Summary of witness evidence at the hearings of the People's Tribunal on Economic Crime

31 August 2018

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TESTIMONY ON APARTHEID ECONOMIC CRIMES

Mr Charles Abrahams

1. Mr Abrahams provided evidence on apartheid state secrecy and the role of foreign corporations in aiding and abetting apartheid.[1].

2. More specifically, he considered the litigation by Khulumani Support Group in the early 2000s against foreign corporations that has assisted apartheid South Africa through providing financial aid and other goods and services. His evidence showed the connection between the economic crimes committed by foreign entities, South Africa's public foreign debt of almost 45 billion dollars as of 1993 and attempts made to hold the foreign entities liable.

3. He offered the following observations about South Africa's foreign debt:

    3.1. As at 1993, South Africa's foreign debt stood at 80 billion dollars with at least 45 billion dollars of that debt amounting to public debt;

    3.2. As of the 1970s, the United Nations consistently condemned the policy of apartheid and adopted resolutions calling for states and corporations to end their business with the apartheid government;

    3.3. In 1976, the World Bank seized its funding to South Africa while the International Monetary Fund continued to fund South Africa until 1983. In fact, after the 1976 student protests, the International Monetary Fund loaned South Africa 400 million dollars, the equivalent of South Africa's subsequent defence expenditure;

    3.4. To fill this funding gap, South Africa turned to foreign corporations such as General Motors, RheinMittal, Ford Motor Company, IBM and Daimler AG.

[1] Mr Abrahams is a lawyer at Abrahams Kiewitz Inc and represented the applicants in the Khulumani litigation and acted as a consultant to Professor John Ruggie, Special Representative of the United Nations Secretary General on Business and Human Rights.

3.5. These corporations continued to fund the apartheid South African government and provide goods and services even though they had full knowledge of the South African government's perpetration of apartheid and human rights abuses.

3.6. Credit extended by these foreign corporations contributed to the foreign debt accrued by apartheid government and inherited by the democratic dispensation post-1994.

4. Following South Africa's transition to democracy, civil society and human rights organisations (such as Jubilee 2000 and Khulumani Support Group) campaigned for South Africa to unilaterally repudiate its foreign debt or for these foreign companies to write off South Africa's debt as an act of reparation for their wrongful conduct.

5. Mr Abrahams submitted that the argument can be made that under international law a successor or new state is not obliged to honour its predecessor's debt obligations, this remains contentious. The more generally held view, he contended, is that only when one state secedes from another state (and forms a new state) can it renege on its 'predecessor' state's financial obligations; this cannot be done when there has simply been a change in government.[2]

6. Abrahams submits that in the case of South Africa, transition to democracy required a regime change in addition to a change of government. This required the adoption of a new Constitution, symbols of states, government entities and acceptance into the international order.

7. The South African government, however, was not willing to pursue unilateral repudiation of apartheid debt, with then Minister of Finance holding that it amounted to only five percent of the government's debt. Mr Abrahams opines

[2] Charles Abrahams 'Lessons from the South African Experience' in *Corporate Accountability in the Context of Transitional Justice* (2013) London: Routledge.

that the new government adopted this stance to show that they were in charge of the economy and to prevent alienating foreign investors and the capital market.

8. Faced with the South African government's unwillingness to repudiate the debt, in 2002 Khulumani launched litigation in the United States of America under the Alien Torts Statute. In *Khulumani v Barclay National Bank Ltd.*[3] Khulumani sought damages for its members who suffered harm as a result of the conduct of foreign companies who supported the apartheid government. The litigation initially implicated twenty-three corporations, however, due to various legal requirements imposed by the threshold of aiding and abetting under international law, it was whittled down to five corporations. These corporations were Daimler AG, Ford Motor Company, General Motors, IBM and Rheinmetall.

9. The case was premised on the corporations knowingly aiding and abetting the apartheid government to commit apartheid and human rights abuses by providing financial support and goods such as vehicles, technology and arms. As a result of the law in place at the time for holding perpetrators to account and jurisdictional issues that required that the case occur in America, Mr Abrahams stated that the focus shifted from odious debt to individual liability of companies and their directors.

