TRANSPARENCY INTERNATIONAL RWANDA

Status of Assets Recovery in Rwanda

Promoting rule of law in Rwanda through sound enforcement of anti-corruption laws

Ministry of Foreign Affairs

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EXECUTIVE SUMMARY

This report provides a summary of how assets connected to corruption and related offenses are recovered and the barriers related to assets recovery in Rwanda. It analyses the actions taken by the institutions in charge of assets recovery, such as the Ministry of Justice, the Office of the Ombudsman and the National Public Prosecution Authority (NPPA), and provides recommendations on how the system of crime related assets recovery could be improved.

In general, Rwanda has a sound legal framework on assets recovery but some barriers are still to identify. Some of the issues identified include the loopholes in the specific law on crime-related assets recovery1, the need for harmonisation with other existing laws, insufficient number of personnel in charge of assets recovery, weak tracing mechanisms of convicts and their properties, the absence of the Unit in charge of the management of confiscated properties andlack of coordination efforts with regard to asset recovery between the Ministry of Justice, NPPA and the Office of the Ombudsman in their work on assets recovery. It was generally found that the assets recovery in corruption and related offenses is still a challenge. Only 11,3% of all recoverable assets (3,738,670,518 Rwf) confirmed by the courts in the cases of corruption and related offenses (including embezzlement) from 2013-2017 have been recovered.

On the basis of these general issues, the priority actions recommended for the Government of Rwanda include the need for an effective coordination of assets recovery; increase the number of staff in order to make assets recovery process more effective; the use of other arrangements that allow the NPPAto secure the convictions of the offenders and at the same obtain the information on the flow of the funds, such as plea bargaining agreements; increased collaboration between the NPPA and the Ministry of Justicein case the NPPA is unable to secure the conviction for any reason so that the Ministry of Justice can explore whether there may be sufficient evidence to proceed through a Non-Conviction Based confiscation or a civil action; establish a strong system of tracing recoverable assets and enactment of a single act on assets recovery in order to avoid disparities of laws.

[1] See the Law n° 42/2014 of 27/01/2015 governing recovery of offence-related assets, in *Official Gazette*, n° 07 of 16 February 2015 (hereafter the 2015 Law on assets recovery).

INTRODUCTION

In Rwanda, there is a specific law to recover crime-related assets2. This law authorizes the seizure, confiscation and management3 of offence-related assets. The 2015 law on assets recovery also determines the framework for cooperation between Rwanda and foreign states in the process of recovering of such assets4.

Although there is a specific law to recover crime-related assets, there are still difficulties to recover those assets. For example, according to the Auditor General's report of state finances for the year ended 30 June 2015, only 4.6% out of 1.6 billion of identified stolen assets have been recovered since the fiscal year 2010/2011. This situation attracted the attention of Transparency International Rwanda to track the status of assets recovery in Rwanda. Therefore, in the framework of the project on "Promoting rule of law in Rwanda through sound enforcement of anti-corruption laws", funded by the Embassy of the Kingdom of the Netherlands in Rwanda, Transparency International Rwanda has conducted this research to track the status of assets recovery in Rwanda from 2016 to 2017.

The objectives of this research areto a)analyse how court proceedings are conducted in regard to assets connected to corruption and related offenses, b) assess how court orders are enforced and c) identify the barriers related to assets recovery in Rwanda.

[2] See the Law n° 42/2014 of 27/01/2015 governing recovery of offence-related assets, in *Official Gazette*, nº 07 of 16 February 2015 (hereafter the 2015 Law on assets recovery).
[3] See articles 5-9, 15-17 of the Law on assets recovery.
[4] See article 18 of the Law on assets recovery.

METHODOLOGY

This study is based on secondary as well as qualitative data, collected from a) a desk review and b) qualitative interviews. A desk review of the laws related to assets recovery was conducted to complement the information collected from the institutions in charge of assets recovery, namely the Ministry of Justice, Office of the Ombudsman and National Public Prosecution Service. The desk review helped to analyse the provisions of the 2015 Law on offense-assets recovery and its major deficiencies and the consequences that might arise therefrom.

Interviews were also conducted with the institutions in charge of assets recovery, namely the Ministry of Justice, the Office of the Ombudsman and the National Public Prosecution Authorities. The aim was to understand better how assets recovery process is initiated by concerned institutions, their cooperation for a smooth assets recovery process and the challenges attached to assets recovery.

This study first highlights important provisions of the 2015 law on offense-assets recovery and its major deficiencies. In the second part, it then summarizes the status of assets recovery in Rwanda and formulates recommendations, based on the information collected from the institutions in charge of assets recovery and the loopholes of the 2015 law on assets recovery for the betterment of assets recovery in Rwanda.

The text below is based on the laws that were in use when the research was conducted. It is worth to note that that new laws have been enacted before the publication of this report. For example these two laws may contain new changes on the offense-related asset recovery: law n° 54/2018 of 13/08/2018 on fighting against corruption, the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general and the Law n° 69/2018 of 31/08/2018 on prevention and punishment of money laundering and terrorism financing.

I. The content of the Law on assets recoveryand its implementation

The 2015 law on the recovery of offense-related assets was enacted to complement other legal provisions on assets recovery such as the law on criminal procedure5 and the penal code6. This section summarises the main provisions of the 2015 law on the recovery of offense-related assets and presents how it is implemented by different institutions such as the National Public Prosecution Authority (NPPA).

