

External review template – open peer review

Thank you for accepting to conduct an open peer review of the forthcoming publication *Illicit Enrichment*. Please note the [COPE Ethical Guidelines for Peer Reviewers](#) and inform us if you have any concerns. As per standard practice, with your permission your review will be published in full alongside the online version of the book and the author's comments in response to your review.

Please comment on the following areas. The questions are provided as guidance only.

1 Contribution to the discipline

Does the paper provide an original and valuable contribution to the discipline, considering both academic and practical applications? Are you aware of overlaps with existing publications? Does the book align with the stated scope and objectives in the title and description above?

2 Academic rigour and accuracy

Are the research methodology, findings, and analyses clearly explained and justified in your opinion? Please point out any areas of weakness or where greater clarity is needed. Do any potential inaccuracies stand out that may require further investigation? Are factual statements adequately supported by citations? Are conclusions and recommendations well-argued and supported by evidence?

3 Style and structure

Is the structure clearly and accurately presented? Is the style appropriate to the target audience? Are the graphic elements (charts, table) clear and meaningful? Usability by a wide range of academics and practitioners is important: please feel free to give suggestions to improve this aspect in particular.

4 Other comments

Do you have any other comments, suggestions or concerns not covered above?

Peer review: Martin Polaine

Barrister, Brooke Chambers, London; Director, Amicus Legal Consultants Ltd; Senior Lecturer, College of Law (Sydney).

1 Contribution to the discipline

This is a timely work and it is laudable that it is aimed specifically at the practitioner audience. Its true value lies in the exposition it gives of the full sweep of considerations and issues that arise in relation to the illicit enrichment offence and its overall very competent treatment of the various forms and guises of 'illicit enrichment' in national laws, both in civil law and common law jurisdictions.

It is not an academic text, but does not pretend to be. Indeed, it has identified its intended readership correctly and sensibly. Experience from around the world shows, time and again, that policy makers/legislators and their draftspersons are in particular need of the sort of practical guidance that this work will give. By the same token, law enforcement, prosecutors and judges are in equal need of a source of ready, up to date and easily accessible reference on the topic and will now have one available to them.

There are caveats, though. As highlighted in section 4, below, there are some minor additions that, in the opinion of this reviewer, would make the work even more attractive both to those drafting such an offence and those investigating and prosecuting economic crime and corruption. Furthermore, although it has to be recognised that the Basel Institute will wish to build the capacity and technical 'know how' of the prosecution and judiciary, it would be heartening to have a practitioner text that, at the same time, seeks to enhance the skills of those lawyers called upon to defend in illicit enrichment cases. In fact, if such an approach were to be taken and the existing text added to/amended to reflect such a need, it would be likely to benefit all criminal justice stakeholders, not least prosecutors and judges themselves.

Accepting that the work does provide an academic legal analysis of the law relating to illicit enrichment, it has to be said that it does succeed in giving its intended practitioner readership a sufficient framework of relevant statutes and case law to enable a thorough grasp of what is, after all, an often complex and nuanced criminal offence. In fact, it deserves especial praise for seeking to set out clearly and unambiguously the overlap and differences between illicit enrichment on the one hand and civil forfeiture/confiscation *in rem* and extended confiscation on the other. This is to be wholeheartedly to be welcomed, as there

is no doubt that a worrying level of confusion arises on the part of some policy makers, draftspersons and practitioners across most regions. Again, though, section 4, below, contains a suggestion for a minor addition that would amplify the assistance that the text gives in that regard.

There is some overlap with existing publications, but it should be said straightaway that the overlap is more apparent than real. There are certainly existing works which address illicit enrichment, but none of them is as practitioner-focused as the present text and none succeeds in giving such a clear global oversight encompassing both principal legal traditions. Additionally, of course, the most notable (the StAR publication, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, Lindy Muzila *et al*) was published in 2012 and the world of illicit enrichment has certainly moved on in the interim. Moreover, that work was shorter than the present text and was less helpfully and systematically arranged.

This reviewer is familiar with the following publications:

- UNCAC Legislative Guide (only cursory treatment of illicit enrichment)
- UNCAC Technical Guide (relies on the Legislative Guide for Criminalisation commentary)
- *Corruption and Misuse of Office* (3rd ed., 2017), Nicholls *et al* (no detailed treatment of illicit enrichment)
- *Comparative Evaluation of Unexplained Wealth Orders*, US Department of Justice report (2011)
- *Combating Economic Crimes: Balancing competing rights and interests in prosecuting the crime of illicit enrichment* (2012), Ndiva Kofele-Kale (as title suggests, although a treatment of criminalisation, focuses on reversal of burden and the right to a fair trial)
- *U4 Brief: The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable* (2012), Maud Perdriel-Vaissiere
- *Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations* (2013-4), Jeffrey R Boles

- Transparency International Reports on asset declaration systems in seven countries (Egypt, Lebanon, Libya, Morocco, Palestine, Tunisia and Yemen) (2015) (does not address illicit enrichment as a distinct topic, but rather examines the legal provisions in each of the countries along with recommendations)
- Transparency International, Asset Declarations in MENA Countries: Illicit Enrichment and Conflicts of Interest of Public Officials (2015)
- Andrew Dornbierer's Quick Guide to Illicit Enrichment (2019), Basel Institute of Governance
- UNICRI article: Criminalization of illegal enrichment (Issue 4), Davor Derenčinović
- Criminalising and Prosecuting Illicit Enrichment: The Case of Ethiopia (2019), Mesay Tsegaye Meskele

It will be seen from the above list that no previous publication has taken the present work's approach and, certainly, none offers the practitioner an up to date, accurate and practical guide through each of the aspects of illicit enrichment likely to be encountered.

2 Academic rigour and accuracy

The research methodology is not presently explained, but it is imagined that it will feature in the preliminary note, once written, or in the introduction, when finalised.

