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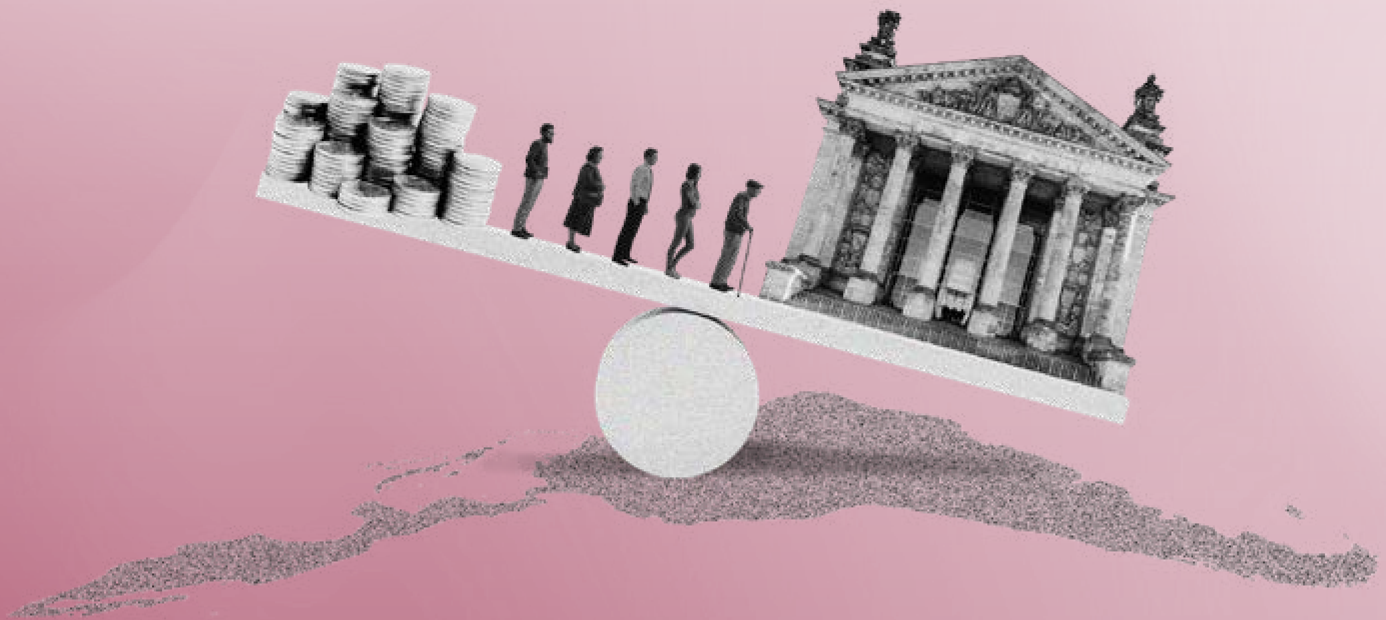
Targeting illicit wealth through non-conviction based forfeiture

Identifying human rights and other standards for Latin America

Oscar Solórzano | September 2024



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About this report

This paper explores the wide variety of non-conviction based (NCB) forfeiture laws in Latin America, with a special focus on the region's predominant model, Extinción de dominio. It argues that NCB forfeiture legislation, which allows for the recovery of stolen assets outside of criminal proceedings, can contribute significantly to a state's policy response to rampant economic and organised crime. The paper emphasises the importance of critically reviewing and harmonising domestic practices of NCB forfeiture around emerging standards, so that they can reach their large potential. Ensuring their alignment with international human rights and other recognised norms and rules ultimately builds trust, lends legitimacy and fosters judicial cooperation in international NCB forfeiture cases.

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1 To learn more about the regional expert meetings in Lima, see Basel Institute on Governance (2022). Asset forfeiture laws in Latin America: agreeing a human rights focus and more. Available at: https://baselgovernance.org/news/asset-forfeiture-laws-latin-america-agreeing-human-rights-focus-and-more.

2 To learn more about the regional expert meetings in Lisbon, see Basel Institute on Governance (2022). Lisbon Conference 2022: Lusophone countries come together to expand the asset recovery toolbox. Available at: https://baselgovernance.org/news/lisbon-conference-2022-lusophone-countries-come-together-expand-asset-recovery-toolbox; International Centre for Asset Recovery (ICAR) (2022). Supporting stakeholders in adopting non-conviction based forfeiture as a tool for asset recovery. Recommendations of the Lisbon Conference, 5-7 July 2022. Available at: https://baselgovernance.org/publications/lisbon-conference-en.

3 To learn more about country assessments under the INL programme, see Solórzano, O. & Cheng, D. (2022), La capacidad de Colombia para recuperar activos ilícitos: Un diagnóstico conforme a los 9 principios de la recuperación de activos. Programa ICAR Latam, INL. Available at: https://baselgovernance.org/publications/la-capacidad-de-colombia-para-recuperar-activos-ilicitos-un-diagnostico-conforme-los-9; Solórzano, O. & Cheng, D. (2022). La capacidad de Chile para recuperar activos ilícitos: Un diagnóstico conforme a los 9 principios de la recuperación de activos. Available at: https://baselgovernance.org/publications/diagnostico-chile.

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Acronyms and abbreviations

ACHR	American Convention on Human Rights
CAFRA	Civil Asset Forfeiture Reform Act (U.S.)
CEPAL	Comisión Económica para América Latina y el Caribe
CPI	Corruption Perceptions Index (Transparency International)
ECHR	European Convention on Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
ECtHR	European Court of Human Rights
ERA	Academy of European Law
EU	European Union
FATF	Financial Action Task Force
GAFILAT	Grupo de Acción Financiera de Latinoamérica
GDP	Gross Domestic Product
IACtHR	Inter-American Court of Human Rights
ICAR	International Centre for Asset Recovery
ICJ	International Court of Justice
IFFs	Illicit financial flows
IMAC	International Mutual Assistance in Criminal Matters
LAPLAC	Legal Assistance Programme for Latin America and the Caribbean (UNODC)
MLA	Mutual legal assistance
NCB	Non-conviction based (forfeiture)
NCBC	Non-conviction based confiscation
OECD	Organisation for Economic Co-operation and Development
PEP	Politically exposed person
POCA	Proceeds of Crime Act 2002 (UK)
UDHR	Universal Declaration of Human Rights
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
U.S.C.	United States Code

Use of terms

Asset forfeiture vs. confiscation vs. recovery: Different terms are used to refer to the permanent deprivation of assets in relation to a criminal offence. In legal systems of the Anglo-Saxon world, "forfeiture" is usually the term applied to the power of the state to take away the instruments of the crime (*instrumenta sceleris*). "Confiscation" is typically reserved for the proceeds of crime (*producta sceleris*). Since the terms are frequently used interchangeably, both terms are understood as equivalent in this paper.[4] "Asset recovery" refers more broadly to the entire process of tracing, identifying, seizing, forfeiting/confiscating and returning illicit assets to victims and/or victim states.

Best practice: A best practice is a method or technique that has been generally accepted as superior to alternatives because it tends to produce superior results. Best practices are used to achieve quality as a complement to mandatory standards. Establishing a best practice requires assessment in all contexts through a comparative process between methodologies.

Extinción de dominio: The law "Extinción de dominio" or "Extinción del derecho de dominio" is a common model of non-conviction based (NCB) forfeiture in Latin America. There is no standard translation for this law in English. The following text maintains the Spanish term "Extinción de dominio". Official English translations often use the terms "NCB forfeiture" or "NCB confiscation" as equivalents. Since it uses a civil standard, the term "civil forfeiture" is also often used as an equivalent, although differences exist. The lack of an exactly equivalent term and concept in English has led to widespread confusion, with some translations referring to Extinción de dominio very generally as "asset forfeiture",[5] "asset seizure",[6] or "*in rem* forfeiture".[7] This has doubtless contributed to the lack of international understanding and trust of such laws.

Human rights: The term "human rights" is broad and contested. It is used narrowly here to refer to standards applicable to confiscation arising from both human rights treaties and the jurisprudence of human right tribunals. In particular, these include the right to a fair trial and the right to property. Other aspects of human rights in relation to NCB forfeiture laws are still a matter of debate among both practitioners and the courts. This paper does not seek to resolve these open debates, but to provide insights from using human rights doctrines to clarify the current debate about the compatibility of confiscation laws with recognised international standards.

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4 Pieth, M., Low, L. & Bonucci, N. (eds.) (2013). The OECD Convention on Bribery: A commentary. 2nd Edition, Cambridge University Press, p. 309.

5 For example, Insight Crime (2017). Asset forfeiture in Latin America: a moral dilemma? Available at: https://insightcrime.org/news/analysis/asset-forfeiture-latin-america-moral-dilemma.

6 For example, Fiscalía General de la Nación's press release: "Judge legalised 12 arrests of people who would be linked to Clan del Golfo. Available at: https://www.fiscalia.gov.co/colombia/en/2020/03/10/judge-legalized-12-arrests-of-people-who-would-be-linked-to-clan-del-golfo/.

7 For example, Legal Assistance Programme for Latin America and the Caribbean (LAPLAC) (2011). Model provisions on in rem forfeiture. Available at: https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2011-August-25-26/V1185274e.pdf.

