

Transparency International Anti-Corruption Helpdesk Answer

Non-conviction-based confiscation as an alternative tool to asset recovery.

Lessons and concerns from the developing world.

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Asset recovery remains one of the biggest loopholes in anti-corruption policies as only a very small share of the proceeds of corruption is confiscated from criminals and returned to its victims. With the goal of overcoming some of the barriers to asset recovery, non-conviction-based (NCB) asset forfeiture has emerged as an alternative confiscation tool, endorsed by the UNCAC, the FATF, the OECD, the EU and many others. It has been implemented in several countries in the developed and developing worlds, with varying levels of success.

NCB asset forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction – whether the defendant is dead, unknown, missing, or immune from prosecution, or in cases where the statute of limitations prevents prosecution. It benefits from the lower evidentiary threshold required to obtain a confiscation order, when compared to proceedings designed to determine criminal liability.

Criticisms and concerns have been raised with regards to potential authoritarian misuses of NCB confiscation, as well as to the tensions between the anti-corruption and human rights agendas, the risk of political interference in judicial and court systems, and encroachments on both the right to a fair trial and to due process. There have also been concerns about self-incrimination and distribution of the burden of proof, the proportionality of asset forfeiture measures, compensation for third parties, and infringements of property rights. These issues are particularly prominent in the developing world, especially where weak institutions and rule of law deficits allow abuses to happen. In this sense, a number of safeguards must be in place to ensure that NCB asset forfeiture is used in accordance with human rights standards. Independent institutions are key to avoiding political interference in investigations and judicial proceedings. NCB forfeiture should be lawful and proportionate, and its proceedings should ensure the rights of due process and to a fair trial.

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Query

What is non-conviction-based asset forfeiture and why has it emerged as alternative confiscation tool to strengthen asset recovery efforts? What are the main concerns with its implementation, especially in developing countries? Please provide examples from Africa and Latin America.

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Introduction

Recovering assets stolen by way of corruption remains one of the biggest challenges faced by law enforcement officials, as they seek to deprive criminals of the proceeds from illicit activities and to return those assets to their original owners or to compensate the victims. In fact, concerted efforts to recover assets stolen by criminal organisations have met limited success across the board – including in cases of drugs and arms trafficking, human trafficking, smuggling and tax evasion, to name a few.

In order to supply new avenues to officials responsible for asset recovery and potentially overcome some of the obstacles they face when using traditional tools to confiscate stolen assets, efforts have been made to promote alternative paths to succeed in the confiscation of ill-gotten gains. One of the non-traditional tools for confiscation that has found increased support in the international community is non-conviction-based (NCB) asset forfeiture.

Main points

- Non-conviction-based confiscation has emerged as an alternative tool to help overcome barriers to asset recovery.
- It is particularly useful when it is not possible to obtain a criminal conviction due to the criminals being dead, missing, unknown, immune from prosecution or due to the statute of limitations having run out.
- NCB forfeiture proceedings usually require a lower evidentiary threshold to demonstrate that particular assets have an illicit origin or destination.
- There are concerns about the impact of NCB forfeiture on property rights, as well as on the presumption of innocence and the rights to a fair trial and due process.
- If the necessary rule of law and human rights safeguards are in place, NCB forfeiture can become an important anticorruption tool.

There are many expressions used to refer to non-conviction-based (NCB) asset forfeiture or confiscation, such as “civil forfeiture”, “in rem forfeiture”, or “objective forfeiture”. In Spanish, both the expressions “*extinción de dominio*” and “*decomiso sin condena*” are used.

While these other expressions may sometimes be used as synonyms for NCB forfeiture, they do not necessarily encapsulate all its possible features. For example, NCB forfeiture can take place within criminal proceedings and, even though they are usually focused on specific properties (*in rem*), they may also target individuals.

Confiscation is defined by different international treaties, including the United Nations Convention against Corruption (UNCAC), as the “permanent deprivation of property by order of a court or other competent authority” (art. 2 (g), UNCAC). Non-conviction-based forfeiture is, thus, only one of the ways through which confiscation can happen.

The Financial Action Taskforce (FATF 2022) [defines](#) non-conviction-based confiscation as a “means of confiscation through judicial procedures related to a criminal offence of which a criminal conviction is not required.”

Despite several international, regional, and national initiatives endorsing its rationale and promoting its implementation, NCB confiscation is still a highly controversial mechanism, in both the developed and developing worlds.

Criticisms and concerns have arisen with regards to the authoritarian misuse of its mechanisms, as well as to the tensions between the anti-corruption and human rights agendas, the risk of political interference in judicial and court systems, and encroachments on both the right to a fair trial and due process. There have also been concerns about self-incrimination and distribution of the burden of proof, the proportionality of asset forfeiture measures, compensation for third parties, and infringements of property rights.

All these issues are especially relevant when dealing with developing countries, where institutional and legal fragility abounds and allows anti-corruption policies to be misused by political

leaders for their own ends, including cracking down on opponents.

Responding to pressures for more effective asset recovery tools, but also to these growing concerns and risks, there is a need to develop NCB forfeiture systems with necessary due process and rule of law safeguards. As Mat Tromme (2019: 173) puts it, “an NCB system that is implemented in a rule of law-compliant manner makes it ... more legitimate and sustainable”, but there are important challenges to implementing these safeguards, ranging from political will to judicial independence and property rights.

Asset Recovery

Asset recovery has many different definitions. It generally refers to the process by which state and non-state entities work to recover assets that were stolen through illegal activities, be these narcotics and arms trafficking or tax evasion and corruption.

Transparency International (2022) foregrounds the predicate crime of corruption as being central to asset recovery, which it [defines](#) as “the legal process through which a country, government and/or its citizens recover the resources and assets that were stolen through corruption from another jurisdiction.”

Similarly, but with a wider scope, the FATF (2012) defines asset recovery as “the return, repatriation or sharing of illicit proceeds, where these proceeds are located in foreign countries.”

While asset recovery often has a cross-boundaries connotation due to its relevance to cases of transnational corruption, the process may sometimes take place only within a single country. For example, if the stolen funds were not sent to another country or jurisdiction, after being confiscated they may be immediately transferred to the domestic entities or individuals that were victims of the criminal enterprise.

The asset recovery process can be separated into three steps: (i) tracing, identifying, and locating the assets; (ii) seizing, freezing and confiscating the assets; and (iii) recovering and returning the assets to their legitimate owners or the victims of said crime. This Helpdesk Answer will focus on the

second phase of the asset recovery process, given that NCB forfeiture is a type of confiscation.

There are many reasons why asset recovery policies are an essential part of any anti-corruption framework. It is considered a fundamental principle of the UNCAC, which requires that States Parties provide each other the widest measure of cooperation and assistance in this regard (art. 51).

The existence and effectiveness of asset recovery tools serve as a deterrent to criminals who intend to enjoy the proceeds of their malfeasance. If financial gains are the main motivation behind corruption offences, ensuring that said ill-gotten gains are unassailable should in principle discourage future wrongdoing. Asset forfeiture also serves to incapacitate criminal organisations, depriving them of the funds that allow them to maintain substantial material capabilities and support from their members and employees (Cassella 2019: 45).

Asset recovery is also a very important means of providing resources for the financing of public policies and projects. Especially in developing countries, funds recovered from illicit financial flows can provide the financial resources needed to invest in education, healthcare and public safety services (African Union 2015: 46). Recovered assets (or funds originating from their liquidation) can also be used to provide training and equipment to police and law enforcement agencies, increasing their ability to tackle criminal organisations in the future (Cassella 2019: 44).

Preventing illegally obtained funds from being held and used by corrupt individuals also prevents them from investing those funds into achieving economic and political influence in their societies, establishing corrupt control over law enforcement institutions, and ensuring impunity for corruption (OECD 2018: 7). It deprives criminals of the instruments that could be used to commit subsequent offences, to promote violence and harm against individuals and institutions, and to further weaken the rule of law and democracy (Global Initiative against Transnational Organised Crime 2021: 2).

