

12. ASSET RECOVERY

12.1 One of the highlights of the UN Convention is the provision for asset recovery. The preamble to the UN Convention makes it clear that the State Parties to the Convention are determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and “to strengthen international cooperation in asset recovery”. Furthermore, asset recovery is stated explicitly as “a fundamental principle of the Convention”. In respect of this issue, the UN Office on Drugs and Crime remarks as follows:

“This is a particular important issue for developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Reaching agreement on this chapter has involved intensive negotiations, as the needs of countries seeking illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance is sought.”²

In view of the above, the opinion is held that the Chapter dealing with asset recovery is of particular importance for SADC Member States who are in a “reconstruction and rehabilitation” phase. Paragraphs 12.2 to 12.10 hereunder summarise Chapter V of the UN Convention.

- 12.2 State Parties must afford one another the widest measure of cooperation and assistance regarding the return of assets (Article 51).
- 12.3 Article 52 provides for the consideration and implementation of measures by State Parties pertaining to the prevention and detection of transfers of proceeds of crime. This includes –
- (a) requiring financial institutions within its jurisdiction to verify the identity of customers, and to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of such accounts in order to detect suspicious transactions;

² See http://www.unodc.org/unodc/en/crime_convention_corruption.html.

- (b) implementing measures to ensure that financial institutions maintain adequate records, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner;
- (c) implementing appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group;
- (d) establishing effective financial disclosure systems for appropriate public officials and providing for appropriate sanctions for non-compliance;
- (e) taking measures to permit its competent authorities to share that information with the competent authorities in other State Parties to investigate, claim and recover proceeds of offences;
- (f) taking measures to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts.

12.4 Article 53 of the UN Convention provides for measures for the direct recovery of property acquired through the commission of a Convention offence. This include measures permitting —

- (a) another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of a Convention offence;
- (b) its courts to order those who have committed Convention offences to pay compensation or damages to another State Party that has been harmed by such offences; and
- (c) its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of a Convention offence.

12.5 Article 54 of the UN Convention provides for measures for the recovery of property through international cooperation. This includes measures—

- (a) permitting its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
- (b) permitting its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law;
- (c) allowing confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases;
- (d) permitting its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation;
- (e) permitting its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation; and
- (f) permitting its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

12.6 Article 55 of the UN Convention deals with international cooperation for purposes of confiscation of property. This Article contains, among others, the following provisions:

- (a) A State Party that has received a request from another State Party, having jurisdiction over a Convention offence, for the confiscation of proceeds of crime, property, equipment or other instrumentalities situated in its territory must —

(i) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(ii) submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party insofar as it relates to proceeds of crime, property, equipment or other instrumentalities situated in the territory of the requested State Party.

(b) Following a request made by another State Party having jurisdiction over a Convention offence, the requested State Party must take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation to be ordered either by the requesting State Party or by the requested State Party. A request must also contain a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law.

(c) Decisions or actions provided for in Article 55 shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

(d) Cooperation under Article 55 may be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value. However, before lifting any provisional measure taken pursuant to Article 55, the requested State Party must, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

12.7 In terms of Article 56 each State Party must endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of Convention offences to another State Party without prior request, when it considers that the disclosure of such information might assist the

receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under the UN Convention.

- 12.8 Article 57 deals with the return and disposal of confiscated property. Each State Party is required to adopt legislative and other measures to enable its competent authorities to return confiscated property, when acting on the request made by another State Party. The rights of *bona fide* third parties should be taken into account. Where appropriate, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property. Furthermore, where appropriate, State Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.
- 12.9 Article 58 of the UN Convention obliges State Parties to consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.
- 12.10 In the final instance Article 59 of the UN Convention urges State Parties to consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to the application of Chapter V of the Convention.