Human rights international standard: A human rights standard is the criterion or value for considering acceptable or unacceptable compliance with the norms governing the protected rights. Standards derive from the content of the norms, and refer to certain attributes of the exercise or realisation of the right and the conduct required or prohibited by states in the fulfilment of their obligations to respect, protect, satisfy and realise rights. These standards can be found in international treaties or in observations, recommendations and comments on their appropriate interpretation and application produced by the bodies of the international system for the protection of human rights.[8]

International law: Also known as public international law and the law of nations, this is the set of rules, norms, and standards generally recognised as binding between states. It establishes norms for states across a broad range of domains, including war and diplomacy, economic relations, and human rights.

Standard: A standard is something established by an authority as a rule for the measure of quantity, weight, extent, value or quality. The setting of standards in the area of NCB forfeiture is multifaceted and evolving.

8 Manual de Protección de los Derechos de la Sociedad Civil (Glosario), Available at: https://derechosoc.civilisac.org.

Executive summary

Non-conviction based (NCB) forfeiture legislation – allowing for the recovery of illicit assets outside of criminal proceedings – has great potential to help states counter organised and financial crime, including corruption, and to recover criminal assets for the benefit of their people.

NCB forfeiture has proven its worth in several regions of the world including Latin America, where it is regularly used to target criminally tainted property in proceedings separate from criminal prosecution. Although all but two countries in the region have some form of NCB legislation, only a few are seeing relative success in its application against organised economic criminality. As this paper exposes, asset recovery rates remain marginal in the region and novel mechanisms such as NCB forfeiture are far from being widely accepted or uniformly applied.

This paper argues that for asset recovery in Latin America to reach its potential, it must be conducted through efficient but also fair and sustainable mechanisms. A criminal policy that seeks to reduce the criminal incentive by confiscating criminal assets must respond to concrete social threats and be applied in line with the fundamental rights of the affected person(s).

In the judicial practice of international courts, the discussion on the legitimacy of such laws has revolved around two key elements: a better conceptual definition of NCB forfeiture and the identification of the standards applicable to it, some of which this research pursues to introduce in the Latin American context. This paper recommends that lawmakers and judicial practitioners in Latin America harmonise the current wide variety of NCB forfeiture models around human rights and other international standards. Failing this, the laws' acceptability will be undermined and international cooperation for purposes of asset recovery will likely be denied or subject to stringent conditions.

The paper briefly analyses the predominant model of NCB forfeiture legislation in Latin America, Extinción de dominio, and concludes that it is fundamentally in line with international standards and practice. However, this research exposes, through case studies, that domestic judicial practices in some countries actively enforcing Extinción de dominio need to be critically reviewed and compared with emerging standards in this complex area.

1 Introduction: Why is it necessary to set standards for Latin American asset recovery practice?

1.1 Background

In the last 20 years, Latin America has been the scene of various legislative efforts aimed at recovering assets stemming from corruption and organised crime in its various manifestations. A central theme has been NCB forfeiture, which allows for the recovery of illicit assets outside of criminal proceedings, through an independent judicial process that applies civil rules and is directed against the asset itself (*in rem*).

The efforts made across the region have not translated into a uniformly applicable model of NCB forfeiture law. On the contrary, the lack of harmonisation has raised doubts as to whether the human rights and other legal safeguards of the individual(s) concerned are properly respected in these procedures. Positive examples, such as in Colombia, Guatemala and Peru, are clear signs of the evolving nature of this regional legislative effort. But setbacks have also been felt, for example in Mexico where the Supreme Court has severely limited the scope of application of the Mexican NCB forfeiture law.[9] Similarly, the Ecuadorian Constitutional Court has ruled that NCB forfeiture in Ecuador requires a previous criminal judgement against the asset holder in order to be applied, which reduces its scope of application to virtually nothing.[10] In both cases, human rights and other procedural standards are said to be infringed.

Unsurprisingly, the lack of standardised rules has also resulted in Latin American countries' limited success in obtaining international cooperation through mutual legal assistance (MLA) in such cases, negatively affecting victim states' ability to freeze and confiscate suspect assets held abroad. This situation is felt particularly strongly in the international enforcement of confiscation orders, although it would be fair to point out that several international financial centres, such as Switzerland or Luxembourg, have taken decisive steps in clarifying the requirements to enforce NCB forfeiture decisions from overseas.

9 See Supreme Court of Justice of Mexico (2021), Action of unconstitutionality 100/2019, 21 June 2021. Available at: https://www.cndh.org.mx/documento/accion-de-inconstitucionalidad-1002019.

10 Constitutional Court of Ecuador (2021). Decision No. 1-21OP/21, March 17, 2021. Available at: https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1-21-OP/21.

1.2 Starting points

This paper has three starting points.

First, criminality linked to diverse forms of lucrative organised crime is growing steadily in the Latin American region. Asset recovery, in contrast, amounts to less than one percent of estimated illicit financial flows (IFFs) globally.[11] A reinvigorated criminal policy reaction is needed to counteract the negative effects of organised crime in Latin American states, including by confiscating ill-gotten gains and property used to commit these crimes.[12]

Second, although standard-setting organisations continue to proclaim that further efforts are required globally to support international asset recovery[13] – and that a key element of such efforts is NCB forfeiture – to date a binding treaty obligation on states does not exist in relation to NCB forfeiture. This means international financial centres can, and do, refuse to cooperate internationally with Latin American states seeking to recover criminal assets through NCB forfeiture mechanisms.

The recent changes to the Financial Action Task Force (FATF) Recommendations 4 and 38 (on confiscation and international cooperation respectively) require states under the scope of the FATF review process to implement NCB forfeiture and enforce foreign NCB forfeiture judgements. These changes have the potential to be decisive in international judicial practice in this area. For them to have the desired effect, however, NCB forfeiture laws must be implemented in accordance with recognised international standards. Indeed, the FATF requires not only regulatory compliance (adoption of the law) but also its effective implementation. At a minimum this requires making such laws subject to human rights and the rule of law, or as formulated in FATF Recommendation 1, "consistent with fundamental principles of domestic law".[14]

Third, efforts are underway to harmonise Latin America's primary NCB forfeiture legislation (Extinción de dominio) to address emerging threats arising from pernicious forms of organised criminality and to ease international cooperation. Harmonisation and alignment with human rights standards will ultimately build trust amid states and foster international judicial cooperation in NCB forfeiture cases.

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11 See for instance Wood, H., "The Courage of its (Non) Convictions: The FATF Review of Asset Recovery", Commentary, 19 January 2023, RUSI, available at: https://rusi.org/explore-our-research/publications/commentary/courage-its-non-convictions-fatf-review-asset-recovery; INTERPOL (2022). Especialistas examinan mecanismos para priorizar el rastreo fronterizo, la incautación y la confiscación de activos delictivos. Available at: https://www.interpol.int/es/Noticias-y-acontecimientos/Noticias/2022/FATF-and-INTERPOL-intensify-global-asset-recovery.

12 See in that context FATF-GAFI (2022), "FATF and INTERPOL intensify global asset recovery", available at: https://www.fatf-gafi.org/en/publications/Methodsandtrends/FATF-INTERPOL-intensify-global-asset-recovery.html.

13 Gray, L., Hansen, K., Recica-Kirkbride, P. & Mills, L. (2014). Few and far. The hard facts on stolen asset recovery. Washington DC, World Bank and OECD, p. 61.

14 Cf. Basel Institute on Governance (2024), "FATF seeks to change the landscape of international asset recovery: what this means for Latin America", blog available at: https://baselgovernance.org/blog/fatf-seeks-change-landscape-international-asset-recovery-what-means-latin-america.

1.3 Objective and structure

The main objective of this paper is the identification of standards applicable to NCB forfeiture with a view to enhancing its practice in Latin American countries. The author argues that the application of rules universally recognised by the international community will enhance NCB forfeiture's credibility and legitimacy and ultimately provide a better balance between criminal policy objectives and the protection of the rights of individuals. In the same vein, the determination of clear and recognised rules should improve international cooperation to recover assets hidden overseas.

The identification of standards is a complex and constantly evolving matter. In the field of economic crime, the applicable standards have followed the sway of changing interests over time and the evolution of societies' understanding of the criminal phenomenon. NCB forfeiture is also a relatively new discipline in most Latin American countries and its rules are under continuous development in more than one jurisdiction. For these reasons, the applicable standards in domestic NCB forfeiture procedures often differ depending on the region of the world or the legal tradition in which they are implemented.

At the global level, the situation appears more complex as no binding treaty rules exist in this area that could provide guidance to states in international NCB forfeiture cases. The UNCAC set a minimum standard in 2005 that no longer seems to correspond to the needs of today's societies. NCB forfeiture does not exist as a legal obligation for States Parties (Art. 31 UNCAC) and it is only framed as a recommendation in the context of judicial cooperation pertaining to the execution of foreign MLA requests based on such laws. Although several interpretations are often given, the model of NCB forfeiture imagined by the UNCAC legislator essentially refers to a subsidiary model, i.e. one that is triggered when criminal confiscation is not possible because the offender cannot be prosecuted (art. 54(1)(c) UNCAC).