10. The case resulted in an out of court settlement from General Motors to the value of 1.5 million dollars.

11. The South African government opposed the Khulumani litigation, stating that the Truth and Reconciliation Commission ('**TRC**') was put in place to address direct or complicit wrongdoing during apartheid. Further, the government reasoned that such litigation would detrimentally impact foreign investment in South Africa.

12. Charles testified that the TRC only heard individual testimony and not that of companies. The TRC adopted a narrow truth-seeking mandate that resulted in amnesty being extended to those who came before the TRC.

[3] *Khulumani v Barclay National Bank Ltd* 504 F. 3d 254 (2nd Cir. 2007).

13. Because corporations, especially foreign corporations did appear before the TRC, they do not have immunity and can therefore be held liable for their conduct. Therefore, reparations can be sought from these companies should a claim be lodged against them as the companies have not paid any compensation.

14. Mr Abrahams states that some of the lessons from the Khulumani litigation include:

    14.1. The need to recognise that the TRC's mandate was too narrow and wholly insufficient in dealing with apartheid history as it relates to the economic crimes during apartheid;
    14.2. The recommendations of the TRC need to be revisited;
    14.3. Litigation and the law have their limits and do not deal with the structural issues present in poly-laden matters such as apartheid.

Advocate Dumisa Ntsebeza[4]

15. Mr Nstebeza provided evidence on:
    15.1. The role and mandate of the TRC;
    15.2. The extent to which the TRC considered economic crimes committed by domestic and international business during apartheid; and
    15.3. Action taken by state institutions, including the NPA, to implement the recommendations of the TRC.

16. According to the witness in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('**TRC Act'**), the TRC was established with the mandate to, amongst others;
    16.1. to initiate and facilitate inquiries gross violations of human rights during apartheid, the perpetrators and victims thereof, any urgent reparations that can be made to the victims of such acts and to facilitate and

[4] Advocate of the High Court of South Africa and Chair of the Investigative Unit of the TRC.

promote the granting of amnesty to perpetrators who make full disclosure of their conduct;[5]

16.2. to promote national unity and reconciliation between perpetrators and victims.

17. The TRC Act defined 'gross human rights violations' as killing, abduction, torture of severe ill treatment of any person, including any attempt, conspiracy or incitement thereof.[6]

18. Mr Ntsebeza provided that a further aim of the investigations of the TRC was to consider the socio-economic consequences of apartheid in relation to their relationship with promoting unity and reconciliation. To acknowledge these socio-economic issues and economic crimes, the TRC made provision for special hearings.

19. In these special hearings, the role of business in supporting or promoting apartheid would be identified. Businesses were invited to come forward and make full disclosure of their role in aiding and abetting apartheid, with the opportunity for amnesty to be granted.

20. Ntsebeza relays that none of the big business in South Africa, like Chrysler or Mercedes, who financially supported and profited from apartheid, testified at the TRC. This was because these and other captains of the industry did not feel like their conduct aided and abetted apartheid and therefore they did not have to plead for amnesty.

21. Business that did appear before the TRC focused on justifying their conduct during apartheid and bemoaned the fact that apartheid was a hindrance to the proliferation of their business. Because these companies did not fulfil the requirement of the TRC Act of providing full disclosure, many of the few of them that did appear were denied amnesty.

[5] TRC Act, s3 & 4.
[6] TRC Act, s1.

22. For these reasons, Mr Nstebeza concludes that contrary to the view of the South African state and businesses expressed during the Khulumani litigation, the TRC did not adequately consider the role of international and domestic business and economic crimes during apartheid.

23. There were thus, rudimentarily, three categories of perpetrators at the TRC:

    23.1. Perpetrators who made full disclosure, sought amnesty and received the same;
    23.2. Perpetrators who sought amnesty but were denied the same; and
    23.3. Perpetrators who did not appear before the TRC and did not seek amnesty.

24. From category two and three above, at least 17 files or 200 cases were handed over by the TRC to the Justice Department and the NPA for further prosecution.

25. However, there has been a scarcity of prosecutions due to lack of political will and in some cases, active political and state interference in attempts to prosecute these crimes.

26. One such case was that of the application by the Simelane family for an order compelling the NPA to investigate and prosecute the abduction and murder of Nokuthula Simelane. The perpetrators of this crime did not receive amnesty from the TRC as they failed to make full disclosure of their crimes.