Overall, the findings and analyses are clearly set out, explained and justified. However, inevitably, in a work that is seeking to be reasonably concise, there is not always the opportunity or space to provide the level of detail and analysis, particularly of statutory provisions and case law, that a practitioner might need for the purposes of written or oral argument. Expectations must, therefore, remain realistic.

Generally, factual statements are well-supported by citation or reference and the analysis undertaken/conclusions reached/recommendations made are appropriately evidenced and well-argued.

That having been said, there are some passages that should be re-visited and further clarified:

- Page 8: 'Signatories' should be replaced by 'States Parties' or even 'parties.'
- Pages 8 & 9: there seems to be some inconsistency: There is mention of a 'high level of scrutiny' by courts, but then the assertion that it is an 'untested' area of law. A body of law may not have been created, but the offence has been tested in the courts.
- Page 18: It would be helpful here to analyse what is meant by 'intentionally' in Article 20.
- Page 29: (i) The discussion around 'thresholds' should be re-worded. See my side note on the text pdf. (ii) A fuller quote from R v Rondo is needed. The key point of there being a factual basis should be brought out. There is a danger that the reader might be misled otherwise.
- Pages 118-119: The opening paragraphs of section 4.1.1.2 should be re-worked as they give too simplistic a view of the positions that courts have reached on inroads into the presumption of innocence. Although there is clarification further down in the section, there is a risk that a policy maker or draftsman, in particular, might seize upon the first part of the section and not appreciate the nuances and fine balancing required when such an inroad is being considered.
- In the discussion of the presumption of innocence/reversal of burden, there does not appear to be a discussion of circumstances where a court has 'read down' a legal burden to an evidential burden.

3 Style and structure

The structure is well-formulated and logical. Illicit enrichment raises a number of different issues of law and practice and the author has arranged the contents reasonably and sensibly with those in mind. It is entirely appropriate to have a comparative section before going on to address how illicit enrichment is established and what legal challenges are likely to be raised, given that those latter two sections depend upon a range of examples from different States being highlighted. The use of a wide range of sub-headings (including those that are phrased as an interrogatory) is also helpful, all the more so as the sub-headings

themselves reflect the range of questions that a practitioner is likely to ask him/herself when having conduct of an illicit enrichment case.

Similarly, the style overall is clear and succinct and is likely to be readily comprehensible by both native and non-native English speakers alike. There are, however, some passages that in the text that are awkward or in need of some minor re-wording for the sake of greater clarification. This reviewer has noted them in his text pdf side notes.

The text has introduced a number of definitions that, as far as this reviewer is aware, have not been used in earlier publications in order to distinguish the criminal offence of illicit enrichment from its civil counterpart and the 'regular' offence from that which requires an additional threshold to be met. Given that phrases such as 'criminal illicit enrichment', 'civil illicit enrichment' and 'qualified illicit enrichment' are not in common use, it would be helpful for the definitions of these to be set out in a box or in highlighting at an early stage in the text.

Similarly, it would be of assistance to include, within a box or as a graphic for emphasis, the key differences between illicit enrichment and civil forfeiture/*in rem* confiscation, and between illicit enrichment and extended confiscation. Although matters are addressed in the sections at pages 31 and 32, the confusion that sometimes arises on the part of policy makers and practitioners alike means that a concise pictorial or highlighted overview is likely to assist the reader greatly.

In some instances, the insertion of a short introductory paragraph would help to highlight an issue in general terms in advance of the text moving on to consider national examples. For example, the discussion on who amounts to a 'public official'.

4 Other comments

Although the work is not intended as a drafting manual, this reviewer feels that it would be tremendously helpful to many States to have a short overview guide to illicit enrichment legislation. Not a set of model provisions, but rather a checklist or similar that will highlight what should be considered in drafting and what potential pitfalls should be anticipated. It is, perhaps, a page or two that might be added to Annex 1.

Annex 2 is helpful, but the initial explanation of source and application analysis feels rather laboured and could be shortened. It would also be helpful to practitioners to have some more guidance on financial investigation issues. In particular:

- Essential considerations when formulating a financial investigation strategy;
- The relationship between the financial investigation and the rest of the investigation;
- The value of an ongoing role for the FIU even after investigation commenced;
- Practical ways of tracing funds that have gone offshore;
- The various forms of financial intelligence in identifying assets/wealth (including often underused open-source intel);
- Circumstances in which the use of an analyst is likely to assist.

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Response to the Peer Review of Martin Polaine for publication titled 'Illicit Enrichment'

26 February 2021

Andrew Dornbierer

The following document outlines the actions that I have taken to address comments received by the Basel Institute on Governance on 15 February 2021 as part of the Open Peer Review process for the publication titled 'Illicit Enrichment'. It should be noted that the amendments outlined below may still be subjected to an internal editing process before final publication.

'The research methodology is not presently explained, but it is imagined that it will feature in the preliminary note, once written, or in the introduction, when finalised.'

A 'Methodology' section has subsequently been added to the publication immediately after the 'Introduction' section and before Part 1 to provide more clarity on the research behind the publication.

*'Page 8: 'Signatories' should be replaced by 'States Parties' or even 'parties'.
Pages 8 & 9: there seems to be some inconsistency: There is mention of a 'high level of scrutiny' by courts, but then the assertion that it is an 'untested' area of law. A body of law may not have been created, but the offence has been tested in the courts.'*

These have now been amended. While the reference to 'high level of scrutiny' was meant to be read as 'often' leads of 'high level of scrutiny' - which is true in some countries - I understand that this may cause confusion and the reference has now been removed to avoid any ambiguity.

'Page 18: It would be helpful here to analyse what is meant by 'intentionally' in Article 20.'

I wanted to focus on the different definitions in a broad sense at this point, so I have left the discussion for this issue at Section 3.4.5.

