substantial problem. Its proximity to Somalia makes Kenya an attractive and likely destination for the laundering of piracy-related proceeds. As a regional financial and trade center for Eastern, Central, and the Horn of Africa, Kenya's economy has large formal and informal sectors. Although banks, wire services, and other formal channels execute funds transfers, there are also thriving, unregulated informal networks of hawala and other alternative remittance systems using cash-based, unreported transfers that the Government of Kenya cannot track.

Foreign nationals, particularly the large Somali refugee population, primarily use hawala to send and receive remittances internationally. Mobile money (using telecom networks for cash transfers) is increasingly important and makes tracking and investigating suspicious transactions more difficult.

Kenya ranks 139 out of 174 countries on the 2012 Transparency International Corruption Perceptions Index.

Major profit generating crimes include robbery and thefts, economic crimes, corruption, and drug offenses. The Kenyan authorities are not aware of proceeds being laundered in any particular sector. However there is a general perception in the press that proceeds are being laundered in Kenya but this is not supported by any evidence or statistics.[75]

In the Eastern African Region, cooperation is provided under the Eastern Africa Police Chiefs Cooperation Organization (EAPCCO) Agreement between the police in Kenya and members of EAPCCO. The Eastern Africa Police Chiefs Cooperation Organization (EAPCCO) was created in 1998 in Kampala, Uganda, as a regional practical response to the need to join police effort against transnational and organized crime. EAPCCO consist of the following 11 member countries: Burundi, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, Seychelles, Somalia, Sudan, Tanzania, and Uganda. The priority crime areas for the sub-region as determined by

[75] *Id.* page 28.

EAPCCO are: anti-terrorism, motor vehicle thefts, drugs, economic crimes and corruption, illegal firearms, cattle rustling, environmental and wildlife crime, and trafficking in human beings and illegal immigrants.[76] It would be useful to try to ascertain whether EAPCCO has cooperate much on wildlife crime and, if so, whether it has been successful.[77]

4. *Compliance with International Anti-Money Laundering Standards*

a. *Recommendation 1 and Recommendation 2: Scope of Criminalizing Money Laundering*

Kenya does not criminalize all the designated categories of predicate offenses, including racketeering, financing of terrorism, and migrant smuggling.[78]

The offense of money laundering under section 4 of the POCAMLA does not apply to persons who commit the predicate offense.[79]

The effectiveness of the money laundering regime in Kenya could not be assessed.[80]

The POCAMLA does not provide for administrative liability to run parallel with criminal and civil proceedings.[81]

The effectiveness of the regime could not be determined.[82]

b. *Recommendation 3: Provisional Measures and Confiscation*

Predicate offenses that have been criminalized do not cover all the designated categories of offenses. This compromises the scope of offenses for which provisions relating to confiscation or forfeiture can be used.[83]

Forfeiture of property of corresponding value provided for under section 29 of the Penal Code does not cover all offenses.[84]

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[76] *Id.* page 207.
[77] U.S. Department of State, Money Laundering Report – 2013.
[78] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, *supra* at. page 217.
[79] *Id.* page 217.
[80] *Id.* page 217.
[81] *Id.* page 217.
[82] *Id.* page 217.
[83] *Id.* page 217.
[84] *Id.* page 217.

It is not clear whether forfeiture of property of corresponding value is provided for under the POCAMLA.[85]

The POCAMLA does not provide for steps to prevent or void actions.[86]

The absence of statistics made it impossible to determine effectiveness.[87]

As of mid-2013, the POCAMLA still has not been used to freeze or seize criminal accounts.

The prevention of Organized Crimes Act also provides for seizure of cash and property used by organized criminals to commit an illegal act.[88]

c. *Recommendation 24 and Recommendation 25: Designated Non-Financial Businesses and Professions (DNFBPs)*

Lawyers and TCSPs are not subject to AML measures under the POCAMLA.[89]

There are no measures in place to enable the Betting Control and Licensing Board to prevent criminals or their associates from being the beneficial owner of a significant controlling interest in a casino.[90]

The same deficiencies identified under Recommendations 17 and 29 that apply to financial institutions also apply to the DNFBPs.[91]

DNFBPs are not monitored for compliance with AML measures.[92]

The overall effectiveness of the supervisory regime in the DNFBP sector could not be assessed.[93]

No guidelines have been issued to assist financial institutions to comply with their AML obligations under the POCAMLA.

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[85] *Id.* page 217.
[86] *Id.* page 218.
[87] *Id.* page 218.
[88] U.S. Department of State, Money Laundering Report 2013.
[89] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, *supra,* at page 225.
[90] *Id.* page 225.
[91] *Id.* page 225.
[92] *Id.* page 226.
[93] *Id.* page 226.

No feedback was provided to reporting entities.[94]

Guidelines do not provide reporting entities with a description of money laundering and FT techniques and methods[95]

No guidelines have been issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.[96]

d. Recommendation 26: Establishment of a Financial Intelligence Unit FIU)

In April 2012, the Kenyan government established its FIU, the Financial Reporter Center (FRC) and appointed an interim director. The FRC has obtained its own office space and is completing its staffing requirements. It still requires an automated system to analyze suspicious transaction reports (STRs).[97]

e. Recommendation 27: Ensuring Law Enforcement Authorities Have Responsibility for Money Laundering Investigations

The overall effectiveness for money laundering could not be assessed.[98] Some of the designated categories of predicate offenses are not criminalized in Kenya.[99]

f. Recommendation 28: Compulsory Powers to Obtain Evidence

The overall effectiveness for money laundering could not be assessed.[100] To demand bank account records or to seize an account, the police must present evidence linking the deposits to a criminal violation and obtain a court warrant. The confidentiality of this process is difficult to maintain and, because of leaks, account holders are tipped off about the investigations and then move their accounts or contest the warrants. The Office of the Public Prosecutor is organizing a special unit to address financial crimes and is collaborating with the Ethics and Anti-Corruption Commission to investigate illicit financial flows.[101]

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[94] *Id.* page 226.
[95] *Id.* page 226.
[96] *Id.* page 226.
[97] U.S. Department of State, Money Laundering Report 2013
[98] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, *supra,* at. *page 226.*
[99] *Id.* page 226.
[100] *Id.* page 226.
[101] U.S. Department of State, Money Laundering Report 2013

g. Recommendation 29: Adequate Financial Supervisory Authorities

The assessors could not establish whether the scope onsite inspections under the POCAMLA would include a review of policies, procedures, books and records, and extend to sample testing.[102]

The Center does not have the power to compel production or to obtain access to all records, documents or information relevant to monitoring compliance except in the context of an inspection.[103]

The overall effectiveness of the supervisory regime under the POCAMLA could not be assessed.[104]

The Central Bank of Kenya has closed down several foreign exchange bureaus for failing to comply with new, more stringent AML standards.[105]

h. Recommendation 30: Adequate Financial, Human, and Technical Resources

The FRC is not yet adequately staffed and funded to undertake its AML supervisory function under the POCAMLA.[106]

Staff members of supervisory authorities have not been provided with adequate and relevant training for combating money laundering and the financing of terrorism.[107]

Law enforcement agencies are not adequately funded to effectively carry out their mandates.[108]

There is no adequate training of law enforcement agencies on money laundering and financing of terrorism issues.[109]

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[102] *Id.* page 227.
[103] *Id.* page 227.
[104] *Id.* page 227.
[105] U.S. Department of State, Money Laundering Report 2013.
[106] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, supra,* at page 227.
[107] *Id.* page 227.
[108] *Id.* page 227.
[109] *Id.* page 227.

Kenyan law enforcement authorities lack the institutional capacity, investigative skill, and resources to conduct complex financial investigations, and a number of bureaucratic impediments present challenges.[110]

i. Recommendation 31: Effective Mechanisms to Cooperate and Coordinate Domestically

There is no mechanism in place to enable the FIU to cooperate and coordinate domestically with law enforcement and supervisory authorities concerning the development and implementation of policies and activities to combat money laundering as there is no operational FIU in Kenya.[111]

j. Recommendation 32: Effective Review of Money Laundering Systems by Maintain Comprehensive Statistics

Kenya does not review the effectiveness of its systems for combating money laundering on a regular basis.[112] Competent authorities in Kenya do not keep comprehensive annual statistics on matters relevant to the effectiveness and efficiency of systems for combating money laundering.[113]

k. Recommendation 35: Membership in International Enforcement Conventions

Kenya is a member of the Palermo Convention and UNCAC, but it has not become a member of the CoE Convention on Laundering, Search, Seizure and Forfeiture. It is a member of the ESAAMLG, a FATF FSRB.

It needs implementing legislation to fully implement the requirements under the Palermo Convention.[114] For instance, it has not criminalized participation in criminal organized group.[115]

Insufficient information, such as comprehensive statistics, exists to support implementation or use of special investigative techniques.[116]

Kenya lacks legislation providing assistance to and protection of victims.[117]

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[110] U.S. Department of State, Money Laundering Report 2013.
[111] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, supra*, at page 227.
[112] *Id.* page 228.
[113] *Id.* page 228.
[114] *Id.* page 229.
[115] *Id.* page 229.
[116] *Id.* page 229.

l. Recommendation 36: Mutual Assistance and Extradition

The Mutual Legal Assistance Act of 2011 provides for greater law enforcement cooperation in obtaining and sharing evidence or information with foreign states or international entities, without the need for an MLAT.[118]

i. Non-criminalization of some of the predicate offenses limits the extent of formal mutual legal assistance which can be offered.[119]
ii. Insufficient information kept to determine the effectiveness of the mutual legal assistance regime in Kenya.[120]

m. Recommendation 37: Rendering Mutual Assistance Without Dual Criminality

Since Kenya has not criminalized some of the predicate offenses, it can refuse a request on the offenses due to failure to satisfy the dual criminality requirement.[121]

The power of the competent authority to use its discretion in matters where the dual criminality requirement had not been met and that it was a requirement of the law, could not be determined due to absence of comprehensive statistics and decided cases on such requests.[122]

n. Recommendation 38: Authority to Act Expeditiously in Response to Foreign Requests to Freeze, Size, and Confiscate Proceedings of a Crime

Kenya lacks mechanisms to ensure that there is timeliness in attending to requests for provisional measures.[123] Other predicate offenses like corruption, migrant smuggling, and racketeering are not criminalized.[124] Kenya lacks clear provisions providing for forfeiture of property of corresponding value.[125] It does not have formal mechanisms to coordinate seizure and confiscation actions with other countries.[126] Statistics do not exist to determine the timeliness in effectively attending to requests for provisional measures.[127]

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[117] *Id.* page 229.
[118] U.S. Department of State, Money Laundering Report 2013.
[119] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya, Eastern and Southern Africa Anti-Money Laundering Group, September 2011, supra*, at page 229.
[120] *Id.* page 229.
[121] *Id.* page 229.
[122] *Id.* page 230.
[123] *Id.* page 230.
[124] *Id.* page 230.
[125] *Id.* page 230.
[126] *Id.* page 230.
[127] *Id.* page 230.

o. Recommendation 39: Recognizing Money Laundering as an Extraditable Offense

Kenya has not criminalized all the predicate offenses which make such offenses non-extraditable.[128] The overall effectiveness of the extradition regime could not be assessed.[129]

p. Recommendation 40: Providing Widest Possible Range of International Cooperation

The IRA and RBA do not have powers to enable them to conduct inquiries on behalf of foreign counterparts.[130]

The CBK, CMA and the RBA do not statutory powers to conduct investigations.[131]

It is not clear whether under the powers of the IRA to investigate as provided under section 9 of the Insurance Act is able to conduct investigations on behalf of foreign counterparts.[132]

The confidentiality provisions under the CM Act and the Insurance Act do not provide for exceptions to enable the CMA and the IRA to exchange confidential information with foreign counterparts.[133]

With respect to information which is received by competent authorities outside the scope of MOU or bilateral agreements, there are no appropriate controls and safeguards in place to ensure that information received by competent authorities is used only in an authorized manner.[134]

The overall effectiveness of the regime could not be assessed as competent authorities do not keep comprehensive statistics on matters of international requests that they make and receive, relating to or including AML/CFT, including whether the request was granted or refused.[135]

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[128] *Id.* page 230.
[129] *Id.* page 230.
[130] *Id.* page 230.
[131] *Id.* page 230.
[132] *Id.* page 231.
[133] *Id.* page 231.
[134] *Id.* page 231.
[135] *Id.* page 231.

E. Uganda

Much of this summary is based on the AML/CFT Assessment of Republic of Uganda has been undertaken by the World Bank under the Financial Sector Assessment Program, the U.S. State Department Money Laundering Report 2013, recent media articles on the Anti-Money Laundering Bill, and the ruling party's manifesto. In line with agreed procedures for ESAAMLG Mutual Evaluations, the Detailed AML/CFT Report and the Executive Summary were adopted by the Task Force of Senior Officials and the Council Ministers in August 2007.[136] An important development is that on or about July 12, 2013, the Uganda parliament passed the Anti-Money Laundering Bill, which President Musevini has 30 days to sign into law. At this point we have not confirmed whether the bill has become law and only have a couple of newspaper articles about its provisions.

1. Executive Summary

Ugandan authorities clearly state that they have the necessary political will and support from the Cabinet of Ministers to pass legislation that will meet the FATF Recommendations. Yet the bill had not been introduced into Parliament at the time of the August 2007 MER. Until legislation is passed which meets international standards, Uganda will, as in this assessment, be non-compliant with the international standards.[137] As mentioned above, in mid-July the Parliament did pass an anti-money laundering bill. It appears that, assuming the bill becomes law, Uganda will have made important strides in adopting anti-money laundering legislation.

There are some legislative provisions for seizure and confiscation powers for corruption cases, domestic terrorism and drug crimes. The FIA Act (S.8) provides for freezing of proceeds of crime but does not deal with forfeiture.[138]

2. Legal Systems

Current efforts to combat money laundering are piecemeal and based on other legislation such as the Anti-Terrorist Act of 2002 and the Financial Institutions Act of 2004. Ugandan efforts to combat money laundering are limited by the lack of comprehensive AML legislation, severe resource constraints, and internal government corruption. As of the end of June 2013, Uganda has not criminalized money laundering[139]

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[136] *Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism*, Republic of Uganda, Eastern and Southern Africa Anti-Money Laundering Group, August 2007.
[137] *Id.* page 9.
[138] *Id.* page 9.
[139] U.S. State Department Money Laundering Report 2013.

Uganda has deployed significant resources to institutions established to combat corruption. Ugandan officials recognize that money laundering and corruption are inextricably linked. Although Ugandan anti-corruption agencies have broad powers of investigation, prosecution and forfeiture, anti-money laundering legislation would significantly enhance the ability to combat corruption and related crimes.[140]

On December 11, 2002, the Cabinet approved the principles for the Uganda Anti-Money Laundering Framework, which formed the basis of the "Proposed Anti-Money Laundering Bill, 2004" (draft AML bill 2004).[141]

Although Uganda passed the amended Financial Institutions Act 2004 (FIA) and the Anti-Terrorism Act of 2002, these measures do not adequately address the core issues of the 40 Recommendations on Money Laundering and the 9 Special Recommendations on Terrorist Financing.[142]

Uganda has not done an internal assessment to determine its vulnerability to money laundering by type, magnitude, geographic location, nor has it identified the resources currently deployed against the vulnerabilities or determined what new resources are necessary. However, whenever asked, government officials and citizens alike state that government corruption at all levels is the greatest challenge that they face.[143]

An interview with the Customs Service showed duty fraud, which is causing substantial loss of revenue arising from the smuggling of cigarettes, oil, and drugs, to be their most significant threat. Of a lesser degree, but still of significance, is illegal trade in endangered/protected species and in counterfeit goods. Assessment by the Customs Service based on the amount and frequency of these events is that they are controlled by organized crime groups.[144]

The ruling party (NRM) has pledged to act to protect tourism, Uganda's fastest growing industry. Much of its tourism is ecotourism and is to experience game parks, birds, and animals. The administration has said it will take animal deterrent measures to reduce incidences of human animal conflict in the national parks.[145]

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[140] Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Uganda, Eastern and Southern Africa Anti-Money Laundering Group, August 2007, *supra.* page 7.
[141] *Id.* pages 7-8.
[142] *Id.* page 8.
[143] *Id.* page 13.
[144] *Id.* page 14.
[145] NRM Manifesto 2011-16, Prosperity for All better Service Delivery and Job Creation, at 84-87.

3. *Money Laundering Vulnerabilities*

A 2012 report by the Center on Global Counterterrorism Cooperation concludes that Uganda is "deeply vulnerable to money laundering and terrorist financing" and that "money laundering is rampant in the country."[146] Money laundering in Uganda arises primarily from government corruption, misappropriation of public funds and foreign assistance, and abuse of the public procurement process. Other widespread offenses for money laundering in Uganda include arms and natural resource smuggling, exchange control violations, and human trafficking.

Uganda's enormous cash-based informal economy provides an enormous opportunity for money laundering, as does its lack of anti-counterfeiting legislation which feeds a large black market for smuggled and/or counterfeit goods. Currently, most laundered money comes from domestic proceeds. However, Uganda's inability to monitor formal and informal financial transactions, particularly along porous borders with Sudan, Kenya, Tanzania, and the Democratic Republic of Congo render Uganda vulnerable to more advanced money laundering activities and potential terrorist financing. Uganda's black market takes advantage of these borders and the lack of customs and tax collection enforcement capacity. Annual remittances are Uganda's largest single source of foreign currency.[147]

Uganda is not a regional financial center and is not a major hub for narcotics trafficking or terror financing. It appears that a large percentage of the money laundering in Uganda is derived from domestic criminal actions, often related to smuggling counterfeit products, and other financial fraud. Large drug trafficking organizations, organized crime groups, and terror groups have historically not played a leading role in money laundering activities in the country. However, some of Uganda's weaknesses in monitoring financial transactions and the widespread use of cash may make it a potential target for money laundering in the future. The Government of Uganda does not effectively monitor cross-border financial activities.

The extensive use of cash instead of other financial instruments, even for major purchases such as real estate, also impedes the ability of authorities to monitor financial transactions.

The financial sector in Uganda is relatively small, with total assets equivalent to 29.5% of GDP in June 2002. It is undeveloped, with indicators of financial depth being low both in absolute terms and relative to most African comparators. In terms of its structure, commercial banks dominate the financial system, accounting for over 82 percent of financial assets, and traditional bank deposits represent the major form of financial savings. Other financial intermediaries are limited in number, small in size, and relatively ineffective. These include

[146] US State Department Money Laundering Report - 2013:
[147] *Id.*

pension funds, insurance companies, microfinance institutions, and other nonbank financial intermediaries.[148]

4. Compliance with International Anti-Money Laundering Standards

a. Recommendations 1 and 2: Scope of Criminalizing Money Laundering

There is no law criminalizing money laundering.[149] However, the Anti-Money Laundering Bill criminalizes money laundering and provides for the establishment of a Financial Intelligence Authority that would have unlimited access to any suspicious accounts for purposes of carrying out investigations into the source, destination, and recipients of the money.[150] Persons who convert, transfer, or transport property suspected to be proceeds from crime, or assist another person to benefit from such transactions are liable to imprisonment for a period not exceeding 15 years, or a fine not exceeding 2 billion Ugandan shillings, or both punishments.[151]

b. Recommendation 3: Provisional Measures and Confiscation

While several different laws provide confiscation authority in drug, corruption, and terrorist financing cases, they fall short of the international standards.[152]

The Financial Institutions Act provides the BOU with the ability to freeze accounts which are believed to be the proceeds of crime. However, the Act does not provide procedures for either asset forfeiture or releasing funds.[153]

There is no overall AML/CFT confiscation legislation.[154] However, a Proceeds of Crime bill was proposed in 2012-13 as part of Uganda's efforts to implement UNCAC and the African Union Convention for Preventing and Combating Corruption.[155]

In existing laws the scope of property subject to confiscation is inadequate.[156]
There are no procedures for tracing and identification.[157]

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[148] IMF, *Uganda: Financial System Stability Assessment, IMF Country Report* 04/97, 8-9 (April 2003)
[149] *Id.* page 19.
[150] Halima Abdallah, *Uganda finally passes anti-money laundering Bill in sync with partners*, THE EAST AFRICAN, July 13, 2013.
[151] Moses Mulondo and Mary Karugaba ,*Ugandan MPs Pass Anti-Money Laundering Bill*, ALLAFRICA.COM, Jul y 11 2013
[152] *Id.* page 22.
[153] U.S. State Department, Money Laundering Report 2013.
[154] *Id.* page 22.
[155] NRM Manifesto 2011-16, Prosperity for All better Service Delivery and Job Creation, at 43.
[156] *Id.* page 22.
[157] *Id.* page 22.