27. In the application, an affidavit submitted by a civil police servant detailed political interference in attempts by the NPA and police to deal with cases handed over by the TRC inn an attempt to stymy the prosecution of these cases. Further, former NDPP, Mr Vusi Pikoli disclosed government ministries responsible for dissuading prosecution of apartheid era crimes and claims that one of the reasons contributing to his dismissal as NDPP was the fact that he pushed for the prosecution of cases handed over by the TRC.

28. There is also still no political appetite to implement the recommendations of the TRC. Khulumani proposed to Parliament that government pay each of the victims identified by the TRC R2000 per month for six years as a symbolic reparation for the violation of their human dignity. This would have cost government a tota of around R3 billion over six years.

29. This amount would have recovered by Treasury if the TRC's recommendation to impose a 1% tax on all companies listed on the Johannesburg Stock Exchange was implemented. A total of R11.5 billion would have been recovered in this way. It is important to note that many of the listed companies were in favour of paying the 1% tax.

30. The government refused to adopt the recommendations and instead paid each identified victim a once off amount of R30 000, which according to Nstebeza, is an insult to the dignity of the victims.

31. Some of the consequences arising from the failure to prosecute include the following: first, failure to prosecute undermines the rule of law and encourages current day impunity. Failure by state actors to themselves recognise and implement the rule of law does little to set an example for the rest of us. In Nstebeza's opinion, state authorities failing to recognise the rule of law is a recipe for chaos and a culture of impunity.

32. Second, the failure to prosecute cases emanating from the TRC does impeded reconciliation in that the structural nature of racism and inequality is not addressed.

33. Nstebeza relies on Judge William Heath and writer, Mr Sampie Terreblanche to stress the importance of unearthing and addressing the way in which apartheid caused today's social and economic inequality. Both Heath and Terreblanche commend some work of the TRC but hold that it did little to show that apartheid that was a system that allowed white people access and exploit economic and political systems while depriving millions of black people. Those lines of benefit and deprivation stand today. True reconciliation is dependent on the beneficiaries

of apartheid, white people, to make the confessions, make the necessary reparations and repentance.

34. Ntsebeza finds government's refusal to make adequate compensation particularly worrying when one considers the billions of Rands that siphoned today by state-owned enterprises

35. On the conclusions of the TRC on the role of business during apartheid, Ntsebeza shared:

    35.1. In relation to the parastatal Eskom, the investigating committee found that between 1950 – 1980 international finance institutions and foreign private banks granted loans to Eskom amounting to at least 7.5 billion U.S. dollars;

    35.2. Banks in France granted 24% of the finance, West Germany 17%, British banks 26%, Swiss banks 12% and the World Bank and other parastatal entities such as the South African Reserve Bank also granted substantial loans to Eskom;

    35.3. It was uncovered that Eskom used its location as a parastatal to exploit domestic minerals in order to take advantage of global market in a manner that did not benefit the majority of the South African population;

    35.4. Eskom was used as an instrument to further the political objectives of the apartheid state. The Broederbond influenced the selection of Eskom's chief executive officers. Management of Eskom in turn offered preferential employment to poor white people, refused to recognise non-racial trade unions and offered long term supplier contracts to Afrikaner coal mining companies;

    35.5. Eskom used Afrikaner financial institutions to issue and market public bonds and administer bank accounts;

35.6. Eskom supported the implementation of Bantustans by offering extra chief tariffs in border areas;

35.7. They buttressed state claims to racial hegemonies by controlling electricity distribution in occupied areas; and further

35.8. Eskom never testified before the TRC nor sought amnesty for their contribution to apartheid.

36. Nstebeza recommends the following action be taken to address the inadequacy of the TRC and subsequent inaction of state institutions:

36.1. Civil society ought to rally around the revisitation of the TRC recommendations to compel adoption and implementation of the recommendations;

36.2. if necessary, seek a second TRC that delves into the structural social and economic inequalities caused by apartheid and the role of business in this;

36.3. to approach domestic courts to hold corporations responsible for their role in apartheid;

36.4. to consider non-judicial avenues such as engaging companies on assuming responsibility for their conduct and requiring the private sector to adopt and implement binding internal standards of compliance;

36.5. to reconsider the imposition of a wealth tax, the imposition of a retrospective surcharge on corporations who profited from apartheid during specified dates and to implement a surcharge on golden handshakes received by public servants since the 1990s.