I.1 Initiation of assets recovery

The 2015 law on assets recovery has applied a "list approach" by which only 18 crimes listed in article 37 are understood to trigger the recovery of assets. However, article 3, 19o, of the same law, emphasizes that "any other offence provided by the Law committed with respect to public assets, assets of an organ or an individual" can trigger the assets recovery. In fact, this approach of listing crimes that can trigger the assets recovery poses the following issues:

- There is no need for the list of the offense while any offense provided by the law can trigger the assets recovery in accordance with article 3, 19o;
- This "list approach" contracts the title of the law which is the law on the recovery of the crime-related asset (there is no limitation in the title)8;
- This "list approach" is in contradiction with the Penal Code which has applied an "all-crimes approach", meaning that assets used or derived from all crimes in the Penal Code may be recovered by the law enforcement9.

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[5] See articles 30 and 70 (seizure), 36 and 216 (confiscation) of Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, in *Official Gazette*, n° 27 of 08/07/2013 (hereafter Law on criminal procedure).

[6] See articles 31, para. 2 (1°), 32, para. 1 (8°), 51-53 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, *Official Gazette*, n° Special of 14 June 2012 (hereafter Penal Code). See also confiscation for specific crimes: articles 257, 480, 597, 605,608, 651 (confiscation of proceeds of corruption and related offenses).

[7] Article 3 of the 2015 Law on assets recovery states that "Recoverable assets shall be those derived from the following offences: 1° corruption and other related offences provided for by criminal laws and international conventions on the fight against corruption ratified by Rwanda, 2° terrorism; 3° organized crime; 4° illicit trafficking of narcotics; 5° illicit trafficking of weapons, goods, animals and other items not authorized for commerce; 6° human trafficking; 7° exploitation of prostitution; 8° illicit use of hormonal, anti-hormonal, beta-adrenergic or production stimulating substances on animals or the illegal trade in such substances;9° illicit trafficking in human organs and tissues; 10° offence related to the stock market exchange or illegal public issue of shares; 11° financial fraud, theft or extortion, forgery and use of forged documents, fraudulent bankruptcy;12° embezzlement of public assets;13° hijacking of vessels, aircrafts and vehicles;14° kidnapping;
15° money laundering;16° illegal award of public tenders;17° use of public assets for purposes other than those for which they are intended;18° misappropriation of assets seized by court;"

[8] See also Francis Dusabe, "Reflections on Rwanda's approaches to crime related asset recovery", in *Journal of Financial Crime*, vol. 25, n° 1, (2018): 72.

During the interview with the NPPARepresetative, the interviewee also noticed that there was no need for the "list approach" while any offense can trigger the assets recovery10. A better approach according to Transparency International Rwanda would be the one that captures all crimes in order to curb criminality in a much broader sense. Thus, it is recommended that the government enact a single crime related assets recovery act that captures all crimes not those "listed" in the law.

I.2Identifying liable persons

The law on assets recovery establishes the liability of the following persons11:

- the person convicted of the offences;
- the person liable to prosecution under Laws relating to civil liability;
- the heirs of the perpetrator when he/she is deceased;
- the person who received from the perpetrator of the offence assets derived from such an offence;
- any person having benefited from the commission of any offence;
- the person or institution managing any proceeds derived from the commission of the offences.

This list describes the persons who are liable in their individual capacities. However, the 2015 law on assets recovery does not provide explanations/specifications for the cases of co-offenders, which is known as "joint liability" in criminal law. The concept of joint liability is a pertinent in asset recovery, especially where the predicate offence was perpetrated by more than one person and there is no clear evidence as to the extent of benefits that each of them accrued. How would one apportion the liabilities and their corresponding benefits? The 2015 law on assets recovery does not provide any guidelines.

During our interview with the NPPA Representative, he mentioned that in case of joint liability, the Prosecution refers to article 45 of the penal code for holding the convicts jointly liable. This article states that "all persons convicted of the same offence shall be jointly liable for the payment of the fine, restitution, damages and court fees. However, the court may, by a justified decision, relieve some of the convicts, either wholly or partially, from the joint liability".

[9] See article 31, para. 2 (1°), 32, para. 1 (8°), 51-53 of the Penal Code.
[10]TI Rwanda interview with the Director of Financial and Economic Crimes Unit, NPPA, March 26, 2018.
[11] See article 4 of the 2015 law on assets recovery.

The NPPA Representative also mentioned that the prosecution faces the problem of "disparities" of laws relating to assets recovery. There is a specific law on assets recovery but also many provisions in other laws such as the law on criminal procedure, penal code, the law on the procedure in civil, commercial, labour and administrative matters, etc. He suggested that it would better to harmonise the laws and put all issues related to assets recovery in one act.

TI-Rwanda shares the same view with the NPPA. It is recommendable to have a single act governing assets recovery that provides all the details on assets recovery as much as possible. TI-Rwanda also recommendsto apply the concept of joint and several liability in cases where more than one defendants are accused of corruption and related offenses.

This concept permits to recover the full value of the benefit from each of the convicted defendants. For example, if five people embezzle 5,000,000 Rwf, according to joint and several liability principle, the entire amount is recoverable from each individual, rather than 1,000,000 Rwf from each of the five offenders. This is useful if four of the defendants are found to be impecunious, but the fifth has assets of 10 million, for example12. In brief, under joint and several liability, a claimant, for example the victim of embezzlement, may pursue an obligation against any one of the defendants as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment.

I.3 Assets subject to seizure

Assets to be seized can be grouped into three measure categories: instrumentalities, intermingled assets and derived proceeds.