'Page 29: (i) The discussion around 'thresholds' should be re-worded. See my side note on the text pdf. (ii) A fuller quote from R v Rondo is needed. The key point of there being a factual basis should be brought out. There is a danger that the reader might be misled otherwise.'

This section has now been reworded in line with the suggestion. The section now also emphasises the need for a factual basis, and also includes a footnote with the entire paragraph [53] from R v Rondo from which the excerpts have been taken.

'Pages 118-119: The opening paragraphs of section 4.1.1.2 should be re-worked as they give too simplistic a view of the positions that courts have reached on inroads into the presumption of innocence. Although there is clarification further down in the section, there is a risk that a policy maker or draftsman, in particular, might seize upon the first part of the section and not appreciate the nuances and fine balancing required when such an inroad is being considered. '

I merged the first two paragraphs in an attempt to make sure readers aren't too quick to make assumptions, but I have left the wording as it was as I wanted to avoid repetition. I also think that the risk of a reader only seizing on the first paragraph messages is small, as the phrase 'the deviation from this principle prevalent in illicit enrichment laws is actually an acceptable one for a number of reasons' should be enough to encourage readers to continue reading through the entire section to learn what the 'reasons' mentioned in this phrase are.

'In the discussion of the presumption of innocence/reversal of burden, there does not appear to be a discussion of circumstances where a court has 'read down' a legal burden to an evidential burden.'

This issue has not been widely examined in illicit enrichment cases. Nonetheless I have now flagged the issue in a footnote in Section 4.1.1.3 where I discuss other issues that have been raised in non-illicit enrichment cases with regards to reversed burdens and the presumption of innocence. The following text was included:

“Additionally academics have discussed whether potential infringements on the presumption of innocence in illicit enrichment laws would be considered more acceptable if any burdens placed on a defendant in illicit enrichment proceedings were evidential burdens rather than legal burdens. As evidential burdens are considered less onerous on a defendant, some have suggested that courts should ‘read down’ any apparent legal burdens contained in illicit enrichment laws to evidential burdens to limit any potential incursions on the presumption of innocence. For a further discussion on this issue, see N. Kofele-Kale, *Combating Economic Crimes – Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment*, Routledge, Milton Park, 2013, p.13 and the Australian Law Reform Commission’s Report *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) Tabled 2 March 2016 at [9.12].

'Given that phrases such as 'criminal illicit enrichment', 'civil illicit enrichment' and 'qualified illicit enrichment' are not in common use, it would be helpful for the definitions of these to be set out in a box or in highlighting at an early stage in the text.'

The definitions box originally in Part 1.2 has now been moved to the start of Part 1 and also now includes the definitions for the terms above.

'...it would be of assistance to include, within a box or as a graphic for emphasis, the key differences between illicit enrichment and civil forfeiture/in rem confiscation, and between illicit enrichment and extended confiscation.'

I decided not to create any additional boxes on this issue, as I feel these will predominantly repeat the differences between these laws already highlighted in the Table under 1.5.3

'Although the work is not intended as a drafting manual, this reviewer feels that it would be tremendously helpful to many States to have a short overview guide to illicit enrichment legislation. Not a set of model provisions, but rather a checklist or similar that will highlight what should be considered in drafting and what potential pitfalls should be anticipated.'

I think that this would be a good addition, however it would require consultations of additional experts to ensure that any such tool is created in a way that is of use to the relevant practitioners. This will be considered for future editions, and also as a potential complimentary tool to the planned online database for illicit enrichment legislation.

'Annex 2 is helpful, but the initial explanation of source and application analysis feels rather laboured and could be shortened. It would also be helpful to practitioners to have some more guidance on financial investigation issues. In particular:

- Essential considerations when formulating a financial investigation strategy;*
- The relationship between the financial investigation and the rest of the investigation;*
- The value of an ongoing role for the FIU even after investigation commenced;*
- Practical ways of tracing funds that have gone offshore;*
- The various forms of financial intelligence in identifying assets/wealth (including often underused open-source intel);*
- Circumstances in which the use of an analyst is likely to assist.'*

I chose not to shorten the initial explanation of source and application analysis, but in an attempt to make it seem less long-winded, I have now instead inserted sub-headings to break up the text.

With regards to the suggestion to include more guidance on financial investigations, this is certainly a valid suggestion, however I wanted to focus more on issues of financial investigation that relate specifically to an illicit enrichment/source and application context rather than the wider financial crime context, to avoid the risk of this annex becoming a 'financial investigation' guide – which is something that has been done in other Basel Institute publications/online material.

The issue of evidence from offshore however is an issue that is of particular concern in this context as many countries do not have illicit enrichment laws and may refuse to provide assistance on this basis to other countries conducting illicit enrichment investigations. Consequently, this issue will actually be covered in a separate section in the main publication, through an external contribution that is currently being edited.

Selected comments specifically included in the PDF

'Isn't [illicit enrichment] also mandatory under the AUCPCC (by virtue of Arts 4 & 5)?'

I understand your argument, however as these articles do not include mandatory language (ie. the word 'shall') it does not seem to be considered mandatory by commentators who have previously discussed this issue (eg. L. Muzila et al., *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, The World Bank, Washington, 2012, N. Kofele-Kale, *Combating Economic Crimes – Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment*, Routledge, Milton Park, 2013). While it is admittedly ambiguous to say the least, as the text does not use of the word 'shall', and instead repeatedly uses the word 'undertake' rather than something more definitive, I feel it is difficult to disagree with previous assessments.

'For the sake of completion, it is worth highlighting in the footnote that the 2002 Act was amended by Criminal Proceeds Confiscation and Other Acts Amendment Act 2009 (Act No. 2 of 2009).'

The Queensland references have now been updated as follows: "Criminal Proceeds Confiscation Act 2002 (as amended by the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013) (Australia - Queensland)"

'I can't see Seychelles in the lists below (see its ACA 2016).'