Generally, preventing the entry of ill-gotten funds into the formal economy is considered essential for ensuring the integrity of that economy. Anti-money laundering regulation was created with this goal in

mind. As illicit funds enter the formal economy, they can threaten legitimate private sector entities, disrupt markets by offering artificially lower prices, sabotage the integrity of financial indicators, undermine responsible economic policies, and promote economic distortion and instability of all kinds, ultimately reducing income and increasing inequality (McDowell & Novis 2001: 1).

There is also a **reparative** purpose to asset recovery. Corruption produces incalculable damages to governments and societies. Recovering embezzled funds, bribes and kickbacks allows for these resources to be used to compensate the damages suffered and to restore the rights and interests of the victims of corruption (OECD 2018: 7).

It also serves the purpose of raising awareness about the impacts of corruption on a given society. When individuals notice the positive impacts of stolen assets being returned and invested into the common good – as originally intended – the negative impact of corruption on their daily lives becomes much more tangible.

Confiscation, which is one of the components of asset recovery, can also perform a **punitive** function. In some cases, the assets of a convicted person, including those obtained on lawful grounds and from legitimate sources, may also be subject to confiscation (OECD 2018:7).

Despite the importance of asset recovery, most studies have found that the portion of assets that are eventually recovered continues to be extremely small, in stark contrast to the huge amount of funds embezzled or diverted from their original destination.

The total amount of money paid in bribes and lost to corruption reaches trillions of dollars annually and produces immense harm, especially to developing countries. The World Bank (2014a) estimates that “each year US\$ 20 to US\$ 40 billion, corresponding to 20% to 40% of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas.” The OECD estimates that bribes equal more than 10 per cent of business transactions, on average, and 34.5 per cent of their profits (OECD 2016: 2).

For its part, the High-Level Panel on Illicit Flows from Africa estimated that at least US\$ 50 billion and likely much more are lost annually from the continent (Africa Union 2015: 12).

In contrast, the Stolen Asset Recovery Initiative (StAR) estimated, in 2011, that only US\$ 5 billion in stolen assets had been repatriated over the previous 15-year period (World Bank 2011: 1).

The OECD (2014: 88) has found similar disappointing results. Between 2006 and 2009, only four countries among OECD member states (Australia, Switzerland, the UK, and the US) returned stolen assets to a foreign jurisdiction, totalling US\$ 276 million. In that same period, those four countries, plus France and Luxembourg, had frozen a total of US\$ 1.225 billion. Between 2010 and 2012, the results were even worse: out of a total of US\$ 1.4 billion of corruption-related assets frozen, only US\$ 147 million were returned to a foreign jurisdiction.

Unsurprisingly, a 2018 report by the UNCAC's Implementation Review Group concluded that "most countries reviewed to date did not have practical experience with the return and disposal of assets" (UNODC 2018a: 7).

The low effectiveness of asset recovery is not restricted to the proceeds of corruption-related offences. According to Europol, only about 2 per cent of criminal proceeds are frozen and 1 per cent is confiscated in the European Union. These are staggeringly small figures considering that between 0.7 and 1.28 per cent of the annual EU GDP is involved in suspect financial activity (European Commission 2020: 2). In the UK, statistics suggest that only 26 pence out of every 100 pounds of criminal proceeds were recovered in 2012-13 (Tromme 2019: 169).

In this context, NCB asset forfeiture is considered a "critical tool for recovering the proceeds and instrumentalities of corruption, particularly in cases where the proceeds are transferred abroad" (World Bank 2009: 15).

The OECD (2014: 12) also recognised that "countries that are most successful in tracing, freezing and repatriating assets have legal frameworks that allow for non-conviction based forfeiture and civil prosecutions".

Of course, the lack of NCB asset forfeiture laws is not the only obstacle to recovering stolen assets. A comprehensive study conducted by StAR listed another 28 barriers to asset recovery, among them a lack of trust, effective coordination and political will, as well as deficient resources, banking secrecy laws, unreasonable delays in providing or even inability to provide mutual legal assistance (MLA), and the absence of quick freeze or restraint mechanisms (World Bank 2011).

While there are challenges specific to all three phases of the asset recovery process – and some which affect them all – this Helpdesk Answer focuses on the barriers to confiscation and tools developed to overcome them, especially the NCB forfeiture.

Confiscation

Confiscation is the definitive deprivation of property, and as such, it differs from other provisional measures such as asset freezing and seizure orders that also do not depend on a criminal conviction. Seizure, in general, refers to the act of taking control or possession over someone or something, but this action is not necessarily definitive. With forms of confiscation such as NCB forfeiture, the property is irrevocably lost by its holder, in contrast to interim measures that can be revoked (United Nations 2021b: 4).

This Answer treats confiscation and forfeiture as synonyms, using both terms interchangeably, as do other organisations, such as the [UNODC](#).

The confiscation procedure itself can also be divided into three phases (OECD 2018: 9):

- i. the investigative phase, when the proceeds from crime are identified and located, and evidence about their ownership is collected;
- ii. the judicial phase, when the owner is put on trial to be convicted (or acquitted) or another decision is rendered by the court, leading to the confiscation of their property; and

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- iii. the disposal phase, when the property is actually confiscated and disposed of by the State in accordance with the law.

Confiscation can be based either on property, when a specific asset is named, or on value, when an amount of money owed by a specific person is determined. There is frequently overlap between the operational reach of laws establishing one system or the other. Some jurisdictions employ them both, permitting confiscation of specific assets connected to the criminal offence or of legitimate assets which are owned by an individual who is found to owe a corresponding amount of money (World Bank 2021: 191).

The property-based system requires that a link be established between the identified assets and an offence. It is most useful when assets can be linked to the proceeds or the instrumentalities of a given crime. Determining the amount owed in the value-based system depends on calculating the value of the benefits – defined broadly to include the full value of cash or non-cash benefits received directly or indirectly by a defendant – derived from a criminal offence.

Confiscation can be conducted through three different types of proceedings: criminal, civil or administrative:

- i. Criminal confiscation usually requires a criminal conviction by trial or a guilty plea from the defendant. The confiscation order can be part of the sentence or be adjoined in the following proceedings, designed to determine and apply the ensuing sanctions. Alternatively, confiscation can also be determined in the absence of a conviction within the context of criminal proceedings, as is discussed below.
- ii. Civil confiscation happens within civil proceedings, which have different evidentiary standards and rules from criminal proceedings.
- iii. Administrative confiscation occurs when a judicial decision is not necessary to confiscate specific assets or value-amounts. It is more commonly associated with the enforcement of customs laws, drug trafficking and cross-border

transportation of currency. In all of these cases, the very possession of smuggled items, drugs or unreported cash is considered an administrative (and possibly criminal) offence, leading to their confiscation as the first sanction in what can possibly go on to become a longer proceeding (World Bank 2021: 191).

Different confiscation methods

Traditionally, the confiscation of assets, as a direct interference on property rights, takes place after a formal conviction is obtained. The logic behind this is that the criminal proceedings that precede a conviction allow for individuals to fully defend themselves, ensuring their rights to due process and to a fair trial are upheld. The interference with property rights, at this stage, does not constitute an arbitrary measure, but is rather the result of legal proceedings that determined the illicit origins or use of said assets.

Relying on a criminal conviction to confiscate assets, however, creates limitations to the effectiveness of asset recovery policies. Some of the barriers identified by StAR are directly related to this requirement. Especially in corruption cases, proving an offence under criminal standards may be difficult, particularly if one must prove that the payment of a bribe was made as part of a corrupt pact. Equally difficult is to establish, beyond reasonable doubt, that assets are linked to a specific criminal offence (World Bank 2011: 62).

There are also cases where obtaining a criminal conviction is impossible because the accused party has died, is a fugitive or is not known. The accused may also enjoy immunity from criminal prosecution or benefit from the right to be tried by a higher court. Finally, prosecutors may not be able to launch criminal proceedings once the pertaining statutes of limitation have expired. When it comes to corruption cases, where public officials are often able to conceal their wrongdoings and prevent investigations, limitation periods may end up shielding offenders (World Bank 2011: 74).