Mr Hennie van Vuuren[7]

37. Mr van Vuuren extrapolated in evidence submitted in the written submission: 'The arms money machine: apartheid's sanctions busting bank'.

38. His testimony explained the role of private actors, specifically two banks, Kredietbank based in Belgium and Kredietbank Luxembourg (KBL) in Luxembourg, in assisting Armscor and the apartheid regime to violate international law and mandatory United Nations arms sanctions.

39. He also indicated that there is a very narrow understanding of the crime of corruption, with economic crimes and sanctions-busting or violations of embargoes often not being regarded as crimes that contribute to corruption.

40. Mr van Vuuren's testimony centred on:

    40.1. the secrecy created by the apartheid regime to ensure their clandestine trade in weapons with the international and domestic state actors and foreign entities;

    40.2. the role of Kredietbank and KBL in setting up a money laundering system that allowed Armscor to illegally trade weapons in contravention of United Nations sanctions; and

    40.3. the fact that KBL and Kredietbank had knowledge of the Armscor's conduct and perpetration of apartheid and the banks' wilful support of Armscor's conduct and perpetration of apartheid.

41. In relation to secrecy, the apartheid government promulgated the 1960 Armaments Act which penalised any disclosure of information on the activities of Armscor and arms exports or acquisitions and the development of weapons a crime punishable by up to 15 years imprisonment.

[7] Director of Open Secrets, author of *Apartheid, Guns and Money* (2017).

42. The apartheid government also put in place the Special Defence Account for the purpose of trading in arms, almost R500 billion worth of cash today passed through the Special Defence Account for military expenditure. Reporting around and auditing of such financial activities and auditing these accounts were limited by legislation such as the Armaments Act above.

43. In part, the secrecy around South Africa's arms trade was prompted by the adoption of United Nations resolutions imposing arms embargoes against South Africa from at least the 1960, with a mandatory resolution being promulgated in 1977. This resolution prevented the companies from selling or purchasing arms, and later, arms parts from South Africa.

44. Despite these resolutions, at least fifty countries, including all seven members of the United Nations Security Council, traded arms with South Africa. In addition, a number of banks private companies and international financing bodies lent money to South Africa for the purchase of arms or traded in arms with them directly.

45. Mr van Vuuren' testimony details how Armscor had an office in the South African embassy in Paris from which Armscor officials received and money from South Africa and then, through various bank accounts, controlled the flow of money to the above companies and states to trade in arms.

46. The French government had full knowledge of the presence and conduct of Armscor officials from the South African embassy in Paris and still approved their diplomatic presence in France.

47. In relation to Kredietbank and KBL, Mr van Vuuren indicates that the bank assisted Armscor in setting up a money-laundering scheme to allow Armscor to clandestinely trade in arms in contravention of United Nations arms sanctions.

48. The two banks achieved this by first, setting up a series of numbered bank accounts from which deposits and payments for arms could be made by Armscor for arms. Second, the banks set up a number of front countries in jurisdictions

including Panama and Liberia to help channel cash payments between Armscor and buyers or sellers of weapons.

49. Numbered bank accounts were used to keep all parties' identity secret and to prevent the cash flows and loans to and from Armscor from being traced.

50. In his book *Apartheid Guns and Money*, van Vuuren identifies at least 844 numbered bank accounts used. 487 of these accounts were controlled by Armscor, the rest were held by arms companies and brokers with whom Armscor traded.

51. van Vuuren also relays that senior members of KBL and Kredietbank had knowledge of the role that their banks and the banks employees played in assisting South Africa to bust sanctions.

52. Affidavits submitted to the Tribunal by former Armscor official, Daniel Loubscher, who worked at the Armscor office in Paris stated that Armscor officials met with KBL officials to discuss Armscor's accounts held at the bank. Further, KBL officials referred to Armscor as 'Groupe Speciale' due to the important relationship between the bank and Armscor.

53. No action has been taken by state institutions regarding the evidence disclosed in *Apartheid Guns and Money.*

54. van Vuuren submitted that it is possible that the Belgian and Luxembourg governments are complicit in the conduct of the corporations registered in their jurisdiction to the extent that the respective states failed to exercise adequate and appropriate state oversight.