This statute was missed in the research, and the criminal illicit enrichment law of the Seychelles (Section 25 of the Anti-Corruption Act 2016) has now been added to the publication and the database.

'It will depend on what the definition is of 'asset'. For instance, the Kenyan law unfortunately contains no definition of an 'asset', so it seems that this has been taken to mean physical assets.'

It is true that the word 'asset' is not defined, but it is very unlikely that the courts will interpret the word 'asset' to include expenditures made for general services. Guidance can be drawn from other Kenyan statutes, such as the Public Procurement and Asset Disposal Act 2016, where 'assets' are defined as:

"movable and immovable property, tangible and intangible, including immovable property, stores, equipment, land, buildings, animals, inventory, stock, natural resources like wildlife, intellectual rights vested in the state or proprietary rights".

'If Chile is indeed different, does this mean that the examples in the above paras are laws where the legal burden (not just the evidential) has been shifted? Could benefit by clarification on that here.'

The nature of the burdens in illicit enrichment laws is not expressly covered by the laws, nor jurisprudence. Most cases simply state that the burden on the person must be exhausted by proving that the disproportionate wealth in question was from legitimate sources, on the 'balance of probabilities'. This would suggest that burdens in illicit enrichment laws are legal burdens by nature. Unfortunately, further information was not contained in judgments that provided guidance on this issue. If more clarity arises from future court decisions, these sections will be revisited to provide additional details in future editions.

Peer review: Jason Sharman

Sir Patrick Sheehy Professor of International Relations, University of Cambridge

The Illicit Enrichment text provides a very useful and comprehensive guide to the subject that is well suited to the intended audience of investigators, prosecutors, judges and policy-makers. Though academics are not identified as the potential audience (which makes sense), the book would also be useful in this realm also. The text is clearly structured and well expressed throughout, making effective use of opening summaries and text boxes (most of the graphics are yet to be inserted so I can't comment on those; page numbers would have been helpful). The extensive footnotes both provide confidence in the conclusions and allow for readers to easily follow up particular lines of inquiry.

The report and the relevant annexe (2) are effectively divided into three portions: one based on the analysis of legislation, one based on the analysis of case law, and then the annexe providing something of a 'how to' guide for investigators. This might mean that rather than being read from beginning to end, specific audiences may concentrate on one portion of the report. Much of the report is descriptive and analytical, comprising a global survey of the relevant legislation and case law, with explicit recommendations mainly confined to the Annexe. The recommendations there to investigators seem sensible well justified, though since I'm not an investigator my judgment here is tentative.

The main recommendation is implicit: that illicit enrichment laws are legally and morally justified and can be practically effective (though the report does not aim to provide evidence of broad policy effectiveness). Thus a good deal of coverage is devoted to rebutting arguments levelled against such laws: that they violate the presumption of innocence, the right to silence, and to avoid self-incrimination. These rebuttals are well researched and well argued. Ultimately perhaps whether such laws are justified is as much a moral as a legal question, especially as it is admitted that they do in fact violate the presumption of innocence, though on grounds the report concludes are justified. This uncertainty is compounded as no one knows how much these laws reduce corruption in the aggregate, if it all.

In terms of originality and comparative sources, the closest equivalent that I know of is the Stolen Assets Recovery program 2012 book *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*. Although it makes extensive reference to legislation and case law, this text is more a 'how to' guide for investigators, and thus has basically the same aim of annexe 2. The two books compliment each other well especially as the StAR publication is now almost a decade old, and many countries have only recently introduced such laws.

From all of the above, Illicit Enrichment is a clear success and a great credit to its authors. I have some queries and suggestions for revisions, but these are matters of judgment rather than errors to be corrected. The first relates to how widely or narrowly the definition of illicit enrichment laws is drawn, the second the extent to which they interact with other provisions, especially asset declarations, but perhaps also to a lesser extent tax.

The conventional understanding of illicit enrichment laws is that they are criminal laws that apply to public officials in the fight against corruption. The subtitle of the StAR report referenced above states as much, but so does the UN Convention Against Corruption (article 20) and most other relevant conventions. This book adopts a wider definition, including civil law measures that are not restricted to public officials and that were not designed to fight corruption. An example that is referenced many times is the Western Australian civil law that allows confiscation from any citizen, and that was clearly designed as a means of confiscating drug profits from motor-cycle gangs (p.67). The same goal is behind most of the Australian laws, which are not targeted at public officials and are not designed or customarily used as anti-corruption tools (though they could be). Civil illicit enrichment laws are clearly a minority of the sample (16 compared to 75), and this total is somewhat inflated by counting different Australian states and territories individually.

Though the definition presented in the report (p.19) is internally consistent, I'm not sure that this expanded and extended definition is a good idea. It runs the risk of muddying the waters, and complicates some of the defences of such laws later on, which are often justified on the grounds that public officials are held to higher standards and that corruption is a uniquely dangerous threat to society. I certainly accept that it is difficult to draw a hard-and-fast line between illicit enrichment laws and others, and that to a point this is a matter of taste. The report certainly does a very good job of explaining why UK Unexplained Wealth Orders (which are primarily aimed at corrupt officials) and Non-Conviction-Based Forfeiture are not illicit enrichment laws (pp.20-22, 31-33).

The other two queries relate to whether more coverage could be given to the interaction of illicit enrichment laws and asset declarations, and secondarily the tax system. Just to clarify this point in relation to my reservation above, clearly these are not the same thing as illicit enrichment laws, but especially declarations are often closely bound up with them. Although asset declarations are referenced in the report (57, 76, 80, Annexe 18) and tax assessments (80 Annexe 19), they don't get much coverage.