There is no uniform protection of bona-fide third parties.[158]

No confiscation action has been taken under existing law which brings into question the effectiveness of existing measures. The definition of funds subject to confiscation in the various laws does not address adequately funds indirectly held and controlled. There are no safeguards for bona fide third parties.[159]

c. Recommendation 24 and Recommendation 25: Designated Non-Financial Businesses and Professions (DNFBPs)

There are no AML/CFT provisions and no supervisory or other body oversees set-up or operations.[160]

In the absence of AML/CFT legislation, there is no requirement for DNFBPs to make suspicious transaction reports.[161] However, the 2013 Anti-Money Laundering Bill has requirements for DNFBP.

Guidelines have been issued for banking institutions, insurance companies and capital markets firms. Such guidelines do not deal with CFT. There are no guidelines for DNFBPs. There appears to be little, if any, feedback or assistance with STRs.[162]

AML guidelines do not deal with CFT and no guidelines address DNFBPs.[163]

d. Recommendation 26: Establishment of a Financial Intelligence Unit (FIU)

No national center exists for the receipt, analysis and dissemination of STRs.[164] However, the 2013 AML Bill establishes a Financial Intelligence Authority (FIA). There is no guidance issued regarding reporting requirements.[165] Where information is provided to the Bank of Uganda, there is no established mechanism to access LEA and other administrative information.[166] The reporting regime has no operational independence as it is currently undertaken as an ad-hoc function of the Bank of Uganda.

[158] *Id.* page 22.
[159] *Id.* page 22.
[160] *Id.* page 47.
[161] *Id.* page 41.
[162] *Id.* page 44.
[163] *Id.* page 47.
[164] *Id.* page 25.
[165] *Id.* page 25.
[166] *Id.* page 25.

There are no public reports, statistic, nor are typologies conducted.[167]

e. Recommendation 27: Ensuring Law Enforcement Authorities Have Responsibility for Money Laundering Investigations

There is no law enforcement authority (LEA) or other competent authority designated with responsibility for AML or CFT.[168]

f. Recommendation 28: Compulsory Powers to Obtain Evidence

The Penal Code and Drug, Corruption, and Anti-Terrorism Acts provide differing and inconsistent authorities for investigators and prosecutors to gain access to financial and other records needed to conduct investigations adequately. It appears that law enforcement has adequate authority to search and seize.[169]

g. Recommendation 29; Adequate Financial Supervisory Authorities

Supervision of AML is not consistently applied among the different types of financial institutions.[170] The BOU, CMA and the Insurance Commission, especially the CMA and the Insurance Commission, have not exerted their full powers to supervise AML and have not exercised enforcement powers.[171]

h. Recommendation 30: Adequate Financial, Human, and Technical Resources

LEA and other competent authorities do not have AML components or regimes. There is no practice of inter-agency taskforces.[172]

The Criminal Investigations Department (CID) of the Ugandan Police Force is understaffed and lacks adequate training in financial investigation techniques related to money laundering and terrorist financing. Internal corruption within the CID also hampers police investigative capacity. According to GOU officials, criminals often have access to technology that is more sophisticated than that available to police investigators.[173]

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[167] *Id.* page 25.
[168] *Id.* page 33.
[169] *Id.* page 33.
[170] *Id.* page 43.
[171] *Id.* page 45.
[172] *Id.* page 33.
[173] US State Department Money Laundering Report -2013.

Consideration has not yet been given to integrity and other issues, such as training and technical resources, that would affect an efficient AML regime.[174]

There are no administrative or operational structures, including no provision for training, in place within the law enforcement and or prosecution agencies to effectively deal with money laundering. The BOU has adequate financial, human, and technical resources with which to conduct supervision and does include AML as an area of supervision. However, because the BOU has no effective enforcement authority, its effectiveness is limited.[175]

LEA and other competent authorities have structures within their current organizations. Unfortunately they do not have AML components or regimes. There is some work but not on money laundering.[176]

Consideration has not yet been given to integrity and other issues such as training that will affect an efficient AML/CFT regime.[177]

i. Recommendation 31: Effective Mechanisms to Cooperate and Coordinate Domestically

While operational cooperation exists, this does not extend to money laundering or terrorism financing matters.[178] The AML Bill of 2013 had provisions to create a national Anti-Money Laundering Task Force. However, the provisions were struck because they were considered a duplication of the roles of the FIA.[179] There is no evidence of cooperation or coordination at a higher policy level.[180]

j. Recommendation 32: Effective Review of Money Laundering System by Maintaining Comprehensive Statistics

There are no mechanisms for measuring effectiveness.[181]The only statistics currently held are crime statistics which do not reflect AML components.[182] The limited existing statistics have never been analyzed to assess AML risks.[183]

[174]Mutual Evaluation/Detailed Assessment Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Uganda, Eastern and Southern Africa Anti-Money Laundering Group, August 2007, *supra*, *at* page 33.
[175] *Id.* page 25.
[176] *Id.* page 43.
[177] *Id.* page 43.
[178] *Id.* page 51.
[179] Mulondo and Karugaba, *supra.*
[180] *Id.* page 51.
[181] *Id.* page 25.
[182] *Id.* page 33.
[183] *Id.* page 33.

k. Recommendation 35: Membership in International Enforcement Conventions

The government has signed and ratified the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption (UNCAC) and the African Union Convention for Preventing and Combating Corruption. The combined effect of the provisions of these treaties is to oblige the government to introduce into its domestic legislative framework laws pertaining to the recovery of the proceeds of corruption and other crime.[184] The relevant AML conventions must be domesticated and fully implemented.[185]

l. Recommendation 36: Mutual Assistance and Extradition

There are no laws or other mechanisms in place.[186]

m. Recommendation 37: Rendering Mutual Assistance Without Dual Criminality

There are statements of government officials that they will provide mutual legal assistance upon request. However, there are no laws that address mutual legal assistance in AML matters.[187]

n. Recommendation 38: Authority to Act Expeditiously in Response to Foreign Requests to Freeze, Seize, and Confiscate Proceeds of a Crime

There are no laws or other mechanisms in place.[188]

o. Recommendation 39: Recognizing Money Laundering as an Extraditable Offense

The Extradition Act (1968) does not address AML. The Extradition Act needs to be amended to include AML offenses. As written, dual criminality is a requirement for extradition. The Minister may, by statutory instrument, amend the schedule of extraditable offenses (adding, editing, and altering) at his discretion. But no changes have been made. AML are not addressed in the Act or by ministerial discretion.[189]

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[184] U.S. Department of State Narcotics Report 2012; NRM Manifesto 2011-16, Prosperity for All better Service Delivery and Job Creation, at 43.
[185] *Id.* page 52.
[186] *Id.* page 52.
[187] *Id.* page 53.
[188] *Id.* page 52.
[189] *Id.* page 53.

p. Recommendation 40 (Giving Competent Authorities the Widest Bases to Cooperate)

There is no for mechanism for providing assistance in a consistent manner.[190]

II. NEW LEGISLATION TO PROVIDE FORFEITURE INCENTIVES UNDER THEIR OWN LAWS, WITH SHARING PROVISIONS THAT DIRECTLY BENEFIT PARK RANGER AGENCIES

This section discusses the optimal legislation to provide forfeiture incentives under national laws with sharing provisions that directly benefit park ranger agencies.

A. The Need for a Fully Functioning the Criminal Justice System[191]

To properly discuss targeting the financial aspect of elephant poaching and ivory trafficking requires the consideration of relevant actors in criminal justice systems. Detecting and prosecuting crimes require investigators, prosecutors, and sentencing/confiscation officials. Each of the functions involves different professionals who must cooperate in order to ensure the adequate and effective treatment of a case.

Law enforcement is effective only when it operates as an integrated process – when intelligence about possible criminal activity is collected, analyzed, and disseminated to criminal investigators who can effectively develop the evidence required to prove that a crime has been committed and work collaboratively with prosecutors to obtain the conviction. These prosecutors should be skilled in preparing the case for presentation to the court and will be able to pursue those cases that, in their view, make the most effective use of resources in punishing past crimes and helping to prevent future crime. The success of prosecutions depends, in large part, on how well the key stakeholders can coordinate their different functions into a continuous and single-minded process. With respect to wildlife and elephant poaching enforcement, the key players will be park rangers, environment officials, financial intelligence units, investigators, customs officials, financial intelligence units, prosecutors, and judges.

Park rangers and environmental officials are on the front lines in detecting elephant poaching. While they may be considered on the margins of the criminal justice process compared to some law enforcement officials, the park rangers are in the best position to provide intelligence about crimes relating to elephant poaching because the crimes occur in the parks. Forest rangers usually detect the crimes when they are doing routine monitoring and inspection.

[190] *Id.* page 54.
[191] This section is based on Marilyne Pereira Goncalves, Melissa Panjer, Theodore S. Greenberg, and William B. Magrath, JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING (World Bank 2012), especially Chapters 2, 3 and 4.

Other sources of detection include informants, aerial surveillance, and satellite detection. However, park rangers rarely have specialized legal or police training and generally do not have the skills or equipment for maintaining evidence and interviewing witnesses. Park rangers also play an important role in the detection of wildlife trafficking and elephant poaching through park management systems. Such systems may include putting GPO necklaces or devices on elephants and other methods to keep track of elephants and the other wildlife in the parks under their control.

Park rangers are often poorly paid compared to other enforcement positions. They may lack some of the most basic equipment needed to properly detect crimes and detail suspects, including uniforms, vehicles, fuel, weapons, ammunition, field quarters, and radios/computers/iPhones. In some countries, park rangers have no enforcement powers at all and must refer all suspects and all enforcement actions to the police. In other countries, park rangers have only limited power to enforce environmental laws

Police, border guards and customs officials also play an important role in preventing and detecting elephant poaching and/or ivory trafficking. For example, customs officials are in a position to prevent the movement of unauthorized shipments across borders with false documentation, while the police may encounter trucks transporting poached elephant parts, such as tusks on the roads. The police may also be presented with forged transport permits. Determining the guilty party, whether it be the poacher, driver, contract company, managing company, sourcing company, or individuals present within these companies is often beyond the capability of forestry and police officers or local investigators. Faced with this problem, they often choose instead to take no action. They may disengage and fail to investigate.

Criminal investigators usually take the lead in analyzing intelligence to identify criminal activity or targets and in gathering evidence that can trigger the next phase of the process and finally prove the criminal offense. This occurs through interviewing witnesses, collecting evidence (including forensic or other scientific evidence), and by gathering and analyzing documents, such as financial, public, or business records. In civil law jurisdictions, the investigation phase is undertaken under the supervision of the investigating magistrate on the case.

One of the most important roles of a criminal investigator is interviewing suspects. The resulting confessions, or extraction of information and lead intelligence, can be vital to developing a case. Investigators, in consultation with prosecutors, will often decide whether the person moves from the category of “suspect” to “witness” or “participating informant” or “accused.”

Financial intelligence units (FIUs) are important players where anti-money laundering and asset confiscation are concerned. These units have the responsibility to collect, analyze, and disseminate suspicious transaction reports (STRs) coming from financial institutions, such as banks, insurance companies, and designated non-financial businesses and professions (e.g., company formation agents, lawyers, accountants, or notaries) to law enforcement agencies. Often, these reports provide the first indication of money-laundering offenses involving the proceeds of underlying predicate crimes, which may constitute the profits obtained through elephant poaching and/or ivory trafficking. Where appropriate, FIUs disseminate their analysis of STRs to law enforcement, who may initiate a criminal investigation to determine if prosecution is warranted. In such a case, the investigator or prosecutor should be able to make an inquiry with the FIU to see if any large cash transactions or other suspicious transactions have been reported.

Prosecutors guide and lead the investigation in consultation with the investigators. When these parties cooperate effectively and coordinate their efforts from the start of a criminal inquiry, success is often achieved. Their work helps ensure that the evidence is admissible (e.g., it fulfills legal standards of reliability and relevance). In addition, through their cooperation, prosecutors and investigators can develop a coherent strategy for the investigation. This may determine the prosecutor's courtroom strategy and increases the potential of obtaining a conviction. Like the investigator, the prosecutor must determine which offenses apply, which crimes can be proven, and who is to be charged from among the potential defendants - whether they are the poachers, driver, contract company, managing company, sourcing company, or individuals present within these companies.

When trying a case, one of the prosecutor's critical tasks is the synthesis of various parts of evidence into a coherent structure. He or she must cogently present the case for conviction through each new piece of evidence, presenting it in a manner that is clear and logical and which falls within the applicable procedural rules. Often, the prosecutor must also educate the court about which laws apply. Therefore, the prosecutor must have sufficient expertise in the procedure that dictates how that evidence must be brought before the court, as well as a detailed understanding of the specific laws that apply and where park and environmental laws and regulations are at issue, the overall regulatory scheme. The prosecutor bears the burden of convincing the court that the accused committed the crimes as charged and the prosecutor must link that criminal activity to any proceeds to ensure confiscation. Of course, these tasks will be impossible if investors, police, and park rangers do not collect and preserve the evidence required to prove the offense in court.

Prosecutors of wildlife trafficking must have experience with particular evidentiary problems that frequently arise in these cases. For instance, to show that an elephant was poached in an area not allowed, the prosecutor must prove that a confiscated ivory tusk came from a

particular elephant in the country and area in question during the time period in question. The prosecutor could use DNA matching, but that is often too expensive. Sometimes, a chain of custody for the elephant parts or tusk must be proven in court and witnesses must testify to establish that the piece came from that particular park and matches a particular elephant. This may be especially challenging in countries that do not allow photographic evidence. In addition to such technical problems, prosecutors may also be faced with evidence that is not admissible in court because the forest rangers or other investigators taking the evidence did not have sufficient training to meet evidentiary requirements.

Judges ultimately decide whether the defendant is guilty or innocent and, if guilty, for what crimes, and whether any proceeds of the crime may be confiscated. In this process, they must also make a number of other decisions, such as whether the evidence offered by the prosecutor or defense attorney is admissible (that is, meets certain legal standards making it eligible for consideration) and whether the prosecutor has presented sufficient evidence to convict the accused. Judges are also responsible for imposing punishments.

These major acts in elephant poaching and ivory trafficking have not traditionally worked well together and their lack of cooperation has often obstructed effective enforcement. If each of these stakeholders was to have a more detailed appreciation of the role of other players, cooperation would undoubtedly improve, helping to remove one of the key impediments to conviction - lack of communication between the various parts of the system.[192]

B. Targeting the Financial Aspect of Elephant Poaching and Ivory Trafficking

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is important in that it subjects the trading of species to certain controls for import, export, re-export, as well as the introduction of specific plants and animals. A weakness of CITES is its lack of an international enforcement mechanism. Hence, the approximately 178 states party to CITES must adopt their own domestic legislation to ensure that CITES is implemented in their country and can be enforced within that jurisdiction. In the effort to combat elephant poaching and trafficking in ivory, CITES is useful because it provides a legal basis for international cooperation and the establishment of the same crime in multiple jurisdictions around the world.

1. Crimes for Elephant Poaching

Countries that are parties to CITES are required to criminalize and make it unlawful for any person: (1) to import or export raw ivory from any country other than an ivory-producing country; (2) to export raw ivory from the legislating country; (3) to import raw or worked ivory that was exported from an ivory producing country in violation of that country's laws or of the

[192] *Id.* at 11-14.

CITES Ivory Control System; (4) to import worked ivory, other than personal effects, from any country unless that country has certified that such ivory was derived from legal sources; or (5) to import raw or worked ivory from a country for which a moratorium is in effect.

Some countries such as the U.S. have established a moratorium on the import of African elephant ivory. For instance, the U.S. established a moratorium on the import of African elephant ivory in 1989 which is still in effect. As a result, it is illegal to import raw African elephant ivory into the U.S. from any country unless certain conditions are met.

2. *Offenses that Criminalize the Facilitation of Access to and Profiting from Elephant Poaching and Ivory Trafficking*

Elephant poachers and ivory traffickers may also engage in a series of criminal acts, apart from elephant poaching and ivory trafficking that will facilitate their access and profit from such activities. The link between elephant poaching and corruption is widely recognized. Corrupt regulatory (e.g., customs) and park ranger officials accept bribes and grease payments in exchange for protection from prosecution for elephant poaching or in the case of customs officials for not inspecting containers or shipments or not enforcing the law when they detect illegal ivory. Such conduct may overlap with a number of different offenses prosecuted in the fight against corruption: active or passive bribery of national or foreign public officials; embezzlement of public funds or property; trading in influence (giving an undue advantage with a view to obtaining abuse of the official's influence); illicit enrichment (significant increase in the assets of a public official that cannot be explained by legitimate income); abuse of functions of position (an official takes action or fails to take action in discharging his or her function in exchange for undue influence); bribery or action in discharging his or her function in exchange for undue influence); bribery or embezzlement in the private sector; concealment of an offense; or obstruction of justice.[193]

It is important to criminalize and seize assets that are instrumentalities and facilitate the crime of poaching and the further crime of trafficking in ivory. The assets include trucks, cars, and helicopters and/or planes that are used to transport persons to the parks where elephants are found and then transport the ivory tusks and/or elephant parts from the park to the ship, planes, and/or vehicles to transport them out of the country.

Once the tusks are brought for further work and/or then exported, criminal groups also use trucks, cars, ships and/or planes to transport the tusks and/or ivory pieces to the consuming countries. To the extent the owners of these vehicles know that ivory pieces and/or tusks are being transported, the owners and their vehicles become instrumentalities of the crime and subject to seizure.

[193] For a list of general corruption offenses, *see* the UN Convention against Corruption (UNCAC), Articles 15 to 25.

As a result of the international dimension, elephant poaching and ivory trafficking operations often involve sophisticated criminal organizations and a whole chain of criminals and criminal activity. For instance, CITES has reported that illegal killing of large numbers of elephants for their ivory is increasingly involving organized crime and, in some cases, well-armed rebel militias. Some poached ivory is believed to be exchanged for money, weapons, and ammunition to support conflicts in several African countries. A significant poaching incident has been reported in the Garamba National Park in the Democratic Republic of the Congo.[194]

As a result of the involvement of criminal organizations, criminal laws prohibiting aiding and abetting, criminal organizations, and conspiracy can serve as important mechanisms in dealing with elephant poaching. Conspiracy is an agreement to undertake some illegal act or purpose. While the specifics of what is required to prove conspiracy may vary across jurisdictions, all judges recognize conspiracy as a serious crime and may impose heavier penalties for related offenses.

Elephant poaching may also involve violent crimes, such as extortion, kidnapping, or murder in the course of poaching or ivory trafficking.

3. *Offenses by which the Offender Benefits from the Possession of Illegal Elephant Parts and Ivory*

Additional offenses may be committed at a later stage in the production chain, once the elephant poaches have killed the elephants and are in a position to earn the profits of their illegal activities. These offenses often occur during the transport and sale of illegal ivory and elephant parts. They include trafficking in stolen goods, receiving or concealing stolen goods, tax evasion, smuggling and other customs violations (false declarations), as well as money laundering. Money laundering involves, among other actions, the concealment of the source of illegally obtain funds or the manipulation of such funds so that they appear to be of legal origin. Money laundering may involve placing the proceeds of crime into the financial system, moving illicit gains and transferring them into different assets as a means of disguising their nature and integrating the proceeds of crime with the proceeds of illegal activities.

In the illegal trafficking of ivory context, smuggling consists of transporting ivory across borders in violation of the national law or international conventions (such as CITES). It will often involve species whose transport is banned under national law, or export without the appropriate permits. The movement of illegal ivory across borders also means that the parties are guilty of avoiding payment of the applicable import or export duties. The perpetrators are often also guilty of tax evasion, having illegally killed an endangered species and profited from

[194] CITES, *Eight countries submit national action plans to combat illegal trade in elephant ivory*, Press release, May 16, 2013.

the same, but having failed to declare earnings and pay the applicable tax. The perpetrators may also be guilty of violating foreign bank and asset reporting laws.

Most of the above-mentioned offenses concern direct involvement in the elephant poaching, processing, or transport of the ivory or elephant parts. However, law enforcement and prosecutors should not neglect the potential opportunity of bringing charges against other parties involved at different stages in the processing and sale of illegal ivory and elephant parts. For instance, the smuggling and transportation of ivory is generally handled by parties distinct from those involved in the actual elephant poaching. Indeed, the whole process may be overseen by the heads of organized syndicates. All these parties, whether individuals or other criminal organizations, should not be ignored by law enforcement because eliminating these actors can help to cut off the flow of ivory to the market. Additionally, these people may be willing to identify other individuals and groups involved in the illegal elephant poaching or trafficking in ivory in exchange for more lenient sentences. In the money laundering context, the professionals who assist criminals with laundering their money – often bankers, lawyers, accountants, or real estate brokers, may also be guilty of money laundering.[195]

4. *Targeting Money Laundering and Asset Forfeiture, Including of the Instrumentalities of the Crime*

Two important mechanisms that can and should be utilized to combat the financial dimension of elephant poaching and predicate offenses are money laundering and asset forfeiture and sharing. These two regimes can simultaneously prevent criminals from enjoying the proceeds generated by their involvement in illegal activities and deny them the funds and instrumentalities to carry out those activities.

a. *International Law Obligations to Seize and Confiscate the Instrumentalities of the Crime*

As discussed below, international law requires the seizure and confiscation of the instrumentalities of organized crime, such as elephant poaching and ivory tracking. In particular, Article 12 of the Palermo Convention on Transnational Organized Crime provides as follows:

Article 12. Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

[195] *Id*. at 17-19.