I.3.1. Seizure of properties and instrumentalities

The 2015 law on assets recovery determines that property and equipment used or intended for use in the commission of an offence are subject to seizure13. The law does not give details on how this seizure is done. However, during our interview with the NPPA Representative, he told us that all properties and instrumentalities (e.g. assets used to facilitate the crime, such as a car) used in the commission of the crime are seized. He added that before the court, only those properties and instrumentalities proved that they have been used to commit a crime are confiscated. Thus, during

[12] See for more details, Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners*, (World Bank, Washington DC, 2011): 113.
[13] See article 5, para. 2, of the 2015 law on assets recovery.

the seizure, all properties and instrumentalities presumed to have been "used" in the commission of the crime are seized. The NPPA Representative mentioned that during the confiscation process (before the court), the prosecutor has to prove that the property and instrument have been "used" in the commission of the crime. According to the NPPA Representative, this procedure is satisfying in that it presents legal safeguards to ensure that only the instrumentalities "used" in the commission of the crime are seized.

However, Transparency International Rwanda finds that the law should provide guidance on how to deal with seizable assets which have more value than the actual crime.Let us say, for example, Mr. Z. is a corrupt official and he accepts a cash bribe of Rwf 10,000,000 to manipulate the process in awarding a government contract and he carries out series of transactions subsequently to move and launder the funds. He deposits the bribe into a bank account in his friend's name and then, the friend buys a house in the name of Mr. Z. and the friend transfers the funds to the seller of a house. After one year, this house has a value of 20,000,000 Rwf. Meanwhile, the prosecutor learns about all these corrupt activities. What would the prosecutor do when these corrupt activities come to a light? It seems that the 2015 law on assets recovery enables the prosecutor to seize an asset regardless of its value.

Furthermore, the current 2015 law on the assets recovery does not shed light on how to deal with instrumentalities of crimes belonging to third parties, who are not involved in the commission of an offence14. Transparency International Rwanda finds that a strict application of the law enables the prosecutor to seize assets regardless of their owners and their innocence, as long as the asset was "used" or was intended to be "used" in the commission of an offence.There should be a mechanism that limits the prosecutor to seize only instrumentalities belonging to the suspects.

In addition to that, Transparency International Rwanda finds it necessary to consider the definition of "use" in the 2015 law on assets recovery. It is unclear how it is determined that an instrumentality has been "used" to commit a crime.

I.3.2. Mixed assets

[14] See, for example, the UNCAC, article 31(9): the protection of the rights of *bona fide* third parties.

The term intermingled assets means proceeds of crime which are mixed with legitimate wealth, for example, when a criminal uses illicit money to invest in an existing legitimate business15.
The 2015 law on assets recovery empowers the law enforcement officials to confiscate "new/other assets up to the value of the components related to the offence when the asset derived from the offence has been inseparably intermingled with other objects"16.

Though the law provides thisapproach, it may lack the capacity to fully deter criminals from overworking the law enforcement. There should be another approach which would help to deal with intermingled assets whereby the whole of the intermingled asset becomes liable to forfeiture. This approach, which is widely applied by countries like New Zealand, is known of its ability to deter offenders from using this modus operandi to frustrate law enforcement agencies17.

I.3.3. Derived proceeds

The Rwandan law on assets recovery enables the law enforcement officials to confiscate new asset derived from an asset that was subject to recovery only when the asset that was subject to seizure in whole or in part has been transformed or converted18. This provision leaves out the benefits accrued, in case the criminal did not manoeuvre the recoverable assets. For instance, the benefits derived for criminal money deposited in banks cannot be recovered under this provision simply because the criminal did not transform or convert the money which was subject to recovery. In accordance with article 31(6) of United Nations Convention Against Corruption (UNCAC), the 2015 law on assets recovery should allow to recover any generated profits, in addition to the actual proceeds19.

I. 4 Right to claim for restitution of the seized assets

[15] See AwamuAhmadaMbagwa, *The Role of Procedural Laws in Asset Recovery: A Roadmap for Tanzania*, (Thesis, University of the Western Cape, Faculty of Law, 2014): 69; see also Jean-Pierre Brun *et al.* (2011):109-110.
[16] See article 5, para. 3, of the Law on assets recovery. See also article 31 (4 and 5) of the UNCAC.
[17] See Liz Campbell, "The recovery of 'criminal' assets in New Zealand, Ireland and England: fightingorganized and serious crime in the civil realm", in *Victoria University of Wellington Law Review*, vol. 41, n° 1, (2010): 16-36. See also Jean-Pierre Brun *et al.*, (2011): 109-110.
[18] See article 5, para. 4, of the Law on assets recovery
[19] Article 31(6) of UNCAC: Income or other benefits derived from proceeds of crime are also seizable.

The 2015 law on assets recovery provides for the recovery of all criminal assets, except those owned by "persons who were not involved in the commission of the offence"20. In order to get back the seized property, those persons are required to write to the National Public Prosecution Authority.

However, this 2015 laws does not clearly address the issues of prior legitimate owners, namely, those who owned the property lawfully before it was used in the commission of the crime. Most importantly, also the bona fide third parties, namely, those who have lawfully and innocently acquired assets subject to recovery and the victims of predicate offences, those who suffered from the consequences of crime are not mentioned anywhere in this law. Even though there is such lack of clarity, during our interview with NPPA Representative, he emphasized that the category of prior legitimate owners and bona fide third parties are also protected by article 10 of the 2015 Law on assets recovery21. Bona fide third parties can also claim their assets by writing to the NPPA or by basing on the criminal action to file an action for restitution of their assets. For the victims, they can base on the law on the criminal procedure22 or the civil code to institute the civil action23 against the perpetrators of the crime and claim damages.