In order to address the challenges encountered during asset recovery, a number of tools have been developed to strengthen the hand of

investigators and prosecutors, increasing the likelihood that proceeds and instrumentalities of criminal activities are effectively confiscated.

Before turning to the focus of this Helpdesk Answer on NCB forfeiture, the next section briefly considers some of these other, related tools.

Unexplained Wealth Orders

Unexplained Wealth Orders (UWOs) are considered one of the tools which can lead to non-conviction-based asset confiscation. They start from a rebuttable presumption that a particular asset was illegally obtained and thus transfer the burden of proof to the defendant so that they must prove the lawful origin and use of said asset (United Nations 2021b: 6).

UWOs combine aspects of NCB forfeiture regimes with illicit enrichment regulations. The UNCAC itself recommends States Parties consider the possibility of requiring an offender to demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation (art. 31 (8)).

Generally, UWOs result from an application by a law enforcement official who gathered preliminary evidence about the connection between an offence and a specific asset, which may be its proceeds or instrumentalities, and an individual with control over that asset. Other requirements may also need to be met depending on national legislation. There might exist a list or roster of individuals – usually public officials and Politically Exposed Persons (PEPs) – that may be subject to this kind of measure. Sometimes, only assets of a certain value may be targeted by UWOs (Martini 2015).

If the application is accepted, the court issues an order requiring the individual to present evidence that the assets in question were obtained through legitimate means. If they are not able to prove this, proceedings may lead to the confiscation of said assets and the evidence gathered can be forwarded for criminal prosecution.

A slightly different but related tool are lifestyle audits. They consist of an assessment of an individual's income, assets, and investments to determine if they match that person's legitimate income. They are useful for determining whether

the extravagant lifestyle of an individual is the consequence of illicit enrichment (France 2021).

Lifestyle audits can be used not only to identify indications of illicit enrichment, but also to single out specific assets that can later be targeted by confiscation.

Extended Confiscation

Extended confiscation is a tool used to seize assets that have not been proven to refer to a specific offence but are nonetheless assumed to be illicit in origin. This assumption arises out of a number of other circumstances, including when the assets' owner is convicted of serious crimes that are deemed capable of generating economic benefits, as well as from the absence of a legitimate explanation for the origins of the confiscated assets. In these cases, confiscation can extend beyond the proceeds of the offence that is the object of the criminal proceedings (United Nations 2021b: 3)

Law enforcement officials are sometimes unable to demonstrate a direct link between the assets and the offence committed. For example, in the context of state capture, government officials have various tools to prevent detection of corruption, to launder ill-gotten gains and to foster impunity. Long-running criminal organisations also benefit from the fact that it becomes much more difficult with the passing of time to obtain evidence of crimes and trace the financial benefits they generated back to specific assets.

There is a rebuttable presumption underlying extended confiscation presumptions: the conviction for a single offence raises the inference that assets acquired during a specific period of time are benefits of that offence or other related criminal activities. This presumption allows for the confiscation of assets that may be derived from other offences for which the offender was not charged or convicted. It is a rebuttable presumption because the offender can prove that they acquired said assets legitimately.

The UNCAC stipulates that "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable for confiscation [...]" (art. 31 (8)). Similar provisions

can be found in the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism – the 2005 Warsaw Convention (art. 3 (4)) – and in [Directive 2014/42/EU on the Freezing and Confiscation of the Instrumentalities and Proceeds of Crime in the European Union](#) (art. 5).

'Confiscation enhancements'

There are other forms of "confiscation enhancements", as procedural aids to improve the effectiveness of the confiscation regime are called.

Substitute asset provisions allow law enforcement officials to overcome obstacles found in property-based systems by permitting the confiscation of assets not connected to the offence. They are especially useful whenever the original assets cannot be located or are otherwise unavailable (World Bank 2021: 203).

These provisions allow prosecutors to apply for the confiscation of an equivalent value of the offender's assets that were not originally connected to the criminal enterprise.

Rebuttable presumptions (or 'reverse onus') assist the prosecution or the defence in meeting the burden of proof. For example, it may be set in law that if the prosecution proves that an individual is part of a criminal organisation, their assets are presumed to be the proceeds of criminal activity and, thus, subject to confiscation. This presumption, however, can be overcome in case the defendant presents sufficient evidence demonstrating that they acquired said assets legitimately (World Bank 2021: 63).

Civil remedies

Different legal systems allow for some civil remedies to be employed by private and public entities in order to recover stolen assets. These remedies present some advantages when compared to criminal procedures: they allow for the distribution of the confiscated amount to the victims of the crime and, by allowing for a general claim for damages, they provide an avenue for recovering more substantial portions of the proceeds of corruption that were not proven

directly to be linked to the criminal activity (Willebois & Brun 2013: 618). They are also particularly useful in private corruption cases.

There are two types of civil actions/remedies that can be used to recover assets stolen as a result of corruption.

Property claims seek to enforce ownership rights on a particular identifiable asset. The UNCAC recognises that States Parties must take measures to permit other governments to initiate civil action in their courts to establish title or ownership of property acquired through the commission of a corruption offence (art. 53 (a)).

Personal claims may be presented against a person or an entity for damages caused by a breach of contract, tort, or unjust enrichment. In this sense, 'damages' is understood as the money to be paid to a person as compensation for loss or injury. In corruption cases, determination of damages seeks to place the victim in a position as close as possible to where they would have been if not for the commission of the corrupt act. All expenses and lost profits caused by the corrupt act must be compensated (Willebois & Brun 2013: 629).

Finally, disgorgement is a type of civil remedy in common law jurisdictions, derived from the court's equitable power to correct unjust inequality. It can be defined as "the forced giving up of profits obtained illegally", designed to prevent the illicit enrichment of criminals (World Bank 2014b: 142).

Non-conviction-based forfeiture

International legal basis

Asset recovery and, especially, confiscation are important components of all anti-corruption international treaties. They are also dealt with in international treaties that tackle drug trafficking (the Vienna Convention, art. 5) and organised crime (the Palermo Convention, art. 12).

A number of international treaties and other international norms recommend the adoption of

non-conviction-based forfeiture as part of the asset recovery regulation that countries must adopt.

The [United Nations Convention against Corruption \(UNCAC\)](#) determines that States Parties should “consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases” (art. 54, 1 (c)).

It should be noted that the UNCAC uses non-binding language (“consider taking such measures”) for non-conviction-based forfeiture, while mandatory language is used for the other mechanisms for recovery of property (art. 54, 1 (a), (b)). The UNCAC also lists a few of the least controversial hypotheses (“death, flight or absence”) in which this tool can be used, even though it leaves open the possibility that states adopt it in other scenarios (“other appropriate cases”).

The Implementation Review Mechanism (IRM) for UNCAC regularly monitors how countries have implemented this recommendation to institute NCB forfeiture. In its latest report on the implementation of chapter V provisions (Asset Recovery), the IRM took stock of 53 country reports. It concluded that a majority of states had taken measures to allow for confiscation without criminal conviction in cases where the defendant was missing or dead, or in cases of serious crimes and tainted property (United Nations 2021a).

The Political Declaration that came out of the Special Session of the United Nations General Assembly reaffirmed states’ commitment towards implementing NCB forfeiture. Governments committed to “adequately address requests based on non-criminal proceedings, including civil, administrative non-conviction-based proceedings” and to “using the available tools for asset recovery and asset return, in accordance with domestic law, such as conviction-based and non-conviction-based confiscation” (United Nations 2021c: 12).

Along those same lines, among the [Nine Key Principles on Asset Recovery for the G20](#), NCB confiscation is also mentioned:

4. Establish a wide range of option for asset recovery. Experience shows that multiple avenues can be used for asset recovery, including systems that allow for recovery through non-conviction-based confiscation or equivalent (at minimum in cases of death, flight or absence), unexplained wealth orders and private (civil) law actions.