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

In the case of elephant poaching, law enforcement officials who catch poachers may also be able to seize and start forfeiture proceedings against the instrumentalities the poachers are utilizing. As discussed above, the assets include trucks, cars, and helicopters and/or planes that are used to transport persons to the parks where elephants are found and then transport the ivory tusks and/or elephant parts from the park to the ship, planes, and/or vehicles to transport them out of the country. It is possible that the instrumentalities may involve a building or warehouse used by criminals to dismember the elephant and/or start carving or processing the tusks or elephant parts. Instrumentalities may include bank accounts used to receive and/or pay money to participants in the crimes. The instrumentalities may be partly in the country in which the elephants originate and they may be partly in other jurisdictions.

Once the tusks are brought for further work and/or then exported, criminal groups also use trucks, cars, ships and/or planes to transport the tusks and/or ivory pieces to the consuming countries. To the extent the owners of these vehicles know that ivory pieces and/or tusks are being transported, the owners and their vehicles become instrumentalities of the crime and subject to seizure.

b. International Law Obligations to Criminalize Money Laundering

Anti-money laundering laws provide a category of offense that criminalizes the movement or transfer or concealing of any funds that constitute the proceeds of a criminal offense. In this regard, Articles 6 and 7 of the Palermo Convention provide as follows:

> Article 6. Criminalization of the laundering of proceeds of crime
> 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> > (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
> > (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7. Measures to combat money-laundering

1. Each State Party:

(a) 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 emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national center for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavor to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.[196]

c. FATF Requirements with Respect to Criminalizing Money Laundering

To meet international law standards, each of the five countries discussed must meet the FATF requirements.

Recommendation 3 of the current (2012) FATF Recommendation states as follows:

"Countries should criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offense."

Interpretative Note 2 to Recommendation 3 states that countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offenses may be described by reference to all offenses; or to a

[196] JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING, supra.

threshold linked either to a category of serious offenses; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.

According to Interpretative Note 3, if countries apply a threshold approach, predicate offences should, at a minimum, comprise all offenses that fall within the category of serious offences under their national law, or should include offences that are punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months imprisonment.

Interpretative Note 4 states that the offense of money laundering should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime. When proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence. In other words, every country should have non-conviction based asset forfeiture – either in rem or civil based asset forfeiture.

Anti-money laundering laws have a much wider scope than environmental and anti-poaching laws because they permit the prosecution of individuals and entities who manipulate the proceeds derived from the poaching of elephants or other related crimes mentioned above, known as "predicate offenses". In this regard, it should be noted that environmental crime is included as a predicate offense by FATF. The money laundering offense criminalizes participation in schemes designed to legitimize the illicit origin of funds where someone knows – or should have known – the illegal origin of those funds, even if they do not necessarily know which specific predicate offense generated them. For instance, this would include a banker, financial advisor, lawyer, or any other individual who performs a financial transaction with the intention of concealing the illegal origin of their client's funds. When proceeds of elephant poaching and/or ivory trafficking are invested in real estate or exchanged for arms or commodities, notaries, real estate agents and brokers, or other professionals who participate in the transactions are guilty of money-laundering, provided that those professionals know that the proceeds are of illegal origin.

The use of money laundering laws to elephant poaching and ivory trafficking is beneficial in several other respects. Money laundering is a separate offense that carries additional jail time and serves as a legal basis for freezing and confiscating proceeds of crime. In many cases the scope for legal action and applicable penalties are greater and more severe than those associated with environmental laws. In addition, AML laws create greater access to financial records and information, which can also help to develop the information required for asset confiscation.

AML laws and regulations require banks and other financial institutions, as well as designated non-financial entities, to adopt "know your customer" (KYC) policies. These policies are intended to prevent criminals from placing proceeds of crime into the banking system and the

legitimate economy. This occurs through the implementation of customer due diligence (CDD) whereby banks and other entities (called "reporting entities") require customers to provide identification and verify the information provided by the customers. The reporting entities must also develop a customer profile that can subsequently be used to monitor accounts (e.g., identifying any abnormal transactions) and to report any suspicious transactions to the country's Financial Intelligence Unit (FIU). In cases involving elephant poaching, a bank must submit a STR to the FIU whenever it suspects that a customer is involved in a transaction using assets that may be the proceeds of elephant poaching and ivory trafficking.

AML laws are especially relevant to elephant poaching and/or ivory trafficking because they require banks to proceed to enhanced due diligence measures for high-risk customers. These are customers who are more likely to be involved in crime, such as persons engaged in transnational organized crime or Politically Exposed Persons (PEPs). In the context of elephant poaching and/or ivory trafficking, PEPs are government officials and other individuals who are in a position to become involved in elephant poaching and/or ivory trafficking, whether by virtue of their position in a government agency, or because of their involvement in a seemingly legitimate business associated with elephant poaching and/or ivory trafficking. It should be done on the occasion of any large cash withdrawals which may be used to pay suppliers, poachers, or bribes, or on receipt of transfer payments from abroad which may originate from the buyers of the ivory or elephant parts.

Governments and other bodies can act to facilitate the use of AML legislation in the environmental and wildlife sector. If they have not already done so, countries can criminalize the financial backers of elephant poachers and require their banking supervisory authorities to monitor the implementation of these principles specifically by banks and informal transfer value agents that have clients in the elephant poaching and/or ivory trafficking. Another measure would be for a country to go beyond the international standards and expand the implementation of KYC and reporting obligations to any business or profession that it at risk to being misused for the laundering of the proceeds of elephant poaching and/or ivory trafficking in its jurisdiction.

The prosecution of money laundering offenses also permits the scarce law enforcement resources to be targeted on those areas where they will have the strongest effect. Due to their international aspect, these prosecutions facilitate cross-border cooperation - a key component in investigating and prosecuting elephant poaching and/or ivory trafficking perpetrators. Elephants poached in one country often process the ivory in another and monies earned from their sale in still a third country will often be invested abroad as well. The FATF urges countries to recognize crimes committed in another country as predicate crimes if they would have been such under their own money laundering laws.[197]

[197] FATF 2012 Recommendations, Rec. 19.

Hence, the fact that the predicate crime of elephant poaching and/or ivory trafficking may have occurred in Countries A and B would not prevent Country C from prosecuting any laundering of the proceeds of the poaching and/or ivory trafficking occurring within its jurisdiction.[198]

d. FATF Requirements on Confiscation and Provisional Measures

FATF Recommendation 4 provides as follows:

> Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations, or (d) property of corresponding value. Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or avoid actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures. Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law

In adopting and/or implementing measures with respect to confiscation and provisional measures, each country should be guided by the FATF best practices on confiscation and a framework for ongoing work on asset recovery.[199]

i. Tracing and Investigation

Measures should be in place to identify, trace and evaluate property that is subject of confiscation. FATF Rec. 38 requires the existence of authority to take expeditious action in response to requests by foreign countries to identify property that may be subject to confiscation.

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[198] JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING, supra, at 3.

[199] FATF, Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery (Oct. 2012).

Best practices for countries to strengthen legal frameworks and ensure that asset tracking and financial investigations can be conducted effectively include the following:

(a) Appropriate procedures and legal frameworks must operate to permit informal exchanges of information, including prior to making the letter of request for mutual legal assistance. These procedures and frameworks may include building relationships between practitioners. These procedures and practices can assist in focusing efforts and resources before the request reaches a formal stage.
(b) Competent authorities should also engage with foreign counterparts, from a bilateral or regional perspective, and utilize appropriate international bodes such as the Egmont Group, Interpol, Europol, and Eurojust or even create their own groups as discussed below in Part III (potential additional mechanisms).
(c) Appropriate procedures and legal frameworks must operate to permit information deemed to be useful to be share spontaneously, subject to controls and safeguards to ensure that the information is used only in an authorized manner, without a request being received to trigger this exchange. The practice of spontaneously exchanging information concerning asset tracing and financial investigation helps to facilitate a culture of reciprocity.
(d) General arrangements should exist, including formal bilateral asset sharing agreements, with other countries. The existence of such asset sharing agreements should not be a prerequisite for cooperation, but may have a significant bearing on the resources allocated to facilitate asset tracing requests. Formal bilateral asset-sharing agreements are often a significant incentive to the executing country to respond diligently to requests for asset tracing.

FATF has set forth best practices for countries to minimize structural impediments to effective asset tracing and financial investigation.

(a) They should ensure that foreign counterparts can easily identify appropriate points of contact.
(b) At the domestic level, countries should implement mechanisms to coordinate asset tracing and financial investigations with a view to ensuring that such efforts are not impeded by regionalized or fragmented systems, or competing local priorities.
(c) Countries should consider establishing specialized units or dedicated personnel with training in specialized financial investigation

techniques. Such personnel should have adequate resources and training.

(d) Countries should establish mechanisms permitting rapid access to high quality information on ownership and control of such property (e.g., land, vehicles, and legal persons). This information should be available without the need for a formal request.

(e) Countries should explore mechanisms, in consultation with the private sector, that would facilitate more rapid access to financial information, including where the requesting country has only minimal information (e.g., the specific account number is not previously known). For instance, countries could consider, among other things, the feasibility of establishing a central register of bank accounts or, alternatively, other mechanisms that would offer less fragmented access to financial information which is already being held in a centralized manner.

FATF has enunciated the following best practices for countries to help to streamline the process and procedures for conducting asset tracing and financial investigations.

(a) In the case of both formal and informal requests, competent authorities should underscore the importance of handling external requests in a timely way, as a policy goal. Setting targets and monitoring performance in executing asset tracing requests from overseas would be useful to ensure that such policy goals are met.

(b) In case of formal requests, competent authorities should reduce any unnecessary bureaucracy, both in terms of making the requests (if requests are filtered through central points domestically) and in terms of receiving and processing incoming requests. For instance, agreed standard formats and terminology for submitting requests between countries would help reduce bureaucratic impediments.

To address cultural issues that may cause problems for asset tracing and financial investigations, it is best practice for countries to promote a culture of reciprocity, based on a mutual level of trust and understanding, whereby each country can expect to receive an acknowledgment that appropriate and timely action is being taken. This practice would help to strengthen asset tracing and financial investigations at the international level, particularly where effective bilateral agreements or informal networks currently do not exist, or where requests are given lesser priority on the basis that the requesting country is poor at facilitating asset tracing.[200]

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[200] *Id.*, Sec. III (Tracing and Investigation).

ii. Provisional Measures (Freezing/Seizure)

FATF Rec. 38 requires countries to have authority to take expeditious action in response to requests by countries to identify, freeze and seize property laundered, proceeds from money laundering or predicate offenses, instrumentalities used or intended for use in the commission of these offenses, or property of corresponding value.

FATF has set forth that the mechanisms used to take this action should have the following features:

(a) The executing country can take freezing or seizing action on the basis of requests submitted before criminal charges have been made in the requesting state.

(b) The executing country can take freezing or seizing action, within the short timeframes that are required to be effective, upon receiving a request for provisional measures. Such requests can be enforced directly or indirectly. However, as a rule, to the extent that it is not inconsistent with the fundamental principles of a country's domestic law, direct enforcement (i.e., accepting/registering and directly instating steps to enforce the freezing or seizing order issued by the requesting country) is a more effective and swift way to comply with foreign requests for provisional measures than indirect enforcement (i.e., the executing country will obtain a domestic order using the evidence contained in the foreign request).

(c) The executing country has a framework in place that would enable it to keep the freeze/seizure in place until the requesting country has ruled upon the fate of the property concerned (either lifting of the freeze/seizure or confiscation of the property). This practice is intended to give to the requesting country sufficient time to lead its criminal proceeding to a confiscation decision on the property seized pursuant to the mutual legal assistance request. However, it should be noted that the ability to uphold a freezing/seizing action may depend on how expeditiously the requesting country is able to conclude its proceedings.

(d) The possibility of appeal from a decision to take provisional measures on the basis of a foreign request is limited to the minimum allowed by due process rules and, in the case of an appeal, the freezing/seizing action is not suspended. This practice facilitates the maintaining of the provisional measures.[201]

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[201] *Id*., Sec. V [Provisional Measures (Freezing/Seizure)].

iii. Non-Conviction Based (NCB) Confiscation

FATF Rec. 4 provides that countries should consider adopting measures that permit laundered property, proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation) to the extent that such a requirement is consistent with the principles of their domestic law.

To facilitate the recognition and enforcement of foreign confiscation orders in the widest range of cases, FATF Rec. 38 requires countries to have the authority to respond to requests made on the basis of non-conviction based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.

Non-conviction based confiscation may occur in the context of criminal laws and proceedings, or through a separate system or law outside criminal proceedings.

In responding to requests for cooperation made on the basis of non-conviction based confiscation proceedings, the Interpretive Note to FATF Rec. 38 requires counties to be able to act, at a minimum, in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or the perpetrator is unknown.

Non-conviction based confiscation is a useful mechanism in several other circumstances. The may include circumstances where property is found:

(a) But a conviction could not be obtained for procedural or technical reasons (e.g., the statute of limitations is exceeded);
(b) But substantial evidence exists to establish that the proceeds were generated form criminal activity, but there is insufficient evidence to meet the criminal burden of proof;
(c) But a criminal investigation or prosecution is not realistic or impossible;
(d) But the perpetrator has been acquitted of the predicate offense because of insufficient admissible evidence or a failure to meet the burden of proof;
(e) That was generated from other or related criminal activity of the convicted person (i.e., extended confiscation); or
(f) Is immune from prosecution.

It is best practice for countries to explore ways to recognize the non-conviction based confiscation orders of other countries, even if they do not have the same such orders. [202]

[202] *Id*., Sec. VI. (Non-Conviction Based Confiscation).

In establishing a forfeiture system, including NCB asset forfeiture, jurisdictions must consider whether NCB asset forfeiture laws can be incorporated into existing laws or whether a separate statute is warranted.[203]

The key concepts in NCB asset forfeiture has been set forth. The first key concept is that, while NCB asset forfeiture can be an effective tool to recover assets connected to crime, it should not be used as an alternative to criminal prosecution when a jurisdiction has the ability to prosecute the violator. It should be complementary to criminal prosecutions and convictions.[204]

The relationship between an NCB asset forfeiture case and any criminal proceedings, including a pending investigation, should be defined. The simultaneous approach, allowing criminal prosecution and NCB asset forfeiture action to occur simultaneously, is preferred although both need not proceed at the same time. They can both proceed without violating protections against double jeopardy because NCB asset forfeiture is neither a "punishment" nor a criminal proceeding.[205]

An important principle is that NCB asset forfeiture should be available when criminal prosecution is not available (e.g., property owner is unavailable because he is dead, fled the jurisdiction, or enjoys immunity from prosecution) or successful. A prosecution may not be successful because evidence gathered may be inadmissible, a witness may recant, or due to judicial or some other corruption in the legal system.[206]

Domestic NCB asset forfeiture systems operate more effectively when there are evidentiary and procedural rules that are specific and well defined. Specificity promotes uniformity in application and reduces the opportunity for judicially imposed rules that may be inconsistent with the intent of the legislation. Laws, administrative rules and rules of procedure should normally cover the following: investigations, including methods for obtaining evidence; tracing required by the government to substantiate its case; restraint and seizure of assets, including the duration of restraints and seizures and the ability to seek judicially approved extensions of time; forfeiture; asset management; and international cooperation, including whether dual criminality is required for international cooperation, and the extraterritorial effect of a restraint and recovery order (or final order).

The laws, administrative rules and rules of procedure on forfeiture should typically cover the following: requirements for the factual and legal basis for ordering forfeiture; parties with standing, third party interests, status of fugitives (that is, fugitive disentitlement) decedents, and officials with immunity; parties entitled to notice and how it is to be effected; time limits for filing and responding to forfeiture actions; rules, if any, protecting against self-incrimination in

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[203] Theodore S. Greenberg, Linda M. Samuel, Wingate Grant and Larissa Gray, STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE 222 (2009).
[204] *Id.* at 29.
[205] *Id*. at 30-31.
[206] *Id*. at 30-32.

criminal proceedings based on interviews conducted for NCB proceedings; applicable defenses; admissibility of evidence (e.g., hearsay and summary documents); the ability to request the court to dispose of one or more of the claims in favor of the moving party without need for further trial proceedings; requirements for written reasons for judgment specifying factual and legal basis, which should also be a public document; whether payment in lieu of forfeiture is allowed; and whether property representing the original property is recoverable (substitute assets).[207]

An important principle is to define assets and offenses subject to NCB asset forfeiture. In this regard, assets derived from the widest range of criminal offenses should be subject to NCB asset forfeiture. Some jurisdictions have simply provided that all proceeds and instrumentalities of crime, or in some cases, proceeds and instrumentalities of any felony or serious offense, are subject to forfeiture. The latter approach of subjecting all crimes to NCB asset forfeiture is more comprehensive, as well as easier to understand and apply.[208]

A key concept is that NCB asset forfeiture legislation should reach all assets of value, including proceeds of crime and property traceable thereto, instrumentalities of crime, fungible property, commingled goods and substitute assets, and proceeds derived from foreign offenses if the conduct giving rise to forfeiture is also a crime in the country where the assets are located.[209]

The definition of assets subject to forfeiture should be broad enough to encompass new forms of value, such as stored value cards.[210]

The retroactive or retrospective application of NCB asset forfeiture laws against criminal proceeds that were acquired before the enactment of the forfeiture laws is an important concept. Unless such laws are retroactively enforceable, the criminal defendant would be able to profit from acts that were illegal at the time they were committed. In addition, permitting the retroactive application of the law is especially important to recover proceeds of corruption against officials who are in power for long periods and have had years of opportunity to steal state funds.[211]

The government should have discretion to set appropriate thresholds and policy guidelines for forfeiture, as it is neither cost-effective nor a deterrent to pursue forfeiture of assets that are limited or depreciating in value or are burdensome to maintain. Legislation should make forfeiture mandatory, but only assets of more than minimal (*de minimus*) economic value should be seized.[212]

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[207] *Id.* at 33-36.
[208] *Id*. at 37.
[209] *Id*. at 38-43.
[210] *Id*. at 43-44.
[211] *Id.* at 44-47.
[212] *Id*. at 47-49.

A set of principles concern measures for investigation and preservation of assets. A key concept is that the specific measures the government may employ to investigate and preserve assets pending forfeiture should be designated. Preservation methods include provisional measures for freezing, seizing, and monitoring assets. The most common form of asset preservation is a restraining order or preservation order directed at the person or entity with custody of the property. Some jurisdictions specifically provide in their forfeiture legislation for the appointment of receivers or curators to manage property before conclusion of forfeiture proceedings. NCB asset forfeiture legislation should include prohibitions on tipping-off and provide that production orders or subpoenas to financial institutions not be disclosed to the account holder, notwithstanding other banking laws.[213]

Preservation and investigative measures taken without notice to the asset holder should be authorized when notice could prejudice the ability of the jurisdiction to prosecute the forfeiture. Forfeiture legislation should clearly set forth the ability to obtain an ex parte order for financial or other evidence or for freezing an account.[214]

As circumstances change after an investigation and forfeiture occur, legislation should exist that allows law enforcement to immediately seek the modification of orders for the preservation of assets, monitoring accounts, and the production of information offers flexibility as conditions change. In addition, courts must be able to hear and rule on such requests promptly.[215]

The law on procedural and evidentiary concepts plays an important rule. Specificity in the law is important in all aspects of a forfeiture regime because it creates uniformity and ensures that the legislature, not the judiciary, creates the rules that govern the forfeiture process. Typically, the complaint or application for forfeiture filed by the government should allege the facts giving rise to forfeiture, the statutory basis for the forfeiture, and the legal theory of forfeiture.

The law should also explain how a person with an interest in the property can assert a claim to the property and contest or object to the forfeiture action, and should specify the time within which a claim must be filed. Time periods are typically related to when the party received direct notice of the forfeiture action, or if direct notice was not received, some period after public notice. If proper notice is given, failure to file a timely response or claim should result in extinction of the owner’s interest in the property.

Since NCB asset forfeiture actions are not against an individual but against the property, most regimes require, as the first step, that an individual contesting forfeiture file in court a

[213] *Id*. at 51-54.
[214] *Id*. at 54-55.
[215] *Id*. at 55.

response or claim to the property describing a legal interest in the property. Responses or claims must generally be filed under oath on penalty of perjury. [216]

Legal systems vary in the degree of proof that is required by the prosecutor to sustain a forfeiture action. The options are from probable cause or reasonable grounds to believe, to the same standard required for a criminal conviction – proof beyond a reasonable doubt. Between these two extremes is the preponderance of the evidence or a balance of probabilities standard, which typically equates to more likely to be true than not true, or a greater than 50 percent chance that the proposition is true.