Considering the explanations given by the NPPA Representative, TI-Rwanda suggests that the issues of prior legitimate owners, bona fide third parties and the victims be clearly addressed in the 2015 Law on assets recovery. This would help to harmonisethe laws but also conform with the UNCAC provisions which emphasize the protection of the rights of this category of persons24.

Furthermore, in all cases of corruption and embezzlement won by the NPPA, the Ministry of Justice did not claim damages caused to the government. For example, if a public agent embezzles 300 million that were designated to build public offices and the government has to rent from private offices, was there no damage caused to the government? Is the government not the victim of the criminal acts of embezzlement?

TI-Rwanda recommends NPPA and the Ministry of Justice to explore how they can coordinate their work on assets recovery, especially by coordinating criminal and civil actions. For example,

[20] See article 10 of the Law on assets recovery.
[21] Article 10 of the 2015 law on assets recover states that "A person whose assets are seized while he/she is not involved in the commission of the offence, shall give notice thereof in writing to the Public Prosecution which in turn writes a related statement. If the Public Prosecution finds that the seized assets are not related to the commission of the offence, the seized assets are returned to him/her (…)".
[22] See articles 9-17 of the Law on criminal procedure.
[23] See article 258 Civil Code Book III.
[24] See article 57(1, 2 and 3,c) of the UNCAC.

the NPPA can seek the conviction of the suspect and claim the return of the amount of money embezzled but the convict should also pay for the damage caused to the victim (i.e. Government) through a civil action.

I.5 Standard of proof of assets recovery

In the Rwandan criminal law, two notions are predominant, namely the "freedom of proof"25 and the "proof beyond reasonable doubt" in criminal matters26. The Rwandan law on assets recovery is silent with regard to the applicable standard of proof in assets recovery. In our interview with the NPPA Representative, he confirmed to TI-Rwanda that the two notions of criminal law are also applied in assets recovery.

However, this is contrary to the UNCAC, where it is recommended the application of a lower standard of proof or simply an inference from other factual circumstances when dealing with matters of asset recovery27. Several jurisdictions with both conviction and non-conviction based systems have lowered the standard of proof for confiscation to a balance of probabilities and require only "reasonable grounds to believe" or even "reasonable ground to suspect" for the freezing of assets28.

One may argue that the absence of a clear provision and other necessary procedural aspects in confiscation proceedings in Rwanda will render judges to misapply the law, thus making the business of asset recovery more difficult.

I.6 The management of assets recovered

Regarding the administration of frozen and confiscated assets, the 2015 law on assets recovery empowers the National Public Prosecution Authority or the Military Prosecution Department (depending on the nature of the offender) with the sole responsibility for the daily management of

[25] Article 86, para. 1, of the Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, in *Official Gazette* n° 27 of 08/07/2013 states that "Evidence shall be based on all the facts and legal considerations provided that parties are given an opportunity to present adversary arguments".

[26] See article 165 of the Law on criminal procedure states that "if the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving *beyond reasonable doubt* that the accused committed the offence, the judges shall order his/her acquittal".

[27] See article 28 of the UNCAC obliges States parties to ensure that "knowledge, intent or purpose required as an element of an offense established in accordance with this Convention may be inferred from objective factual circumstances. See also Kevin M. Stephenson et al., *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, (World Bank, Washington DC, (2011): 7; 62-63.

[28] Kevin M. Stephenson *et al.*,(2011):63.See also Francis Dusabe (2018) : 75.

the seized assets and confiscated assets throughout the national territory29. In fact, the unit entrusted with the management of seized and confiscated assets based on the Public Prosecution is the only organ in the whole country in charge of the daily management of the confiscated property30.

Once assets have been seized, the prosecutor handling the case makes a proposal to the court on their allocation31, which can be any of the following32:

- To be deposited with the public treasury;
- To be transferred to a public entity;
- To be transferred to any other organ; and
- Such other allocation as may be determined by the court.

During our interview with the NPPA Representative, the latter mentioned that the responsibility of the NPPA is only to manage the confiscated property. Once the property is seized, the court confiscates the property and the latter is transferred to the NPPA for management purposes. He emphasized that the NPPA is not in charge of assets recovery through the enforcement of court judgements ordering people to pay back, for example, embezzled properties, etc. This responsibility is under the Ministry of Justice.

The interview with a staff from MINIJUST showed that the NPPA elaborates a report on court judgements with res judicata force and shares it with Ministry of Justice. Then, the latter is responsible for enforcing those court judgments. Apart from the enforcement of court judgement, the Staff interviewed mentioned that the Ministry of Justice is in charge of recovering the properties through a civil action33.

TI Rwanda commends this possibility of instituting an in rem action against the property itself without the need for securing a criminal conviction because it is in conformity with the international standard, whereby states are requested to adopt measures that allow the confiscation of proceeds or instrumentalities of crime without requiring a criminal conviction34.

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[29] See article 15 of the 2015 Law on assets recovery.

[30] See article 3 of the Ministerial Order n°004/08.11 of 11/02/2014 determining the modalities for administration of confiscated property, in *Official Gazette*, n° Special of 12/02/2014.

[31] See article 7of the 2015 Law on assets recovery.

[32] See article 9 of the 2015 Law on assets recovery.

[33] TIR Interview with Senior State Attorney and Civil Litigation Service Manager, Ministry of Justice, March 26, 2018. See also article 12, para. 3, of the Law on assets recovery.