This seems a little strange in that asset declarations for public officials are very widespread (over 110 countries), they are often legally paired with illicit enrichment laws (e.g. wealth not declared becomes illegal), and they have the same aim of targeting corrupt wealth held by public officials without the need to prove a specific corruption offence. The aim is that the declaration provides a baseline total legitimate wealth against which any extra illicit wealth can be gauged according to the same logic of a Source and Application of funds investigation.

Tax assessment are obviously legally very different, but are practically used in very similar ways as illicit enrichment laws, especially in the broad sense employed in this report: the tax authority calculates total wealth/income, subtracts what they believe is legal (declared), presumes the rest to be illicit (undeclared), and then confiscates some portion of it. The parallel is important because in some jurisdictions (the United States, Australia) the authorities use tax powers to achieve exactly the ends that would otherwise have been pursued with illicit enrichment laws.

Lastly but importantly, there are a lot of references to legislation and case law, but very few to how these laws have been applied in practice in a way that illustrates the process from start to finish, from suspicion or first report to recovering assets with all the stages in between. A few concrete examples would be really helpful.

Some more minor comments.

p.21 Here and elsewhere there's the phrase of people 'proven to have carried out illicit enrichment', but this obscures the logic of the law, the whole point that this specific conduct does not have to be proved.

If there was a need to cut material, some of the explanation about how to get illicit wealth you subtract legal wealth from total wealth could be shortened, this gets a bit laboured.

Both the main text and annexe end rather than conclude, which is a little abrupt.

Response to the Peer Review of Jason Sharman for Publication titled 'Illicit Enrichment'

26 February 2021

Andrew Dornbierer

The following document outlines the actions that I have taken to address comments received by the Basel Institute on Governance on 4 February 2021 as part of the Open Peer Review process for the publication titled 'Illicit Enrichment'. It should be noted that the amendments outlined below may still be subjected to an internal editing process before final publication.

'Though the definition presented in the report (p.19) is internally consistent, I'm not sure that this expanded and extended definition is a good idea. It runs the risk of muddying the waters, and complicates some of the defences of such laws later on, which are often justified on the grounds that public officials are held to higher standards and that corruption is a uniquely dangerous threat to society. I certainly accept that it is difficult to draw a hard-and-fast line between illicit enrichment laws and others, and that to a point this is a matter of taste.'

The scope of the definition contained in the publication was something I grappled with for a long time. My decision to set the definition of 'illicit enrichment laws' in the book as a 'wide' definition was predominantly to focus it on the two key features that I feel distinguish this basket of laws from other asset recovery mechanisms, namely that:

- they impose a sanction on someone that has committed an act of illicit enrichment (enjoyed wealth that cannot be explained in reference to their lawful income); and
- that (critically) they do not require the state to demonstrate to a criminal or civil standard that some sort of separate or underlying criminal activity has taken place.

I understand that to group both criminal-based and civil-based laws together is a deviation from previous publications on this topic. However, I feel that this was the correct choice to make as even though these sub-categories of laws are contained in two separate branches of legal procedure, they still share the two key features I mention above that distinguish them from other asset recovery laws. Moreover, in practice, the evidence and facts that need to be demonstrated in proceedings for both these kinds of laws is essentially the same (albeit with different standards of proof) and in some instances, even the actual wording used in both civil

and criminal types of illicit enrichment laws is almost identical (see for example the two types of illicit enrichment laws from Fiji). Therefore I felt that it was better to group them together into a wider category rather than only deal with criminal-type laws (which is the approach that has been taken in other publications).

Nonetheless, to highlight the fact that there are illicit enrichment laws that are based in different branches of legal procedure, and to assist with providing certain contextual clarities during discussions in the publication, I have consistently referred to individual illicit enrichment law examples as either ‘criminal illicit enrichment laws’ or ‘civil illicit enrichment laws’. I have now also included a ‘definitions’ box at the start of Part 1 to ensure that these terms – which admittedly are new terms – are immediately defined, and I hope that this will provide more clarity.

Additionally, while it would have been ideal to be able to distinguish illicit enrichment laws as those that specifically target public officials, rather than those that target everyone, I didn’t feel that this was a feasible idea, as there are many criminal and civil illicit enrichment laws that operate almost identically, but for this additional requirement that a person must be shown to be a public official. For instance, if such a line was drawn in this regard, it would arguably rule out the criminal law in Uganda from being classified as an illicit enrichment law as it applies to ‘any person’ rather than ‘public officials’, even though it is contained in Uganda’s anti-corruption legislation, has only been used to date to target public officials, and operates exactly like other laws mentioned in the publication that only target public officials such as Tanzania or Hong Kong (and even contains much of the same wording as these laws). It would also rule out the civil law in Mauritius, which despite applying to everyone, has also been used to target public officials in the exact same way as other illicit enrichment laws that only apply to public officials.

Nonetheless, I fully appreciate the validity of the comment. The boundaries for the concept of ‘illicit enrichment’ are certainly far from clear at the moment.

To provide a little more clarity on my decision making process with regards to a definition, I have also now added a ‘Methodology’ section after the Introduction to discuss this issue and to provide some justification for my choice to go with a broad definition.

‘...more coverage could be given to the interaction of illicit enrichment laws and asset declarations, and secondarily the tax system...’

Unfortunately, there aren’t many documented case examples at the moment that demonstrate the interaction between illicit enrichment laws and tax laws. I am guessing this

is because the interaction would occur during the investigations phase of a case – potentially through the sharing of intelligence and evidence between tax authorities and law enforcement agencies. Nonetheless, I have now added a reference under Section 2.6.6 to a paper on the issue published by the WU Institute for Austrian and International Tax Law which does discuss these issues to some degree. Admittedly, I am not an expert on tax law, and I am a little hesitant to provide an in depth analysis on how these two areas of law can potentially interact.