In the latest G20 Anti-Corruption Action Plan for 2022-2024, Member States agreed to “promote the use of various methods for asset recovery, such as procedurally fair non-conviction-based confiscation or civil and administrative methods, where consistent with fundamental principles of domestic laws and international obligations as set out in UNCAC or Recommendations such as those coming from the FATF” (G-20 2021).

The FATF’s Recommendation number 5 on ‘Confiscation and provisional measures’ states that “countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction-based confiscation)” to the extent that such a requirement is consistent with the principles of their domestic law (FATF 2021: 12).

In its Best Practices Paper on Confiscation, the FATF (2012: 6) lists a number of circumstances where non-conviction-based confiscation may be a particularly useful tool. These include:

- When a conviction cannot be obtained for procedural or technical reasons (e.g. the statute of limitations is exceeded);
- When there is substantial (enough) evidence to establish that the proceeds were generated from criminal activity, but there is insufficient evidence to meet the criminal burden of proof;
- If a criminal investigation or prosecution is unrealistic or impossible;
- When the perpetrator was acquitted of the predicate offence due to insufficient admissible evidence of failure to meet the burden of proof;

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- If the defendant is immune from prosecution.

On the international cooperation front, the FATF (2021: 28) also recommends that states be able to respond to requests by other countries to identify, freeze, seize and confiscate property laundered even if those requests are made on the basis of non-conviction-based confiscation proceedings. It adds, however, the same caveat: “unless this is inconsistent with fundamental principles of domestic law”.

It goes on to recommend that authorities look for ways to recognise non-conviction-based confiscation orders of other countries even if they do not have this same tool available to them. With a host of different names being used to refer to similar proceedings, each request should be evaluated on the substance of proceedings (FATF 2012: 7)

International organisations uniformly support the adoption of NCB forfeiture mechanism by countries around the world.

After reviewing the results of asset recovery efforts between 2010 and 2012, the OECD (2014: 13) recommended that countries “implement comprehensive, strategic policies and best practices for rapid tracing, freezing and repatriating stolen assets, such as non-conviction-based forfeiture, acceptance of foreign confiscation orders, recovery by civil trial and assistance to foreign jurisdictions”.

Similarly, the World Bank and the UNODC, through the Stolen Asset Recovery Initiative, have endorsed NCB forfeiture (World Bank 2011: 67:

Countries without NCB confiscation provisions should introduce domestic legislation permitting the use of this tool. Such laws will not only broaden the measures available to combat corruption and the laundering of proceeds domestically but can also assist originating jurisdictions that may choose to delegate the case to the requested jurisdiction. Practitioners highlighted the usefulness of NCB confiscation because it can be quicker and more efficient and may be the only recourse when the offender is dead,

has fled jurisdiction, or is immune from prosecution.

At the regional level, the European Union has moved further ahead in endorsing NCB forfeiture. [Directive 2014/42/EU on the Freezing and Confiscation of the Instrumentalities and Proceeds of Crime in the European Union](#) states that, when traditional criminal confiscation is not possible as a result of illness or absconding of the suspected or accused person, Member States must take measures to enable NCB confiscation of instrumentalities and proceeds of crimes (art. 4 (2)).

Analysis by the European Commission (2020: 14) of the implementation of this Directive noted that most EU Member States have more far-reaching systems for NCB confiscation than the Directive provided for. Countries such as Italy and Germany have gone beyond the minimum requirements and their experiences are considered “particularly promising”.

The European Commission (2020: 15) went on to note that “the introduction of further measures in the area of non-conviction-based confiscation is feasible and has potential benefits in increasing the levels of freezing and confiscation of proceeds of crime.”

Rationale for NCB forfeiture

This section assess why NCB forfeiture has become such a widely recommended tool for confiscation of stolen assets.

NCB forfeiture offers an alternative to overcome some of the barriers to asset recovery that have been identified by policymakers and practitioners around the world.

As previously stated, when confiscation depends on a criminal conviction, prosecutors face a higher evidentiary threshold. Proving that someone is guilty of a criminal offence is intentionally difficult because of the grave consequences of a criminal conviction, notably the restrictions on an individual’s liberty and rights.

The presumption of innocence is, thus, paramount in criminal law. The right of the accused to be

considered innocent until proven guilty is acknowledged as a fundamental human right. The logical consequence of this right is that the burden of proof lies with the prosecution to establish guilt 'beyond any reasonable doubt'. The burden of proof for determining one's criminal liability is exceptionally high (World Bank 2021: 201).

Different proceedings use different standards of proof to reach their conclusion. In this respect, there are some notable differences between civil law and common law jurisdictions that are pertinent to NCB confiscation.

Civil and common law standards of proof in criminal cases are relatively similar, with common law countries requiring a standard beyond a reasonable doubt and civil law countries requiring an *intime conviction*, that is, an intimate, deep-seated conviction on the part of the judge (Open-ended Intergovernmental Working Group on Asset Recovery 2019: 3).

In civil cases, however, civil law standards of proof diverge from common law ones. While civil law countries maintain high standards of proof in civil cases, common law countries only require civil claims to be proved by a preponderance of the evidence (Clermont and Sherwin 2002).

The 'balance of probabilities' (or 'preponderance of the evidence') standard requires the party with the burden of proof to convince the decision-maker (usually the judge) that there is a greater than 50 per cent chance that the claim presented is true.

Proving guilt beyond a reasonable doubt is a much higher standard. It requires the prosecution to convince the decision-maker (the judge or a jury) that there is no other reasonable explanation, besides the defendant's guilt, that can be derived from the evidence presented at trial. No other logical explanation can be inferred or deduced from the evidence. In other words, all the defendant has to prove in order to be found innocent is that there is another explanation for the facts presented, even if it is highly improbable (Cornell Law School 2017).

In common law countries, where NCB asset forfeiture relies on a civil standard of proof, based on a 'balance of probabilities', it can thus be more straightforward to confiscate ill-gotten gains

without needing to rely on prosecutors to prove the defendant's guilt beyond any doubt.

As such, while NCB confiscation can be particularly advantageous in common law countries, its main advantage in civil law countries is not so much related to a lower standard of proof but the fact that it does not depend on a criminal conviction, which can fail in cases of death, immunity and so on.

There are other standards of proof that may be employed in specific stages or proceedings and they may also be used as a reference for NCB forfeiture. For example, the 'clear and convincing evidence' standard, commonly applied in administrative law proceedings, requires the plaintiff to prove that a particular fact is substantially more likely to be true than not true. To express this standard in probability terms, some note that it refers to a 71 per cent probability that the claim is true, while the "preponderance of evidence" standard requires a 51 per cent probability of truth (Kagehiro & Stanton 1985: 1).

Some countries go beyond just changing the standard of proof and simply shift the burden of proof to the defendant altogether. That is the case, for example, in Australia, where the onus of demonstrating the lawful origin and use of their property falls entirely on the defendant. The use of rebuttable presumptions can lead to this same result (United Nations 2012b: 12).

One of the benefits of property-based NCB forfeiture claims is that they can be directed at assets owned by people in positions of power within criminal organisations. Prosecutors often struggle to connect specific criminal acts to individuals who are at the top of the chain of command and do not participate themselves. In these cases, NCB forfeiture can be used against their properties if and when they have the hallmarks of ill-gotten gains (Bright Line Law 2020: 16).

There are other situations where it is simply not possible to obtain a confiscation based on a criminal conviction because the suspect has, for example, died, fled or is not known. These are the hypotheses expressly mentioned in UNCAC. This logic is also applicable when there is no possibility

of extradition or international cooperation or when the costs of concluding these legal arrangements far outweigh the benefits (Bright Line Law 2020: 16).

In places where corrupt officials are legally or practically immune from prosecution, civil action against specific assets may prove more likely to succeed. It has also been suggested that NCB forfeiture is particularly useful in countries where the reach and impact of organised crime is more significant (Tromme 2019: 188).