[34] See The Financial Action Task Force (FATF), *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, (2012), updated October 2016, FATF, Paris, France, recommendation 4: "Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and

As the Ombudsman Office is also in charge of assets recovery35, TI Rwanda went for an interview with them to find out he work of the Office of the Ombudsman in assets recovery and how it is coordinated with the NPPA and the Ministry of Justice. However, TI Rwanda was informed that the Office of the Ombudsman does not intervene in assets recovery and that it focuses only on assets declarations. Rather, when the Prosecutors of the Office are prosecuting the crimes, they can request for the confiscation of the assets related to the crime (but as the prosecutors under NPPA). The Office of the Ombudsman will then play a role of verifying whether the assets have been recovered in accordance with law36.

Despite the work done in assets recovery management, TI Rwanda has identified the following issues that need an urgent redress:

- The Unit in charge of the management of confiscated properties does not exist at the NPPA level even though it was provided for in the ministerial order n°004/08.11 of 11/02/2014. Thus, one may have concerns regarding the proper management of such assets by the NPPA which is an institution not created for the main purpose of administrating the recovered assets rather created withthe main responsibilities of crime prevention.
- With the lack of a "Special" Unit in charge of the assets recovery, there are no trained staff in assets recovery management and thus, it is unclear how skilful the NPPA Staff are in the management of the confiscated property.
- All our interviewees raised concerns about the need for coordination effort with regard to asset recovery between the Ministry of Justice, NPPA and the Office of the Ombudsman in their work on assets recovery. There should be, for example, joint teams from these

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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 organisations, 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 void 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".

[35] See article 14 of the Law n° 76/2013 of 11/9/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman.

[36] TI Rwanda interview with the Director of Preventing and Fighting Injustice Unit, Office of the Ombudsman, April 17, 2018

institutions, which would handle all issues relating to asset recovery, from tracing of assets to their final access.

- Article 14 of the Law on the Office of the Ombudsman gives the powers of assets recovery to the Office of the Ombudsman while these powers are not recognized in the 2015 law on assets recovery. There should be harmonization of these two laws to avoid the confusion about the legal nature of the Office's legal action instituted against assets to be recovered.

The section below, discuss the status of assets recovery covering the period between 2016-2017.

II. Status of assets recovery 2016-2017

After analyzing the content of the Laws related to assets recovery, this report shows the status of assets recovery in Rwanda. The data used below was collected from the Ministry of Justice and the National Public Prosecution Authority (NPPA) during our interviews with them.It is worth noting that some assets were recovered by the NPPA (II.1) and others by the Ministry of Justice (II.2).

II.1. Assets recovered through the NPPA

As mentioned above, the NPPA is the solely responsible institution for the daily management of the seized assets and confiscated assets throughout the national territory. We have also mentioned that the NPPA is not in charge of enforcing a court judgement. This is the work of the Ministry of Justice. However, the NPPA is not only seen in the management of seized and confiscated assets. It is involved in the recovery of assets. During our interview with the NPPA Staff, it was interesting to hear that the NPPA uses the "fine without trial"procedure to recover embezzled funds. It also recovered taxes that were not retained by employees or were not paid by tax payers.

The "fine without trial" is provided for in article 36 of the law on criminal procedure. This article states that "for any offence that falls within his/her competence, a Prosecutor may ask the accused to choose between being brought before the court or paying a fine without trial, which fine cannot exceed the maximum fine increased by any possible additional amount stipulated by law, if he/she considers that, owing to the circumstances in which the offence was committed, the court may only impose a fine and possibly order confiscation of property. If the suspect chooses to pay the fine without trial, the criminal action is discontinued".

By using the"Fine without Trial" procedure, the NPPA recovered 163,050,000 Rwf. Furthermore, the NPPA recovered 295,151,619 Rwf + 8,100 $ +3,726 Euro related to taxes that were not

retained by employers in accordance with article 53 of the Law no 16/2005 of 18/08/2005 on direct taxes on income37. The NPPA was also able to recover,through fine without trial, around 104,828,079 Rwf which were embezzled by employees (see table 5). The tables below show the figures of recovered assets through "fine without trial" and the funds confirmed by the courts to be recovered.

Table 1:**Recovered assets through fine without trial from 2007-2014**

Year	Number of persons who accepted to pay	Amount paid (Rwf)
2007	63	27,050,000
2008	64	30,450,000
Mini-budget 2009	25	12,750,000
2009-2010	54	25,800,000
2010-2011	44	18,950,000
2011-2012	62	28,550,000
2012-2013	3	1,000,000
2013-2014	32	18,500,000
Total	347	163,050,000

Source: TI Rwanda interview with the Director of Financial and Economic Crimes Unit, NPPA, March 26, 2018.

Table 2: **Recovered public funds related to tax frauds from 2007-2014**

Year	Number of suspects	Recovered assets
2007	81	25,195,317 Rwf
2008	98	31,2016,755 Rwf
Mini-budget 2009	69	49,950,515 Rwf
2009-2010	28	8,032,722 Rwf
2010-2011	34	11,266,008 Rwf
2011-2012	182	37,445,644 Rwf
2012-2013	114	47,542,677 Rwf+4,800USD
2013-2014	91	84,501,981 Rwf+3,726Euro+4,300 USD
Total	583	295,151,619 Rwf+9,100USD+3,726 Euro

[37]See the Law n° 16/2005 of 18/08/2005 on direct taxes on income (Official Gazette, n° 1 of 01/01/2006) as modified and complemented up to date.

Source: TI Rwanda interview with the Director of Financial and Economic Crimes Unit, NPPA, March 26, 2018.