With regards to asset declaration systems, these types of systems do play a role in illicit enrichment proceedings yes, but also predominantly during the investigation phase. While they may serve an evidential purpose during court proceedings, the information contained in asset declarations are often unreliable and generally need to be independently verified by separate evidence as well. In light of this, and as you mentioned in your review, I have decided to predominantly focus the discussions regarding the role of asset declarations within the context of investigational practice (Annex 2) as they are an excellent starting point for financial investigations into illicit enrichment. However, to further draw attention to this issue, I have now also added a box at the end of Section 3.3.3 with the text below, to further encourage readers to turn to these discussions in Annex 2 and to hopefully better understand the critical role such declarations can play in investigating and proving illicit enrichment cases.

Author’s note: Asset declaration systems and illicit enrichment laws

In the context of illicit enrichment laws targeting public officials, asset declaration laws can play a key role in the establishment of disproportionate wealth in illicit enrichment investigations and proceedings, and in fact, many illicit enrichment provisions exist in legislative instruments alongside asset declaration provisions. While the credibility of information contained in such asset declarations must always be verified, such declarations can often provide a useful starting point in the assessment of person’s wealth. The evidential value of such declarations is covered in Annex 2 (Section 2.5.1)

‘...there are a lot of references to legislation and case law, but very few to how these laws have been applied in practice in a way that illustrates the process from start to finish, from suspicion or first report to recovering assets with all the stages in between. A few concrete examples would be really helpful.’

While I agree that this would be helpful to readers, it is unfortunately a bit difficult to get information of this sort from an independent source. The illicit enrichment judicial decisions identified in research do not describe the earlier stage of the investigation process in such detail and instead generally only focus on the evidence brought before the court. While I personally have been involved in the investigation of illicit enrichment cases from the point of first report, I chose not to describe my experience in detail as the prosecutions for these cases

are not yet finished. If the prosecutions for these cases are completed soon then I will certainly be including an in depth explanation of these cases in future editions.

'p.21 Here and elsewhere there's the phrase of people 'proven to have carried out illicit enrichment', but this obscures the logic of the law, the whole point that this specific conduct does not have to be proved.'

I disagree: while there is an element of ambiguity yes, it is still necessary for a court to be satisfied that someone has illicitly enriched themselves (i.e. enjoyed an amount of wealth that is not explained by reference to their lawful income). Nonetheless, in the interests of avoiding ambiguity, I have changed the p.21 phrase mentioned from *"As this law clearly imposes a civil sanction against a person who is proven to have carried out illicit enrichment, then the law is considered an 'illicit enrichment law' by this publication "* to *"As this law clearly imposes a civil sanction against a person who is proven to control unexplained and disproportionate wealth, then the law is considered an 'illicit enrichment law' by this publication"*

'Both the main text and annexe end rather than conclude, which is a little abrupt.'

Despite the admitted abruptness in style, I have chosen not to add conclusions as I feel it is unlikely that a person will read the publication from start to finish, Instead, I feel most people will take a more fragmented approach and will focus more on reading the sections of the publication that are relevant to their particular context.

Peer review: JC Weliamuna

Formerly Board Member of the Transparency International, Adjunct Associate Professor (Griffith University), Adjunct Professor (School of Law, University of Canberra) & formerly Chair of the Presidential Taskforce on Recovery of State Assets, Sri Lanka

I have comprehensively perused the draft publication (Main Text of the Book) and checked the reference material, sources and footnotes. I have also examined Annexure 2. My opinion/comments on this very advanced draft of the Book are set out below:

1. Contribution to the Discipline

- i) This publication (the Book) has a potential to be a leading contribution to the discipline and an exceptional resource material for policy makers, researchers, academics, judges, prosecutors, and practitioners in general. It is comprehensive and unique. It can be an easy guide for practitioners across the world, while encouraging other scholars to consider interdisciplinary engagements.
- ii) The nature of the material presented, and the subtle differences of legal contexts pose a potential challenge to understanding the important contents of the book. Having regard to the multiple target audiences among the practitioners, the graphs, tables and presentation style have minimised such confusions.

2. Academic rigour, analysis and accuracy

i) Methodology, findings, and justifications

Extensive research has gone into the Book and the case studies on selected jurisdictions have helped the Author to examine in depth the working of the relevant laws in different contexts. The author was successful in capturing the rational of the relevant statutes and judicial decisions, that were relied upon. Academic analysis is exceptionally good.

ii) Areas of weakness or where greater clarity is needed.

- (a) The Author correctly recognises that “illicit enrichment“ is a contentious area of law deviating from tradition legal thinking. Some of the key target audiences of the book, who are familiar with the common law concept of “unjust enrichment” (but new to the field of asset recovery) will struggle to grasp unjust enrichment elements in the Book. One reason is that the Roman Law concept of “unjust enrichment” (based on the maxim: *nemo locupletari potest aliena iactura* or *nemo locupletari debet cum aliena iactura* - Nobody can be made rich at the expense of another.) is still a live legal concept practiced in many jurisdictions. In my opinion, further clarity is required either to further distinguish this concept of unjust enrichment OR to state clearly that those civil restitution concepts do not form part of the present discourse of “illicit enrichment” within the scope of the Book.
- (b) Section 1.5 of the Book- the difference between illicit enrichment laws and other similar laws is very stimulating. If it this can be explained through a graph (in addition to the table), subtle differences can be easily captured by the new practitioners.

iii) Foot notes

Though the foot notes will finally be checked and edited, I suggest at this stage the following:

- a) The laws and judicial decisions referred to in the foot notes are clearer to the non-academic audiences if the source is identified with the relevant country. Most of the foot notes with the statutes/decision do in fact identify the country but some do not. I suggest that the country be stated within parenthesis. For example, f.n. 53, Prevention of Bribery Act (Promulgation No 12 of 2007) does not disclose the Fiji as the country though the text does. However, f.n 74 has reference to Bangladesh as the country.
- b) Some of the foot notes have kept the original text of the laws/decisions etc. in French/Spanish. (e.g. f.n. 57,58, 119) If the Book is intended to be available in English electronically, an English (only) reader may be able to use google translation. If printed version is expected, it seems difficult for a English (only) practitioner to use the foot notes. In the absence of an editorial policy on this, it is best if a brief translated version is supplied into the footnotes to maintain consistency.