55. Both Belgium and Luxembourg adopted United Nations Security Council Resolutions against South Africa and were therefore aware of the conduct of the apartheid government and the implications of corporations assisting South Africa to secure contraband arms through economic or other means.

56. In terms of the remedial action that can be taken against the banks, the witness proffers the following:

    56.1. domestic litigation can be considered against the banks for their role in aiding and abetting the apartheid government's commission of a crime against humanity, that is, apartheid along with other constituent crimes;

    56.2. that the banks and other private actors acknowledge their wrongful conduct and make some form of reparation to the South African people;

    56.3. that South Africa improve its access to information regimen to allow more closure on the perpetrators of apartheid and the nature and extent of their conduct;

    56.4. that implicated domestic and foreign state actors and parastatals acknowledge their role in apartheid; and

    56.5. that appropriate state institutions investigate and take appropriate action against implicated parties.

Professor Bonita Meyersfeld[8]

57. Professor Meyersfeld considered the legal liability of the banks and implicated private corporations for their role is aiding and abetting the commission of apartheid and its constituent crimes as a crime against humanity under domestic and international law.

58. Currently, there is no international or cross border entity that holds banks and other financial sector entities accountable for human rights violations and non-compliance with banking regulations and best practice guidelines.

[8] Associate Professor at Wits University and former Director of the Centre for Applied Legal Studies.

59. Moreover, international law at present does not impose binding negative or positive human rights obligations on private actors.

60. There is thus no comprehensive and enforceable complaints mechanism against the financial sector or access to effective remedies of victims of human rights abuses.

61. At present, there are various non-binding mechanisms and principles that impose voluntary obligations on corporations and banks. These would include the Equator Principles, the Guiding Principles for Transnational Corporations and Human Rights and the OECD Guidelines for Multinational Enterprises.

62. The OECD Guidelines for Multinational Enterprises provides a potential non-binding avenue for corporate accountability. The OECD Guidelines provides a set of principles on trade conduct, labour relations, competition and more recently, human rights standards that transnational corporations should abide by. The Guidelines are targeted at states, asking states to ensure that corporations hosted and/or registered in their countries abide by the Guidelines.

63. National Contact Points (NCPs) are set up in each member country to enforce the OECD Guidelines by hearing complaints of violations of the OECD Guidelines, facilitating mediation between parties on issues raised and providing recommendations to the company as to how to bring their conduct in line with the OECD Guidelines.

64. NCPs may also issue a statement against a corporate entity identifying corporate behaviour in the complaint that breached the OECD Guidelines and making recommendations as to what remedial steps the corporation should take. The NCP may issue a statement irrespective of whether or not an implicated corporation agrees to mediation under the NCP.

65. An advantage of the OECD process is that as a non-judicial process, it does not rely on the onerous burdens of proof and the intricate legal thresholds of showing

causality for legal accountability to accrue. The mechanism can, proverbially, show that while the banks and corporations may not have held the shotgun that shot victims of apartheid, they very well financed it. This indicates the often undisclosed, yet indispensable role the financial sector plays in funding human rights violations.

66. Highlighting poor corporate conduct in this way may result in good citizens of the corporate world and some states ostracizing the implicated corporation until they remedy their conduct.

67. Another mechanism that be exploited by the South African in relation to other states who aided and abetted apartheid through act or omission is the International Court of Justice ('ICJ'). The ICJ can hear claims of international state responsibility brought by other states, although individuals cannot bring such claims.

68. Such action requires political will by the South African government and to prioritise accountability for apartheid-era crimes and addressing structural inequality in South Africa over foreign investment. Foreign states also play an important role in ensuring full accountability of their governments and natural and juristic persons who contributed to apartheid by condemning the conduct of these parties and taking decisive action against them.

69. Other mechanisms that could be considered include the anticipated binding treaty on transnational corporation and other business entities in relation to human rights, regional for a such as the African Commission on Human and Peoples Rights and the European Court of Human Rights.

70. According to Meyersfeld, it is important that relief requested from and steps taken by corporations for their human rights and other violations exceed the hollow standard of 'corporate social responsibility'.

71. Some of the suggested remedies that may be ordered against non-state and state actors implicated in evidence before this Tribunal include:

71.1. Parties who aided and abetted apartheid issuing an apology to the South African government and its people;

71.2. Making appropriate symbolic or other reparation to the victims of apartheid;

71.3. Taking measures to impose binding accountability and regulatory mechanisms which have effective powers of enforcement in relation to the conduct of the financial and other private sector actors.