For the actual forfeiture of such assets, a higher standard, often the balance of probabilities standard, is generally required. With some exceptions, most civil law jurisdictions require the even higher level of proof of beyond a reasonable doubt.

The differing standards of proof can be an obstacle to foreign recognition of an NCB judgment where such judgment is regarded as remedial and obtained on a balance of probabilities standard. There have been some successes in resolving the obstacles. Whatever standard of proof is deemed appropriate, specificity in the statute defining the standard of proof is essential. [217]

The procedural rules should specify the defenses to forfeiture, along with the elements of those defenses and the burden of proof.[218]

A key concept is that the government should be authorized to offer proof by circumstantial evidence and hearsay. Most jurisdictions allow the use of circumstantial evidence or inferences based on objective circumstances to establish certain elements of an offense, even in criminal prosecutions. International conventions and agreements also provide for inferences, such as permitting the knowledge, intent, or purpose required as an element of an offense to be inferred from objective factual circumstances.[219]

The applicable statutes of limitations (prescription) should permit maximum enforceability of NCB asset forfeiture.[220]

Forfeiture rules need to designate the parties to forfeiture proceedings and notice requirements. Fundamental principles of due process and basic fairness require that persons with a potential interest in property subject to an NCB asset forfeiture action must have notice of the action. The NCB law should prescribe how notice of the forfeiture action is made to such parties and who is responsible for giving that notice. Because the forfeiture extinguishes all rights in the

[216] *Id.* at 57.
[217] *Id.* at 58-63.
[218] *Id*. at 63-64.
[219] *Id.* at 65-66.
[220] *Id*. at 66-67.

property, some additional form of notice to the population at large is given. This usually occurs by publication in newspapers or legal gazettes and the internet.[221]

A prosecutor or government agency should be authorized to recognize secured creditors without requiring them to file a formal claim. Countries should have a fugitive disentitlement law, so that a fugitive who refuses to return to the jurisdiction to face outstanding criminal charges should not be allowed to contest NCB asset forfeiture proceedings.[222]

Legislation should authorize the government to void transfers if property has been transferred to insiders, including close friends and family members, or to anyone with knowledge of the underlying conduct. Sometimes this is done by the law imposing presumptions.[223]

Granting a claimant access to forfeitable assets to pay for living expenses or lawyers' fees is a controversial topic. Access to such assets depends on a number of domestic law and policy considerations, such as the tainted nature of the restrained funds, preventing purposeful dissipation of the funds, competing third party interests, the existence or sufficiency of a legal aid system, due process, and the right to counsel. With respect to the right to counsel, considerations include whether the right extends to NCB asset forfeiture proceedings in which incarceration is not likely; whether there exists a system for court-appointed counsel or government funded legal aid available to indigents in NCB asset forfeiture cases; and whether corporate entities are entitled to have counsel provided at government expense.[224]

Various key concepts apply to judgment proceedings. States should consider authorizing default judgment proceedings when proper notice has been given and the assets remain unclaimed, in order to facilitate prompt resolution of uncontested cases and judicial efficiency by relieving the government from having to prove the forfeiture case and the court from having to hear a case when no one is contest the forfeiture.

To avoid unnecessary litigation, the NCB asset forfeiture law should allow claimants to consent to the forfeiture of assets without a trial through a process that is supervised by a court.

States should consider what relief, if any, should be available to the claimant if the government does not succeed in obtaining a forfeiture judgment. The law should require that the seized property be returned immediately. It should also address whether the claimant should be permitted compensation for damage to property or consequential damages resulting from a freeze or seizure when the case does not result in a judgment of forfeiture.

Any final judgment should be in writing, contain the statutory basis for the forfeiture, and recite a summary of the factual findings and legal conclusions supporting the court's ruling in

[221] *Id*. at 69-70
[222] *Id*. at 70-72.
[223] *Id*. at 73-74.
[224] *Id.* at 74-76.

favor of forfeiture. A written judgment that explains the basis for the court's findings provides the parties with an explanation of the court's reasoning and application of the facts to the law so that they will know the precise outcome of the litigation. The written decision provides a basis for an appellate court to consider the proceedings in any appeal. Perhaps most importantly, a sufficiently detailed written judgment is critical for enforcement in a foreign jurisdiction. A foreign jurisdiction almost always requires more than the simple details of the order, including the facts that are the basis for the decision, the laws applied, and procedures followed.[225]

A successful non-conviction based asset forfeiture program requires various organizational considerations and asset management. A key concept is to specify which agencies have jurisdiction to investigate and prosecute forfeiture matters. A state should confer forfeiture investigative authority to all law enforcement agencies with responsibility for investigation of financial crimes. However, due to the technical nature of forfeiture and the special financial skills required to follow the money and establish the nexus to the underlying offense, some specialization may be appropriate to ensure that forfeiture cases are handled by competent investigations. Some jurisdictions have adopted specialized authorities or regional forfeiture units staffed with specially trained investigators who support multiple police agencies. Some countries already have a financial crimes clearinghouse, an anti-money laundering agency, or an FIU, which may have the requisite investigative skills to support NCB asset forfeiture cases Existing agencies may be able to provide the investigate resources to support an NCB asset forfeiture regime without creating a new agency.[226]

An important concept is the assignment of judges and prosecutors with special expertise or training in forfeiture to handle NCB asset forfeitures. Sufficient training and financial, material and human resources must exist at all levels to ensure the efficient and effective handling of forfeiture cases. In some cases, especially if a country does not have expertise in NCB asset forfeiture, a country should consider dedicating specific judges and prosecutors to deal with forfeiture cases. Advantages accrue to assigning specialized judges and prosecutors to deal with NCB cases.

Specialization requires costs that may be beyond the financial or operational reach of less developed countries. A jurisdiction must consider an appropriate funding mechanism to ensure sufficient financial resources. Judges' salaries should not be paid from forfeited assets. Seized assets pending forfeiture should not be used for this purpose, since this creates the appearance of, if not a real, conflict of interest. However, forfeited assets can appropriately fund other aspects of the forfeiture and judicial infrastructure without affecting the impartiality of the process.[227]

A system should be established for pre-seizure planning, maintaining, and disposing of assets in a prompt and efficient matter. The establishment of an effective NCB asset forfeiture

[225] *Id*. at 82.
[226] *Id.* at 83-84.
[227] *Id*. at 84-85.

system requires not only the enactment of a comprehensive law, but also an organizational infrastructure to cope with the myriad practical issues that occur when handling seized and forfeited property, including the custody, safe storage, management, and disposition of such property. A government must determine which national body will have responsibility for managing property involved in the forfeiture process.

A successful forfeiture program should include pre-seizure planning to consider the specific actions that will be required to take custody of particular property and consider whether the property should be seized in the first instance.[228]

An important requirement with respect to organizations considerations and asset management is that resources must be allocated for all phases of the asset forfeiture process, including tracing, freezing, seizing, and managing the forfeited assets. Cases that involve the seizure of assets that must be maintained or businesses that must be operated until the forfeiture process is complete can be very expensive. In addition, in cases involving transnational crime, other expenses occur, such as travel to interview witnesses, translation of documents, and other related investigative expenses. Meeting these resource requirements is essential for a successful asset forfeiture program. Hence, it is essential that jurisdictions establish mechanisms to ensure predictable and adequate financing.

It is best from a public finance perspective to fund government programs from the general budget so that available monies from all sources can be allocated to their highest priority use. Forfeited funds are deposited into the general treasury and resources are appropriated to law enforcement through the general budget.

Important issues for jurisdictions deciding to establish a forfeiture fund relate to the design of financial management arrangements and the designation of revenues and expenditures. Financial management arrangements should ensure that funds are used efficiently and transparently, respecting the accountability framework for all public monies. Ideally, the forfeiture fund should be established within the framework of the public financial management system, which would require the establishment of special treasury designated expenditures are paid. The application of these funds would follow relevant budgetary procedures.

Legislation establishing the forfeiture fund should identify the source of deposits (e.g., proceeds from the sales of forfeited property, including settlements, money judgments, or incoming asset sharing from other jurisdictions); which agency will have the authority to administer this fund; and which agency will have responsibility for program administration.[229]

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[228] *Id*. at 85-86. See "Pre-Seizure planning Guide" in *id*, appendix VI; "Financial Profile Form" in *id,* appendix IV; and "Financial Investigations Checklist" in *id*., CD-ROM appendix K.
[229] *Id*. at 90-94.

iv. The Onus of Proof

FATF Rec. 4 states that countries should consider adopting measures which require an offender to show the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

It is best practice for countries to implement such measures, consistent with the principles of domestic law. The following are two examples of how such measures may be structured.
Example 1

When considering confiscation, the court can, on the basis of an action brought by the public prosecutor, in a procedure separate from the criminal case, decide that a convicted person must pay an amount of money to the State because of unlawful vested benefit. There are three conditions:

(a) A person is convicted for a serious offense (punishable with the highest fine);
(b) During the criminal investigation against that person a criminal financial investigation was started; and
(c) The criminal financial investigation (Report) shows it is plausible that the offense the person was convicted for or other criminal offenses resulted in any way to unlawful vested benefit.

The substantial calculation of the unlawful vested benefit can be based on a comparison of property or a cash comparison for a certain period. For example, such period can be based on the start of criminal conduct and the arrest of the criminal for that conduct. It is then up to the convicted person to make a well-reasoned case to refute the arguments of the prosecution.

Example 2

When considering confiscation, the court must decide whether the defendant has a "criminal lifestyle". A defendant will be deemed to have a criminal lifestyle if one of the three conditions is satisfied. There has to be a minimum total benefit for the second two of the three conditions below to be satisfied. There has to be a minimum total benefit for the second two of the three conditions below to be satisfied. The three conditions are:

(a) it is a 'lifestyle offense' (for example, drug trafficking is a lifestyle offense);
(b) it is part of a 'course of criminal conduct' or
(c) it is an offense committed over a period of at least six months and the defendant has benefited from it.

The court is required to calculate benefit from criminal conduct using one of two methods:

(1) *General criminal conduct ("criminal lifestyle confiscation*"): This method is used when the defendant is deemed to have a criminal lifestyle. The court must assume that:

- any property transferred to the defendant from after a date six years prior to the start of the criminal proceedings was obtained as a result of criminal conduct;
- any property held by the defendant at any time after the date of conviction was obtained as the result of criminal conduct;
- any expenditure over the six year period mentioned above was met by property obtained as a result of criminal conduct; and
- for valuation purposes, any property obtained by the defendant was obtained free of third party interests.

Where the criminal lifestyle condition is fulfilled, the burden of proof in respect of the origin of the property is then effectively reversed (i.e., the prosecution has met its evidential obligation and the defendant has to prove on a balance of probabilities that a particular asset, transfer, or expenditure has a legitimate source).

(2) *Particular Criminal Conduct ("criminal conduct confiscation*"): This method is used when the defendant is not deemed to have a criminal lifestyle. This requires the prosecutor to show what property or financial advantage the defendant has obtained from the specific offense charged. The law permits the prosecutor to trace property or financial advantage that directly or indirectly represents benefit (for example, property bought using the proceeds of crime). There is no minimum threshold for this method of calculation of benefit.[230]

v. Mechanisms to Effectively Manage and Dispose of Confiscated Funds

According to the FATF Interpretive Note to Recs. 4 and 38, countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated. These mechanisms should be applicable both in the context of domestic proceedings, and pursuant to requests by foreign countries.

Hence, countries should consider establishing an asset forfeiture fund into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes.

[230] FATF, Best Practices on Confiscation (Recommendations 4 and 38), *supra,* at 7-8.

Countries should try to use confiscated property transparently to fund projects that further the public good.[231]

To increase the effectiveness of confiscation regimes, countries should implement a program to efficiently manage frozen, seized and confiscated property and, where necessary, disposing of such property. Depending on the nature of the property or the particular circumstances of the case, the best method of managing it might be through any one of (or a combination of) the following: competent authorities; contractors; a court-appointed manager; or by the person who holds the property subject to appropriate restrictions on use and sale.

Ideally, an asset management framework has the following characteristics:

(a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designed authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.
(b) Sufficient resources must exist to handle all aspects of asse3t management.
(c) Appropriate planning must occur prior to taking freezing or seizing action.
(d) Measures must be in place to: properly care for and preserve as far as practicable such property; deal with the individual's and third party rights; dispose of confiscated property; keep appropriate records; and take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.
(e) Persons responsible for managing (or overseeing the management of) property must have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.
(f) Persons responsible for managing the property must have sufficient expertise to manage any type of property.
(g) A statutory authority must be able to allow a court to order a sale, including in cases where the property is perishable or rapidly depreciating.
(h) There must be a mechanism to allow the sale of property with the consent of the owner.
(i) The property that is not suitable for public sale is destroyed. This includes any property that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offense; that is counterfeit; or that is a threat to public safety.

[231] *Id.*, Sec. VII.A. (Use of Recovered Property, p.7).

(j) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.
(k) To ensure the transparency and assess the effectiveness of the system, there exist mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realized.[232]

Finally, confiscation laws permit the state to dispossess criminals of the illegal proceeds (property generated from the commission of the illegal activity)[233] and instrumentalities (assets that have facilitated the commission of the criminal activity) of their crime. Confiscation, unlike a penalty or a fine, can be pursued before, during, or after criminal prosecution. Generally, the proceeds in question will first be frozen to prevent dissipation during the investigation and prosecution of the case. At the appropriate time, the court determines whether there is sufficient evidence that the assets in question constitute the proceeds of a crime. If so, it orders their confiscation. If not, the assets are returned to the defendant along with (depending on the country and the system in place) the legal costs incurred in the course of the confiscation proceeding. In the context of elephant poaching and/or ivory trafficking, confiscation laws permit the state to obtain possession of the poached elephants and/or ivory trafficking, confiscation laws permit the state to obtain possession of the poached elephant and/or ivory trafficked itself, as well as any other property linked directly or indirectly to the criminal activity.

In cases where the actual proceeds or instrumentalities of a crime are no longer available or cannot be located, confiscation laws may also have the advantage of permitting seizure of assets of equivalent value held by the criminal - even if they are of legal origin. This is called "value confiscation." Value confiscation is especially useful where the proceeds and instrumentalities of crime are commingled with legitimate assets.

C. Making Effective Use of Law Enforcement Procedures

Criminal codes and rules of evidence and procedure provide the procedures for enforcement, prosecution, and sentencing, specifying the ways in which actors in the criminal justice system may or may not proceed. Criminal procedure laws cover, for instance, plea agreements, witness testimony, rules for evidence collection, and investigation procedures. These codes also have rules for the use of special investigative techniques, plea agreements, and witness protection programs.

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[232] *Id.*, Sec. VII.E (Management of Frozen, Seized and Confiscated property).
[233] Article 2 of UNCAC defines proceeds as "any property derived from or obtained, directly or indirectly, through the commission of an offence." Property is defined as "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets."

Decisions made at every stage of the criminal justice process will affect where a conviction and significant penalty will be imposed and, additionally, whether it will be possible to target the "kingpins" ultimately responsible for the crime. Because decisions on the ground at the early stages of the case are so important, key personnel – not just the prosecutors – should be well acquainted with the criminal procedural tools that they may find useful.

While each country has its own particular procedures and rules, several relevant international conventions address procedural law. At least 171 Countries are party to the UN Convention against Transnational Organized Crime (UNTOC), which requires member states to enact anti-money laundering laws, including the means to identify, trace, freeze, and seize the proceeds and instrumentalities of crime for the purpose of confiscation.[234] Article 20 of the Convention provides for special investigative techniques of particular interest in tackling grand criminality, such as elephant poaching. These techniques, included as important tools in the 40 Recommendations on Money Laundering issued by FATF include electronic or other forms of surveillance (interception of telephone communications or access to computer systems), undercover operations, and controlled delivery of the proceeds of crime. UNTOC encourages states to conclude agreements or arrangements with other jurisdictions to cooperation in the use of these techniques where crimes across natural boundaries, as is often the case with elephant poaching and/or ivory trafficking. Similarly, the UNCAC, to which 167 States are party, specifically provides for the investigation of corruption offenses through the use of such techniques.[235]

These techniques are essential for detecting and building evidence against criminal organizations, especially where those organizations span several countries. They are especially valuable in helping provide important information about the financial aspects of the crime. Few environmental or wildlife laws contain specific provisions allowing electronic surveillance, cover operations, or controlled delivery operations. However, more general criminal laws – whether common law or set out in criminal statutes – invariably allow such operations and tend to incorporate the provision required by the UN Convention against Corruption (UNCAC) and UNTOC.

Witness protection measures are also important mechanisms in dealing with the criminal organizations involved in elephant poaching and/or ivory trafficking. Often in these cases, some of the most valuable testimony comes from people within the criminal organization who would face serious threats if their cooperation with the authorities became known. Testimony can also come from regular citizens who, unless they had access to witness protection, would rarely come forward. Therefore, UNTOC calls on parties to protect witnesses in criminal cases from intimidation, threats, corruption, or injury. Similarly, UNCAC requires member states to take appropriate measures to "provide effective protection from potential retaliation or intimidation

[234] UNTOC, Articles 6 and 7.
[235] UNCAC, Article 50.

for witnesses and experts who give testimony" concerning offenses covered by the Convention. They may also extend to their relatives and other persons close to them. These measures might include anything from permitting witnesses to testy from a remote location through video-conferencing technology to physically relocating them to an undisclosed location. The UN Office on Drugs and Crime (UNODC) has developed a good practices guide describing the available witness protection measures for witnesses in organized crime cases.[236]

However, responding to this adequately requires more than the mere enactment of a law. Witness protection, if done effectively, can be resource-intensive, involving 24-hour protection and, in some cases, permanent relocation. In countries where the population is relatively small, witnesses may even have to be moved to other countries to ensure their safety. Acknowledging this, some countries have concluded agreements to cooperate with one another in helping to relocate witnesses who face serious threats as a result of their testimony in a case. Countries should devote significant resources to witness protection programs (including funding) and to provide personnel with the necessary training to protect witnesses who are at risk.

Witness protection measures are often required to protect witnesses who provide information as part of a negotiate plea agreement. In cases involving organized crimes and corruption offenses, obtaining information from a cooperating defendant through a plea agreement can assist in the very difficult – if not impossible – task of marshaling evidence against those in country. In countries where plea agreements are allowed, the accused agrees to admit guilt to a particularly charge, often in conjunction with an agreement to cooperate with law enforcement officials and in exchange for possible leniency in the punishment. Negotiated plea agreements may also include an agreement that the individual will not be prosecuted for certain crimes or for a number of courts in exchange for cooperation. The cooperation offered by the accused typically includes the provision of information that may lead to the arrest of other criminals involved in the same transaction to information that enables authorities to locate and confiscate the proceeds of the crime. Additional benefits for the state include savings on trial costs and avoiding the need to expose security sources, such as informants, in court.[237]

D. Enhancing Stakeholder Engagement in Elephant Poaching and/or Ivory Trafficking

When they try to cope with elephant poaching and/or ivory trafficking, most domestic law enforcement regimes have directed their efforts at low-level criminal activity, involving individuals acting in isolation rather than targeting the complex and organized criminal enterprises. When they trace smaller, lower-level crime, a reactive law enforcement system may be sufficient. Investigators wait for reports of crime to occur and then they contact the prosecutor. However, to address more complex, pervasive, and organized criminal activity, the law enforcement community must act proactively. Park rangers, environmental, and other key

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[236] For a copy of this guide, see http://www.unodc.org/documents/organized-crime/Witness-proteciton-manual-Feb08.pdf.
[237] Goncalves et al, *supra*, at 23-25.

officials (tax and customs authorities, FIUs, and so forth) must actively engage with investigators and prosecutors to discover who is engaged in elephant poaching and/or ivory trafficking, how they are doing it, and where the offenders are sending the proceeds of their crime. A coordinated response addressing the many features of elephant poaching and/or ivory trafficking will require strong political will. It will require support from high-level officials who will support a shift in policy, priorities, and resources who will prevent corrupt from derailing their efforts.

This sector considers a number of general strategies to remedy the problems in park ranger and environmental enforcement. It discusses some specific reforms that can be implemented to further these goals.

1. Building Political Will

a. Raising Awareness at the Ministerial Level

Effectively combatting elephant poaching and/or ivory trafficking must become a priority and the prioritization must be clearly communicated to the public at large and to the officials responsible for investigating and prosecuting the crimes mentioned above. The minister responsible for the environment should become the champion. This minister should engage the minister of justice to ensure that elephant poaching and/or ivory trafficking become a real criminal justice priority and are appropriately integrated into the national criminal justice strategy. The ministers in charge must also work to security a high-level commitment from other key stakeholders and interested parties, including the ministry of home affairs, justice, or the interior (which often supervises law enforcement agencies and investigatory forces); the ministry of finance; the agency responsible for registering and/or regulating companies and other legal entities; the central bank; customs agencies; FIUs; law enforcement agencies; prosecutors; anti-corruption bodies; military and intelligence services; tax authorities; and any other body that would directly or indirectly have a stake in tackling elephant poaching and/or ivory trafficking.