Chapter V of UNCAC left States Parties wide discretion to legislate on asset recovery. Twenty years later it can be noted that the exercise of such discretion has not necessarily resulted in legislative or judicial coherence worldwide. On the global scene, countries that are victims of serious crimes have adopted NCB forfeiture to recover illicit assets, while developed countries (with some exceptions) seem more reluctant to recognise and enforce requests arising from such procedures.[15] Although this field continues to evolve, this dichotomy of practices is one of the reasons why international asset recovery through NCB forfeiture is not yet significant in the fight against all forms of economic crime.

Section 2 of this paper presents an overview of the criminological situation in Latin America and advocates for the adoption of NCB forfeiture to effectively respond to pernicious forms of economic criminality. The paper points out that once the concept of "pernicious organised crime" appears in the

15 Betti, S., Kozin, V., Brun, J-P. (2021). Order without borders: Direct enforcement of foreign restraint and confiscation decisions. International development in focus. Washington DC, World Bank.

national criminological context, states are not only allowed, but obliged, to activate stricter standards in the field of economic crime, e.g. in the area of NCB forfeiture. Rationally applied, it is argued, NCB forfeiture laws can contribute significantly to a state's criminal policy objectives. This section also discusses the Extinción de dominio Model Law developed by the United Nations Office on Drugs and Crime (UNODC) as a response of the Latin American legislator to rampant economic criminality.

Section 3 introduces the main arguments and concepts of NCB forfeiture.

Section 4 explores how NCB forfeiture models align with international human rights doctrines, with a focus on Latin American laws.

Section 5 looks at early experiences in the field of international judicial cooperation in NCB forfeiture cases and discusses the applicable international standards.

Section 6 concludes.

2 Latin America's fight against crime

Latin America[16] totals 21 countries whose population represents almost 9 percent of the world's population and whose vibrant economies account for 8 percent of the world's GDP.[17]

One thing holding back sustainable development is the rampant crime rate, which makes some Latin American countries among the most dangerous places in the world.[18] Overall, crime imposes significant costs on Latin American economies, absorbing at least 3.5 percent of the region's economic output, twice as much as in developed countries.[19] This estimate is comparable to the amount the region spends annually on infrastructure.[20]

16 Although the expression Latin America" has several connotations, in this document it refers mainly to a geographical area on the American continent, including some island and Caribbean countries, which are united by strong cultural, linguistic and historical traits.

17 World Bank (2020). Purchasing Power Parities and the Size of World Economies: Results from the 2017 International Comparison Program, p. 2.

18 Insight Crime news (2022). Why does Latin America Dominate the World's most violent cities list? Available at: https://insightcrime.org/news/latin-america-stranglehold-world-most-violent-cities-list/.

19 Muggah, R. & Aguirre Tobón, K. (2018). Citizen security in Latin America: Facts and Figures. Igarapé Institute, p. 12. Available at: https://igarape.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf.

20 Jaitman, L. (2019). Frontiers in the economics of crime: lessons for Latin America and the Caribbean, in: Latin American Economic Review 28, p. 1

High levels of corruption, transparency deficits and weak governance in most Latin American states provide fertile ground for financial crime to occur.[21] According to Transparency International's Corruption Perceptions Index, the region's average score is consistently low, which indicates a high persistence of corruption in both non-democratic countries and major democracies.[22]

Financial crime is recognised as a threat to democracy and stability in the region. The Basel AML Index estimates that the risks associated with money laundering and terrorist financing are structural in Latin America.[23] The Economic Commission for Latin America and the Caribbean (ECLAC) has estimated the total amount of illicit financial flows in Latin America and the Caribbean at USD 325 billion per year.[24] Despite the magnitude of the problem, however, the region is lagging in the production of rigorous research and the application of evidence-based policies to fight and deter crime.[25]

Latin America is also the home of notable asymmetries in more than one respect. It has world-class financial hubs on the one hand, and markets with little exposure to the international financial system on the other. The priorities and incentives to fight financial crime are therefore different. With regard to asset recovery, the region counts highly advanced states such as Brazil, Colombia, Guatemala and Peru, and others that barely enforce confiscation laws in general.[26]

In the face of these problems, Latin America has nevertheless shown a strong political will to continue building an effective regional system to combat pernicious financial crime. In this context, most Latin American countries have signed and ratified the United Nations conventions on drug trafficking,[27] organised crime[28] and corruption.[29] Similarly, most states adhere to and implement the recommendations of standard-setting organisations such as the FATF[30] and its regional organisation GAFILAT,[31] which includes 18 countries from Latin America. It can therefore be assumed that most countries in the region are subject to the international standards on confiscation stipulated in these international instruments.

21 Yansura, J., Mavrellis, C., Kumar, L. & Helms, C. (2021). Financial Crime in Latin America and the Caribbean. Understanding Country Challenges and Designing Effective Technical Responses. Global Financial Integrity, p. 192. Available at: https://secureservercdn.net/50.62.198.97/34n.8bd.myftpupload.com/wp-content/uploads/2021/10/GFI-LAC-Financial-Crime-Report.pdf?time=1659487646.

22 Transparency International (2022). Corruption Perceptions Index 2021, p. 12. Available at: https://images.transparencycdn.org/images/Report_CPI2022_English.pdf.

23 Basel Institute on Governance (2022). Basel AML Index 2022: 11th Public Edition. Ranking money laundering and terrorist financing risk around the world. Available at: https://baselgovernance.org/publications/basel-aml-index-2022.

24 CEPAL (2021). Clave, combatir flujos ilícitos, impago de impuestos y aliviar la deuda. Available at: https://mexico.un.org/es/155349-clave-combatir-flujos-ilicitos-impago-de-impuestos-y-aliviar-la-deuda-cepal.

25 Jaitman, L. (2019). Frontiers in the economics of crime, p. 2.

26 Solórzano, O. & Cheng, D. (2022). La capacidad de Chile para recuperar activos ilícitos, p. 34 f.

27 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UNODC, Vienna, 1988.

28 United Nations Convention against Transnational Organized Crime and the protocols thereto, UNODC, Palermo, 2000.

29 United Nations Convention against Corruption, UNODC, Merida, 2003.

30 FATF-GAFI (2012). FATF 40 Recommendations. Available at: https://www.cfatf-gafic.org/documents/fatf-40r.

31 GAFILAT (Grupo de Acción Financiera de Latinoamerica) is made up of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, and Uruguay.

2.1 Asset recovery in Latin America

Asset recovery has been a continuous concern of Latin American legislators. Early experiences in Colombia and the development of a regional Model Law on Extinción de dominio have permitted NCB forfeiture systems to develop into a mechanism adhering to the basic principles of the rule of law. In some cases, Latin American NCB forfeitures are among the most advanced in the world. Regionally speaking, nevertheless, the NCB forfeiture legislative

panorama is composed of a patchwork of laws with different scopes and applicable standards that cry out for harmonisation.

NCB forfeiture laws have been successfully used in Colombia since the early 1990s[32] through a form of NCB forfeiture that implements a separate procedure to criminal proceedings. The principles that governed the Colombian NCB forfeiture mechanism of Extinción de dominio strongly evoke those of the U.S. civil forfeiture law and have evolved by incorporating other mechanisms available in civil law legal frameworks that govern most Latin American states.

The success of Extinción de dominio – which made possible the recovery of the immense illicit wealth of the drug barons in Colombia – quickly spread to other countries of the region, where it is applied in various criminological contexts. While in Central America it is used to dismantle the criminal finances of the "Maras" (gangs),[33] in Peru and Guatemala it is used to pursue the bribes and embezzled assets of political elites.[34] Extinción de dominio has gained importance in the region and is undoubtedly the predominant model of NCB forfeiture in Latin America. With the recent legislative developments in Chile[35] and Venezuela[36] in 2023, only two countries – Nicaragua and Panama – still lack NCB forfeiture legislation of any kind.

NCB forfeiture laws in Latin America can be grouped into three principal models:

- NCB forfeiture within criminal proceedings
- Administrative or civil NCB forfeiture
- Extinción de dominio

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32 Solórzano, O. & Cheng, D. (2022). La capacidad de Colombia para recuperar activos ilícitos, p. 54.

33 See press release: RPP (2018). El Salvador: Piden que USD 1,8 millones, casas y automóviles de la Mara Salvatrucha pasen al Estado. Available at: https://rpp.pe/mundo/latinoamerica/el-salvador-piden-que-18-millones-casas-y-automoviles-de-la-mara-salvatrucha-pasen-al-estado-noticia-1162305.

34 To learn more about the prosecution of bribery through NCB forfeiture in Peru, see Basel Institute on Governance (2023), "Switzerland to return USD 8.5 million to Peru in precedent-setting case of non-conviction based forfeiture", available at: https://baselgovernance.org/news/switzerland-return-usd-85-million-peru-precedent-setting-case-non-conviction-based-forfeiture; Basel Institute on Governance (2019). "Landmark asset recovery case puts Peruvian non-conviction-based confiscation legislation to the test. Available at: https://baselgovernance.org/blog/landmark-asset-recovery-case-puts-peruvian-non-conviction-based-confiscation-legislation-test; Basel Institute on Governance (2023). "Peru orders confiscation of USD 1.5 million stashed in Mexico by a corrupt Army General. Available at: https://baselgovernance.org/news/peru-orders-confiscation-usd-15-million-stashed-mexico-corrupt-army-general.