The NPPA recovered 295,151,619 Rwf + 8,100 $ +3,726 Euro related to taxes that were not retained by employers in accordance with article 53 of the Law no 16/2005 of 18/08/2005 on direct taxes on income. It seems that there is the huge fall of suspects from 2009 to 2010 and then the slow rise after. TI- Rwanda could not know the reasons behind this fall. It is also to note that in 2011-2012, the number of suspects was much higher than other years and the amount of money recovered was much less than the amount recovered in 2013-2014 whereby the number of suspects was less than the number of suspects in 2011-2012. The reasons were not provided by the NPPA.

Table 3:Corruption (and embezzlement) cases that have been completed before the courts.

Year	Number of completed cases	Number of convicted persons	Funds confirmed by courts (Rwf)
2013-2014	76	183	1,721,274,284
2014-2015	388	439	925,442,337
2015-2016	179	219	739,667,140
2016-2017	127	158	352,286,757
TOTAL	770	999	3,738,670,518

Source: TI Rwanda interview with the Director of Financial and Economic Crimes Unit, NPPA, March 26, 2018.

Even though there are good practices mentioned above in assets recovery, some 501 cases (among them 296 were related to embezzlement) have been abandonedfor different reasons (see table 3) and no further actions followed to determine how theassets that were related to those cases could be recovered.TI-Rwanda recommends the Ministry of Justice to explore the possibility of assets recovery through a non-conviction based confiscation or civil recovery when the NPPA fails to secure a conviction through the criminal action.

Table 4. **Table on received, prosecuted and abandoned cases by the NPPA**

Year	Type of crime	Number of cases received	Number of cases prosecuted	Number of cases abandoned	Reasons for abandonment38
2015-2016	Corruption	315	196	83	Death of the accused, lack of evidence, unknown identity of the suspect, the expired prescriptive period of the offence
	Embezzlement	261	157	95	
2016-2017	Corruption	404	271	122	
	Embezzlement	573	350	201	
Total		1,553	973	501	

Source: TI Rwanda interview with the Director of Financial and Economic Crimes Unit, NPPA, March 26, 2018.

Even though the number of abandoned cases seems to be very high, Transparency International Rwanda was unable to know the worth of assets for these abandoned cases because the NPPA did not have the details. The reasons for abandonment of the cases were also provided by the NPPA in a general ways and TI Rwanda was unable to separate the cases abandoned because of lack of evidence, expired prescriptive period of the offense, death of the suspect, etc.,in order to assess the effectiveness of justice in corruption and related offenses.

II.2. Assets recovery through the Ministry of Justice

As mentioned above, the enforcement of court judgements lays within the Ministry of Justice. During our interview with the Staff39 of the Ministry of Justice, the latter confirmed that the NPPA transferred all court judgements related to corruption and embezzlement that need enforcement for the purpose of assets recovery. Thus, the Ministry of Justice has the duty to recover all 3,738,670,518 Rwf confirmed by courts. We also learned that the Ministry of Justice has won 1,243,838,945 Rwf and 200 USD from civil actions (civil recovery). The table below summarises the status of assets recovery from 2014-February 2018 through the Ministry of Justice.

[38] Articles 4 and 44 of the law on criminal procedure: death of the accused, incomplete of elements of the offence (lack of evidence), unknown of the identity of the suspect and the prosecution is not necessary.
[39] TI Rwanda Interview with Senior State Attorney and Civil Litigation Service Manager, Ministry of Justice, March 26, 2018.

Table 5: **The status of assets recovery from 2014 to February 2018 by the Ministry of Justice**

Fiscal Year	Recovered assets in corruption and related offenses	Recovered assets in "other cases"	Recovered assets by the NPPA (fine without trial procedure)	Su-total of recovered assets
2014-2015	55,156,473 Rwf + 6,743 USD	0	0	55,156,473 Rwf + 6,743 USD
2015-2016	121,223,511 Rwf	219,870,489Rwf	0	341,094,000 Rwf
2016-2017	84,239,888 Rwf	710,807,776 +200 USD	104,828,079 Rwf	899,875,743 Rwf
2017-Feb.2018	114,835,845 Rwf	312,160,680 Rwf	0	426,996,525 Rwf
TOTAL	320,299,244 Rwf +6,943 USD	1,243,838,945 Rwf +200 USD	104,828,079 Rwf	1,667,966,268 Rwf + 6,943 USD

Source: TI Rwanda Interview with Staff of the Ministry of Justice, on March 26, 2018.

The assets recovery in corruption and related offenses is still problematic. For example, out of 3,738,670,518 Rwf confirmed by the courts in the cases of corruption and related offenses (including embezzlement) from 2013-2017, only 425,127,323 Rwf (11,3%) have been recovered as of February 2018. The assets recovery in "other cases" seems easier in that the amount of money recovered is almost three times (1,243,838,945 Rwf) the amount of money recovered in corruption cases.

This weakness in assets recovery through the Ministry of Justice is related to the following challenges as revealed by the Staff in charge of assets recovery40:

First, there is an inadequate number of personnel. The Ministry has only 2 state attorneys in charge of following up all legal actions related to assets recovery on the whole national territory. They are in fact overloaded with the cases and this delays the assets recovery process.

[40] TI-Rwanda Interview with Senior State Attorney and Civil Litigation Service Manager, Ministry of Justice, March 26, 2018

Second, the current tracing mechanisms of convicts is very weak. The main challenge faced by the Ministry of Justice is to trace the convicts and their properties. There is a project of having a "coordinated tracing mechanism" that will help to trace the assets of the convicts but it is not yet effective. Through this mechanism, the Ministry of Justice will share the information about all persons who owe the money to the State with institutions such as Rwanda Revenue Authority (RRA), Rwanda Land Management and Use Authority (RLMUA), National Identity Agency (NIDA) and Rwanda Directorate General of immigration and Emigration so that these institutions can help to trace the properties of those debtors.