A high-level policy group can then develop an overall strategy based on its specific assets and vulnerabilities, including the type, location, magnitude of elephant poaching and/or ivory trafficking being committed, and the availability of resources for combating them. Thereafter, the relevant operational agencies should establish a proactive rank-ordered targeting list. For example, the list can be based on the requirements to protect the units of national parks with the most vulnerable elephant populations, or on the activities of known criminals, and organized crime groups.

b. Designing an Adequate Criminal Justice Strategy for Elephant Poaching and/or Ivory Trafficking

To ensure effective integration of elephant poaching and/or ivory trafficking into the criminal justice system, an analysis and review of each country's existing system is required.

Despite the diversity of different jurisdictions in terms of legal and environmental frameworks, all countries should consider revising legislation, allocating resources for training purposes, and developing incentives for practitioners, with the goal of specifically targeting the weaknesses and circumstances that exist in the country. A detailed review of the laws and shortcomings should be made (potentially with the help of the CITES Secretariat, NGOs, or development assistance bodies) to identify changes that should be made immediately, those that should be made in the short term, and those that can wait until the long term.

c. Assigning Adequate Resources to Relevant Authorities and Agents

Once the strategy is in place, officials must receive the tools and resources they need to do their job. The present level of funding in most countries is not sufficient to permit existing agencies to tackle a crime as complex and multifaceted as elephant poaching and/or ivory trafficking. Since the perpetrators rely on a vast network of participants, combating them requires a proportionate level of resources. An inadequately funded park rangers unit, investigative unit, or prosecutor's office cannot be expected to produce significant results. Failure to provide sufficient resources also leads to a lack of dedicated and specialized personnel.

Lack of sufficient resources to park rangers and other officials devoted to combating elephant poaching and/or ivory trafficking encourages corruption and renders even basic law enforcement tasks impossible.

Agencies need more financial resources if they are to implement new strategies to overhaul and remedy the problems currently crippling the enforcement system. At the practitioner level, salaries for prosecutors, investigators, park rangers, and environment personnel must be improved to help combat corruption. Other important incentives, such as the prospect of merit promotion (replacing the need to buy a job or promotion) and the appropriate recognition of successes, will be created only if illegal logging takes on greater status as a priority.

Resources and specialized training should also be available for criminal justice personnel to combat elephant poaching. Studies have shown that officials at every stage of the process lack sufficient training to develop the skills and knowledge they need to help prosecute these crimes. They also show that investment in the training of existing staff members could have an impressive effect on the quality of detection.

d. Tracking Successes in the Criminal Justice Response

Strengthening criminal justice requires important resources, including staff, time, and financing. The political economy of resource allocation requires that countries consider designing and implementing a strategy with clear and reasonable objectives and timelines for

completion, as well as creating appropriate assessment tools to track the success of the reforms in the criminal justice system. These tools would permit following up on the status and resolution of elephant poaching and/or ivory trafficking, establishing accountability lines, and obtaining objective data to determine future allocation of resources.

Each country involved in combating elephant poaching and/or ivory trafficking should develop a set of reasonably achievable goals, with benchmarked tasks and milestones. The key is not the quantity but the quality of targeting, investigation, prosecution, conviction, sentencing, and confiscation. For instance, in law enforcement, a common indicator is the percentage of solved and unsolved crimes and the number of crimes resulting in charges.

Agency case tracking systems that focus on elephant poaching and/or ivory trafficking cases are also very helpful because they allow tracking of a case from its first entry into the system. They also help to identify interplay with other cases and enable a broader analysis of the evolution of cases and problems within the system - identifying, for instance, where cases may stall or ultimately fail. These cases tracking systems also help move cases along by tracking deadlines required for legal procedures.

2. Strengthening Domestic Cooperation

Adequate enforcement requires that the agents in charge of detection make information available to other players so as to build successful cases. An essential mechanism to strengthen capacity and coordination in identifying, investigating, and prosecuting elephant poaching and/or ivory trafficking cases is the use of interagency and interdisciplinary groups. This enables participants to combine different skills, competencies, and resources and focus them on a common goal. Some jurisdictions create a high-level policy counsel and then an operational group to target, investigate, and prosecute cases. The operational group may be called a "Special Unit," "Task Force," or "Strike Force."

a. Interagency Cooperation at the Policy Level

Park rangers, environmental officials, law enforcement, prosecutors, and FIUs are all important players in combating elephant poaching and/or ivory trafficking. Customs authorities and the commerce ministry are also key partners. Customs agencies have the responsibility to control the flow of goods in and out of the country and hence are uniquely placed to detect smuggling and transport offenses, as well as trafficking in prohibited species, namely ivory. A multidisciplinary approach is required to mobilize each relevant agency and to maximize domestic cooperation – both at a policy and an operational level. A multidisciplinary response is required to ensure that these crimes are detected in national parks and forests, at borders, and at financial institutions, and that the ensuing investigations and prosecutions are successful.

Interagency cooperation can be formalized by the establishment of a body to advise the stakeholder ministries in drawing up and implementing an integrated criminal justice and elephant protection strategy. Such an interagency policy group may be useful in many ways. For instance, in identifying key partners, establishing guidelines for the integrated strategy, and recommending the allocation of resources to immediate, short-term, and long-term goals. Where appropriate, such groups should have the ability to report quickly to their political counterparts to maintain momentum, legitimacy, and guidance. Members of such a group might include officials from law enforcement, park rangers, the environment, the prosecutor's office, tax, customs, immigration and commerce offices, the central bank, FIUs, and any anti-corruption agencies. The ultimate goal is that these policy discussions lead to operational case work, investigation, prosecution, and confiscation involving significant cases.

These groups have been employed with success to improve domestic cooperation in other areas involving sophisticated and multifaceted crime, such as money laundering and international organized crime.

b. Cooperation between the Environmental Sector and FIUs to Improve Detection

Domestic cooperation is also important at the operational level, where it can be used both to improve detection and to suppress elephant poaching and/or ivory trafficking. When combating criminal organizations and large-scale elephant poaching and/or ivory trafficking, investigators and prosecutors must act proactively in the detection phase of the law enforcement process, especially where money laundering of the illegal proceeds is occurring. Interagency domestic collaboration will facilitate access to the knowledge necessary to develop typologies of transactions involving the laundering of the proceeds of elephant poaching and/or ivory trafficking. Banks need to understand the profits of customers to discern whether or not these customers are, in fact, involved in elephant poaching and/or ivory trafficking. Cooperation between FIUs and the park rangers and environment sectors is therefore necessary to create a profile of the "red flags" or "warning signs" that a customer's transactions may be related to elephant poaching and/or ivory trafficking and other environmental crimes.

Due to the links between corruption and elephant poaching, park rangers can also contribute to an effective PEPs regime to help in the fight against corruption by park rangers and environmental officials. PEPs are those individuals who are or have been entrusted with prominent public functions, their family members, and close associates. They represent greater money laundering risks because of the possibility that they may abuse their positions and influence to carry out corrupt acts, such as extorting bribes and misappropriating state assets, and may then use domestic and international systems to laundering the proceeds. Park rangers and environment officials can participate in the preparation of guidelines to banks and other reporting entities on filing STRs concerning PEPs and the beneficial owners of accounts related to

individuals or businesses involved in the environmental ministry or parks in which elephants may be located.

c. Elephant Poaching and/or Ivory Trafficking Joint Investigation Strike and Task Forces

Operational investigative cooperation can be achieved through an "elephant poaching strike force." Such a strike force can facilitate interagency, interdisciplinary, and international cooperation and coordination. This is especially useful because complex, organized crime can only be combated successfully through a coordinated, organized approach. The creation of strike forces also shows to the public and those involved in environmental law enforcement that there is political will to tackle elephant poaching and ivory trafficking. These strike forces bring together multiple agencies and work towards a common goal, building trust, cooperation, and interagency access to, and sharing of, law enforcement information.

Strike forces should be based on terms of reference agreed upon by the necessary ministers or president, but do not require the establishment of a new agency. Strike forces must have sufficient authority to undertake investigations and prosecutions and confiscation. They must also have the requisite funding. Such forces should target important cases involving high-level corruption and money laundering and should focus on investigation, prosecution, the freezing and forfeiture of the proceeds of elephant poaching and ivory trafficking, corruption, and other related crimes. Strike forces can be national, regional, target or case-focused, temporary or permanent.

d. Cross-fertilization of Experiences and Expertise

Domestic cooperation can also be improved using cross-fertilization between the experiences of staff involved in environmental law enforcement on the ground and those in the prosecution office, as well as other parts of the criminal justice process. The sharing of experience and expertise will reinforce training provided in these areas by providing actual case experience with a level of detail that is difficult to replicate in training alone. It may also be useful for officials from other agencies in the enforcement chain to participate in the training initiatives of each agency. Staff exchange initiatives help develop contacts in other agencies, build relationships, and generally create good paths for communication – hence reinforcing domestic cooperation.[238]

e. Improving International Cooperation

Elephant poaching and ivory trafficking are international crimes. The perpetrators are typically located either within a "producer" country – often developing countries whose wildlife

[238] Goncalves, *supra*, at 26-38.

resources are rapidly being depleted as a result of elephant poaching and/or ivory trafficking or a "consumer" country, where the elephant parts are transformed, especially into ivory parts. Strong demand for ivory encourages illegal logging activities in producer countries.

The financial aspects of elephant poaching and/or ivory trafficking are also international. Technological advances facilitate the transfer of large amounts of money across borders through the use of computers. When the investigation leads to assets held in foreign jurisdictions, investigators and prosecutors must request assistance from the country to help identify the assets and obtain evidence. They must also request assistance in imposing provisional measures to seize or restrain the assets while they wait for a court decision on the request for confiscation. They make requests for assistance and seizure or restraint through official channels, pursuant to obligations under treaties, regional or international conventions, or mutual legal assistance agreements. Even when a country is not a party to the international conventions and has no other treaty in place to seek legal assistance, assistance may still be obtained through "letters rogatory," which is a formal request from a judicial officer in one country to a judicial officer in another country.[239]

f. Using Proper Terminology

The selection and definition of key terms are important in all aspects of forfeiture legislation. They are critical in the context of international cooperation. The use of certain terms has led to significant confusion, delay, and even the refusal of mutual legal assistance requests. The confusion arises primarily from differences in terminology between civil law and common law jurisdictions, as well as from the fact that certain terms do not have corresponding terms in different languages.

In NCB asset forfeiture the use of the term "non-conviction based forfeiture" to describe in rem actions against property is important. It can avoid the problem of a foreign state being unable to enforce another state's forfeiture order that, due to terminology appears to be something other than what it really is. It is recommended that jurisdictions avoid using the term "civil forfeiture" if possible, in favor of the term "non-conviction based forfeiture," which should help achieve maximum mutual legal assistance, including enforceability, in some primarily civil law jurisdictions.[240]

g. The Importance of Extraterritorial Jurisdiction

Extraterritorial jurisdiction is required for the court to reach assets located in another jurisdiction. Extraterritorial jurisdiction is the ability of a court to exercise jurisdiction over

[239] *Id.* at 34.
[240] Greenberg et al, *supra*, at 95-96.

individuals or property located outside the geographic confines of the jurisdiction in which the court is located.

Extraterritorial jurisdiction is also useful to allow a government to seek the restraint of assets when they are situated in another jurisdiction, even though the actual restraint or enforcement will be governed by the law of the state in which the assets are located. Increasingly, jurisdictions are enacting laws to enable them to enforce foreign restraint and forfeiture orders. Some international conventions, such as the UNCAC's asset recovery provisions, especially Articles 54, 55 and 57, contemplate that victim countries will be able to exercise jurisdiction over assets located outside their physical jurisdiction on the basis of a final judgment in the requesting jurisdiction.

The ability of the victim country to obtain a forfeiture judgment against property in another jurisdiction, and for the jurisdiction where the property is located to execute that judgment, greatly facilitates the implementation of the mandatory asset return provisions involving embezzled funds covered in UNCAC, Art. 57(2)(a). Hence, for an effective asset recovery regime, courts of the victims' countries must have the authority to enter orders affecting proceeds of crimes located beyond their borders.[241]

h. Authority to Enforce Provisionally Foreign Judgments

Countries should have the authority to enforce foreign provisional orders. Bilateral treaties on mutual legal assistance and multilateral conventions, such as the Vienna Convention, UNTOC, and UNCAC, requires signatories to adopt measures to provide assistance in freezing and seizing assets for the purpose of eventual forfeitures. Due to the speed with which assets can move from one jurisdiction to another, requests typically involve urgent circumstances under which it is critical to preserve assets before they are dissipated or hidden. Hence, jurisdictions should have a streamlined capacity to restrain forfeitable assets and accept the finding of the court of the jurisdiction in which the underlying criminal activity occurred.[242]

i. The Need for Authority to Enforce Foreign Forfeiture Orders

The ease and speech with which assets can be transferred from one jurisdiction to another requires that forfeiture laws be as agile as the criminals who generate the proceeds of crime. An NCB asset forfeiture law is critical to a country's ability to recover criminal proceeds. Strong international assistance provisions give jurisdictions the ability to provide assistance to other countries by preserving assets and enforcing foreign forfeiture orders. A forfeiture regime that complies with UNCAC and other relevant conventions better ensures the enforceability of a forfeiture judgment beyond the requesting jurisdiction's borders. Indeed, the mandatory return obligation of UNCAC arises upon the execution of the requesting jurisdiction's final forfeiture

[241] *Id*. at 97-98.
[242] *Id*. at 99-100.

judgment by the requested jurisdiction. As a result, jurisdictions must have both the capacity to obtain a forfeiture judgment against property located beyond its borders when it is the requesting country and the capacity to enforce a forfeiture judgment of another country when it is the requested country.

A law allowing the enforcement of foreign forfeiture judgments should permit the enforcement of foreign money judgments because not all forfeiture judgments are directed against specific property. If criminal assets have been spent or cannot be located, some jurisdictions permit the entry of judgments against substitute assets or a money judgment. Additionally, the law should permit the enforcement of NCB asset forfeiture judgments.

The law should set forth the applicable procedures for enforcement, such as the defenses that will be recognized and whether the property owner would be allowed in the enforcement proceedings to challenge the underlying forfeitability decision. Some jurisdictions prevent that type of challenge on the grounds that the asset owner would have had the opportunity to make that challenge in the country in which the judgment was originally rendered. If the government "domesticates" the foreign order, the need for an asset sharing agreement becomes apparent so that the jurisdiction that rendered the forfeiture judgment can receive a portion of the proceeds once they are realized.[243]

j. Using NCB Asset Forfeiture to Restore Property to Victims

Any forfeiture system should take the interests of victims of crime into consideration. Once the violator's assets have been forfeited, the government should have the legislative authority to return forfeited funds to the victim(s) of the offense giving rise to forfeiture, or in some cases, to the victim(s) of similar or related offenses. This is a matter of fairness and is in accord with international commitments.

NCB asset forfeiture legislation should also consider how foreign victims are treated. International treaties regulate the return of assets to victims. However, the methods or provisions vary depending on the underlying offenses.

Jurisdictions should ensure that victims have the right to initiate private legal proceedings against those responsible for the damage they have suffered.[244]

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[243] *Id*. at 100-103.
[244] *Id*. at 103-105.

k. Authorization to Share Assets With or Return Assets to Cooperating Jurisdictions

Countries must determine what to do with proceeds realized through forfeiture. If there are victims or prior legitimate owners, assets should be returned in accordance with the provisions of UNCAC and UNTOC.

In cases in which the return of assets is not required, the NCB asset forfeiture law should authorize the government to share those forfeited assets with jurisdictions that facilitated the successful forfeiture effort. Several UN conventions, such as the UNTOC, encourage asset sharing. Other multilateral agreements encourage member states to enter into bilateral arrangements on asset sharing.[245]

l. FATF Best Practices for International Coordination

Under FATF Rec. 38 countries must have authority to take expeditious action in response to requests by foreign countries, and arrangements to coordinate freezing, seizure and confiscation proceedings, which should include the sharing of confiscated assets, especially when confiscation is directly or indirectly a result of coordinated law enforcement actions.

Countries must also consider establishing an asset forfeiture fund into which all or a portion of confiscate property will be placed for law enforcement, health, education, or other appropriate purposes.

FATF has enunciated the following best practices for countries to facilitate the development of effective arrangements for coordinating freezing, seizure and confiscation proceedings.

(i) They should ensure that the authorities which coordinate such actions have sufficient expertise and resources. The practice will enhance effectiveness by addressing the specialist and time-sensitive demands of the confiscation process.

(ii) Countries should implement mechanisms to facilitate real-time cooperative joint law enforcement and prosecutorial efforts by subject matter experts in the requested and requesting countries. Regardless of who is responsible for undertaking or supervising such coordination, this work should primarily be undertaken or driven by the actual subject matter experts who sought the assistance and those who are charged with executing the foreign requests. Such mechanisms should promote informal discussions between the requesting practitioners and executing

[245] *Id*. at 105-107.

practitioners concerning all aspects of the assistance provided and to be provided in the future. In this regard, below under extraregional mechanisms and potential additional mechanisms there is a discussion of establishing an African Center for Investigation and Prosecution of Environmental Crimes (ACIPEC) as an informal mechanism on wildlife trafficking.

(iii) In cases with an international element, where possible, countries should treat confiscation efforts as joint investigations with all the benefits that attach to such designations. For instance, such benefits can include the possibility to target property and perpetrators located in other countries. Communications about these joint investigations should be through secure networks, using standardized forms, agreed upon standards of practice and a common terminology.

(iv) Countries should conclude asset sharing agreements with other countries. The agreements should be consistent with the appropriate compensation of victims. Countries should be willing to share the results of their confiscations with other countries, which includes ensuring that such results are available for sharing.

(v) Countries should designate a competent authority at the national level with responsibility for facilitating asset sharing requests, and liaising with local or regional law enforcement agencies. This could be a specialized competent authority or, alternatively, other mechanisms that would allow the country to participate in asset sharing agreements.

(vi) As required by FATF Rec. 33 countries should maintain comprehensive statistics on the property frozen, seized and confiscated. With respect to provisional measures and confiscation, such statistics should be dived by year and include the items below:

(a) The number of freezing, seizing and confiscation actions and the amounts or values involved, regarding money laundering, terrorist financing and the 21 designated categories of predicate offenses, collected in such a manner as to ensure that no double counting exists vis-à-vis statistics relating to the money laundering offense and the underlying predicate offense;
(b) A breakdown of whether such cases are domestic or relate to a foreign request;
(c) Statistics on the general level of criminality in the country in relation to the 21 designated categories of predicate offenses;

(d) A breakdown of the status and/or ultimate outcome of such actions (e.g., pending, property releases, property or value confiscated);
(e) A breakdown of the amounts ordered in confiscation proceedings and actually recovered.

Such statistics will show whether provisional measures and confiscation are being systemically pursued and imposed, and whether proceeds are actually being recovered in order to asset the country in asse3ssingt the effectiveness of its regime.[246]

m. Mutual Legal Assistance

FATF best practices on confiscations require that, when evaluating a request for mutual legal assistance or international cooperation relating to non-conviction based confiscation, countries should look beyond terminology and labels to the substance of the proceedings with a view to substantively evaluating the request. This ensures that such requests are not unreasonably refused due to confusion caused by the use of different terminology. For instance, some countries can enforce orders for non-conviction based confiscation, provided that the confiscation procedure can be analogized to a case of criminal character even in the absence of criminal proceedings. In such cases, a request should not be refused on the basis that the requesting country uses the term "civil forfeiture," provided that this precondition is met.[247]

An important international convention is UNCAC. With 167 state parties as of July 12, 2013, UNCAC creates common basis for cooperation among countries that are committed to respond to corruption-related crime. It requires parties to provide one another with "the widest measure of mutual legal assistance" in relation to covered offenses.

The UNTOC, the principle international convention aimed at curbing international organized crime, requires member states to provide each other with the "widest measure of mutual legal assistance" in investigations, prosecutions, and judicial proceedings for covered offenses.[248] Generally, the types of mutual legal assistance available include requests to take evidence, execute searches and seizures, and other measures for identifying, tracing, freezing, or seizing the proceeds of crimes. Countries that are party to UNTOC and UNCAC have obligated themselves to enacting laws that facilitate prosecuting by requiring international cooperation in obtaining evidence and pursuing asset recovery.

A request for mutual legal assistance is made after the investigation has pinpointed a foreign jurisdiction. The procedure is very formal. Unfortunately, it may take a long time for

[246] FATF, Best Practices on Confiscation (Recommendations r and 38) and a Framework for Ongoing Work on Asset Recover, *supra*, Sec. VI (International Coordination).
[247] *Id*., parag. 19.
[248] UNTOC, Article 18.

requests to be processed. Still, they do work and must be pursued to obtain evidence that will be admissible at trial. These formal channels for requesting assistance also apply in enforcing confiscation judgments to repatriate confiscated assets from one country to another.