35 Law on Systematisation of Economic Crimes adopted on 15 May 2023, see https://www.gob.cl/noticias/se-despacha-ley-congreso-aprueba-normativa-que-amplia-responsabilidad-penal-para-delitos-economicos-y-contra-el-medio-ambiente/.

36 In May 2023, Venezuela adopted a form of Extinción de dominio in administrative matters, see https://tugacetaoficial.com/leyes/ley-organica-de-extincion-de-dominio/.

Within these three models, there is much variation:

- For example, Paraguay[37] and Chile[38] have special NCB forfeiture procedures in criminal proceedings but apply civil standards of proof. Meanwhile, Venezuela and Brazil[39] have implemented NCB forfeiture in administrative matters (administrative improbity law) that applies civil and a variety of other standards.
- NCB forfeiture laws apply to different predicate crimes in different countries. Some focus on drugs, as in Bolivia, or exclusively on money laundering, as in Uruguay.[40] Others have an "all crimes approach", like Peru or Colombia.
- Countries including Colombia, El Salvador, Guatemala, Honduras and Peru have implemented separate courts to deal with NCB forfeiture cases. Extinción de dominio is carried out by specialised judicial authorities[41] in most cases and, in some infrequent ones, in purely criminal or civil instances (as in Argentina[42]).
- Finally, some forms of Extinción de dominio include underlying behaviours that are not crimes in the penal sense of the term, but rather some forms of administrative or other misconduct that could affect social mores.[43]

2.2 Extinción de dominio

Among the various models of NCB forfeiture present in Latin America, Extinción de dominio is the prevailing typology. Initially developed during the 1990s in Colombia in the context of the fight against drug trafficking, it is now present in several Latin American countries, though domestic Extinción de dominio laws differ to various degrees from one country to another.

The rise of Extinción de dominio can also be traced back to a regional effort by UNODC to adopt a Model Law in 2011,[44] which introduced in the Latin American context an alternative route to confiscate assets of serious crimes such as corruption, money laundering, drug trafficking and organised crime,

37 Special confiscation, see Article 96 of the penal code of Paraguay (Ley n.° 3440/08).

38 See Ley n.º 21,577

39 In June 2023, the Constitutional and Justice Commission has approved a constitutional amendment to include Extinción de dominio in the Brazilian constitution. The amendment is still under discussion in the relevant chambers.

40 "Full confiscation" (decomiso de pleno derecho), see GAFILAT (2020). Mutual Evaluation Report of the Eastern Republic of Uruguay, note 306. Available at: https://biblioteca.gafilat.org/wp-content/uploads/2024/07/MER-Uruguay.pdf.

41 As happens in Peru, Colombia or Guatemala.

42 Law No. 9.151 on the Procedural Regime of the Civil Action of Extinción de dominio was approved in 2019. The first case of application of this law dates from 2021. See the ruling in: http://www2.jus.mendoza.gov.ar/listas/proveidos/vertexto.php?ide=8009525722.

43 Law 1708 (2014), issuing the Code of Extinción de Dominio of Colombia, Articles 1 and 2.

44 UNODC (2011). Model Law on Extinción de dominio. Legal Assistance Program for Latin America and Caribbean. Available at: https://www.unodc.org/documents/legal-tools/Ley_Modelo_Sobre_Extincion_de_Dominio.pdf.

among others.[45] UNODC is currently working on a new draft version of the Model Law on Extinción de dominio.[46]

2.2.1 Concept

Article 1 of the draft Model Law defines Extinción de dominio as "a patrimonial [financial] consequence implying the transfer of ownership in favour of the State, of assets or rights linked by origin or destination to illicit activities, without there being any compensation for the proprietor."

Extinción de dominio is said to be a reparative form of NCB forfeiture and not a penalty or a punishment[47] as its purpose is to ensure that the country's economy remains free of illicit assets by confiscating them. Influenced by the Model Law, most Extinción de dominio country laws have their own catalogue of definitions and applicable principles, which, for the most part, attribute the Extinción de dominio a material (substantive) content that makes it more than a simple procedural tool.[48]

2.2.2 Scope

Extinción de dominio applies insofar as the prosecution successfully establishes a link between the assets subject to NCB forfeiture and a crime. The prosecution must prove, to a balance of probabilities standard of proof,[49] that the assets are the proceeds or the instrumentalities of crime or are in any other way connected to it.

More precisely, the prosecution must demonstrate the occurrence of the legal scenarios set out in the Model Law on Extinción de dominio as presupestos,[50] i.e. situations whose surrounding facts need to be proven by the prosecution for the NCB forfeiture request to be admitted by the judge. The Model Law on Extinción de dominio provides a detailed description of the various scenarios in which an asset is related to a crime.

45 See Draft Version of the Model Law on Extinción de Dominio (2022), Preamble.

46 See press release: Naciones Unidas Colombia (2021). UNODC conmemora los diez años de la Ley Modelo de Extinción de Dominio. Available at: https://colombia.un.org/es/149454-unodc-conmemora-los-diez-anos-de-la-ley-de-modelo-de-extincion-de-dominio; Basel Institute on Governance (2021). "Latin America's model law on non-conviction based forfeiture of illicit assets turns 10 – what now?" Available at: https://baselgovernance.org/news/latin-americas-model-law-non-conviction-based-forfeiture-illicit-assets-turns-10-what-now.

47 See Constitutional Court of Colombia (2003). Judgment C-740/03, 18 August 2003. Available at: https://www.corteconstitucional.gov.co/RELATORIA/2003/C-740-03.htm.

48 The concept of "illicit activity" as opposed to crime, for example, expands the scope of application of Extinción de dominio to administrative faults or other misdemeanours. In other cases, Extinción de dominio (re)defines concepts such as the "bona fide" concept that requires individuals to take positive and concrete actions to prove their good faith in the context of the Extinción de dominio trail, see Article 2(d) Model Law. "Good faith": A person's intimate belief or conviction that his or her conduct is in accordance with the law, after he or she has satisfied him self or herself, in accordance with the due diligence applicable to him or herself, that his or her belief is reasonable.

49 See, e.g. Extinción de Dominio Court of Appeal of La Libertad (2020). Casefile no. 0010-2020-0-1601-SP-ED-01, para. 35. Available at: https://extinciondedominio.org/web/rb/files/SED-0010-2020-0-inmueble-TID-Lambayeque.pdf.

50 From Latin *Presuppositus*: pre (previous) Suppositus (hypotheses).

These scenarios can be grouped into five categories:

1. Assets produced[51] in the commission of crimes (proceeds of crime)[52]
2. Assets that had been used or will be used to commit crimes (instrumentalities of crime)
3. Assets that are unjustified or unexplained (illicit enrichment)[53]
4. Licit assets intermingled with illicit assets (tainted asset confiscation)
5. Replacement assets (value-based NCB forfeiture)

First, Extinción de dominio allows for the confiscation of the proceeds of crime outside of criminal proceedings. In order for a judge to determine the *extinción* of an asset, the prosecutor must provide sufficient evidentiary material establishing a causal link between the targeted asset and a crime.[54] The prosecutor does not have to prove the guilt of the alleged perpetrator but that a crime has been committed and that the assets originate from it (NCB forfeiture of proceeds of crime).

Second, Extinción de dominio allows for the NCB forfeiture of instrumentalities of crime, i.e. lawful property used to commit crimes that fall within its scope of application (NCB forfeiture of instrumentalities of crime).

Extinción de dominio also uses the legal presumption of illicit enrichment as one of the conditions triggering the application of the NCB forfeiture under certain conditions. In addition, Extinción de dominio allows for the NCB forfeiture of intermingled assets (tainted asset NCB confiscation) and substitute assets (NCB value-based confiscation), in order to replace the proceeds that no longer exist because they have been dissipated or cannot be located with reasonable efforts.

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51 Under the United States civil forfeiture law, the term "proceed" includes the civil law notion of object and profit or benefit, i.e. the indirect advantages obtained or retained as consequence of the crime, see Cassella, S. (2012), Asset Forfeiture Law, p. 904, 905. Under Swiss law, benefits of crime can be confiscated as long as a link, even indirect (but adequate), is established between the benefits and the underlying crime, see FTR 137 IV 79, recital 3.3.

52 The concept of *producto* under Extinción de domino encompasses the direct and indirect proceeds of the illicit activity. Organisation for Economic Co-operation and Development (1997). See also, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Commen tary 21: "The 'proceeds' of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery."

53 Unexplained assets are in fact proceeds of crime that deserve the application of a lower standard in relation to the link that must exist between the enrichment and the crime it produces.

54 It is worth noting that the Model Law leaves the determination of the concept of crime to the domestic legislator, which in some cases, as explained, have included underlying behaviours subject to Extinción de domino that are not crimes in the penal sense of the term.