Third, banks are given the priority over the government in assets recovery. When the property of the convict is a mortgage of the bank, the bank has a privilege over the government to be paid first. Thus, the convict can be become bankrupt after paying the bank and then, assets recovery by the Ministry of Justice becomes impossible.

III. Conclusion and recommendations

III.1. Conclusion

In Rwanda, there is a specific law to recover crime-related assets[41]. This law gives the responsibility to the NPPA, the Ministry of Justice (and the Office of the Ombudsman to some extent) to coordinate the activities related to the seizure, confiscation and management of offence-related assets.

TI-Rwanda carried out a study to analyse how those institutions involved in the assets recovery process carry out court proceedings in regard to assets connected to corruption and related offenses, assess how court orders are enforced and identify the barriers related to assets recovery in Rwanda. The study reveals that reveals that the NPPA is in charge of carrying out all "conviction based assets recovery" while the Ministry of Justice is involved in all "non-conviction based assets recovery" proceedings. The Office of the Ombudsman is more focused on the declaration.

The study also shows that the NPPA is responsible to manage all confiscated assets while the Ministry of Justice is in charge of enforcing all court judgments related to assets recovery.

[41] See the Law n° 42/2014 of 27/01/2015 governing recovery of offence-related assets, in *Official Gazette*, n° 07 of 16 February 2015 (hereafter the 2015 Law on assets recovery).

Although the 2015 law on assets recovery offers a comprehensive legal regime on assets recovery in Rwanda, the study shows that there are several barriers to its implementation, as discussed in the following section, and it provides the recommendations to each barrier to be implemented by all institutions in charge of assets recovery.

III.2. Recommendations to barriers related to assets recovery

Barrier 1: The need for effective coordination

TI Rwanda found out that two institutions, namely the Ministry of Justice and the National Public Prosecution Authority, are involved in assets recovery. It was also found out these two institutions lack an effective coordination in their work on assets recovery. This has a big impact on assets recovery process. For example, the Ministry of Justice told TI-Rwanda that one of the challenges they have is to identify the convicts who owe the money to the government. One would wonder how this is possible while the NPPA (and the court) has the duty to provide the full identity of the accused before the court!

Anyway, TI-Rwanda acknowledges that assets recovery requires a greater commitment of expertise, tools and resources. Assets recovery also demands the participation and co- operation of a wide range of stakeholders, including law enforcement officials, financial institutions, private companies, development agencies, civil society and the media.

Therefore, it is recommended to establish "specialized units", with trained practitioners and adequate resources, which wouldbe in charge of coordinating the work of both institutions on assets recovery. These units also should conduct outreach to make other relevant actors (the judiciary, parliament, private sector, civil society and other public institutions) more aware of the unique difficulties of assets recovery and demand their cooperation.

Barrier 2: Deficient resources

TI-Rwanda found that the Ministry of Justice is inadequately staffed, with only two (2) State Attorneys who are in charge of legal actions for assets recovery. It is recommended that the Ministry of Justice increase this number in order to make assets recovery process more effective. During the Pre-validation Technical Meeting with the Ministry of Justice and other stakeholders, TI-Rwanda learned that the Ministry of Justice has signed the Memorandum of Understanding with the Association of Professional Bailiffs to assist the Ministry of Justice in the assets

recovery. There are now 90 bailiffs involved in assets recovery. TI-Rwanda commends this initiative.

Barrier 3: Fine without trial vs plea agreement (plea bargaining)

The NPPA recovered 295,151,619 Rwf + 8,100 $ +3,726 Euro related to taxes that were not retained by employers and 163,050,000 Rwfwhich were embezzled by employees by using the procedure of "Fine without Trial" provided for in the law on criminal procedure. This is a good practice but we think this amount is still little compared to 3,738,670,518 Rwf confirmed by the courts in the cases of corruption and related offenses (including embezzlement) from 2013-2017.

TI-Rwanda recommends that there should be other arrangements that allow the government to secure the convictions of the offenders and at the same obtain the information on the flow of the funds. For example, countries such as Peru[42] and Georgia[43] have used the plea bargaining (agreement) in corruption cases with a very significant success in recovering assets.

The important part of plea agreements is that they allow the prosecution to let the defendant plead to a lesser charge, or decrease the number of counts charged, in exchange for substantial cooperation. Part of that cooperation generally includes the defendant's willingness to disclose where and how illicit assets are concealed, thus eliminating the need for complex and lengthy investigations, resulting in a more effective and swift asset recovery.

TI-Rwanda is of the view that the lack of a plea bargain (agreement) mechanism for motivating the defendant to cooperate is a barrier to asset recovery. Thus, it is recommended that the government of Rwanda creates mechanisms that permit proportionate cooperation from defendants in asset recovery cases.

Barrier 4: Inability to obtain a conviction

During our interview with the NPPA Staff, the later told the TI-Rwanda that between 2015-2017, 501 cases related to corruption and embezzlement were abandoned (classement sans suite). The reasons for abandonment range from the lack of evidence to the death of the accused. Interestingly, when the NPPA abandons the case, no further actions are envisaged.

[42] Kevin M. Stephenson *et al*.,(2011): 69-71.
[43] See Transparency International Georgia, *Plea Bargaining in Georgia: Negotiated Justice*, (Tbilisi, Georgia, 15 December 2010).