In addition to formal international mutual, legal assistance, informal assistance is a useful way to obtain international cooperation. International cooperation among police forces occurs through Interpol. The Interpol National Central Bureau in each country has a vital connection between countries and helps enforcement officials overcome language barriers with their counterparts throughout the world. However, more recently, an informal mechanism to obtain information and assistance with tracing and freezing assets has been established through the FIU network.[249] If authorized by the laws of a given country, FIUs may be able to share information and to take provisional measures (such as a temporary seizure) more quickly than if the action had occurred through the formal process of a treaty or letters rogatory request.

In addition, in 2009, the StAR Initiative and Interpol established a database listing focal points and officials in countries that can respond to emergency requests at any time or day or night in cases when failing to take immediate action would result in losing the money trial. At least 74 jurisdictions are part of the database. As mentioned in the section on FATF Best Practices for International Coordination, these informal channels should be used initially before a mutual legal assistance request. Informal assistance can provide valuable information required to make formal requests for mutual legal assistance under UNCAC or the provisions of treaties and may help to identify specific requirements of the foreign jurisdiction unknown in the requesting country.

With respect to UNTOC, all five countries are members. With respect to UNCAC, all but Chad are members.

n. Regional Networks

International cooperation can be improved by participation in and promotion of regional networks. These networks facilitate the exchange of information and ideas on good practices in prosecuting elephant poaching, ivory trafficking, money laundering, and confiscation efforts. They provide a forum in which park rangers and environmental enforcement professionals can exchange knowledge and expertise in techniques to defeat the criminal organizations operating with ease across national borders. For instance, in the area of confiscation, the Camden Asset Recovery Interagency Network (CARIN) is an informal network of mostly European members whose aim is to increase the effectiveness of efforts to deprive criminals of their illicit gains. The Asset Recovery Inter-Agency Network (ARINSA) for South Africa, started in 2009, is a similar network. Additionally, informal peer-to-peer networks promote better cooperation and

[249] In 2001, the establishment of the Egmont Group facilitates cooperation among FIUs throughout the world. For addition information about the Egmont group, please see http://www.egmontgroup.org.

build trust between jurisdictions for future mutual legal assistance requests or requests for informal assistance. The FATF-style Regional Bodies, which are international organizations with a regional focus mandated to promote the implementation of international standards within their regional coverage, should also play an important role in undertaking studies of money laundering patterns and typologies related to wildlife crimes, such as elephant poaching and/or ivory trafficking. Another potential network discussed below is ACIPEC.

o. The Imperative of Improving Mechanisms to Share Confiscated Proceeds With the Source Countries

One of the most vital components of an effective money laundering prosecution and asset recovery regime, with respect to elephants poached and ivory trafficked, is the need to more effectively share assets with the source countries. The source countries suffer from problems of capacity, know how, and political will. Unless source countries can see concrete tangible results from enforcement activities, they may continue to lack the capacity and resources to effectively enforce anti-poaching and trafficking laws and lack of political will. In particular, a problem is that in many cases law enforcement has to compete with the resources and power of organized crime that will pay law enforcement officials not to enforce the law (e.g., not to inspect their truck or cargo shipment) or when they are caught, they pay bribes, as necessary, since such bribes are merely a cost of doing business.

Perhaps future enforcement networks, such as the Clinton Global Initiative or the initiatives by international organizations, such as CITES, Interpol, and the United Nations, may want to solicit commitments by participating governments, especially the main consumer countries, to pledge to increase the sharing of assets and then have a mechanism to oversee and report on whether consuming countries are in fact sharing assets. Perhaps, some of the sharing should go not just to the government of the source country, but part could go to regional enforcement networks. The oversight mechanism would track the use of the assets shared to ensure their continued use for the best enforcement purposes.

FATF may want to ascertain whether sharing as a best practice is taking place pursuant to its best practices guidelines. Some of the NGOs, IGOs, and other members of the environmental enforcement networks may also want to engage in moral suasion and educational efforts to exert pressure for consuming countries to use MLATs, multilateral conventions, and other mechanisms to share. Some of the members of the environmental enforcement networks may want to call, on an urgent basis due to the indiscriminate slaughter of elephants, for demonstration, prototype projects, in which consuming governments share with source countries.

3. *Harnessing the Private Sector, NGOs, and the Public*

a. *Due Diligence by the Private Sector*

States should not be solely responsible for efforts to combat elephant poaching and/or ivory trafficking. With few resources (both financial and human), policy makers should develop strategies that will mobilize and engage the private sector into addressing this issue. Through anti-money laundering and other prudential measures, banks, as well as other financial and non-financial private sector entities have implemented due diligence procedures that could be useful in targeting the financial dimension of wildlife crimes. Proper CDD measures will permit entities doing business with clients in the wildlife sector to be fully aware of the general dimensions of their clients' legitimate operations and to be properly suspicious when transactions are conducted in a way that is inconsistent with the clients' normal, customary, and legitimate business. For instance, large foreign transactions made by the relative of a poorly paid foreign ranger or environmental or customs official could properly generate suspicion.

UNCAC requires adequate procedures to ensure that financial institutions pay particular attention to suspicious activity involving the private banking accounts of prominent public officials and their family members and close associates.[250] Similarly, PEPs provisions in domestic anti-money laundering legislation require enhanced due diligence by banks and financial institutions opening accounts for and conducting transactions on behalf of such PEPs – including park rangers and environmental officials. Banks should also have to report any customers who engage in transactions with those known to be involved in elephant poaching and/or ivory trafficking. In the absence of domestic legislation, countries should encourage banks to follow best practices recommendations by the FATF for preventive measures to better monitor suspicious transactions.[251]

b. *NGOs Interested in Elephant Poaching and/or Ivory Trafficking*

NGOs play a vital role in the private sector, serving as partners who are willing to help states combat wildlife trafficking. They have played a major role in detecting wildlife trafficking, in increasing awareness of the extent and impacts of wildlife trafficking, and in conducting research and analysis about the causes of and potential solutions to the problem. For instance, the International Consortium on Combatting Wildlife Crime (ICCWC) has collaborated with CITES on dealing with imminent threat to elephants in the Central African Republic (Dzanga-Ndoki National Park). Other NGOs active on elephant poaching and wildlife trafficking are the Wildlife Conservation Society, Elephant Advocacy, the World Wildlife Fund, Greenpeace, and Natural Resources Defense Council. For instance, on April 26, 2013,

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[250] UNCAC, Article, 52.

[251] See Recommendation 6 of the FATF prior FATF Recommendations, with the related requirements of customer due diligence (We need to Update this reference with the 2012 FATF Recommendations).

TRAFFIC publication, which is a member of the Coalition against Wildlife Trafficking, published an article stating that "a recent study shows forest elephant populations in the Congo Basin fell by almost two-thirds - or 62% -over the past decade as a result of extensive ivory poaching."[252]

c. Public Awareness

Countries should also work to mobilize the public to become engaged in the fight against elephant poaching and ivory trafficking. Without combating organized crime and other predators, the effort to combat elephant poaching and ivory trafficking will not succeed. The public at large must be engaged. Countries should start by promoting public awareness that elephant poaching and ivory trafficking are not victimless crimes. The people of the country suffer. Eco-tourism in many of the countries depends on keeping sustainable elephant populations. A better understanding of these issues is urgently required to build the political will that is so essential for bring a halt to illegal logging. NGOs can be helpful in mobilizing change and promoting public awareness.

The public could also play a more direct role in the detection and prevention of elephant poaching. Private citizens should be encouraged to report suspicious activity to park rangers and law enforcement authorities. Governments, IGOs, and NGOs should encourage individuals to speak out and help with detection of these crimes.[253]

III. MULTILATERAL ENTITIES AND MECHANISMSTHAT MAY FACILITATE ADOPTION AND IMPLEMENTATION OF FORFEITURE TREATIES TO ADVANCE ELEPHANT PROTECTION INITIATIVE

With respect to multilateral entities and mechanisms that may facilitate the adoption and implementation of forfeiture treaties to advance the elephant protection initiative, some useful work has already occurred.

In particular, the National Geographic, the Wildlife Conservation Society, and African Parks Network, the American Association of Zoos and Aquaria, Conservation International, the Nature Conservancy, Traffic and the World Wildlife Foundation have already met and agreed on action. They met on July 16, 2013 with former Secretary of State Hillary Rodham Clinton and agreed to act.[254] At the meeting Cristián Samper, president and chief executive of the WCS, said

[252] *NGO call for action to save the elephants of Central Africa*, TRAFFIC, April 26, 2013 http://www.traffic.org/home/2013/5/3/ngo-call-for-action-to-save-the-elephants-of-central-africa.html
[253] Goncalves, *supra*, at 36-38.
[254] Juliet Eilperin, *Hillary Clinton joins battle to save elephants*, WASH. POST, July 17, 2013 , at A3.

that elephant poaching has reach such a crisis point that the world's leading conservation groups are starting a coordinated strategy to respond to the problem.[255]

A. Regional Organizations

1. FATF-Style Organizations

Three of the five countries, Kenya, Botswana, and Uganda are members of The East and Southern Africa Anti-Money Laundering Group (ESAAMLG). Its members are Botswana, Comoros, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia, and. Zimbabwe.

The ESAAMLG has the following cooperative partners and observers: APG, AUSTRAC, CFATF, COMSEC, Charity Commission – UK, DFID, EAC, EGMONT, FATF, GIABA, IMF, Interpol – Harare, SADC, UK, UN-CTED, UN 1267 Analytical Support and Sanctions Monitoring Team (The Monitoring Team), UNODC, USA, and the World Bank.[256]

Another FATF style regional group in Africa that may be useful is the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA). [257] It has sixteen members, but none of them are the five countries that are the subject of our report.

Still another FATF style regional group in Africa is the Action Group Against Money Laundering in Central Africa (GABAC), of which Chad is a member. According to the CITES Secretariat, on August 6-8, 2013, representatives of Chad and the DRC recently participated in a sub-regional seminar on the use of anti-money laundering and other financial crime tools to address elephant poaching in Central Africa. The seminar was held in Libreville. The seminar was organized by GABAC, with support from the World Bank. The CITES Secretariat also participated in the seminar.

2. Free Trade and Economic Organizations

a. East African Community (EAC)

Another potential organization to advance an elephant protection initiative is The East African Community (EAC), which is an intergovernmental organization comprising five countries in the African Great Lakes region in eastern Africa: Burundi, Kenya, Rwanda, Tanzania and Uganda. Hence, two of the countries with which the report is concerned – Kenya and Uganda- are part of the EAC. The organization was originally founded in 1967, collapsed in 1977, and was officially revived on 7 July 2000.

[255] *Id.*
[256] For more information on ESAAMLG,s see http://www.esaamlg.org.
[257] For more information on GIABA see http://www.giaba.org/member-states/33_member-states.htm.

In 2008, after negotiations with the Southern Africa Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA), the EAC agreed to an expanded free trade area including the member states of all three. The EAC is an integral part of the African Economic Community.

On 1 July 2010, Kenyan President Mwai Kibaki officially launched the East African Common Market Protocol, an expansion of the bloc's existing customs union that entered into effect in 2005. This legislation may take up to five years for each of the countries to enact fully but official recognition of the common market took place on July 1, 2010.

i. The East African Legislative Assembly (EALA)

The East African Legislative Assembly (EALA) is the legislative arm of the Community. The EALA has 27 members who are all elected by the National Assemblies or Parliaments of the member states of the Community. The EALA has oversight functions on all matters that fall within the Community's work and its functions include debating and approving the budget of the Community, discussing all matters pertaining to the Community and making recommendations to the Council as it may deem necessary for the implementation of the Treaty, liaising with National Assemblies or Parliaments on matters pertaining to the Community and establishing committees for such purposes as it deems necessary. Since being inaugurated in 2001, the EALA has had several sittings as a plenum in Arusha, Kampala and Nairobi.

ii. The East African Court of Justice

The East African Court of Justice is the judicial arm of the Community. The court has original jurisdiction over the interpretation and application of the 1999 Treaty that re-established the EAC and in the future may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realize such extended jurisdiction. It is temporarily based in Arusha, Tanzania.

b. The Southern African Development Community (SADC)

The Southern African Development Community (SADC) is an inter-governmental organization headquartered in Gaborone, Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 15 southern African states. It complements the role of the African Union. Its members are Angola, Botswana, DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia, Zimbabwe, South Africa, Seychelles, and Madagascar. Hence, two of the countries with which our report is concerned – Botswana and DRC are members of SADC.

On August 14, 2001, the 1992 SADC treaty was amended. The amendment heralded the overhaul of the structures, policies and procedures of SADC, a process which is ongoing. One of the changes is that political and security cooperation is institutionalized in the Organ on Politics, Defense and Security (OPDS). One of the principal SADC bodies, it is subject to the oversight of the organization's supreme body, the Summit, which comprises the heads of state or government.

The SADC Free Trade Area was initiated in 2000; its original members were the SACU countries (South Africa, Botswana, Lesotho, Namibia, and Swaziland). Next to join were Mauritius, Zimbabwe, and Madagascar. In 2008 Malawi, Mozambique, Tanzania, and Zambia joined, bringing the total number of SADC FTA members to 12. Angola, DR Congo and Seychelles are not yet participating.

In 2008, the SADC agreed to establish a Grand Free Trade Area with the East African Community (EAC) and the Common Market of Eastern and Southern Africa (COMESA) including all members of each of the organizations.

SADC's aims are set out in different sources. The sources include the treaty establishing the organization (SADC treaty); various protocols (other SADC treaties, such as the corruption protocol, the firearms protocol, the OPDS protocol, the health protocol and the education protocol); development and cooperation plans such as the Regional Indicative Strategic Development Plan (RISDP) and the Strategic Indicative Plan of the Organ (SIPO); and declarations such as those on HIV and AIDS and food security. Not all of the pre-2001 treaties and plans have been harmonized with the more detailed and recent plans such as the RISDP and SIPO.

In some areas, mere coordination of national activities and policies is the aim of cooperation. In others, the member states aim at more far-reaching forms of cooperation. For example, on foreign policy the main aim is coordination and cooperation, but in terms of trade and economic policy, a tighter coordination is in progress with a view to one day establishing a common market with common regulatory institutions.

One significant challenge is that member states also participate in other regional economic cooperation schemes and regional political and security cooperation schemes that may compete with or undermine SADC's aims. For example, South Africa and Botswana both belong to the Southern Africa Customs Union, Zambia is a part of the Common Market for Eastern and Southern Africa, and Tanzania is a member of the East African Community.

On October 22, 2008, SADC joined with the Common Market for Eastern and Southern Africa and the East African Community to form the African Free Trade Zone. The leaders of the three trading blocs agreed to create a single free trade zone, the African Free Trade Zone, consisting of 26 countries with a GDP of an estimated $624bn (£382.9bn). It is hoped the African Free Trade Zone agreement would ease access to markets within the zone and end problems arising from the fact that several of the member countries belong to multiple groups.

c. Communaute Économique e Monetaire de l'Afrique Centrale (CEMAC)

An important organization is the Communaute Economique et Monetaire de L'Afrique Centrale (CEMAC). CEMAC is an amalgamation of l'Union monétaire de l'Afrique centrale (UMAC) et l'Union économique de l'Afrique centrale (UEAC). The members of CEMAC are Cameron, the Central African Republic, Chad, the Republic of the Congo, and Equatorial Guinea. The treaty establishing CEMAC was signed on Marcy 16, 1994 and has been in force since June 1999. It is headquartered in Bangui, Central African Republic. As discussed in Part I, the Treaty establishing CEMAC, the additional Treaty on the institutional and legal system, and the two conventions on the Central African Economic Union (UEAC) and the Central African Monetary Union (UMAC), provide for the possibility to transfer monetary, economic, and financial sovereignty. It foresees in particular the adoption by the UMAC ministerial committee of regulations that directly have the force of law and do not require to be transposed into the national laws of each member state. The procedures set forth in the Treaty and UMAC Convention, covering situations where the regulations contain provisions that fall within the purview of other areas of competency, were followed during the preparation and adoption of CEMAC Regulation 01/03 and particularly, the involvement of ministers of justice and the interior. Besides, the regulation was unanimously adopted. CEMAC also has a common customs code. However, implementation occurs on the national level.

Some organizations within CEMAC are also key. The Central African Banking Commission (COBAC) can play a role.

The Council of Ministers is one of the organs of CEMAC.

La Banque des États de l'Afrique Centrale or BEAC has the responsibility for issuing money, conducting monetary policy, conducting exchange operations, and managing reserves, and promoting the payment system within the Community.

The Community Court of Justice is based in Ndjamena and adjudicates controversies concerning the operation of CEMAC.

La Commission de Surveillance du Marché Financier de l'Afrique Centrale (COSUMAF) is headquarters in Gabon.

d. Economic Community of Central African States (ECCAS)

A potentially important regional organization is the Economic Community of Central African States (ECCAS), also known as Communauté économique des États de l'Afrique centrale (CEEAC), an international organization created for economic, social and cultural development with a view to achieving a common market. It flows from the Plan of Action of Lagos of April 1980. The members of ECCAS are Angola, Burundi, Cameroon, the Central

African Republic, the Republic of the Congo, the Democratic Republic of the Congo, Gabon, Equatorial Guinea, Chad, and São Tomé and Principé.

At a summit meeting in December 1981, the leaders of the Central African Customs and Economic Union (UDEAC) agreed in principle to form a wider economic community of Central African states. ECCAS was established on 18 October 1983 by the UDEAC members and the members of the Economic Community of the Great Lakes States (CEPGL) (Burundi, Rwanda and the then Zaire) as well as Sao Tomé and Principe. Angola remained an observer until 1999, when it became a full member.

ECCAS began functioning in 1985, but was inactive for several years because of financial difficulties (non-payment of membership fees) and the conflict in the Great Lakes area. The war in the DRC was particularly divisive, as Rwanda and Angola fought on opposing sides. ECCAS has been designated a pillar of the African Economic Community (AEC), but formal contact between the AEC and ECCAS was only established in October 1999 due to the inactivity of ECCAS since 1992 (ECCAS signed the Protocol on Relations between the AEC and the Regional Economic Communities in October 1999). The AEC again confirmed the importance of ECCAS as the major economic community in Central Africa at the third preparatory meeting of its Economic and Social Council (ECOSOC) in June 1999.

Presided over by President Pierre Buyoya of Burundi, the 2nd Extra-Ordinary Summit of ECCAS was held in Libreville on February 6, 1998. The Heads of State/Government present at the summit committed themselves to the resurrection of the organization. The Prime Minister of Angola also indicated that his country would become a fully-fledged member.

The summit approved a budget of 10 million French Francs for 1998 and requested the Secretariat to:

- Obtain assistance from UNECA to evaluate the operational activities of the secretariat; to evaluate the contributions due by member states; and the salaries and salary structures of employees of the secretariat;
- Convene an extra-ordinary meeting of the Council of Ministers as soon as possible to evaluate the recommendations of UNECA; the Council should then draw up proposals for a new administrative structure for the secretariat and revised contributions due by each member state.

The summit also requested countries in the region to find lasting and peaceful solutions to their political problems. The chairman also appealed to member countries to support the complete lifting of the embargo placed on his country.

During the inauguration of President Bongo of Gabon on January 21, 1999, a mini-summit of ECCAS leaders was held. The leaders discussed problems concerning the functioning of ECCAS and the creation of a third Deputy Secretary-General post, designated for Angola. Angola formally joined the Community during this summit.

The 10th Ordinary Session of Heads of State and Government took place in Malabo in June 2002. This Summit decided to adopt a protocol on the establishment of a Network of Parliamentarians of Central Africa (REPAC) and to adopt the standing orders of the Council for Peace and Security in Central Africa (COPAX), including the Defense and Security Commission (CDC), Multinational Force of Central Africa (FOMAC) and the Early Warning Mechanism of Central Africa (MARAC). Rwanda was also officially welcomed upon its return as a full member of ECCAS.

The 11th Ordinary Session of Heads of State and Government in Brazzaville during January 2004 welcomed the fact that the Protocol Relating to the Establishment of a Mutual Security Pact in Central Africa (COPAX) had received the required number of ratifications to enter into force. The Summit also adopted a declaration on the implementation of NEPAD in Central Africa as well as a declaration on gender equality.

i. COMIFAC

One of ECCAS's specialized organs is COMIFAC. Established by Déclaration of Yaoundé in March 1999, COMIFAC is a political and technical organ to coordinate the conservation of sustainable ecosystems of the forests and savannahs in Central Africa. In February 2005, COMIFAC adopted a Plan to improve the operation and conservation of the forests of Central Africa.