- c) Please check the accuracy of f.n. 48 R v Rondo [2001] NSWCCA 540 (not 54) as well as f.n. 49. The final version will in any case be checked for accuracy and consistency of foot notes.

iv) **Classification of Different Types of Illicit Enrichment laws/provisions**

(a) Confusion of types of laws is inevitable in the sphere of fast evolving legal regime such as asset recovery and illicit enrichment. Despite the challenge, the Chapter 1.5 and 2.1 of the Book attempts an excellent classification of illicit enrichment laws.

(b) Of the 93 countries (Table with categories) that are included in the Chapter 2.1, USA and European jurisdictions are not identified as being consistent with illicit enrichment laws in this list, (though referred to as substantially similar laws in section 2.6). Given the interpretation adopted by the Author for the purpose of the book, the exclusion of those countries may be justified. In the absence of an editorial policy decision, and to further strengthen the quality of the contents of the Book, I wish to make following suggestions/observations in this regard:

- **US law** - The only reference is the tax legislation in Chapter 2.6.6. but the DOJ Criminal Tax Manual has made some contributions to illicit enrichment jurisprudence. Also *Holland v. US* 348US 121 1994, referred to in the Book - an individual can be prosecuted for greater wealth. Asset forfeiture Policy Manual, State Department 2019, is yet another area that may be useful for the practitioners looking at illicit enrichment in USA. <https://www.justice.gov/criminal-afmls/file/839521/download>

No doubt, the US position that reverse burden is unconstitutional has adversely influenced some courts (e.g. Ukrain Constitutional Court to strike down its asset recovery law).

If the concept of targeting a property (instead of an individual) can be accommodated in section 2.2.1 of the

Book, then the US “ in rem jurisdiction” on asset cases– is worth looking at. *If the author take the view that in rem jurisdiction does not come within the scope of the Book, it is always better to say why.*

- The non-conviction based UWO of the UK is sufficiently discussed in the Book giving the audience a good alternative scheme, though it is not strictly within the definition of illicit enrichment. I think there were some cases on this but not sure whether those cases reached higher UK courts. Chapter 2.6 has the following statement:-

“As evidence acquired under a UK UWO has yet to be used in a separate civil proceeding for a recovery order,....”

Please check the accuracy of this statement vide - <https://www.theguardian.com/uk-news/2020/oct/07/businessman-to-hand-over-10m-following-unexplained-wealth-order>

(c) Section 2.6.3 refers to Switzerland ‘s Law. This is critical example with international law implications. If it does not deem fit to be an illicit enrichment law, under the author’s definition, some explanation is welcome in justifying the views of the Author.

(d) Perhaps, an additional graph may capture all the above points relating to countries outside the 93 jurisdictions.

v) ***Reverse Onus***

Reverse onus is one of the most contentious legal aspects in the illicit enrichment laws. The author has comprehensively captured all aspects relevant to the scope of the book.

Reverse burden is not a new phenomenon (e.g. evidence laws in many jurisdictions have it for centuries, particularly when a fact is within the exclusive knowledge of the person concern [e.g. Bus ticket in the possession of a passenger- when the conductor comes in, then only the passenger to prove produce it. Conductor cannot prove the negative].

-
The often quoted dicta of Lord Bingham - Attorney General's Reference No 4 of 2002; *Sheldrake v DPP* [2005] 1 AC 264, [21]. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.

I agree with the analysis of the Author on the compatibility of human rights with the reverse burden in illicit enrichment laws.

vi) *Potential Inaccuracies*

Author has worked on a wide canvass covering an array of issues and comprehensively investigated the subject areas.

vii) *Are factual statements adequately supported by citations?*

Yes.

viii) *Arguments for Conclusions and recommendations and whether they are supported by evidence?*

For a book of this nature (combination of a handbook, reference guide and practitioners guide), it is hard to give specific conclusions and recommendations. The style of presentation, as supported by evidence, will serve the target audience. The Author has justified the statements/conclusions bases on evidence.

ix) *Structure, style and accuracy of Presentation & Whether it is appropriate for the target audience*

For a mixed target audience, some of the facts are repetitive. Great effort is made to simplify a complex branch of the law and evolving area of practice. In my view, the structure and style will serve the target audience.

The style of the Book will certainly interest the target audience and help them to advance their academic and practical knowledge on the subject.

Authors Notes have clarified some of the contentious matters in some of the chapters. For example, *the Note under chapter 2.5.1.2 clarifies the concept of split provision format, which is naturally confusing. No such Notes are seen in most of the Chapters of the Book and it looks selective and it is good to consider consistency in this regard.*

3. Other comments, Suggestions and Concerns, not covered above

- i) A statement of the research methodology adds to the academic integrity of the Book.
- ii) Due to the nature of the material presented and the complexity of the subject, the title of the book is highly critical for clarity and the focus of the Book.
- iii) The scope of the Book and the contents can be made clearer for less experienced practitioners by expressly excluding the Roman Law concept of unjust enrichment, which has totally different approach. This is particularly important because several countries still practice common law elements of Romal Law or restitution based on similar legal principles

END

Response to the Peer Review of JC Weliamuna for publication titled ‘Illicit Enrichment’

26 February 2021

Andrew Dornbierer

The following document outlines the actions that I have taken to address comments received by the Basel Institute on Governance on 14 February 2021 as part of the Open Peer Review process for the publication titled ‘Illicit Enrichment’. It should be noted that the amendments outlined below may still be subjected to an internal editing process before final publication.