Statutes of limitation have been pointed as one of the barriers for effective asset recovery. Corruption, by its very definition, is a secretive affair and often involves individuals in positions of power that allow them to stop investigations. Even when investigations do begin, obtaining and analysing evidence of economic crimes is a burdensome and slow-moving process. Depending on the stage of the proceedings, statutes of limitations may prevent investigators from opening inquiries, prosecutors from presenting charges and judges from delivering guilty verdicts even in the presence of overwhelming evidence. NCB forfeiture offers an alternative to recover assets in these cases (World Bank 2011: 74).

In Italy, for example, assets can be forfeited within a criminal proceeding even when the crime is statute-barred. In those cases, after a conviction in the first instance, higher courts can void the conviction, due to the statute of limitation, but still seize the proceeds of crime. This is a case of non-conviction-based confiscation that takes place within a criminal proceeding (United Nations 2021b: 4).

Despite the merits of NCB forfeiture mentioned above, some observers caution that an excessive reliance on NCB approaches and civil sanctions to the detriment of criminal proceedings may downgrade the seriousness of the offences in the eyes of the public and of offenders (Bright Line Law 2020: 18).

Common features of NCB forfeiture

As described above, NCB forfeiture is a type of confiscation that happens in the absence of a criminal conviction.

When referring to a criminal conviction, in the absence of which NCB forfeiture takes place, one should note that there are different understandings of “conviction” around the world. While some countries consider conviction to mean the decision taken by a judge or jury after trial, others define it as an irrevocable decision (*res judicata*) that can no longer be appealed. Depending on the definition used, NCB forfeiture may be deployed after a conviction in the first instance that is still under review by higher courts (United Nations 2021b: 3).

Similarly, the civil forfeiture proceeding is decided by a court ruling that is not necessarily irrevocable. In fact, the right to appeal the court’s ruling, even in civil proceedings, is considered a part of the right to a fair trial. Provisional execution of the first instance court’s order may be permitted depending on the country’s legal framework, in which case it will be similar to a freezing or a seizure order.

As mentioned, NCB forfeiture can take place both within and outside the criminal justice system. The latter option, also known as ‘civil forfeiture’, is more common, especially in common law countries.

The so-called “criminal” NCB forfeiture is used as an alternative to conviction-based confiscation when said conviction is impossible for reasons hindering the prosecution or preventing the return of a guilty verdict. Confiscation proceedings can occur in the same criminal proceedings dedicated to convicting the defendant of a crime or in autonomous proceedings, within the criminal justice system (United Nations 2021b: 5).

This is a relevant distinction because criminal proceedings usually assume and seek to ensure a wider range of due process rights, given their potential impacts on individual liberties. The distribution of the burden of proof or the determination of the standard of proof in criminal proceedings – even if they are solely designed for NCB confiscation – may also be different from civil proceedings.

While NCB confiscation is characterised by its focus on property and its unlawfulness or suspiciousness, said property may also be confiscated because of its link to a given individual (United Nations 2021b: 4). This happens, for

example, when there are substitute asset provisions in the law.

State practice varies widely as to the circumstances under which NCB forfeiture is allowed. Sometimes there is broad authorisation through generic expressions such as “other appropriate cases”, “any other reason whatsoever” or “adequate grounds”. In other cases, it refers to individual characteristics of the defendant: “generally dangerous”, “habitual bribers” and people “living with the proceeds of their illegal activities”. Public officials may also be particularly targeted. The seriousness of crimes that generated the proceeds that are being confiscated is also frequently considered as a justification for the use of NCB forfeiture. Some countries allow it for serious crimes, such as money laundering, or for other specific offences, like acts of corruption or economic crime (United Nations 2021a: 12).

The precise scope of the objects subject to confiscation depends on the regime but it usually includes both (European Union 2014):

- i. Proceeds: *“any economic advantage derived directly or indirectly from a criminal offence, consisting of any form of property and including any subsequent reinvestment or transformation of direct proceeds and any valuable benefits”*
- ii. Instrumentalities: *“any property used or intended to be used, in any manner, wholly or partially, to commit a criminal offence”*.

However, it is also possible, especially in systems that focus on unexplained wealth, that forfeiture extends beyond assets directly related to the crimes in question. Law enforcement authorities can resort to value-based systems whenever it is impossible to determine the specific proceeds of crime or when they are intermingled with other assets (United Nations 2021b: 8).

While the statute of limitations has been mentioned as one of the barriers for asset recovery, it should be noted that NCB forfeiture may also be subject to them, which can be the same or different from the one specified for criminal offences (United Nations 2021b: 14).

As noted, international cooperation is an essential component of asset recovery. In this sense, there is often a concern that even when states do not have NCB forfeiture provisions or when they are only allowed in a narrow set of circumstances, that they are still able and willing to cooperate and enforce NCB confiscation orders. Some countries have had legislation allowing for this type of cooperation since even before NCB forfeiture was allowed in their own domestic confiscation system (World Bank 202: 226).

International initiatives supporting implementation of NCB forfeiture

There are several international initiatives designed to improve asset recovery legislation and practice around the world. They are headed by international organisations, civil society organisations, governments, universities and think tanks.

Stolen Asset Recovery Initiative

Founded in 2007, the Stolen Asset Recovery Initiative (StAR) is coordinated by the World Bank Group and the UNODC, with the support of the Conference of States Parties to the UNCAC, the G7, the G20, the FAFT, the OECD the Egmont Group, the Camden Asset Recovery Interagency Network (CARIN), the International Bar Association and Transparency International.

According to its official website, “StAR’s ultimate objective is to support efforts to deny safe havens for corrupt funds and facilitate more systematic and timely return of proceeds of corruption”.

It aims to achieve this by

- i. working directly with jurisdictions,
- ii. contributing to the international debate on anti-corruption and asset recovery, and
- iii. drafting reports and conducting research.

The reports published by StAR, especially ‘Asset Recovery Handbook: a guide for practitioners’, ‘Barriers to Asset Recovery’ and ‘A Good Practice Guide for non-conviction-based forfeiture’, provide the basis for this Answer.

According to [its website](#), not only has StAR been able to assist “over 35 countries in drafting legal frameworks, setting up the institutional structure, and building the skills necessary to trace and return stolen assets”, but it also “provide[s] the platform for dialogue and collaboration and facilitate contact among different jurisdictions involved in asset recovery, both developing countries and financial centres”.

Within StAR, there is also the [Global Forum on Asset Recovery](#) (GFAR), which is a platform designed to empower investigators and prosecutors. Through GFAR, best practices are shared and technical training is provided to asset recovery practitioners. It also provides a venue for bilateral and multilateral meetings.

Since its founding in 2017, the GFAR has worked with four focus countries – Nigeria, Sri Lanka, Tunisia and Ukraine – in order to make progress on concrete asset recovery cases.

UNCAC Asset Recovery Working Group

In 2006, the Conference of the States Parties to the UNCAC created the Open-ended Intergovernmental Working Group on Asset Recovery. It is responsible for assisting and advising the Conference of the States Parties in the implementation of its mandate pertaining to the return of proceeds of corruption.

It meets annually with the goal of facilitating the exchange of information, providing good practices and ideas to states and encouraging cooperation between requesting and requested states. It also helps compile the cumulative knowledge of States Parties in this area. It has, thus, become a forum where officials from different countries share their experiences with different asset recovery tools, including NCB forfeiture.

Under the guidance of the Conference of States Parties, in July 2021, the Working Group developed a note on ‘Procedures allowing the confiscation of proceeds of corruption without a criminal conviction’ ([CAC/COSP/WG.2/2021/4](#)). In it, there is information about how countries around the globe have implemented NCB forfeiture, including details provided by 43 States Parties in response to a UNODC questionnaire on the topic.

The work done by the [UNCAC’s Civil Society Coalition’s](#) on fast-forwarding implementation of chapter V – Asset Recovery - of the United Nations Convention against Corruption should also be noted.