However, TI-Rwanda recommends that in case the NPPA is unable to secure the conviction for any reason, there should be a communication with the Ministry of Justice to explore whether there may be sufficient evidence to proceed through a Non-Conviction Based confiscation or a civil action. For example, if the accused dies while there were charges against him/her of embezzlement, the criminal action is terminated but there is a possibility to sue his/her heirs through a civil action and return the embezzled assets.

Barrier 5 : Abandoned cases (dossiers classés sans suite)

There are around 501 cases abandoned by the NPPA between 2015-2017. However, TI-Rwanda was unable to find a detailed report on the causes of abandonment for each case and their values in cash. TI-Rwanda recommends the NPPA to document abandoned cases and determine their values in cash so that concerned institutions be aware of the loss.

Barrier 6: Implementing a Case Management System (tracing assets)

It was found out that there is a general problem of tracing the assets of the convicts which renders the assets recovery more difficult. TI-Rwanda recommends that the Ministry of Justice coordinates with relevant authorities to make sure that all assets are traced, taken into possession and returned. During the interview with the Staff of the Ministry of Justice, TI-Rwanda learned that the Ministry of Justice is planning to partner with institutions such as Rwanda Revenue Authority (RRA), Rwanda Land Management and Use Authority (RLMUA), National Identity Agency (NIDA) and Rwanda Directorate General of immigration and Emigration so that these institutions can help to trace the properties of those debtors. TI Rwanda commends this initiative but urges to speed up its implementation.

Barrier 7: Need for harmonizing the laws on assets recovery

In the Rwandan legislation on assets recovery, there is a general problem of "disparities" of laws relating to assets recovery. In fact, there is a specific law on assets recovery but also many provisions are contained in other laws such as the law on criminal procedure, penal code, the law on the procedure in civil, commercial, labour and administrative matters and sometimes there are contradictions between these laws. TI-Rwanda recommends having a single act governing assets recovery. This single act should take into account all legal loopholes mentioned above and give complete legal solutions to assets recovery by making sure that "the crime does not pay".
Specifically, the following issues should be addressed in the 2015 law on assets recovery:

1. Identifying liable persons

The 2015 law on assets recovery provides a list of the persons who are liable in their individual capacities. However, the cases of co-offenders in assets recovery is not specified. There is a need to clarify how to apportion the liabilities between co-offenders. TI-Rwanda recommends to introduce the concept of joint and several liability in the law on assets recovery in case where more than one defendants are accused of corruption and related offenses. This would allow law enforcement officers to recover the full value of the assets from each of the convicted defendants.

2. Seizure of properties and instrumentalities

The 2015 law on assets recovery sets out the principle of seizing all properties and instrumentalities "used" in the commission of the crime. However, there is no definition of "use" in the law and thus, it is not clear how to determine that a property or instrumentality has been "used" in the commission of the crime. The issues of the seizure of assets which have more value than the actual crime and those assets belonging to third parties, who are not involved in the commission of an offence, are not clearly detailed.

TI-Rwanda finds that a strict application of the law enables the prosecutor to seize assets regardless of their value and owners and their innocence, as long as the asset was "used" or was intended to be "used" in the commission of an offence. There should be a mechanism that limits the prosecutor to seize only instrumentalities belonging to the suspects and it should be clearly provided how to determine the value of sizeable properties and instrumentalities.

In addition to that, TI-Rwanda finds it necessary to consider the definition of "use" in the 2015 law on assets recovery because it is unclear how it is determined that an instrumentality has been "used" to commit a crime. Furthermore, there should be a clear mechanism of maintenance of seized properties and, in case of non-conviction, there should be a mechanism of compensation of the loss caused by the seizure.

3. Intermingled assets

The 2015 law on assets recovery empowers the law enforcement officials to confiscate new assets up to the value of the components related to the offence when the asset derived from the offence has been inseparably intermingled with other objects.

Though the law provides this approach, it not clear how this value is calculated and thus, its capacity to deter criminals from laundering the proceeds of corruption and related offenses. TI-Rwanda recommends another approach in which the whole of the intermingled asset becomes liable to forfeiture. This would discourage the criminals because they will know that once they are discovered they will lose all their assets.

4. Derived proceeds

The Rwandan law on assets recovery enables the law enforcement officials to confiscate new asset derived from an asset that was subject to recovery only when the asset that was subject to seizure in whole or in part has been transformed or converted. This provision leaves out the benefits accrued, in case the criminal did not manoeuvre the recoverable assets.

TI-Rwanda recommends to avoid the use of "transformed or converted" in the law because they limit the recovery of other benefits. The law on assets recovery should allow to recover any generated profits, in addition to the actual proceeds.

5. Right to claim for restitution of the seized assets

The 2015 law on assets recovery provides for the recovery of all criminal assets, except those owned by "persons who were not involved in the commission of the offence". The issues of legitimate owners, bona fide third parties and the victims of corruption and related offenses are not clearly addressed. TI-Rwanda suggests that the issues of prior legitimate owners, bona fide third parties and the victims be clearly addressed in the 2015 Law on assets recovery. This would help to harmonise the laws but also conform with the UNCAC provisions which emphasize the protection of the rights of this category of persons44.

6. Standard of proof of assets recovery

In the Rwandan criminal law, the notion of "proof beyond reasonable doubt" is predominant in criminal matters. The 2015 law on assets recovery is silent with regard to the applicable standard of proof in assets recovery. TI-Rwanda recommends to soften the standard of proof in assets recovery to allow the confiscation when there are "reasonable grounds to believe" or even "reasonable ground to suspect" for the freezing of assets.

[44] See article 57(1, 2 and 3,c) of the UNCAC.

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