

ON INTERNATIONAL CRIMINAL COOPERATION IN ASSET RECOVERY – THE TIMORESE LEGAL SYSTEM FOR FORFEITURE OF THE INSTRUMENTS, PROCEEDS AND BENEFITS OF CRIME AND AN EXAMPLE OF INTERNATIONAL COOPERATION

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The theme of this paper concerns asset recovery through international cooperation and is divided into two parts: first, the Timorese legal system for the forfeiture of instruments, proceeds and benefits of crime, and second, an example of international criminal cooperation.

I. FORFEITURE OF PROCEEDS AND BENEFITS OF CRIME

A. Political-Criminal Significance of the Forfeiture of Property, Proceeds and the Benefits of Crime

In line with modern legal systems, Timor-Leste's criminal law enshrines the mechanism of the forfeiture of criminal property, proceeds and benefits — based essentially on preventive grounds. Thus, the mechanism of forfeiture has the purpose of general prevention, aiming to demonstrate and give effect to the idea that “crime does not pay”, but also has the purpose of special prevention, based on the idea that the proceeds or benefits can be subject to forfeiture if they “pose serious risk of being used in the commission of further crimes”.

B. The Timorese Law on Forfeiture of Property, Proceeds and Benefits of Crime

The Timorese law imposes a general regime of forfeiture of property, proceeds and benefits of crime (articles 102.º and 103.º of the Penal Code) and a special regime of forfeiture of property of criminal origin, contained in the law to prevent and combat money-laundering. Law No. 17/2011 of December 28. The general regime distinguishes between the forfeiture of objects (hereinafter, “instruments”) and proceeds of crime, and the forfeiture of benefits arising from crime proceeds.

1. Regime: Classic Forfeiture

a. Forfeiture of instruments and proceeds of crime

Article 102 deals with instruments “which were or were intended to be used for the commission of a crime”, i.e. the instrumentalities of crime and the proceeds of crime. “Instruments” means the objects (things) used as a means of carrying out the crime. “Proceeds of crime” means “property” created or produced by criminal activity.

The first requirement for the forfeiture of instruments and proceeds of crime is that the object has been used in a criminal activity and that the proceeds result from a criminal activity. However, it is not necessary that the crime has been consummated.

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The "forfeiture" must be decreed, provided that the elements on which the existence of a crime depends, except for fault, are verified. Thus, subject to "forfeiture" they can be both imputable and unimputable agents.

The decision to "confiscate" the instruments and proceeds of crime does not require any determined person to be persecuted and convicted of the criminal act. Thus, the forfeiture of property and benefits may take place even in cases where the agent-in-fact is not determined, but also in cases where, although the agent-in-fact is determined, the case must nevertheless be closed for some reason (cause of termination of criminal liability, e.g. prescription example, or for lack of procedural assumption).

The second requirement for the forfeiture of instruments and proceeds of crime is the hazardousness of such objects or products, which means that the forfeiture only affects objects and proceeds of crime that could prove to be criminally dangerous.

Effectively, the State's law that instruments and proceeds of crime are declared forfeited to the State "where by their nature or by the circumstances of the case endanger the safety of persons or of public order, or pose a serious risk of their being used for the commission of new crimes", Article 102, point (1). It should be noted that the forfeiture of instruments and proceeds of crime to the State must always safeguard the rights of victims and also the good faith for the property rights of third parties.

b. Forfeiture of benefits from crime

Article 103 governs the forfeiture of "things, rights and benefits acquired" as a result of the commission of crimes. The term "benefit" has a broad meaning, meaning both the reward given or promised to the agent, as well as any property benefit that results from or has been obtained through the crime.

If, in the case of forfeiture of the instruments or proceeds of crime, their immediate danger is at stake, in the case of forfeiture of the "benefits", what is at stake is the overall crime prevention objective linked to the need for "withdrawal of the crime". Unlawfully obtained asset benefits and, consequently, to the idea that the State "cannot tolerate an anti-juridical property situation", and the legal means of asset recovery should therefore be applied.

The "forfeiture" of the benefits of crime (in favour of the State) has as its formal presupposition the practice of a typical illicit fact (and not properly, or technically, of a crime). In fact, concern with the "forfeiture of the benefits of crime" responds to "the social alarm" that might arise from the conviction that, in the end, the breach of the criminal law can "compensate", it would be absolutely contradictory that the institution of "forfeiture" could not be applied simply because the agent-in-fact is not imputable or because he acted without fault. Thus, even under these assumptions, the benefit resulting from unlawful de facto practice must be neutralized and removed, and the original assets must be restored.

The Timorese law provides that all benefits acquired, directly or indirectly, "as a result of the commission of a crime", must be declared forfeited to the State, paving the way for the forfeiture

of benefits to occur independently of the sequence of exchanges or transmissions that took place. Only the rights of bona fide third parties are safeguarded.

On the other hand, the law provides that “if things, rights or benefits” cannot be appropriated in themselves, the forfeiture is replaced by payment to the corresponding State. This happens, for example, when the benefit takes the form of reward given to the agent and is not "susceptible to direct transfer to the State".