The Egmont Group

The [Egmont Group](#) was founded in 1995 and it convenes 167 Financial Intelligence Units (FIU) from around the world. Although it is not focused on asset recovery *per se*, it provides a platform for member FIUs to securely exchange their operational financial intelligence and expertise on combating money laundering and terrorism financing (UNODC 2018b: 19).

The Egmont Group published a white paper on the role of FIUs in fighting corruption and asset recovery. In it, a number of case studies are presented, some of which highlight how sharing financial intelligence can prevent criminals from enjoying the proceeds of their illicit activities. FIUs are instrumental in tracing and locating assets that may be later confiscated through NCB forfeiture proceedings (Egmont Group 2013: 12).

INTERPOL

INTERPOL identified corruption as a key priority in 2007 and it has since emerged as a central point of contact for information on asset recovery cases.

In 2009, INTERPOL launched the Global Focal Points platform, which is a network of anti-corruption practitioners that can respond to emergency requests for assistance in asset recovery cases. Focal points also provide information on best practices and on national legislation applicable to asset recovery, including NCB forfeiture laws (INTERPOL 2017).

Other relevant tools are (INTERPOL 2017: 2):

- (i) the Corruption Response Teams, small teams of experts that provide national investigators and prosecutors with mentoring and technical support;
- (ii) the Group of Experts on Corruption, which serves as a policy and advocacy

group designed to develop and implement new initiatives to maximise the efficiency of law enforcement agents in anticorruption efforts; and

- (iii) the Global Programme on Anti-corruption and Asset Recovery, a capacity-building programme comprised of regional and international training workshops on asset recovery.

Asset Recovery Interagency Networks

Across the world, Asset Recovery Interagency Networks (ARINs) have been set up with the goal of facilitating asset identification and recovery through a cooperative approach. ARINs are usually made up of experts and practitioners (law enforcement officials, diplomats, judges, etc.) from the different government institutions that play a role in asset recovery in a given region of the globe (UNODC 2018b).

These networks serve as forums for these practitioners and experts to exchange opinions and perspectives on the challenges of NCB forfeiture implementation, to participate in capacity building exercises and to share information about ongoing investigations and cases.

Global: the [Camden Asset Recovery Initiative](#).

America: the [Red de Recuperación de Activos de GAFILAT](#), the [Asset Recovery Inter-Agency Network for the Caribbean](#).

Europe: the [Balkan Asset Management Interagency Network](#).

Africa: the [Asset Recovery Inter-Agency Network for Eastern Africa](#), the [Asset Recovery Inter-Agency Network of Southern Africa](#), the [Asset Recovery Inter-Agency Network for West Africa](#).

Asia: the [Asset Recovery Interagency – Asia Pacific](#), the [Asset Recovery Inter-Agency Network in West and Central Asia](#).

Inter-American Drug Abuse Control Commission

The Inter-American Drug Abuse Control Commission (CICAD, in the Spanish acronym) is a consultative and advisory board of the Organisation of American States. It was established in 1986 and one of its goals is to provide technical assistance to increase states' capacities to counter the drug problem in the Americas.

The CICAD has a number of expert groups and one of them focuses on 'Control of Money Laundering'. This group has developed a number of studies, guides and best practices on a host of issues, including forfeiture and *in rem* forfeiture. More specifically, it has developed a [Model Law on In Rem forfeiture](#), which provides guidance for countries that want to implement NCB forfeiture provisions.

The [CICAD](#) also provides guidance to help law enforcement officials identify the legal status of forfeiture orders and to detail procedures for soliciting mutual assistance in locating and recovering assets.

Other initiatives in Africa

Set up by the OECD and the governments of Kenya, Italy and Germany, the [Africa Academy for Tax and Financial Crime investigation](#) seeks to strengthen the capacity of tax and financial crime investigators to tackle illicit financial flows.

The initiative was supported by the G7 2017 Bari Declaration and intends to provide demand-driven training addressing the needs of African countries, as well as to build and share regional experiences and best practices. In 2020, the Academy offered a specialty programme on 'Asset Recovery: Freezing and Seizing Assets'.

One should note that there have also been calls for the African Legal Support Facility to engage in supporting asset recovery and repatriation efforts in the region (African Union 2015: 70).

Embedded in the African Development Bank, the African Legal Support Facility works to support African governments in the negotiation of complex business transactions since 2010. It seeks to provide more weight to African interests in asymmetric negotiations with international investors (African Union 2015: 70).

Human Rights concerns

With regards to NCB forfeiture, as it has been previously noted, there are concerns that this asset recovery tool violates fundamental rights, contradicts rule of law provisions and can be easily abused by authorities to persecute opponents and dissidents. Criticism around NCB asset forfeiture focuses on the lifting of constitutional protections for defendants, weaker procedural safeguards and the potential for it to encroach on human and property rights (Bingham Centre for the Rule of Law 2019: 1).

The [Universal Declaration on Human Rights](#) clearly states that everyone has the right to own property and that no one shall be arbitrarily deprived of their property (art. 17). It also reaffirms the presumption of innocence until proven guilty in a trial at which the defendant has all the necessary guarantees for their defence (art. 11).

As it relates to the right of property, [Protocol no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms](#) reaffirms that “every natural or legal person is entitled to the peaceful enjoyment of his possessions” and that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law” (art. 1).

In interpreting said provisions, the European Court of Human Rights (2021: 67) has recognised that

“States have a wide margin of appreciation in implementing policies to fight crime, including confiscation of property that is presumed to be of unlawful origin, property purchased with illicit funds, proceeds of a criminal offence, property that was the object of the offence or property that served, or had been intended to serve for the commission of the crime”.

Property rights, as well as the rights to a fair trial and to due process are deeply enshrined in International Law and in most countries’ Constitutions.

As previously stated, even the UNCAC makes explicit references to these fundamental rights when dealing with measures that affect them. In its preamble, it acknowledges the fundamental principles of due process of law in criminal, civil and administrative proceedings to adjudicate property rights. It also requires States Parties to ensure due process and adequate notification to bona fide third parties when processing confiscation requests (art. 55 (3) (b)).

Despite these references, in practice, a number of challenges and criticisms have arisen in regards to NCB forfeiture, questioning its compliance with human rights and rule of law guarantees.

Civil forfeiture has been considered an “arbitrary interference with property rights”, because it is enforced against whoever holds or owns the affected property. It has the potential to impact innocent third parties when the property from which they benefit is seized without compensation or replacement, a risk that grows considerably as laws begin to include both proceeds and instrumentalities of crimes (Tromme 2019: 187).

As NCB forfeiture, by its own definition, precludes the need for a criminal conviction to impose a sanction on individuals, it does not ensure that they enjoy all the due process protections afforded to defendants on criminal cases (Bingham Centre for the Rule of Law 2019: 3).

Some of NCB forfeiture’s negative effects on defendants are rather similar to the ones caused by criminal prosecution. In addition to the financial loss, in case of conviction, there is the stigma of being associated with a crime, which happens even for people who have not been convicted in either civil or criminal proceedings (Tromme 2019: 187). The lower evidentiary threshold for NCB forfeiture – particularly in common law countries – may encourage prosecutors to initiate proceedings even when they do not have sufficient proof of guilt, increasing the risks of reckless prosecutions.

Indeed, the stigma of receiving a (civil) conviction may not be that different from the one caused by a criminal conviction. It is often difficult for the public and the press to understand the subtleties of different liability regimes. While the NCB asset forfeiture does not impose restrictions on an individual’s liberty, the final decision to confiscate

their assets consists in a formal determination of guilt by the state's judicial system. Even though it falls short of criminal liability, said determination can produce wide-ranging impacts on a person's reputation and standing before the community.

According to Mat Tromme (2019: 171):

“NCB confers overbearing powers on the state, which may be worrying in situations where there are no systems to keep it in check. This practice therefore raises concerns over the abuse of state power, since it is not inconceivable, for example, for it to be used to target political opponents in certain situations”.