Table 1: Assets subject to Extinción de dominio: e.g. corruption

Asset typology	Scope	Example: corruption
1. Proceeds	Extinción de dominio provides for the NCB forfeiture of: • Objects of crime (*objectum scaeleris*) • Products of crime (*producta scaeleris*) • Benefits of the products of crime • Subrogate assets	The prosecution must prove that the property subject to Extinción de dominio is the proceeds (comprising objects, products, benefits) of the corrupt activities. • Embezzled assets (object) • Bribe (direct proceeds) • Benefits generated by the account where the bribe was deposited (indirect proceeds) • House acquired with the bribe (subrogate assets)
2. Instrumentalities	Extinción de dominio provides for the NCB forfeiture of instrumentalities of crime, i.e. assets that have served, will serve or otherwise facilitate the commission of a crime (facilitation theory[55]).	E.g. the bank account instrumentalised to pay bribes to corrupt decision makers.
3. Illicit enrichment	Extinción de dominio introduces the concept of illicit enrichment as a presumption leading to NCB forfeiture.	E.g. the luxury villa of a public official that cannot be explained with their legal income or other legal means. The prosecution must prove the existence of the illicit enrichment and that it is "sufficiently"[56] connected to a crime.
4. Intermingled assets	Extinción de dominio allows for the NCB forfeiture of licit property when it has been intermingled with illicit property with a view to disguising the latter's true illicit origin (tainted assets[57]).	E.g. the company where the corrupt official has invested the bribe or the embezzled assets. The prosecution needs to prove that both types of assets had been permanently intermingled with a view to obscuring their criminal nature.
5. Value-based NCB forfeiture	Extinción de dominio activates replacement actions when the proceeds (direct or indirect benefits of crime) are no longer available for a reason attributable to the asset holder.	E.g. to confiscate a legal business or other licit property of the asset holder (not connected to the crime) when the proceeds of crime are no longer available.[58]

55 The United States Civil Asset Forfeiture Reform Act (CAFRA) introduced the "facilitating" dimension of any asset, meaning instrumentalities of crime that make crime easier to commit or harder to detect, see Cassella, S. (2012), Asset Forfeiture Law, p. 937, 942.

56 For the standards of this matter, see Dornbierer, A. (2021), Illicit Enrichment: A guide to laws targeting unex plained wealth. Basel Institute on Governance, Basel. Available at: http://illicitenrichment.baselgovernance.org.

57 Model Law on Extinción de Dominio (2011), Article 13 (f)(g)(h).

58 Forfeiture for equivalent value is incorporated in the legislation of the following countries: Peruvian Extinción de Dominio law, Article 33; Colombian Extinción de Dominio code, Article 16.

Box 1: Special (NCB) forfeiture mechanisms in Latin America

The Extinción de dominio Model Law introduces the statutory presumption of illicit enrichment as a situation leading to NCB forfeiture. It also expands its scope by introducing rules to implement value-based confiscation via NCB forfeiture.[59] The standards attached to these procedures were, however, unclear in the first version of the Model Law (2011), which led to a poor performance.

Illicit enrichment

Illicit enrichment can lead to NCB forfeiture by creating the rebuttable presumption that unexplained assets possessed by a public official were illegally obtained based on calculations against their declared legal income. In some cases, these mechanisms are also applied to private individuals and companies.[60] As a result of a *prima facie* investigation uncovering elements of unjust enrichment, the burden of proof is partially transferred to the defendant, who is requested to prove the lawful origin of the asset subject to NCB forfeiture. If they fail to do so, the "unexplained" assets can be NCB forfeited in court proceedings following the relevant procedure.

Latin American countries use this mechanism quite frequently in criminal, civil and administrative matters. Extinción de dominio, for example, allows for the NCB forfeiture of unexplained assets when the prosecution proves, in a balance of probabilities, that the existence of the assets can only be explained by the commission of crimes. The procedure usually places the defendant in a position to effectively defend their rights by rebutting the initial presumption using the same standard of proof.

Value-based NCB forfeiture

This typology of forfeiture targets replacement assets that are in principle of licit origin.[61] This mechanism is used when criminal assets cannot be located or are unavailable due to the defendant's behaviour, e.g. because they have consumed or otherwise spent the assets. This form of NCB forfeiture is rarely applied in Latin America. In practice, there are only two cases, despite it being expressly provided for in the 2011 Extinción de dominio Model Law.[62]

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59 Extinción de Dominio draft Model Law (2022). Art. 13(f) to (k) (distributed to experts in 2022 and not yet published at the time of writing).

60 See Article 7(1)(b) of the Legislative Decree n.° 1373 of the Peruvian Extinción de dominio law.

61 Value-based confiscation should be distinguished from the confiscation of subrogated assets, i.e. assets that were acquired with proceeds of crime (e.g. the confiscation of the official's house acquired with the bribe).

62 A recent Peruvian decision ordered the value-based NCB forfeiture of real estate belonging to a former military official accused of illicit enrichment, see Specialised court on Extinción de dominio of Lima (2023), Resolution n.° 30 of May 2, 2023 (confirmed by Judgment of the Sala Penal Transitoria Especializada en Extinción de Dominio, Res. No. 3, of 10 August 2023). For an example in Colombia, see the Judgment of the Tribunal Superior del Distrito Judicial de Bogotá, Case n.° 110013120002201500039 02, dated 11 December 2020.

Value-based confiscation predominantly considers the behaviour (guilt) of the individual and not the circumstances related to the asset, as typically investigated in *in rem* procedures. This fact links this form of confiscation to a retaliatory action of justice aimed at affecting lawful property as additional punishment. Its use in NCB forfeiture proceedings has raised concerns and does not seem to be commonplace in other legal systems.[63]

2.2.3 Procedure

The Model Law provides for a detailed set of procedural rules[64] providing a fairly granular picture of the Extinción de dominio trial. The Extinción de dominio procedure is *sui generis*:[65] of an accusatory nature (as criminal proceedings) but directed against things (*in rem*), and applying civil standards in the different stages of the procedure. The prosecution (in most countries the general prosecutor's office) is the claimant, while the affected person (the asset holder) is the defendant.

Extinción de dominio has two main procedural stages:

1. The investigative phase carried out by the prosecution (a financial-oriented investigation).
2. The judicial phase, during which a judge decides on the evidence afforded by the prosecution.

During the investigative phase the prosecutor carries out a financial investigation and collects the evidence. During this phase, the prosecution requests from the judge all the necessary restraining measures and, if needed, initiates MLA proceedings. At the latest at the end of this phase, the Extinción de dominio procedure requires the prosecution to duly notify the asset holder, any interested third party and other person(s) whose legally protected interests may be affected by the Extinción de dominio proceedings.

The Model Law sets out the basic procedural rules and principles to ensure sound, fair and public proceedings. Although some concepts are left to the interpretation of the adhering state, the Model Law ensures minimum due process rules and other constitutional requirements. The judicial phase is concluded by a decision that can be subject to appeal before a tribunal with broad powers of cognition acting as a final instance.

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63 NCB forfeiture operates in rem, which means that it is exclusively directed against an asset (a thing) and in some cases applies to property traceable to the asset (subrogate assets), excluding however in most cases value-based NCB forfeiture, i.e. lawful property in lieu of illicit funds that have been dissipated, see Cassella, S. (2012). Asset Forfeiture Law in the United States. 2nd Edition. Juris Publishing, p. 21.

64 Draft Version of the Model Law on Extinción de Dominio (2022), chapter I, Article 2, 13.

65 Constitutional Court of Colombia (2003), Judgment C-740, note 7, recital 16. Supreme Court of Justice of El Salvador, Criminal Chamber (2019), Judgment 62C2018, recital 3.

2.2.4 Due process and fundamental rights

The protection of human and procedural rights in the Model Law is comprehensive and includes substantive, procedural and interpretative rules that implement a solid legal framework.[66] Particularly, these rules had been designed to provide the affected person(s) with the means and possibilities to be heard in a public hearing by an impartial and independent judge.

The Model Law introduces the principle of "prevalence,"[67] which requires that constitutional law prevails when a key procedural provision is left to interpretation. Extinción de dominio cannot therefore derogate substantive rights enshrined in the constitution and international treaties.[68] Accordingly and in line with human rights, it grants comprehensive procedural rights, including the right to a fair trial, which comprises the rights to an independent and impartial tribunal, to be heard, to inspect files and to provide evidence, among others.

2.2.5 Standard and burden of proof

The balance of probabilities standard of proof applies in Extinción de dominio.[69] The Model Law states that "it is for each party to prove the grounds on which its position is based". The balance of probabilities standard requires the judge to accept the prosecutor's arguments as proven if they can demonstrate that a particular fact or event was more likely than not to have occurred. To that effect, Extinción de dominio allows the use of circumstantial evidence and leaves tribunals great discretion in the use and assessment of evidence (principle of *libertad probatoria*).

As far as the obligation to provide evidence is concerned (burden of proof), Extinción de dominio implements a mechanism that partially shifts the obligation to prove to the defendant:

- Based on an initial investigation, the asset holder (defendant) is forced to come forward and prove that their assets are lawful.
- If the evidence provided by the prosecutor is deemed sufficient (to a balance of probabilities standard of proof), a general assumption exists in relation to the illicit origin of the assets.
- To shed light on that initial assumption, the judge calls the asset holder (and other affected persons) to the Extinción de dominio trial to defend their property.

66 Draft Version of the Model Law on Extinción de Dominio (2022), Article 69 (a)(b).

67 Draft version of the Model Law on Extinción de Dominio (2022). Chapter II. Principles and procedural guarantees. Article 18. Principles. The following principles govern the process of Extinción de dominio: [...] h) Prevalence of substantive law: Constitutional rights shall prevail over legal forms and procedures. Procedural rules must be interpreted and applied to guarantee the constitutional rights of those affected.