‘In my opinion, further clarity is required either to further distinguish this concept of unjust enrichment OR to state clearly that those civil restitution concepts do not form part of the present discourse of “illicit enrichment” within the scope of the Book.’

In response to the above comment, I have added the following section below to Part 1 to clarify the issue:

1.5.3 The difference between illicit enrichment laws and the concept of ‘unjust enrichment’ as a private claim for civil restitution

The term ‘illicit enrichment’ is used interchangeably with the term ‘unjust enrichment’ in some jurisdictions. It should be noted however, that ‘unjust enrichment’ is also a label given to a private claim for restitution based in civil law, where one party seeks to restore for themselves the gains that another party has unduly made at their expense.¹ These types of claims are often utilised when one party has arguably paid money to a second party as a result of a mistake. Private claims of ‘unjust enrichment’ in this sense are not related to the subject of this publication.

¹ <https://www.lexisnexis.co.uk/legal/guidance/restitution-for-unjust-enrichment-elements-of-the-claim>

'Section 1.5 of the Book- the difference between illicit enrichment laws and other similar laws is very stimulating. If it this can be explained through a graph (in addition to the table), subtle differences can be easily captured by the new practitioners.'

While a graph would certainly have merits, I decided not to include a graph in addition to the table in this section to avoid the risk of the publication being too repetitive. However, as hinted at by the comment above, the table could potentially be improved, and this will be taken into account for future editions.

'Most of the foot notes with the statutes/decision do in fact identify the country but some do not. I suggest that the country be stated within parenthesis.'

Following the general 'clean up' of footnotes required for publication, the relevant country will be added to all legislation references where the name of the country is not included in the title of the Act itself, as I agree this important for clarity. Furthermore, the relevant country will be added to references relating to judicial decisions, but only if the country is not clearly identified in the phrase referencing the decision in the main text.

'Some of the foot notes have kept the original text of the laws/decisions etc. in French/Spanish. (e.g. f.n. 57, 58, 119) If the Book is intended to be available in English electronically, an English (only) reader may be able to use google translation. If printed version is expected, it seems difficult for a English (only) practitioner to use the foot notes. In the absence of an editorial policy on this, it is best if a brief translated version is supplied into the footnotes to maintain consistency.'

The 'original text' in many of these footnotes is intended to provide the original version of the English text mentioned within quotation marks in the main paragraphs of the book. Nonetheless, all footnotes will be re-checked during a final clean-up of the footnotes, to make sure that the English version of the law is actually clearly referenced in the main text, and if it is not, this will be also added to the footnote as suggested by the comment above.

'Please check the accuracy of f.n. 48 R v Rondo [2001] NSWCCA 540 (not 54) as well as f.n. 49'

These footnotes have now been corrected.

With regards to comments in the Peer Review relating to tax laws of the United States, and in rem forfeiture -

As I am not an expert in U.S. tax law, I have decided not to provide a thorough examination of the relationship between U.S. tax laws and illicit enrichment laws, beyond noting the obvious similarities between these laws in Section 2.6.6 and providing references to articles from legal commentators who are much more adept in providing such analysis.

In line with the comments in the Peer Review, to provide more information for any potential reader interested in the Net Worth analysis used in U.S. tax cases, I have now also added a footnote in Annex 2 directing readers to the US Department of Justice's Criminal Tax Manual, which provides a thorough overview of this process.

With regards to comments relating to U.S. 'in rem' forfeiture laws, while the US 'in rem' forfeiture law is not covered by name in the book, these types of laws are distinguished from illicit enrichment laws (albeit indirectly) in Section 1.5.1. The US civil *in rem* forfeiture system requires the state to demonstrate evidence that the relevant property is linked to some sort of criminality (see: <https://www.law.cornell.edu/wex/forfeiture>). Consequently, Section 1.5.1 distinguishes illicit enrichment laws from the broad category of laws referred to as non-conviction based forfeiture laws, otherwise known as in rem forfeiture laws.

'Chapter 2.6 has the following statement:- "As evidence acquired under a UK UWO has yet to be used in a separate civil proceeding for a recovery order,..." Please check the accuracy of this statement vide -<https://www.theguardian.com/uk-news/2020/oct/07/businessman-to-hand-over-10m-following-unexplained-wealth-order>'

The case mentioned above was resolved through an out of court settlement. While a UWO was sought, the final asset recovery did not occur through a civil proceeding/court decision but through a separate negotiation between the parties.

‘Section 2.6.3 refers to Switzerland ‘s Law. This is critical example with international law implications. If it does not deem fit to be an illicit enrichment law, under the author’s definition, some explanation is welcome in justifying the views of the Author.

Perhaps, an additional graph may capture all the above points relating to countries outside the 93 jurisdictions.’

The text includes this paragraph below which justifies why the Swiss law has not been categorised as an illicit enrichment laws:

“Nonetheless, the Swiss legislation also differs somewhat from illicit enrichment laws in that it requires a number of significant conditions to be met before assets can be considered ‘illicit’. Specifically the state must also demonstrate that the level of corruption in the country of origin of the person in question was notoriously high during the person’s time in office. Moreover, before assets can be confiscated, a freezing order for the assets must be issued by a political body, the Swiss Federal Council, and this order can only be issued if the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system.”

In order to avoid repetition I have decided not to draw this out any further. Nonetheless, to help provide clarity, a table has now been included in the publication at the end of Part 2 which further summarises the differences between illicit enrichment laws and the other types of laws mentioned (eg. those of Ireland, Switzerland, France etc.).

‘A statement of the research methodology adds to the academic integrity of the Book.’

A separate ‘Methodology’ section has now been added to the publication immediately after the ‘Introduction’ section and before Part 1 to provide a clear explanation of the research behind the publication and to provide a bit of clarity regarding decisions to classify laws in certain ways.