Besides the risks of political interference, there are arguments to the effect that NCB forfeiture allows for excessive and unfettered judicial discretion by judges. It may also provide tools for abuse and bias by the police when they institute proceedings without judicial oversight (United Nations 2021b: 18).

The Bingham Centre for the Rule of Law (2019) published a briefing paper in which it considered whether NCB asset forfeiture can be compliant with the rule of law. It concludes that, with certain safeguards in place, it can be a useful and effective anti-corruption tool that does not violate human rights. The safeguards suggested are (Bingham Centre for the Rule of Law 2019: 4-5):

- Lawfulness and proportionality as a means to protect property rights. The interference with property rights must be authorised by law and a proportionality test may be deployed to ensure NCB forfeiture does not interfere with individual rights and the punishment imposed is not overly harsh.
- Compensation. Bona fide third parties should not be unfairly or unreasonably affected by NCB forfeiture, and they should be compensated when that happens.
- Mitigating the risk of ‘reverse onus’ provisions. Requiring defendants to prove that their assets were lawfully acquired may constitute an overly heavy burden that affects the procedural right to the

presumption of innocence and the right to a defence. Applying a proportionality test or shifting these ‘reverse onus’ provisions according to the different stages or types of proceedings may mitigate said risks.

- Protections against self-incrimination. Rules should clarify whether evidence produced in civil proceedings can be used in criminal ones, where the fundamental right of the accused not to be compelled to produce evidence against themselves should be respected.
- Challenging forfeiture orders and the right to appeal. Defendants must have the right to appeal in NCB forfeiture proceedings.
- The right to legal aid.
- Restricting the value of forfeited assets. In some countries, such as the US, certain pieces of legislation have placed a threshold beyond which the seizure of assets can only happen through criminal proceedings.

According to Bright Line Law (2020: 27), prosecutors should also be required to clearly define the property that is targeted by NCB forfeiture claims. Moreover, legislation should also ensure that restraints on one's property rights do not threaten their ability to afford living expenses and legal representation.

Other measures more generally considered relevant to ensure that asset recovery works effectively are also paramount to avoid abuses of NCB forfeiture proceedings.

First and foremost, one should note the importance of independent institutions that are capable of conducting investigations and judicial proceedings with no political interference. A fair and independent judiciary are prerequisites to ensure that the rights to a fair trial and due process are respected. Indirectly, it also serves to protect property rights regimes (Bingham Centre for the Rule of Law 2019: 6).

The absence of transparent and accountable structures – not only to investigate, prosecute and judge NCB asset forfeiture cases, but also to administer and return recovered assets – increases concerns about possible abuses pertaining to this tool. This is frequently the case in developing countries (Tromme 2019: 166).

In most countries, challenges to the constitutionality of NCB forfeiture have failed, including in South Africa, El Salvador, Colombia, Australia and Germany (United Nations 2021b: 17).

While analysing a case on the conformity of the European Convention on Human Rights with civil forfeiture practiced in Georgia, the European Court of Human Rights (ECHR) found that there were no human rights violations. The case *Gogitidze and Others vs. Georgia* refers to civil forfeiture proceedings brought against a former Georgian Deputy Minister.

The ECHR used three criteria to assess if the Georgian legislation and its application were in conformity with the European Convention on Human Rights and its Protocol number 1, which ensure protection of property. The assessment concluded that (OECD 2018: 19)

- (i) it was a lawful interference in the right to property because the Georgian law was clear, precise and foreseeable;
- (ii) the actions had a legitimate public purpose, both preventive and compensatory; and
- (iii) they were proportionate to its cause.

Lessons from the developing world

As noted, NCB asset forfeiture has been endorsed by most international organisations working on anticorruption policies. Thus, it has been included in the toolbox countries are encouraged to adopt to improve their asset recovery efforts.

As it happens, however, the concerns about the misuse of NCB confiscation are greater in the

developing world, where the rule of law is not as strong and the institutions are fragile. In this section, the paper presents lessons and experiences pertaining to this mechanism, taken from Latin American and African countries.

Latin America

Argentina

Argentina's legal provision for NCB forfeiture was enacted in 2019 with [Decree of Necessity and Urgency n° 62/2019](#). It determined that all assets acquired by criminals after the beginning of their criminal activities were subject to confiscation, unless they could present legitimate reasons for enrichment. A list of criminal conducts that made offenders subject to NCB forfeiture was stipulated, including corruption and drug trafficking.

The decree also created a specialised office in the Prosecutor-General's Office, dedicated to investigating assets that may have been proceeds of crime and presenting NCB forfeiture cases to the federal courts.

The fact that these provisions were enacted through a presidential decree – and not the regular legislative process – has made them subject to criticism, including by judges who have refrained from applying the Decree's provisions because they deemed the decree unconstitutional (El Financiero 2021).

Before the presidential decree was signed, a bill of law had been making its way through Congress, but there was substantial disagreement between the House of Representatives and the Senate. While deputies approved a bill that closely resembled the model law put forth by the UNODC and the CICAD, senators made sweeping changes to its provisions. Under the bill approved by the Senate, NCB forfeiture was brought into criminal proceedings and one provision afforded defendants the right to damages in case they were found innocent of criminal charges after confiscation (Micucci 2019).

Colombia

Colombia was the first country in Latin America to institute NCB forfeiture provisions in its legislation. In the context of the war on drugs, Legislative

Decree n° 2790, of 1990, instituted a tool for confiscating assets without a criminal provision. These provisions were subsequently changed and, in 1996, the formal proceeding for NCB forfeiture was finally established, though it still fell under the umbrella of criminal law.

Only in 2002, with Law 793, did NCB forfeiture gain full autonomy from criminal proceedings. It was recognised as an autonomous proceeding, designed to give effect to the constitutional provisions that demanded property rights be exercised in connection with ethical and social principles, so as to fulfil the social function of said assets. There are, thus, two grounds for confiscation (UNODC 2015: 10):

- (i) when the assets were illegally acquired; and
- (ii) when they are used against their respective social function.

More specifically, the Constitution determined that a judicial decision – not necessarily a criminal conviction – can extinguish property rights over assets acquired illegally, or when they are in conflict with the state’s mandate or run contrary to social morals (art. 34). The country’s Constitutional Court has ruled that this decision is merely a declaration that such an individual is not in fact the rightful owner of said asset (UNODC 2015: 8).

The legislation currently in effect is Law n° 1708, of 2014, which establishes the ‘[Código de Extinción de Dominio](#)’. With the goal of severing the connection to Criminal Law, this legislation has given full autonomy to NCB confiscation proceedings, going as far as creating specialised prosecutors and courts responsible for handling them (UNODC 2015: 26).

Dominican Republic

The 2010 Constitution of the Dominican Republic authorises, as an exception to the right of property, the confiscation (or ‘*decomiso*’) of assets obtained through crimes against the state and of proceeds of drug trafficking, organised crime and all criminal activities listed in the country’s criminal laws.

It should be noted that the Constitution requires only a definitive judicial ruling, but not a criminal

one *per se* (art. 51 (5)). NCB forfeiture is also expressly mentioned by the Constitution when it notes that the management and disposition of recovered assets shall be regulated by law (art. 51 (6)).

An important historical precedent to those provisions is the efforts made to confiscate the assets of the Trujillo family, who ruled the Dominican Republic between 1930 and 1961. Laws 5,785 and 5,924 established the legal basis for the civil forfeiture of those assets, having gone as far as establishing a ‘Confiscation Court’ in charge of handling cases of illicit enrichment and abuse of power (Martínez 2021).

Currently, there is a bill of law under discussion by the country’s Congress in order to institute NCB forfeiture provisions.

Ecuador

The 2021 [Ley Orgánica de Extinción de Dominio](#) clearly states that NCB forfeiture is an autonomous proceeding that targets assets and not individuals. Article 5 sets up four requirements for confiscation:

- (i) the existence of an asset of illicit origin or use;
- (ii) the existence of criminal activity;
- (iii) a causal link between the asset and the criminal activity; and
- (iv) the knowledge that the owner had or should have had about the illicit origin or unjustified use of that asset.