68 Almost all Latin American states are signatories, and therefore subject to the jurisdiction of the Inter American Court of Human Rights (IACtHR).

69 Peruvian Extinción de dominio Specialised Tribunal (2020), Casefile n.° 25-2020-0-5401-JR-ED-01, judgement of December 9, 2020, recital 11.

- The Extinción de dominio procedure permits the defendant(s) to rebut any initial presumption by providing evidence (to a balance of probabilities standard of proof) that the assets under dispute are of a legal nature.[70]

2.3 Summing up

Most Latin American countries have NCB forfeiture laws and thus fulfil the international standard of adopting NCB forfeiture mechanisms to combat economic crime (FATF Recommendation 4).

In some Latin American countries, NCB forfeiture systems have only recently been created and judicial practice is still scarce. In others, a fully independent Extinción de dominio judicial apparatus has been in place for decades. In such countries, judicial practice continues to move towards the creation of local standards, concepts and principles with a view to broadening the scope of the Extinción de dominio law and the recovery of illicit wealth.

In few cases, criticism had been expressed in particular with regard to the NCB forfeiture of licit property or instrumentalities of crime, whose various scenarios require the application of different standards. This paper does not fundamentally oppose the creation of more incisive rules to combat pernicious organised crime through NCB forfeiture. It suggests, however, to limit the scope of NCB forfeiture to cases of proven criminal participation (or gross negligence) and it calls for national courts to implement the necessary defences aimed at safeguarding the rights of individuals.[71]

The introduction of more incisive standards in confiscation law to counter organised crime has been recognised by human rights international tribunals as compatible with human rights instruments (see section 4). As Chapter 2 suggests, organised crime in its various manifestations is a major problem in Latin America. Therefore, the discussion on the standards applicable to the NCB forfeiture of assets related to this type of criminality is highly relevant.

As we shall see below, human rights courts very often consider that confiscation laws impose “tolerable interferences” to the right of property as long as they comply with the legal conditions – the so-called triple test of legality, legitimacy (public interest) and proportionality.

In a first comparative analysis, we observe that courts accept the adoption of facilitated standards when NCB forfeiture is directed against assets linked to organised crime. In these scenarios, however, the question arises as to how to treat individuals or legal persons who are unconnected to the crime. The determination of standards and defences is necessary to prevent negative consequences for persons who are innocent or whose minimal negligence does not justify the application of severe pecuniary sanctions.

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70 Similar mechanisms apply in Europe, see ECtHR (2004), Radio France v. France, 30 March 2004, para. 24.

71 See interpretative note 8 to FATF Recommendation 4 (confiscation): “[...]. It is also important for such measures to be implemented in a manner which respects the substantive and procedural rights and safe guards that may be implicated by confiscation.”

3 (Re)defining NCB forfeiture

3.1 NCB forfeiture basic models

Forfeiture or confiscation[72] is defined as the "permanent deprivation of property by order of a court or other competent authority".[73] NCB forfeiture is simply one of the approaches through which forfeiture can occur.

NCB forfeiture is generally conceived as a procedural device designed to forfeit criminal assets when criminal proceedings are not possible or desired.[74] Although variations exist,[75] NCB forfeiture usually adopts the following basic procedural models:

- **Subsidiary model:** The NCB forfeiture is a remedial action and occurs in the context of criminal proceedings under the rules of criminal procedure. Generally, it operates in specific scenarios predetermined by law.[76] This is the prevalent model in European civil law states,[77] although with different characteristics.[78]
- **Independent model:** The NCB forfeiture occurs outside criminal proceedings by means of an *in rem* action directed against the property itself. It generally applies civil rules and deploys its own procedural principles. This model is present in some common law countries[79] and in Latin America (Extinción de dominio). Again, several configurations can exist.

The subsidiary model of NCB forfeiture generally applies the safeguards ordinarily applied in criminal trials as its procedure is usually linked to a main criminal case. It continues, therefore, to be an action directed against an individual (*in personam*), but which for practical reasons is directed

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72 FATF Recommendation 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. See FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France. Available at: https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf.

73 See for example, Article 2(g), UNCAC.

74 Cassella, S. (2015). Civil asset recovery. The American experience, in Rui, J.P., & Sieber, U. (eds.). Non-Conviction-Based Confiscation in Europe. Duncker & Humblot, Berlin, p. 14.

75 Conference of the States Parties to the United Nations Convention against Corruption (2021), Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption. Thematic Report prepared by the Secretariat, p. 11 f. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V21/047/59/PDF/V2104759.pdf?OpenElement.

76 See for instance Article 376 of the Swiss Code of Criminal Procedure reserving the application of NCB forfeiture to cases where the criminal has died, has absconded and other similar scenarios.

77 Esser, R. (2015). A civil asset recovery model – The German perspective and European human rights, in Rui, J.P. & Sieber, U. (eds.). Non-Conviction-Based Confiscation in Europe. Duncker & Humblot, Berlin, p. 70.

78 NCB forfeitures can apply both civil or criminal standards of proof as in Germany or Switzerland (see Article 74 of the German Criminal Code and Article 376 ff of the Swiss Code of Criminal procedure, respectively). In other criminal regimes, however, the standard of proof applied is lower as in Norway (qualified balance of probabilities) and the UK (balance of probabilities), see Boucht, J. (2015). Civil asset forfeiture and the presumption of innocence under Art. 6(2) ECHR, in Rui, J.P. & Sieber, U. (eds.). Non-Conviction-Based Confiscation in Europe. Duncker & Humblot, Berlin, p. 155.

79 For example, the UK and Ireland, See Bacarese, A. & Sellar, G. (2015). Civil Asset Forfeiture In Practice, in Rui, J.P. & Sieber, U. (eds.). Non-Conviction-Based Confiscation in Europe. Duncker & Humblot, Berlin, p. 215.

by default against the asset (because a criminal confiscation cannot be obtained). The scenarios regularly evoked to justify its use show NCB forfeiture as the only possibility to recover illicit assets: For instance, when the perpetrator of a crime cannot be criminally prosecuted because they are dead, at large or simply unknown.

The independent model, in turn, is more versatile as it is not tied to the stringent standards of criminal proceedings.[80] It covers scenarios where prosecuting the criminal is not only impossible, but highly improbable, e.g. when the criminal enjoys immunity or absconds overseas and MLA seems unlikely. In these cases, NCB forfeiture can be initiated as a previous, concurrent or subsequent action to criminal proceedings. As independent NCB forfeiture is autonomous,[81] it may also be commenced even if a criminal case does not exist at all.[82]

3.2 Rationale, purpose and nature: the policy-oriented approach to NCB forfeiture

A “rationale” is the explanation of the fundamental reasoning used to reach a goal. For example, it is said that a rationale for asset recovery is the fight against economic crime through the confiscation of the resulting illicit gains. The “purpose” is the goal itself – the response to the question of what the law is trying to achieve. For example, does the law seek to inflict a sanction or resolve a civil matter?

Meanwhile, the concept of the law’s “nature” refers to the properties or characteristics that the law possesses by its very nature, whenever and wherever it happens to exist.[83] For example, it is argued that criminal confiscation has punitive characteristics – and is therefore of a criminal nature – because it is rooted in the determination of criminal liability as a result of criminal proceedings.

In confiscation law, these elements are used to determine the legal discipline in which the confiscation law should be regulated, and the applicable

80 Council of Europe (2013), Impact study on civil forfeiture, p. 13. Available at: https://rm.coe.int/impact-study-on-civil-forfeiture-en/1680782955.

81 In some cases, the Latin American model of Extinción de dominio has sufficiently evolved to produce substantive (material) concepts of its own, which considerably expands the possibilities to apply Extinción de dominio. See for instance the notion of “Illicit activity” (as opposed to criminal offense), which is defined “as any perturbation against the legal order” may it be criminal administrative or other. In some cases, it can include administrative irregularities or behaviours against the mores in addition to criminal offenses, see Article 3 (definitions) of the Peruvian Extinción de dominio law.

82 The EU legislator expressly decided in the 2014 Directive against adopting an independent model of NCB forfeiture, although recent legislative efforts seek to reintroduce the subject (see for example, Council of Europe Programme Office in Skopje (2021). Legislative proposal and support on non-conviction based seizure and forfeiture. Available at: https://www.coe.int/en/web/skopje/-/legislative-proposal-and-support-on-non-conviction-based-seizure-and-forfeiture. European common law countries have, on the other hand, historically utilised independent NCB forfeiture models providing for wide discretion in its enforcement, see for example in the UK: The Proceeds of Crime Act 2002 (POCA). Guidance under section 2A for relevant authorities. 28 June 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001245/June_2021_amended_s.2A_guidance_.pdf.

83 A. Marmor, A. Sarch, “The Nature of Law”, The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.), available at: https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/.

procedural standards. The so-called policy approach recognises the differentiation of distinct policy models allowing for the confiscation of criminal property.[84] This increases the possibilities for legislators to adopt laws in different fields of law and explains, for example, why NCB forfeiture laws can exist in criminal, civil or administrative matters. This approach predominantly takes into account the "policy motive" that underlies the legislator's choice to adopt the confiscation law (its rationale). By doing so, it also determines the realm of law in which the forfeiture law should be included (criminal, civil or administrative/police).[85]

The determination of the rationale as well as the purpose of NCB forfeiture laws generally reveals their nature and thus the standards applicable to their procedures. For example, many NCB forfeiture laws benefit from civil standards of proof because they are said to be non-punitive. This means that the underlying purpose of the legislator is not to punish offenders but to resolve civil matters (e.g. through the relocation of illicit assets) or administrative concerns (e.g. the confiscation of dangerous assets in the public domain).