Advocate Hermione Cronje[9]

72. Advocate Cronje provided evidence relating to some of the prospects and challenges if investigating and prosecuting foreign and domestic economic crime in South Africa.

73. South Africa's legal framework and its adoption of international and regional after 1994 means that it has a solid legal framework in place for investigation, prosecution and penalisation of corruption and economic crime of a domestic and transnational nature.

74. For example, section 179 of the Constitution establishes an independent and impartial national prosecuting authority that has the power to investigate and prosecute crimes. South Africa has anti-corruption legislation, the Prevention and Combatting of Corrupt Activities Act, in place along with asset forfeiture laws, laws for the criminal prosecution of corporations and private actors as well as laws enabling mutual legal assistance and the conclusion of extradition treaties to facilitate the prosecution of economic crimes.

75. There are also strong regional and international mechanisms aimed combatting corruption and transnational economic crime such as the United Nations Convention against Corruption, the OECD Convention on Combatting Bribery of Public Foreign Official and the African Union Convention on Preventing and

[9] Advocate of the High Court of South Africa and former prosecutor of ten years in the asset forfeiture unit of the NPA.

Combatting Corruption. South Africa is subject to numerous state peer-review mechanisms under regional instruments and as an OECD partner.

76. Some of the challenges faced by South Africa that hinder effective utilisation and implementation of the above legal framework include:

76.1. Lack of political will; state institutions either fail to pick up on investigations and prosecutions, are inadequately capacitated to do so or intentionally prevent and otherwise obstruct further action;

76.2. Lack of independence of powerful state institutions and positions such as the NDPP and National Commissioner of Police. To ensure sufficient independence and removal from political interests that may sway who is prosecuted and who is not, Cronje opines that the NDPP ought to be appointed by a process similar to the appointment of judges. Therefore, the appointment can be made by members of parliament and the Judicial Services Commission. Motivated people who are well suited to perform the job and have high credentials should be appointed to these positions to push accountability and ensure that the NPA and police services itself hold itself accountable to the public;

76.3. State institutions responsible for prosecuting corruption and economic crime should have sufficient resources in terms of staffing, budget, policy document and training facilities and programmes that fosters the developments of experts in various fields and creation of institutional knowledge;

76.4. State institutions like the NPA, police services and its specialised units should be held publicly accountable by the public, civil society and by parliament. One of the ways to do this is to encourage these institutions to develop real prosecution targets and plans for which adequate resources should be provided. There should be regular financial and other reviews of whether these institutions have met their undertaking;

76.5. At present, state policing and prosecuting authorities appear to be intent on meeting targets given the pressures they face and their governance. A lot of cases that therefore contribute to the publicised success rate of the NPA and other institutions are actually plea bargains that do not result in true accountability.

77. Cronje suggest that some of the following steps can be taken to improve the operation and accountability of the NPA and policing services in relation to the prosecution of corruption and economic crimes:

77.1. The method of the NDPP should be revised to allow for greater removal between the Office of the President and the NPA, more specifically, the Judicial Services Commission and parliament should appoint the NPA;

77.2. Task teams should be set up within the NPA to pursue the more effective prosecution of transnational and domestic economic crime and corruption. These task teams, including the already established Special Commercial Crimes Unit within the NPA, should develop realistic and effective action plans to investigate and prosecute crimes so as to secure effective remedies. Further these task teams should take initiative to activate clauses under the Prevention of Corruption and other Corrupt Activities Act and other instruments to prosecute crimes;

77.3. Money recovered from proceeds of crime and asset forfeitures at the hands of the police and NPA should be channelled back into these institutions to improve their capacitation and training;

77.4. Parliament, the public and civil society should regularly hold state institutions to account for actions plans developed and for their failure to fulfil their duties;

77.5. Civil society and state institutions supporting constitutional democracy should take steps to make the criminal justice system more accessible to the public through demystifying economic and other crimes to enhance public participation with the NPA and police and their accountability to the public;

77.6. State institutions should use mutual legal assistance opportunities to work with states that have invited South Africa and other affected states to recover proceeds of crime held in their jurisdiction through appropriate legal mechanism.