Responding to a challenge to the constitutionality of the provisions included in the bill that would result in this law, Ecuador’s Supreme Court established some limits to its possible reach. It stated that the lack of a statute of limitations for NCB forfeiture claims would generate unreasonable legal insecurity, leading Congress to establish a 15-year statute of limitations period (Corte Constitucional del Ecuador 2021).

The Supreme Court also criticised the attempt to retroactively apply the law and to establish an extremely wide definition of illegal activity (Corte

Constitucional del Ecuador 2021). The latter argument led Congress to set up a list of criminal conducts that could prompt said confiscation proceedings. Apart from the list, the definition of ‘criminal activity’ also requires a criminal conviction (*‘sentencia condenatoria ejecutoriada’* art. 7 (a)). This disfigures NCB forfeiture proceedings and substantially limits the effectiveness of this legislation.

El Salvador

In El Salvador, the Special Law on *Extinción de Dominio* and Management of Stolen Assets (LEDAB, in its Spanish acronym) was passed in 2013. It presents a list of the criminal activities that can lead to the application of this confiscation tool against the proceeds or instrumentalities of crime.

However, it also allows for the application of NCB forfeiture against any and all criminal conduct that generates economic benefits for an individual or their criminal organisation (Global Initiative against Transnational Organised Crime 2021: 7).

NCB forfeiture quickly gained prominence and became a hotly contested issue as it was used against former Presidents Fernando Flores, Elias Antonio Saca and Mauricio Funes (El Financiero 2021). Between 2015 and 2019, the Salvadoran court in charge of handling NCB forfeiture cases handled 124 proceedings, corresponding to assets that amounted to US\$ 161 million (La Nación 2019). The political class reacted by approving reform legislation that effectively gutted the LEDAB.

The reform removed a rebuttable presumption against public officials under trial for corruption charges and eliminated the concept of ‘substitute assets’ from the law. The reform also instituted a statute of limitations of 10 years for the presentation of NCB forfeiture claims on corruption cases. Previously, there was no time limitation for prosecutors (El Faro 2017).

The reform was struck down by the country’s Supreme Court, which reinstated the original provisions of the LEDAB. According to the ruling, the reform was a step backwards in the fight against corruption and the original legislation was in line with the Constitution. In fact, it considered NCB forfeiture to be a legitimate tool for

weakening criminal organisations. Lastly, it stated that confiscation, in this case, was not a sanction, but merely the declaration that certain assets had an illicit origin, leading to the extinction of an apparent right to said property (Osorio 2021:9).

The Supreme Court also questioned the motives behind the reform (allegedly to comply with international conventions) as well as the rushed legislative proceedings that led to its approval (El Faro 2017).

Peru

Since 2007, Peru has had some form of NCB forfeiture provision in its legislation. Until 2012, however, the law was not applied in practice due to problems in its design (Solórzano 2020). Reforms followed, with Legislative Decree n° 1104 allowing for a wider scope of NCB forfeiture proceedings.

It was only in 2018 that Peru adopted the “*Ley de Extinción de Dominio*” (Legislative Decree n° 1373). This legislation finally provided these proceedings with full autonomy as it relates to criminal cases. It set up a specialised proceeding with quick stages and short deadlines, designed to provide effective results. While there is no reversal for the burden of proof, the evidentiary standards are lower than in criminal proceedings, which helps the prosecution make its case (Huaman 2021).

More recently, a specialised Prosecutor’s Office (*‘Fiscalía Especializada de Extinción de Dominio’*) has been set up to handle NCB forfeiture. Between 2019 and 2021, more than US\$ 25 million were recovered due to its work (Ministerio Público Fiscalía de la Nación 2021).

Africa

South Africa

In South Africa, there is one distinct piece of legislation regulating NCB forfeiture measures worth mentioning: the [Prevention of Organised Crime Act](#) (POCA). One of its major objectives is to remove the economic power from criminal organisations through asset recovery mechanisms, with NCB forfeiture measures mentioned as a fundamental tool against that threat, since

traditional approaches have historically fallen short in the fight against organised crime.

Having passed this legislation in 1998, South Africa was one of the first countries to adopt both post-conviction and NCB forfeiture, with authorities constantly using these mechanisms to target the instrumentalities and proceeds of criminal organisations. The POCA reaffirms that NCB forfeiture are civil proceedings with a lower evidentiary threshold (International Monetary Fund 2021: 76).

In analysing challenges to the POCA, South Africa's Supreme Court stated "we should embrace POCA as a friend of democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their own survival against criminals" (NDPP v. Elran 2013).

Nigeria

In Nigeria, there are very limited circumstances in which authorities may use NCB forfeiture. They are mostly designed to ensure that assets already in possession of the state, with no apparent owner, can be permanently confiscated. Unclaimed property in possession of law enforcement authorities charged with combating economic crime, as well as assets suspected to be the proceeds of unlawful activity, may be targets of NCB forfeiture applications (Bright Line Law 2020: 10).

Applications can also be made when property has been seized in connection with corruption offences, according to the Corrupt Practices and other Related Offences Act 2000. In these cases, notices should be published in the Official Gazette and in newspapers to present the opportunity for any person to present cause as to why the asset should not be forfeited (Bright Line Law 2020: 12).

Tanzania

In Tanzania, despite not mentioning explicitly the term "NCB forfeiture" or "civil forfeiture", there are two important pieces of legislation called the 'Proceeds of Crime Act' and the 'Prevention and Combating of Corruption Act' that include similar conditions in which forfeiture orders can be sought.

According to the [Proceeds of Crime Act](#), a person will be considered convicted of an offence if they abscond in connection with the offence (i.e. if they die or cannot be found to be notified of the criminal proceedings opened against them) (art. 4, 5). The confiscation will follow a conviction in the formal sense, but said conviction is based on the absence of the defendant and, thus, on a presumption of guilt which will have criminal and civil impacts (Diwa 2014: 168).

The '[Prevention and Combating of Corruption Act](#)' allows the Anti-Corruption Bureau to recover gifts or any advantages given to public officials in contravention to the law's provisions. This happens through civil proceedings intended to recover either the gifts themselves or an equivalent value amount.

Somalia

Somalia still adheres to post-conviction forfeiture orders in its Penal Code, which means that the Somali government is unable to confiscate assets in the absence of criminal convictions. In other words, Somalia's legislation does not have NCB forfeiture provisions. In addition, the country has not decided "whether incoming requests from such foreign countries for civil forfeiture (...) may be granted and when, despite its present inapplicability in Somalia" (Girginov 2019: 104).

A note of caution on the risks of misuse of asset recovery tools has been presented by the UN panel monitoring compliance with sanctions on Somalia. The panel has accused a former president, a former minister, and a US law firm of conspiring to divert Somali assets recovered from private bank accounts held abroad (Reuters 2014).

Zambia

In Zambia, the [Forfeiture of Proceeds of Crime Act](#) (FPOCA) was enacted in 2010 introducing the possibility of NCB forfeiture. It allows prosecutors to apply for an NCB confiscation order on "tainted property" (art. 29). This legislation reaffirms that judgement is based on a 'balance of probabilities' standard of proof.

The foundation of an Asset Forfeiture Unit (AFU) at the National Prosecuting Authority was an important step in strengthening asset recovery

efforts, but it has not been adequately funded in order to carry out its functions. Thus, the AFU has not demonstrated it has the full capacity to handle all confiscation cases and there are varying levels of capabilities to implement NCB forfeiture provisions among the other agencies responsible for handling them (FATF 2019: 65).

FATF (2019: 67) has found that Zambian authorities “successfully demonstrated that they use administrative, non-conviction and conviction based confiscations”. However, between 2013 and 2018, only six forfeiture orders were issued in over 180 NCB confiscation proceedings.

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