Most NCB forfeiture models claim to be restorative or preventive in nature, deserving the application of civil standards. Some clarifications seem necessary:

First, if the purpose of the NCB forfeiture law is to re-establish the *status quo ante*, i.e. the factual situation as it was before the unlawful act was committed, its nature is said to be restorative and the underlying policy motive is to suppress or relocate criminal assets. Its rationale implements the "crime should not pay"-policy motive endorsed by most international legal instruments.

For example, the NCB forfeiture has restorative characteristics when it is directed against the bribe that a public official received for illicitly awarding a public contract. The public official cannot prove valid title or ownership of the bribe and, therefore, its forfeiture on the grounds that it constitutes the proceeds of corruption cannot be considered a criminal sanction against them, but the removal (and return to the state) of an asset that should not have been in his possession in the first place. Civil standards are normally authorised in this type of confiscation procedures.

Second, if the forfeiture law seeks to suppress an objectively dangerous asset (not a proceed but an instrumentality, for instance), it is said to be preventive in nature because the criminal policy motive behind its enactment is to prevent the occurrence of a crime, and the applicable standards are generally those of administrative (or police) procedures. Such procedures are used in a wide range of scenarios and can exist in laws of an administrative nature (e.g. custom laws or those regulating prohibited or dangerous substances or even laws targeting criminal organisations) and do not necessarily require the conviction of a person.

84 See discussion in Rui, J.P. & Sieber, U. (2015). NCBC in Europe - Bringing the picture together, in Rui, J.P. & Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe, p. 249 ff.

85 Criminal law could confiscate property by means of sanctions; police law could confiscate property in order to prevent future damage caused by or with this property; civil law could take away property on the basis of the principle of unjustified enrichment, thus attempting to re-establish the situation before the offense took place.

Some of the major Latin American NCB forfeiture laws incorporate this approach to confiscate assets instrumentalised to commit crimes. E.g. the NCB forfeiture action is deemed preventive in nature when it is directed against a house adapted and fully equipped to be used as a lab for the production of methamphetamines. The house is confiscated to prevent future drug-related crimes and the drugs themselves are destroyed to prevent a public health concern.

If, on the other hand, the purpose of the confiscation law is to inflict additional punishment on the perpetrator of a crime by removing their assets, the law is often considered punitive in nature and its procedure deserves the standards of criminal proceedings. As a rule, this form of confiscation requires the establishment of guilt and the confiscation is calibrated to the fault or negligence of the offender.

3.3 Scope of NCB forfeiture

Most NCB forfeiture laws in comparative law are directed against proceeds and instrumentalities of crime. In some cases, the scope of NCB forfeiture laws is extended to other categories of assets.

Proceeds of crime

Proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity. As consequence, it is necessary to establish a causal link between the targeted asset and a crime.[86] Most NCB forfeiture laws around the world are directed primarily against property originating from offences, which is referred to as "proceeds" in the U.S. civil forfeiture law and in other common law countries, and as "products" or "effects" in Extinción de dominio and other NCB forfeiture laws of civil law countries. Both terminologies are largely equivalent in practice.

NCB forfeiture of proceeds of crime indisputably has a restorative nature, i.e. a classical "crime should not pay" type of measure. It aims to suppress criminally tainted property by transferring it from the offender to the state or to the victim. The NCB forfeiture of proceeds of crime is not considered a punishment but the denial of the benefits of crime through a procedure deserving civil rules.

For instance, when the procedure targets the ransom found in a kidnapper's possession, the NCB forfeiture of the ransom in favour of the victim cannot be considered a penalty affecting the offender's property rights as the kidnapper is not the real owner of the assets composing the ransom.

86 It is worth noting that the Model Law leaves the determination of the concept of crime to the domestic legislator, which in some cases, as explained, have included underlying behaviours subject to Extinción de domino that are not crimes in the penal sense of the term.

Instrumentalities of crime

NCB forfeiture of instrumentalities of crime refers to the confiscation of assets used to commit crimes. For instance, the vehicle suitably modified to transport illegal goods or the bank account used to pay bribes.[87]

Unlike the confiscation of proceeds, which implements the rationale that "crime should not pay", the criminal policy reasons used by the legislators to justify the confiscation of instrumentalities is not always easy to understand. Indeed, the determination of the rationale(s) justifying the NCB forfeiture of instrumentalities provides a variety of responses. In the same vein, case law in different countries expose notable differences arising from historical developments and legal traditions.[88]

Box 2: The U.S. crime facilitation theory

The so-called facilitation theory applied in the United States traditionally allowed for the confiscation of property because it has facilitated in any way the commission of a crime. In U.S. case law, the forfeitable property is considered itself guilty. Thus, the innocence of the property owner is irrelevant as far as the "guilt" of the property is established.

The effects of this theory have been mitigated over time, first by case law and then codified in the Civil Asset Forfeiture Reform Act (CAFRA) with the introduction of mechanisms protecting innocent owners of the instrumentalised property and by applying proportionality tests.[89]

The forfeiture of instrumentalities is a globally accepted standard[90] and a hardly questionable form of forfeiture insofar as the instrumentalities per se are illegal and/or their mere possession is illegal. For example, the thief must be deprived of the illegal gun used to commit the bank robbery. When lawful instrumentalities are used to facilitate the commission of crimes, however, opinions diverge.

Four rationales are frequently evoked to justify the confiscation of lawful instrumentalities of crime:

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87 See Directive (EU) 2024/1260 of The European Parliament and of The Council of 24 April 2024 on asset recovery and confiscation, Article 3 (definitions): [...] (3) instrumentalities' means any property used or intended to be used, in any manner, wholly or partially, to commit a criminal offence.

88 "[F]orfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment", see Austin v. United States, 509 U.S. 602, 618 (1993). As a consequence, the excessive fines clause (proportionality) applies to all criminal forfeitures and to some civil forfeitures, see Cassella, S. (2012). Asset Forfeiture Law in the United States, p. 836 f.

89 The exception to this is of course the "innocent owner defence" introduced by the Civil Asset Forfeiture Reform Act (CAFRA). See also Austin, 509 U.S. at 621–22; United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000), stating that courts can reduce forfeiture of illegal proceeds to make the forfeiture proportional to the seriousness of the offense, so as not to violate the Eighth Amendment's prohibition against excessive fines.

90 See for example the Directive 2014/42/EU of the European Parliament and of the Council of 3 April on the freezing and confiscation of instrumentalities and the proceeds from crime in the European Union.

1. As (additional) punishment[91]

In many jurisdictions, the forfeiture of instrumentalities belonging to criminals themselves is understood as additional punishment (in addition to normal punishment consisting of prison sentences or fines) and is therefore traditionally regulated in criminal statutes. For example, the drug dealer who completed a drug deal in his own car is sentenced to two years in prison and additionally, his car is confiscated.[92]

In recent legal history, the confiscation of instrumentalities has been regulated in criminal or administrative law, and even more recently, it has been included in NCB forfeiture laws as it plays a prominent role in the fight against the illicit finances of organised crime.

Today, there is a wide variety of models allowing for the NCB forfeiture of instrumentalities of crime that do not necessarily depend on the classic common and civil law antagonism but on judicial practice and the criminal policy that underpins it. Some common law countries,[93] for example, do not confiscate instrumentalities of crime through NCB forfeiture at all, while others, such as the United States, have an extensive practice of confiscating property that facilitates crime.

The key question underlying such disparity of judicial treatment is whether or not the forfeiture of instrumentalities is punitive or not. If the answer is yes, its procedure should observe criminal defences – in particular the presumption of innocence.

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91 See the leading Supreme Court cases Austin v. United States, 509 U.S. 602 (1993), United States v. James Daniel Good Real Property – 510 U.S. 43 (1993), and United States v. Bajakajian, 524 U.S. 321 (1998).

92 Vogel discussed the shortcomings arising from punishment through the forfeiture of instrumentalities and its compatibility with proportional sentencing rules. He argues that forfeitures of instrumentalities often result in complicated sentencing considerations: It is clearly unfair that drug dealer A, who completed a drug deal in a rental car, is sentenced to two years in prison, whereas drug dealer B, who completed the same drug deal in his own car, is sentenced to two years in prison plus forfeiture of his car valued at USD 20,000. See Vogel J., The Legal Construction that Property Can Do Harm, Reflections on the Rationality and Legitimacy of "Civil" Forfeiture, in Rui, J.P. & Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe, p. 240.

93 For example, the UK. See Pimentel D. Forfeitures revisited: bringing principle to practice in federal court, Nevada Law Journal [Vol.13:1 Fall 2012], p. 10.