2. Special Scheme: Extended Forfeiture

In addition to the general regime, as mentioned, the Timorese legal system contains a special regime for the confiscation of property of criminal origin, contained in the law to prevent and combat money-laundering — Law no. 17/2011 of 28 December. This special regime is valid only for the offences listed in a catalogue (as listed below) contained in article 32-A of the aforementioned law:

- i. Drug trafficking
- ii. Terrorist organizations, terrorism and terrorist financing
- iii. Arms trafficking
- iv. Corruption, embezzlement and economic participation in business
- v. Money-laundering
- vi. Criminal association
- vii. Smuggling practiced in an organized manner
- viii. Sexual exploitation of third parties and organized child pornography
- ix. Counterfeiting of money also practiced in an organized manner

The special scheme for confiscation in favour of the State is set out in Article 43 of the Law which, in paragraph 1, provides that claims are declared to the State:

- i. Proceeds from crime, capital and property, or other property of equivalent value
- ii. Criminal property and property
- iii. Instruments of crime
- iv. Funds or property with which the proceeds of crime have been mixed

The specificities of the special regime of forfeiture of property to the State is provided in the aforementioned law wherein the forfeiture to the State, according to the special regime can only occur with the following requirements:

- i. A conviction for one of the catalogued crimes
- ii. The factual or juridical domain of the convict over property incompatible (incongruent) with his known lawful income, and
- iii. The existence of an earlier criminal activity of the convict in which the offences are included in the catalogue identical to, or have any connection with, the criminal case in question.

II. REFERENCE TO A CASE OF INTERNATIONAL COOPERATION IN ASSET RECOVERY

A. Description of the Case

In October 2014, a case was filed at the Office of the Fight against Corruption and Organized Crime with the Prosecutor General of Timor-Leste, for an alleged crime of corruption and money-laundering, against a Portuguese couple (husband and wife) and a Nigerian national residing and working in Dili, Timor-Leste.

The Nigerian worked as an international advisor in the Ministry of Finance of Timor-Leste, specifically in the oil tax department, and the Portuguese couple owned a company that provided consulting services. As an advisor to the Ministry of Finance, the Nigerian was tasked with negotiating with two Northern European companies to pay oil taxes owed to the State of Timor-Leste.

As soon as he was entrusted with this mission, the Nigerian devised a plan to divert the value of the taxes to his own advantage. The plan was to create a company headquartered outside Timor-Leste, which would be presented to tax-paying companies as an intermediary in whose name tax amounts should be deposited. In order to carry out this plan, he requested and obtained the collaboration of the Portuguese nationals for this purpose, who created it in Macao, Republic of China (where one of them is a native), a company called "Olive Consultancy Company Limited" for the purpose of receiving the amounts transferred by the tax debtors. Effectively, upon indication of the Nigerian, the US \$ 859,706.30 (eight hundred fifty-nine thousand seven hundred six dollars and thirty cents), the amount of taxes, was deposited in BNU (Macao) under the name of Olive Consultancy Company Limited, and transferred from the Macao-based company to national and international creditors.

B. Request for International Cooperation (First Request)

As early as October 2014, the Attorney General's Office of the Democratic Republic of Timor-Leste sent an application for international cooperation requesting the cooperation of the competent judicial authorities to the Macao Administrative Region Prosecutor's Office to obtain the following information:

- i. Identification of the existence of any bank accounts held by the Portuguese couple concerned;
- ii. Obtaining bank transaction statements from 1 December 2011 until the date of the letter (December 2014);
- iii. Freezing and seizure of any amounts deposited in these accounts, up to the corresponding amount of US \$ 859,706.30 (eight hundred and fifty-nine thousand seven hundred six dollars and thirty cents);
- iv. Identification of banks' names and addresses, account numbers and holders, bank account movements indicating suspicious transactions.

The request for international cooperation was complied with, and freezing of the amounts deposited in accounts in the defendant's name (the Portuguese couple and the Olive Consultancy

Company Limited has an account at Banco BNU Oriente, SA of which they are relatives) from one of the members of the Pueblese couple (Macao native).

C. Request for Confirmation of the Validity of the Measures Enacted (Second Request)

Subsequently, specifically in May 2018, the Attorney General's Office of the Democratic Republic of Timor-Leste sent a new letter to the Macao Administrative Region Prosecutor's Office requesting information on the state / validity of the freezing measure deposited with East Timorese banking institutions. Following the first letter of request and the maintenance of the decreed freezes confirmed.

D. Extension of Measures (Third Request)

Recently the Macao authorities indicated that there is another account with Banco BNU Macau. on behalf of the father of one of the defendants, where the amount of USD 221,010.79 (two hundred twenty-one thousand ten dollars and seventy-nine cents) is deposited, transferred by one defendant immediately after the initiation of the proceedings, and in light of this information the Prosecutor General of the Republic of Timor-Leste has made a new request to freeze this account.

E. Current Situation of the Case

The Nigerian left the country early in the process and fled to the USA. The Portuguese were tried in Timor-Leste, and by the decision of 24 August 2017 of the Dili District Court, they were found guilty of engaging in a conspiracy to commit the crime of embezzlement and the crime of money-laundering. They were sentenced as follows:

- Eight (8) years' imprisonment (individually), and
- To pay back to the State of the Democratic Republic of Timor-Leste US \$859,706.30 (eight hundred and fifty-nine thousand seven hundred six dollars and thirty cents), plus interest for late payment until the full payment.

The judgment of the Dili District Court (lower court) has been appealed by the defendants, and the appeal is awaiting a decision of the Court of Appeal. The judgment of the Court of Appeal is expected at any time. After the decision, the Portuguese also fled the country.

F. Possible Developments of the Case

As soon as there is a final decision in the case, and if it affirms the convictions, the Attorney General's Office of the Republic of Timor-Leste will request the Macao Judicial Authorities to repatriate the amounts seized in the various bank accounts. On the contrary, if the decision is for acquittal, it will then request the release of the frozen assets.