The conservation of elephants in Central Africa is spearheaded by the Sub-regional strategy for the conservation of elephants in Central Africa (CAECS)

The conservation of Central African wildlife is an important concern expressed by the Heads of State of Central Africa during the two summits held in Yaoundé in March 1999 and in Brazzaville in February 2005. They are committed to concerted actions to curb large-scale poaching and other unsustainable activities in the sub-region.

It is in this context that, at the request of Ministers in charge of wildlife in the sub-region, a workshop for the formulation of the strategy for elephant conservation in Central Africa was held in Limbe, Cameroon from August 29 to September 2, 2005. The workshop was organized by the Group of Specialists of African Elephants (AfESG) and the Commission for the Protection of Species (IUCN) and has also received financial support from IUCN, the U.S. Wildlife Service, WWF International and WCS. This strategy is part of the response to the concern already expressed by the African elephant specialists to fight against the threats to key species.

e. Community of Sahel-Saharan States (CEN-SAD)

The Community of Sahel-Saharan States CEN-SAD is a framework for Integration and Complementarity. It intends to work with the other regional economic communities and the

Organization of African Unity, to strengthen peace, security, and stability and achieve global economic and social development.

CEN-SAD was established on February 4, 1998, following the Conference of Leaders and Heads of States held in Tripoli. The Treaty on the establishment of the Community was signed by the Muammar Ghaddafi and the Heads of State of Burkina Faso, Mali, Niger, Chad and Sudan. The Central African Republic and Eritrea joined the Community during the first Summit of the organization held in Syrte in April 1999. Senegal, Djibouti, and Gambia joined during the N'djamena Summit in February 2000. There are currently 23 member states.

The CEN-SAD Community was recognized as a regional economic one during the 36th ordinary session of the Conference of Leaders and Heads of State and Government of the Organization of African Unity held in July 2000 in Lomé, Togo.

It was also given observer status in the UN General Assembly by virtue of the UN General Assembly resolution N° A/RES/56/92.

CEN-SAD has concluded partnership agreements with numerous regional and international organizations with the purpose of consolidating collective work in political, cultural, economic and social fields.

f. Intergovernmental Authority for Development (IAGD)

The Intergovernmental Authority on Development (IGAD) in Eastern Africa was created in 1996 to supersede the Intergovernmental Authority on Drought and Development (IGADD) which was founded in 1986. The recurring and severe droughts and other natural disasters between 1974 and 1984 caused widespread famine, ecological degradation, and economic hardship in the Eastern Africa region. Although individual countries made substantial efforts to cope with the situation and received generous support from the international community, the magnitude and extent of the problem argued strongly for a regional approach to supplement national efforts.

In 1983 and 1984, six countries in the Horn of Africa - Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda - took action through the United Nations to establish an intergovernmental body for development and drought control in their region. The Assembly of Heads of State and Government met in Djibouti in January 1986 to sign the Agreement which officially launched IGADD with Headquarters in Djibouti. The State of Eritrea became the seventh member after attaining independence in 1993.

In April 1995 in Addis Ababa, the Assembly of Heads of State and Government made a Declaration to revitalize IGADD and expand cooperation among member states. On March 21, 1996 in Nairobi the Assembly of Heads of State and Government signed "Letter of Instrument to Amend the IGADD Charter / Agreement" establishing the revitalized IGAD with a new name "The Intergovernmental Authority on Development". The Revitalized IGAD, with expanded areas of regional cooperation and a new organizational structure, was launched by the IGAD Assembly of Heads of State and Government on November 25, 1996 in Djibouti, the Republic of Djibouti.

B. Extraregional Mechanisms

1. The Palermo Convention on Transnational Organized Crime

Article 14 of the Palermo Convention on Transnational Organized Crime has an article with respect to the sharing of assets recovered in a transnational organized crime case. It states as follows:

Article 14. Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

2. When acting on the request made by another State Party in accordance with article 13 of this Convention, 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.

3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

(a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2(c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;

(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Interested persons (i.e. countries) should consider making arrangements between the source and consuming countries of ivory trafficking, whereby the consuming countries agree to return proceeds either directly to the source countries and/or to a regional mechanism on wildlife trafficking that can be used by regional enforcement groups, such as Eastern Africa Police Chiefs Cooperation Organization (EAPCCO). All five of the African countries that are the subject of this report are members of the Palermo Convention.

2. *Interpol*

As the world's largest police organization, Interpol is posed to play an important role in combatting money laundering and preventing environmental crimes around the world.

The General Secretariat is located in Lyon, France, and operates 24 hours a day, 365 days a year. INTERPOL also has seven regional offices across the world and a representative office at the United Nations in New York and at the European Union in Brussels. Each of the 190 member countries maintains a National Central Bureau staffed by its own highly trained law enforcement officials.

One of Interpol's greatest strengths is its neutrality, facilitating international police cooperation even where diplomatic relations do not exist between particular countries. Action is taken within the limits of existing laws in different countries. The Interpol Constitution prohibits 'any intervention or activities of a political, military, religious or racial character'.

With regards to environmental crimes, Interpol has taken extensive steps to coordinate an effective international strategy to combat widespread criminal activity involving wildlife. Interpol's environmental crime program consists of the following elements:

- Leading global and regional operations to dismantle the criminal networks behind environmental crime using intelligence-driven policing;
- Coordinating and developing international law enforcement best practice manuals, guides and other resources;
- Providing environmental law enforcement agencies with access to Interpol services by enhancing their links with Interpol National Central Bureaus;
- Working with the Environmental Crime Committee to shape the program's strategy and direction.

The INTERPOL Wildlife Crime Working Group and the INTERPOL Pollution Crime Working Group bring together criminal investigators from around the world to share information and initiate targeted projects to tackle specific areas of environmental crime.

Interpol's Project Wisdom deals directly with illegal ivory trade and the conservation of elephants. With aims to organize collaborative, high-level international efforts to improve political will; transform political will into departmental support; and train officers in the necessary skills, the project will call upon countries to establish National Environmental Task Forces that will be connected regionally and internationally through INTERPOL National Central Bureaus. These task forces will encourage the use of modern intelligence-led enforcement practices for elephant and rhinoceros conservation.

Interpol's Project Wisdom is comprised of the following objectives:

- Encourage communication, cooperation and collaboration with respect to intelligence exchange, cross-border investigations, and better training;
- Contribute to the apprehension of criminals and organized groups;
- Development of a global picture of the criminal activity affecting the ongoing conservation of elephants and rhinoceros.

Since the start of the program in 2008, Interpol has experienced several operational successes. Four of the operations – Baba, Costa, Mogatle and Ahmed – resulted in the arrests of 254 individuals. The conviction rate exceeded 80 per cent and tens of thousands of carved ivory items were recovered, along with around three tons of raw ivory.

Most recently, on July 22, 2013, an INTERPOL-led operation targeting criminal organizations behind the illegal trafficking of ivory in West and Central Africa resulted in 66 arrests and the seizure of nearly 4,000 ivory products and 50 elephant tusks, in addition to military grade weapons and cash.

Supported by the International Fund for Animal Welfare (IFAW), the four-month (January – May) Operation Wendi coordinated national wildlife enforcement authorities, police, customs and specialized units for targeted inspections and investigations against the illegal trade in ivory and other illicit goods by wholesalers, retailers and individuals.

The interventions across five countries – Central African Republic, Côte d'Ivoire, Congo, Guinea and Liberia – also resulted in the seizure of 148 animal parts and 222 live animals, including crocodiles and parrots, which were released back into the wild.

3. *United Nations Office on Drugs and Crime (UNODC)*

a. *Money Laundering*

The Law Enforcement, Organized Crime and Anti-Money-Laundering Unit of UNODC is responsible for carrying out the Global Program against Money-Laundering, Proceeds of

Crime and the Financing of Terrorism, which was established in 1997 in response to the mandate given to UNODC through the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The Unit's mandate was strengthened in 1998 by the Political Declaration and the measures for countering money-laundering adopted by the General Assembly at its twentieth special session, which broadened the scope of the mandate to cover all serious crime, not just drug-related offenses.

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

The Global Program against Money-Laundering, Proceeds of Crime and the Financing of Terrorism (GPML) has developed, in collaboration with UNODC's Legal Advisory Section and International Monetary Fund (IMF), model laws for both common law and civil law legal systems, to assist countries in setting up their anti-money-laundering/countering the financing of terrorism (AML/CFT) legislation in full compliance with the international legal instruments, and in particular the 40 + 9 FATF Recommendations, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 United Nations Convention against Transnational Organized Crime.

In this regard, the following three model laws have been developed:

The 2005 UNODC and IMF Model-Legislation on Money-Laundering and Financing of Terrorism has been reviewed and finalized by an informal group of international civil law experts.

The 2009 Model Provisions for Common Law Legal Systems on Money-Laundering, Terrorist Financing, Preventive Measures and the Proceeds of Crime, which has been finalized by the United Nations Office on Drugs and Crime (UNODC), in joint collaboration with the Commonwealth Secretariat, International Monetary Fund (IMF) and by a panel of experts from common law countries.

These model laws, which serve as working tools for Member States, are in a continuous process of upgrading, encompassing new international standards.

UNODC also provides technical assistance against money-laundering Through the Global Program against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, UNODC assists Governments in confronting criminals who launder the proceeds of crime through the international financial system. It also provides Governments, law enforcement authorities and financial intelligence units with strategies to counter money-laundering, advises on improved banking and financial policies and assists national financial investigation services.

Strategies include granting technical assistance to authorities from developing countries, organizing training workshops, providing training materials and transferring expertise between jurisdictions.

UNODC provides advisory services to states/jurisdictions and financial intelligence units. It provides tools/field support, workshops/seminars, e-Learning, and mentor program.

b. Wildlife Crime

The United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC), contain detailed provisions to support international cooperation in criminal matters, such as extradition and mutual legal assistance, and provide for specific and innovative forms of cooperation that can be applied in the field of wildlife and forest crime. Examples include joint investigations and cooperation for the use of special investigative techniques, such as controlled delivery, electronic and other forms of surveillance and undercover operations. These Conventions further require States parties to adopt appropriate measures aimed at promoting law enforcement cooperation.

The General Assembly affirmed the relevance of the UNTOC to fight illicit trafficking in natural resources in its resolution 55/25 of 15 November 2000, in which it stated that the Convention “constitutes an effective tool and the necessary legal framework for international cooperation in combating such criminal activities as illicit trafficking of protected species of wild flora and fauna, in furtherance of the principles of the Convention on International Trade in Endangered Species of Wild Fauna and Flora”. In this connection, the United Nations Office on Drugs and Crime (UNODC) has an important role to play in terms of strengthening the capacity of Governments to investigate, prosecute and adjudicate crimes against protected species of wild flora and fauna, complementing other international legal frameworks that are relevant for the protection of the environment, as for instance the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

In resolution 2001/12, the Economic and Social Council (ECOSOC) urged Member States to adopt “the legislative or other measures necessary for establishing illicit trafficking in protected species of wild fauna and flora as a criminal offence in their domestic legislation.” In a subsequent resolution 2003/27, the ECOSOC urged Member States to cooperate with UNODC (as well as with the secretariats of CITES and the CBD) with a view to preventing, combating and eradicating trafficking in protected species of wild fauna and flora. This ECOSOC resolution also encouraged Member States to adopt, where necessary, preventive measures together with a review of their criminal legislation in order to ensure that the serious nature of these offences relating to trafficking in protected species is punishable by appropriate penalties.

In 2011, the Economic and Social Council adopted Resolution 2011/36 on crime prevention and criminal justice responses to trafficking in endangered species of wild fauna and

flora. In this resolution, the Council invited Member States to consider making illicit trafficking in endangered species of wild fauna and flora a serious crime and requested UNODC to provide technical assistance to States, upon request, particularly as regards the prevention, investigation and prosecution of trafficking in endangered species of wild fauna and flora, within its mandate and in cooperation with Member States, relevant international organizations and the private sector. As a follow-up, UNODC is in the process of finalizing two computer-based training modules to assist law enforcement agencies in the investigation of wildlife crimes.

Resolution 20/5, also adopted in 2011 by the CCPCJ, addresses the problem of transnational organized crime committed at sea. This resolution offers Member States and UNODC a unique opportunity to tackle wildlife trafficking at sea.

In July 2011, national governments, international organizations and non-governmental organizations met to discuss critical issues related to the illicit trade of commodities such as wildlife, timber, fish and waste at the 11th Asian Regional Partners Forum on Combating Environmental Crime (ARPEC).

In 2012, the Economic and Social Council adopted, on the recommendation of the Commission on Crime Prevention and Criminal Justice, Resolution 2012/19 on strengthening international cooperation in combating transnational organized crime in all its forms and manifestation. In this resolution, the Council recognized the involvement of transnational criminal organizations in all aspects of crimes that have a significant impact on the environment and urged Member States to consider addressing different forms and manifestations of such crime.

4. International Center for Asset Recovery (ICAR)

The International Centre for Asset Recovery (ICAR) specializes in strengthening the capacities of countries in recovering stolen assets, with an emphasis on financial investigations and asset tracing techniques, mutual legal assistance and international cooperation in relation to corruption and money laundering cases.

To this end, ICAR delivers interactive, country-specific on-site training programs conceptualized and devised to enhance the skills and competencies of investigators and prosecutors to analyze, investigate and prosecute complex corruption, financial crime and money laundering cases.

ICAR further assists countries by facilitating mutual legal assistance and providing advice to concerned law enforcement authorities in handling specific asset recovery cases. The demand for such assistance has recently increased in light of the regime changes of the Arab Spring where new democratic establishments are seeking to engage on an international level to trace and repatriate stolen public assets stashed away in countries abroad. ICAR's experts are

also available to review legislation and institutional capacity of countries in relation to asset recovery, and to accompany related reform processes.

Finally, ICAR develops specialized IT tools and products which facilitate the management and implementation of asset recovery processes. This includes software tools designed to facilitate investigations using publicly available information or to document and illustrate complex cases and flows of money. ICAR's IT team also develops e-learning modules on aspects of financial investigation and asset recovery, and advises law enforcement agencies on their IT needs and capacities.

ICAR receives core funding from Liechtenstein, Switzerland and the United Kingdom, as well as project related funding from a range of bilateral donors, international organizations, and partner countries.

5. Asia Pacific Group on Money Laundering (APG)

The Asia Pacific Group on Money Laundering (APG) is a potentially important player because many of the consumer states belong to APG. Its members are Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, Canada, PRC, Cook Islands, Fiji, Hong Kong, India, Indonesia, Japan, Republic of Korea (South), Lao's People's Democratic Republic, Macao, Malaysia, Maldives, The Marshall Islands, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Niue, Pakistan, Palao, Papau New Guinea, the Philippines, Samoa, Singapore, Solomon Islands, Sri Lanka, Taiwan, Thailand, Timor Leste, United States, Vanuatu, and Vietnam.

The APG is one of the most important organizations with which to cooperate because the largest consuming countries are in the APG: the PRC, Japan, the Philippines, and the U.S. The reality is that the largest potential sources of money are in these countries, since the end users are paying the most money and they also have the potential to fund asset recovery. Hence, one potential would be to have an initiative for the consumer countries to repatriate money from seizures to the source countries or at least start a fund similar to the U.S. Multinational Species Conservation fund.

6. World Customs Organizations

The World Customs Organization is an important player because customs officers are on the front line of having the opportunity to inspect, seize, and forfeit any illegally trafficking ivory entering or leaving a country. It participates in the International Consortium on Combating Wildlife Crime, discussed in Sec. 11 below.

7. Egmont Group

Consideration should be given to making the Egmont Group of Financial Intelligence Units part of the elephant protection initiative. In 1995 a group of Financial Intelligence Units

(FIUs) met at the Egmont Arenberg Palace in Brussels and decided to establish an informal group whose goal would be to facilitate international cooperation. Now known as the Egmont Group, these FIUs meet regularly to find ways to cooperate, especially in the areas of information exchange, training and the sharing of expertise.

Any Financial Intelligence Unit which considers itself to comply with the criteria of the Egmont Group of being a central, national agency responsible for receiving, (and as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information, is eligible to apply to become an Egmont member FIU. At present none of the five countries belong to the Egmont Group. Consideration should be given to having the five countries join the Egmont Group, depending what is required to make them eligible.

8. Stolen Asset Recovery Initiative (StAR)

The Stolen Asset Recovery Initiative (StAR) is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

StAR delivers introductory awareness-raising workshops and more advanced training courses on asset recovery to all institutions, practitioners and stakeholders involved in the asset recovery process. More than 720 participants from 70 countries have participated in regional and national training in Latin America, Africa, South Asia, East Asia, Central and Eastern Europe, and the Middle East. In addition, StAR actively engages with several countries, helping them at their request - develop legislation to strengthen legal frameworks to support asset recovery; assisting in the development of their institutional frameworks and strengthening their capacity to conduct successfully their asset recovery efforts.

Upon request, StAR provides technical assistance to countries that are operationally engaged in asset recovery cases. Working with all the relevant institutions – including financial centers and anti-corruption agencies – StAR offers technical advice and best practices in the development of case strategy, as well as in the identification and mobilization of the most appropriate asset-tracing tools – such as mutual legal assistance, seizing and confiscating assets, and assisting in the acceleration of international cooperation.

9. International Monetary Fund (IMF)

The International Monetary Fund (IMF) promotes international monetary cooperation and exchange rate stability, facilitates the balanced growth of international trade, and provides resources to help members in balance of payments difficulties or to assist with poverty reduction.

Through its economic surveillance, the IMF keeps track of the economic health of its member countries, alerting them to risks on the horizon and providing policy advice. It also lends to countries in difficulty, and provides technical assistance and training to help countries improve economic management. This work is backed by IMF research and statistics.

The IMF has 188 member countries. It is a specialized agency of the United Nations but has its own charter, governing structure, and finances. Its members are represented through a quota system broadly based on their relative size in the global economy.

The IMF's legal department has an Anti-Money Laundering Unit that periodically provides technical assistance to countries. The IMF's AML/CFT technical assistance aims to improve AML/CFT regimes worldwide and to provide concrete support to the IMF's membership. This assistance is delivered through timely and high-level programs customized to fit the specific needs and priorities of IMF member countries and their respective institutions.

IMF AML/CFT technical assistance is provided on a voluntary, cooperative basis, i.e., at the request and with the assistance of the authorities of that country. It is based on international standards and best practices derived, inter alia, from the Vienna Convention, the International Convention for the Suppression of the Financing of Terrorism, relevant UN Security Council Resolutions, and the FATF 40+9 Recommendations.

The IMF attaches great importance to country ownership. To ensure that the IMF's technical assistance is effective and brings lasting benefits, it is planned and carried out with the full involvement of the authorities of the recipient country at each stage of the process-from the identification of needs, determined by discussion and agreement on terms of reference and project goals through implementation and follow-up.

Depending on the circumstances, some technical assistance needs may be met by short-term engagements while others may require longer-term commitments. Accordingly, technical assistance may be provided in the form of headquarters-based advice, short-term on-site advisory missions, assignment of longer-term experts or resident advisors, and national or regional seminars and workshops. Such assistance may be provided bilaterally, to a single jurisdiction, or in the form of a regional program covering several jurisdictions.

Since 2009, most of the AML/CFT technical assistance is externally financed through a multi-donor Topical Trust Fund.[258]

While much of this TA is delivered through bilateral missions to member countries, the Fund also conducts regional training and workshops for professionals involved in various aspects of AML/CFT regimes, such as legal drafters, financial sector supervisors, FIU officials, criminal justice officials, and officials preparing to participate in formal assessments of other countries'

[258] IMF, Technical Assistance on AML/CFT (http://www.imf.org/external/np/leg/amlcft/eng/aml3.htm), ACCESSED Aug 14, 2013.

AML/CFT systems; (and, as noted above, some legal drafting advice can be provided in part through correspondence with headquarters). [259]The AML Unit has an official in the IMF regional office in Kenya.

10. CITES Secretariat

The CITES Secretariat is a critical organization, since it is the Convention on International Trafficking in Endangered Species (CITES) that makes it a violation of international law to kill and traffic in endangered species such as elephants. As mentioned in Section II.B, CITES does not have an international enforcement mechanism.

Two of the monitoring tools used by the CITES Secretariat to assess policies for trade in elephant products and to support its decisions are MIKE and ETIS.

MIKE stands for Monitoring the Illegal Killing of Elephants and ETIS for Elephant Trade Information System. Both emerged after the 10th meeting of the Conference of the Parties as systems for tracking illegal activities involving elephants. At its 11th meeting (Gigiri, 2000), the Conference of the Parties approved both systems for implementation. It confirmed this decision at its 12th meeting (Santiago, 2002) with a few refinements [see Resolution Conf. 10.10 (Rev. CoP14)].

MIKE and ETIS are established under the supervision of the CITES Standing Committee. The Committee has formed a MIKE-ETIS Subgroup to oversee the further development, refinement, and implementation of the programs. The Secretariat has established an independent Technical Advisory Group (MIKE-ETIS TAG) to provide technical oversight to both MIKE and ETIS.

On May 16, 2013, the CITES Secretariat announced it had received National Ivory Action Plans from the first group of countries identified as primary source, transit, and import countries affected by illegal trade in ivory: China, Kenya, Malaysia, the Philippines, Thailand, Uganda, the United Republic of Tanzania and Vietnam.

The CITES Standing Committee requested the plans last March as a response to the dramatic rise in the number of elephants poached for their ivory. The alarming statistics produced by the CITES program for MIKE and ETIS (managed for CITES by TRAFFIC, a non-governmental organization) led to this request.[260]

The CITES Secretariat has both budgetary, legal, and institutional limits that prevent it from effectively enforcing the ban on ivory trafficking, at least insofar as the international community and national governments want to use money laundering prosecution and asset recovery as principal tools.

[259] *Id.*
[260]CITES, Eight countries submit national action plans to combat illegal trade in elephant ivory, May 16, 2013.

11. The International Consortium on Combating Wildlife Crime (ICCWC)

In April 2011, the CITES Secretariat, Interpol, UNODC, the World Bank, and the WCO formed the International Consortium on Combating Wildlife Crime (ICCWC). International ICCWC is the collaborative effort by five inter-governmental organizations working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defense of natural resources.[261]

ICCWC has the mission of developing a regime whereby perpetrators of serious wildlife crimes will face a formidable and coordinated response, rather than the present situation where the risk of detection and punishment is all too low. In this context, ICCWC will mainly work for, and with, the wildlife law enforcement community, since it is frontline officers who eventually bring criminals engaged in wildlife crime to justice. ICCWC seeks to support development of law enforcement that builds on socially and environmentally sustainable natural resource policies, taking into consideration the need to provide livelihood support to poor and marginalized rural communities.

In the mid- to longer-term, ICCWC seeks to develop programs to enhance awareness of wildlife crime; provide institutional analysis and support; build capacity of national institutions, sub-regional and regional enforcement organizations, taking into consideration the whole range of investigative and prosecutorial techniques; foster coordinated enforcement actions; support analytic reviews, especially through its Wildlife and Forest Crime Analytic Toolkit; mainstream wildlife crime across relevant national agencies; promote natural resource management and development; understand and address drivers of wildlife crime; and address the drivers of wildlife crime to reduce demand.

The consortium has developed the Wildlife and Forest Crime Analytic Toolkit, built on the technical expertise of all ICCWC partners, as well as through extensive consultations with experts from across the globe from a variety of related fields. The toolkit is designed to serve as an initial entry point for national governments, international actors, practitioners, and scholars to better understand the complexity of the wildlife and forest crime and serve as a framework around which a prevention and response strategy can be developed.

The tool kit consists of five parts: legislation relevant to wildlife and forest offences and other illicit activities; law enforcement measures pertaining to wildlife and forest offenses; prosecutorial and judicial capacities to respond to wildlife and forest crime; factors that drive wildlife and forest offenses, and the effectiveness of preventive interventions, and the availability, collection and examination of data and other information relevant to wildlife and forest crime.

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[261] For additional discussion of the ICCWC's activities, see http://www.cites.org/eng/prog/iccwc.php.

The ICCWC is an example of international organizations innovating and collaborating to pool their own expertise and resources to combat wildlife trafficking.

12. Bilateral Mechanisms

One way to participate in asset recovery is through bilateral arrangements or mechanisms.

a. The U.S. Government Policies and Practices

An example of the bilateral mechanisms is the policy and practice of the U.S. government. The U.S. government encourages international asset sharing and recognizes all foreign assistance that facilitates U.S. forfeitures so far as consistent with U.S. law. Federal statutes, namely 18 U.S.C. § 981(i), 21 U.S.C. § 882(e)(1)(E), and 31 U.S.C. § 9703(h)(2), govern international sharing in the U.S. International sharing by the U.S. is often guided by standing international sharing agreements or the subject of a future case-specific forfeiture sharing arrangement which the U.S. Department of Asset Forfeiture and Money Laundering Section (AFMLS) negotiates and the Department of State approves.[262]

The U.S. government encourages international asset sharing and recognizes all foreign assistance that facilitates U.S. forfeitures so far as consistent with U.S. law. International sharing is governed by 18 U.S.C. § 981(i), 21 U.S.C. § 882(e)(1)(E), and 31 U.S.C. §9703(h)(2). Standing international sharing agreements or the subject of a future case-specific forfeiture sharing arrangement negotiated by AFMLS and approved by the Department of State often guide international sharing by the U.S. The decision to share assets forfeited to the U.S. with a foreign government is a completely discretionary function of the Attorney General or the Secretary of the Treasury. It requires the concurrence of the Secretary of State, and, in certain circumstances, it is a decision that can be disapproved by Congress.[263]

Foreign governments do not need to follow a specific process to request share of assets with the U.S. They can do so pursuant to a treaty, a sharing agreement, or even via other diplomatic or law enforcement channels. Prosecutors and law enforcement agencies should make spontaneous sharing recommendations whenever they receive foreign assistance that facilitated the forfeiture of an asset in a U.S. case, especially when that asset is located in the U.S. When the U.S. forfeits assets in a judicial forfeiture case with the help of a foreign state and the seizing agency is a Department of Justice component or participant in the Department of Justice forfeiture fund, the federal prosecutor assigned to the case is responsible for sending a formal sharing recommendation to AFMLS.[264]

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[262] U.S. Department of Justice, Asset Forfeiture Policy Manual at 139 (2012) (www.usdoj.gov/com/foia/docs/policy07.pdf.

[263] *Id.*

[264] *Id.*

In an administrative forfeiture matter, the seizing agency is responsible for the recommendations. In cases that implicate the Treasury forfeiture fund, the seizing agency, e.g., Internal Revenue Service, U.S. Secret Service, or Immigration and Customs Enforcement is responsible to send a sharing recommendation to Treasury Executive Office of Asset Forfeiture (TEOAF). The seizing agency should consult the prosecutor on the case first. For Department of Justice forfeiture fund international sharing recommendations, AFMLS International Programs Unit (IPU) prepares the sharing recommendations for approval for the Deputy Attorney General. For Treasury forfeiture fund international sharing recommendations, the director of TEOAF approves the sharing recommendations. AFMLS and TEOAF must obtain State Department and each other's concurrence for each proposed transfer to a foreign government after it is approved by their respective designees.[265]

The interagency process can be lengthy. To avoid delays, the agency or prosecutor should make the international sharing recommendation as soon as is practicable, or immediately after the final order forfeiting the foreign assets is obtained. As soon as possible, the seizing agency should note in any electronic asset tracking system, such as the Calibrated Asset Trafficking System (CATS) or TALONS, that a particular asset might be, is, or will be subject to an international sharing request or recommendation – and definitely before that asset has been liquidated.

DOJ policy advises prosecutors and federal law enforcement agencies to be mindful that domestic sharing will occur only after completion of the international sharing process, and will be taken from the federal share, which is the amount of money that the U.S. has available at that time.

With increasing frequency countries are enacting laws to allow them to share domestically forfeited assets with other countries. Hence if the U.S. prosecutors or investigators assisted in foreign cases that resulted in a foreign forfeiture, they are encouraged to contact an AFMLAS IPU attorney to see whether it would be fruitful to submit a sharing request to that country.[266]

Pursuant to the provisions of U.S. law, including 18 U.S.C. §981(I), 21 U.S.C. § 881(e)(1)(E), and 31 U.S.C. §9703(h)(2), the Departments of Justice, State and Treasury have proactively sought to encourage foreign governments to cooperate in joint investigations of narcotics and money laundering as well as other crimes, offering the possibility of sharing in forfeited assets. A parallel goal has been to encourage of spending of these assets to improve narcotics-related law enforcement. The long-term goal of the U.S. government is to encourage governments to improve asset forfeiture laws and procedures so they will be able to conduct investigations and prosecutions of narcotics trafficking and money laundering, which include asset forfeiture. The U.S. and its partners in the G-8 are pursuing a program to strengthen asset

[265] *Id.*
[266] *Id.* at 170.

forfeiture and sharing regimes. Canada, Cayman Islands, Hong Kong, Jersey, Liechtenstein, Switzerland, and the United Kingdom have shared forfeited assets with the U.S.[267]

Under 9-118.000 of the U.S. Attorney's Manual, the United States Attorney General may transfer any forfeited personal property or the proceeds from the sale of any forfeited personal or real property, as authorized by statute, to a foreign country which participated directly or indirectly in any acts which led to the seizure or forfeiture of the property, if such transfer: (1) has been agreed to by the Secretary of State; (2) is authorized in an international agreement between the United States and the foreign country; and (3) is made to a country which, where applicable, has been certified under § 481(h) of the Foreign Assistance Act of 1961

Requests by a foreign agency must be in the form prescribed by the Director, Executive Office for Asset Forfeiture.[268]

Governments wanting to participate in asset recoveries on wildlife trafficking should join multilateral agreements that provide for sharing and consider concluding additional agreements with the main consuming countries of ivory trafficking. Such countries include the Peoples' Republic of China, the Philippines, Thailand Taiwan, and the U.S. Whenever possible, they should also consider negotiating mutual legal assistance in criminal matter agreements.

The U.S. and other governments that share assets in wildlife trafficking may want to encourage other consuming countries to participate in pilot projects to be proactive in seizing and sharing proceeds with the source countries. They may want to do so in CITES, Interpol, the UNODC, the G8, and the G20 fora.

b. Seizure and Forfeiture of Wildlife Trafficking

The U.S. Department of Justice has brought actions for non-conviction based forfeiture. In one case it successfully forfeited Mongolian dinosaur skeleton and returned the same to Mongolia.[269]

Another case involved an in rem action for civil forfeiture against ivory tusk of an African elephant. The owner killed the elephant during a sport hunt under a license from Zimbabwe Parks and Wildlife Management Authority. The owner obtained permits from Zimbabwe to export the tusk to the U.S. However, U.S. customs concluded that the tusk did not qualify as a sport-hunted trophy and could not be lawfully imported into the U.S. The U.S. government won the case on summary judgment because the defendant imported the tusk into

[267] U.S. Department of State, II INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, MONEY LAUNDERING AND FINANCIAL CRIMES 30 (March 2006).
[268] In an effort to help foreign governments and others understand international cooperation on U.S. asset recovery, the U.S. government has authored a publication, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation* (http://www.state.gov/documents/organization/190690.pdf).
[269] *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 U.S. ist. LEXIS 165153 (S.D.N.Y. Nov. 14, 2012).

the U.S. in violation of the Endangered Species Act and the African Elephant Conservation Act. The owner imported the tusk into the U.S. without a permit for the export or the import of a species listed on Appendix 1 of CITES, and hence the tusk was found subject to forfeiture.[270]

To successfully prosecute civil and criminal forfeiture cases often requires evidence from the source country that the importer acted in violation of the source country's laws. Hence, the foreign government can help by sending to the U.S. evidence of their law and declarations of government and/or law enforcement officials with respect to such laws, regulations, and enforcement policies, as well as any information to support the prosecution of the case involved.

When the U.S. DOJ successfully prosecutes a criminal case, it seeks restitution, e.g., pursuant to 18 U.S.C. §§ 3663. 3663A as well as 3563(b)(2) and 3583(d). Sometimes restitution is satisfied by the proceeds seized during the investigation. Restitution may be paid into the Multinational Species Conservation Fund.[271]

c. Multinational Species Conservation Fund

The Multinational Species Conservation Funds (MSCF) save some of the world's fastest disappearing and most treasured animals in their habitats. In particular, the African Elephant Conservation Act (ACEA) (16 U.S.C. §§ 4201-4203, 4211-4214, 4221-4246 and 1538) is used to fund expenses to carry out the AECA.

The funds from the MSCF provide direct support in the form of technical and cost-sharing grant assistance to range countries for on-the-ground protection and conservation of African elephants and other endangered species.

A range of activities funded through this program are designed to promote collaboration with key range country decision-makers, furthering the development of sound policy, international cooperation and goodwill toward the U.S. among citizens of developing countries. The fund strengthen law enforcement activities build support for conservation among people living in the vicinity of the species' habitats, and provide vital infrastructure and field equipment needed to conserve habitats. The program strengthens local capacity by providing essential training and collaborative efforts. Without this financial assistance, it is likely that degradation of species and their habitats will continue, which may ultimately result in extinction.

The MSCF, which are implemented through International Conservation's Wildlife without Borders Species Program, provide technical assistance and grant funding to range countries through broad-based partnerships with national governments, local communities, non-

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[270] *United States v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*, 871 F. Supp. 2d 128 (E.D.N.Y. 2012).

[271] *See, e.g., U.S. v. Vinh Chuong Kha*, U.S. Dist. Ct., C.D. Ca., CR No. 12-202(A) – CAS, Motion for Entry of Consent Restitution Order; Memorandum of Points and Authorities.

government organizations, and other private entities for on-the-ground conservation projects. Funding is target to the highest-priority projects impacting the greatest number of species and support is provided for a range of activities including anti-poaching, conservation education, research, monitoring, habitat restoration, community outreach, law enforcement, training and capacity building.

In many cases the U.S. Fish and Wildlife Service is the sole or leading funder of projects that affect the survival of these endangered wildlife populations. The MSCF are an important mechanism to garner trust and respect for the U.S. internationally, and have engaged nearly 600 domestic and foreign partners working in over 54 countries. From 2007 to 2011, the MSCF provided $56 million in grant funding for on-the-ground conservation, leveraging nearly $87 million in additional matching funds.

In 2011, funds for African elephants improved protection of elephants and key habitats in and in and around of Udzungwa Mountains of southern Tanzania by identifying and monitoring corridors between protected areas used by elephants and initiating programs to protect connectivity and dispersal areas for these increasingly isolated elephant populations. Another project conducted aerial surveillance of Gabon's national parks to detect and respond to signs of poaching targeting forest elephants to prevent future and illegal inclusions, and conducted systematic surveys of the savanna and swamp areas of Batecke, Lope, Loango, and Wonga Wongueparks.

13. Asset Sharing

Both bilaterally and multilaterally, perhaps the most important short-term initiative that can help strengthen both the political will to prosecute elephant poaching and ivory trafficking in the five African countries and simultaneously give them resources to execute the enforcement strategy is for governments from consuming countries to share assets. This can be done both bilaterally, as discussed in 'bilateral mechanisms' under practices of the U.S. government.

As mentioned above in D.1.j through m., FATF best practices calls for assets to be returned to victims or prior legitimate owners of assets forfeited. FATF best practices also call for assets to be returned in accordance with the provisions of UNCAC and UNTOC.

Informal international cooperation through the Interpol NCB should be highlighted. Already Interpol 's Wildlife Crime Working Group and Interpol's Project Wisdom, discussed in Sec. III.B.2, has made significant commitments to helping coordinate effective international cooperation to combat wildlife trafficking and especially elephant poaching and ivory trafficking.

Pilot projects and political commitments by the consuming countries to participate in asset sharing, especially within international organizations and informal groups, such as the G8 and G20, are important potential steps to develop momentum for asset sharing.

14. Potential Additional Mechanisms

One mechanism that could be useful is the establishment of a mechanism for wildlife trafficking. It would be staffed by law enforcement officials in general, park rangers and environmental officials, and financial officials who are responsible anti-money laundering. It could be called African Center for Investigation and Prosecution of Environmental Crimes (ACIPEC). If useful, it could be staffed by some external professionals (e.g., professionals experienced in money laundering prosecutions and asset recovery). They could be seconded to a participating country to help with the investigation and prosecution of a specific case. The participants in ACIPEC could meet periodically and have telephone and/or video conferences to share law enforcement issues and practical approaches to resolving problems. In other words, the participants would informally share ideas and know-how with respect to responding to wildlife trafficking and other environmental problems.

ACIPEC could be modeled on the Joint International Tax Shelter Information Center (JITSIC). The aims of JITSIC are to supplement the ongoing work of tax administrations in: curbing abusive tax avoidance transactions, arrangements, and schemes (also referred to as abusive tax schemes); and enhancing activities against cross-border transactions involving tax compliance risk.

Periodically, the parties will agree on focus areas for JITSIC, based on potential compliance risks. The initial focus areas are: tax administration issues arising from the global economic environment and financial crisis; use of off-shore arrangements to avoid tax; arrangements used by high wealth/income taxpayers to minimize their tax liabilities, and; tax administration approaches and activities to improve transfer pricing compliance.[272]

a. Clinton Global Initiative

On September 26, 2013, the Wildlife Conservation Society (WCS) announced the Partnership to Save Africa's Elephants, a campaign to strengthen and support the Clinton Global Initiative (CGI) commitment made by Hillary Clinton, Clinton Foundation Vice Chair Chelsea Clinton, representatives from African and Asian countries, and a powerful list of several conservative NGOs to save Africa's elephants and respond to the crisis facing Africa's elephants.[273]

The CGI initiative will be part of an $80 million, three-year program directed at ending ivory trafficking, including new park guards at major elephant ranges and sniffer-dog teams at global transit points.

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[272]For background and terms of reference for the JITSIC, *see* http://www.irs.gov/pub/irs-utl/jitsictermsofref.pdf.
[273] Wildlife Conservation Society, *WCS Supports Clinton Global Initiative With "96 Elephants" Campaign*, Sept. 26, 2013.

The new program will enable an expanded law enforcement presence at 50 major elephant sites that together harbor 285,000 elephants, or roughly two-thirds of the African population. It also will include the hiring of an additional 3,100 park guards, adding sniffer-dog teams at 10 key international transit points and strengthened intelligence networks.[274]

"96" Elephants" (www.96elephants.org) is named for the number of elephants currently gunned down each day by poachers. The WCS campaign focuses on: securing effective U.S. moratorium laws; strengthening elephant protection with additional funding; and educating the public about the connection between ivory consumption and the elephant poaching crisis.

The campaign calls for the Obama Administration to start a moratorium on domestic ivory sales and request other countries to do the same. The U.S. is the second largest importer of ivory. Much of the trade is legal under a confusing set of U.S. regulations that perpetuate black market sales of illegal ivory. For instance, it is legal to sell some types of ivory depending on its age and origin. The laws are confusing and complicated and easy to manipulate. The legal trade provides a front for laundering in ivory from the illegal trade.[275]

The 96 Elephants campaign will strengthen elephant protection in the wild by increasing support for park guards, intelligence networks, and government operations in the last great protected areas for elephants throughout the Congo Basin and East Africa. WCS recently started elephant protection programs in four new target sites: Ivindo National park in Gabon; Okapi Faunal Reserve in the Democratic Republic of Cong; Ruaha and Katavi National parks in Tanzania; and Niassa National Reserve in Mozambique. In these four sites alone, 44,000 elephants are at immediate risk.[276]

The 96 Elephants campaign will fund high-tech tools in the field ranging from drones and sophisticated remote cameras that track poachers in real-time, to specially trained sniffer dogs to find smuggled ivory in ports and trading hubs.

The 96 Elephants campaign will engage the public through a series of actions, including online petitions and letter writing campaigns strengthened through social media to support a U.S. moratorium, increase funding, and spread the word about demand and consumption of ivory. WCS will educate public audiences about the link between the purchase of ivory products and the elephant poaching crisis, and support global moratoria and other policies that protect elephants.[277]

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[274] Philip Rucker, *Clinton pushes program to protect wild elephants*, WASH. POST, Sept. 27, 2013, at A20, col. 5.
[275] *Id.*
[276] *Id.*
[277] *Id.*

Another partnering organization is the International Fund for Animal Welfare (IFAW) which has more than 10 years' experience working with INTERPOL, a trusted partner since the start of its wildlife crime program to stop wildlife trafficking.[278]

As part of the program ten countries, including China, japan, Vietnam and other Asian countries that are among the largest consumer markets for ivory, committed to helping reduce the demand among their citizens for the product, including through public education campaigns.[279]

The campaign illustrates the further development of an environmental enforcement network and subregime, whereby governments, international organizations, such as Interpol, and non-governmental organizations, such as WCS and IFAW, cooperate to use heightened enforcement and education to reduce elephant poaching and ivory trafficking and increase prosecutions of persons that are poaching and trafficking ivory.

IV. SUMMARY AND CONCLUSION

The challenges for the five source countries, the consumer countries, and the international community are substantial if they are going to succeed in stopping the slaughter of elephants. Clearly money laundering prosecutions and international asset recovery especially if the money is directed to park rangers will provide more incentives for the source countries to protect elephants and take enforcement action against the persons involved in elephant poaching and ivory trafficking.

Much more education is required in the source countries to sensitize the general public about the link between ecotourism, which is increasingly an important economic sector, and preserving their elephant population as well as the rest of their ecosystems.

Some pilot projects by national governments, international organizations, such as Interpol, UNODC, and African regional organizations, in combination with environmental NGOs, may serve to develop examples of means to prevent and prosecute elephant poaching and ivory trafficking.

[278] Azzedine Downes, *Committing to the Clinton Global Initiative, a milestone Partnership to Save Elephants*, International Fund for Animal Welfare, Sept. 26, 2013.
[279] Rucker, *supra.*