Box 3: NCB forfeiture as punishment

In the United States, civil forfeiture actions against instrumentalities of crime have been explicitly recognised, at least in part, as punishment by the jurisprudence of the U.S. Supreme Court[94] triggering the application of criminal procedural safeguards even in the context of civil forfeiture. Given the particular legal framework of the U.S., it is possible for courts to apply civil forfeiture, which amounts to fines (i.e. penalties). In such cases, nevertheless, affirmative defences are implemented and proportionality tests applied.[95]

The situation in Latin America with regard to the applicable standard of the NCB forfeiture of instrumentalities is still mostly unclear. Extinción de dominio practice tends to create a system as broad as that of the United States, allowing for the NCB forfeiture of instrumentalities in a comprehensive manner. Case law reveals a plethora of scenarios: illicit or licit instrumentalities, used or intended to be used, owned by the offender or by third parties, etc.

With the exception of Mexico, whose Extinción de dominio law does not foresee the *extinción* of instrumentalities, several other countries have implemented hard-hitting judicial practices against lawful instrumentalities resulting in a high percentage of this type of assets in the general statistics of the property confiscated via NCB forfeiture.

2. To prevent crimes

NCB forfeiture is also said to play an important role in the prevention of crimes and to deploy deterrent effects to crime. Deterrence is based on the idea that the risk of incurring NCB forfeiture will encourage an appropriate care in the use of one's *own* property to prevent the commission of crimes.

For example, the teenage son who grows marijuana may expose his tolerating parents to the NCB forfeiture of the family home on arguments that it is an instrumentality of the crime of drug trafficking. The preventive nature of NCB forfeiture manifests in that if I stand to lose my house by growing marijuana in the backyard, I have a strong incentive to refrain from doing so or to exercise a better control over the use of my property.

If such duty of care is breached and a crime is committed, the legal consequence attached is that the instrumentalised property will be NCB-forfeited. This serious legal consequence based on the alleged lack of diligence has been analysed by several courts in various contexts but no definitive theory

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94 See Austin v. United States, 509 U.S. 602, 618 (1993) where the US Supreme Court admits the application of the Excessive Fines Clause because *in rem* civil forfeitures, are "at least in part, punishment".

95 Eighth Amendment "excessive fines" (proportionality). Proportionality is a key principle of criminal law and its breach may constitute cruel and unusual punishment violative of Eighth Amendment guarantees, See Atkins v. Virginia, 536 U.S. 304, 311 (2002).

seems to have emerged to date that brings together all the interests at stake. In this rationale, the key concepts and limits that apply in tort law seem to melt and give way to the pragmatic view of confiscation laws. In more than a few cases, the lack of clarity of these conceptual boundaries has led to criticisable decisions whose standards of protection for legal property are not easy to appreciate.[96]

In the U.S., the Civil Asset Forfeiture Reform Act (CAFRA) statute has introduced specific defences such as the "innocent owner" or "excessive fine" clauses to limit arbitrary and punitive deviances associated with the NCB forfeiture of instrumentalities to prevent crime. In Latin America, on the other hand, the courts have not yet been able to reach a uniform approach in this regard, which continues to be a matter of criticism and controversy.

Box 4: Scenario justifying the NCB forfeiture of licit property to prevent future related crimes

Let's say NCB forfeiture targets a building that was modified to cultivate indoor marijuana with thousands of plants, lights and vents conveniently installed for large-scale production of drugs. Distributions of drugs is organised through a tunnel that leads from under the house, through which the growers also take the trash and dispose of it in a public area. The house was purchased with legitimate funds, but the negligent and absentee owner is "consciously" allowing the premises to be used to cultivate marijuana in exchange for a generous rent, for example.

This scenario provides compelling arguments advocating for the NCB forfeiture of the house, based on the idea that it could be used to produce more drugs if the justice system does not act quickly. The circumstances justifying its NCB forfeiture are not merely that the property has facilitated crime in the past, but that there is a substantial likelihood that the house will facilitate crime in the future.[97]

3. To encourage innocent owners to be more diligent in the supervision of the use of their property

NCB forfeiture of instrumentalities is also justified as an incentive for owners to ensure the lawful use of their property by the third parties who actually

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96 A Peruvian Extinción de dominio decision, upheld on appeal, found that a mother who rented her vehicle to her own son to perform informal taxi work failed to exercise due diligence in the supervision of her property which was used by a taxi passenger to dispatch marijuana in retail. Without specifying exactly what the mother should have done to exercise her due diligence and by reversing the burden of proof by asking the mother to prove that she did not fail in such supervision, the court confirmed the forfeiture of the taxi. See, Court of Extinción de Dominio of Arequipa (Peru) stating on appeal 53/2023-Cusco.

97 Example taken from Pimentel D. Forfeitures revisited: bringing principle to practice in federal court, Nevada Law Journal [Vol.13:1 Fall 2012], p. 51.

commit the crime. In this case, NCB forfeiture targets the property rights of persons completely unrelated to the crime.

For this reason, this mechanism cannot be considered as deterrent or punitive (applicable only to the criminal), but as remedial measures directed against an "innocent" owner. This form of NCB forfeiture is only justified by the person's lack of diligence and vigilance in the use of their property by third parties. The level of diligence is decided case-by-case, but the severe effects on the right to property require this form of NCB forfeiture to operate only in extraordinary cases of gross and suspected negligence.

To the extent that this form of confiscation severely impacts the property rights of innocent third parties, there is great controversy about its limits and the level of diligence required of citizens in the oversight of their property. In other words, the absence of criteria and standards allows in some cases the actions of justice to be punitive and to affect the lawful property of innocent persons, without proving the crime or their responsibility in the commission of a crime.

Box 5: Scenario highlighting the complexities of confiscating property from innocent owners

During a regular border control, the police discovered that a bus of passengers was carrying a large quantity of contraband cigarettes in a secret compartment that did not imply a substantive modification of the bus. Although it was established that only the co-driver was involved in the offence, the transport company had to bear the NCB forfeiture of the bus on grounds that it was an instrumentality used to commit a crime. The judge's central argument was that the company had failed to exercise due diligence in the supervision of its employees without clearly and precisely explaining what the company should have done.

On appeal, the judgment was overturned because the company had been able to establish that it had complied with the rules of the art of international passenger transport and with supplementary internal regulations.[98]

4. To remove dangerous instrumentalities from the criminal domain

Courts often use this rationale to justify the NCB forfeiture of property linked to organised crime. In such cases,[99] the NCB forfeiture is said to also have a preventive nature and is considered remedial. It makes it possible to reduce the risk associated with the repeated criminal (ab)use of a dangerous asset

98 Chamber of Appeals specialised in Extinción de dominio of La Libertad, Case n.° 00239-2023-0-1601-sp-ed-01/ Tumbes.

99 This policy motive is commonly used to NCB forfeit the assets of companies running mafia-type businesses (for instance see the Italian anti-mafia law).

and to remove it from the domain of criminals.[100] It therefore implies that the instrumentalities must be objectively dangerous (a common approach to administrative or police confiscation). For example, if a vehicle equipped/ modified to transport drugs is seized in a drug-related investigation and the prosecution only arrests the driver and returns the vehicle to the owner, it may still be used to facilitated future drug trafficking crimes.

This rationale requires the prosecution to justify the forfeiture not merely on the grounds that the property has facilitated crime. On the contrary, the prosecution needs to be able to establish a substantial likelihood that the property will be used to facilitate criminal activity in the future.

NCB forfeiture based on this rationale has been put forward by courts in several contexts linked to organised crime and is promoted as a good practice. Italian preventive confiscation legislation, for instance, provides a useful international experience that Latin American legislators can draw from, due to its similar criminological characteristics relating to the mafia and organised crime.

Box 6: Italian preventive confiscation legislation

Preventive confiscation was introduced in Italy with the Rognoni-La Torre Law (Law of 13 September 1982, n. 664). This followed two murders that symbolically marked the beginning of a coordinated state response against the Mafia in Italy based on the above rationale. Today, preventive confiscation is applied in Italy through an ad hoc procedure regulated by Legislative Decree 6 September 2011, n. 159 (Code of anti-mafia laws and prevention measures).

Preventive confiscation applies to two categories of subjects: a) persons habitually involved in criminal trafficking or who habitually live, even partially, from the proceeds of criminal activities (generic dangerousness); b) persons suspected of belonging to mafia organisations whose aim is to commit specific insidious crimes, including corruption.

Preventive confiscation has the following main characteristics:

- It does not require a conviction. However, it requires a contradictory procedure.
- As it is not a penalty, the statute of limitations does not apply.
- It applies the balance of probabilities standard of proof.
- The guarantee of non-retroactivity does not apply (*Corte di Cassazione*, United Sections, 26 June 2014, n. 4880).
- Preventive confiscation also applies to cases of assets disproportionate to the declared income, where the holder cannot justify their legitimate origin (Art. 20 and 24 of Legislative Decree n. 159/2011).

100 Vogel J. The Legal Construction that Property Can Do Harm, Reflections on the Rationality and Legitimacy of "Civil" Forfeiture Vogel, in Rui, J.P. & Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe, p. 241 f.

- In the event of death of the person who is the subject of the measure, preventive confiscation applies to the heirs or assignees (Art. 18, paragraphs 2 and 3, of Legislative Decree n. 159/2011).
- The procedure of preventive confiscation can be started or continued in absentia (Art. 18, paragraph 4, of Legislative Decree n. 159/2011).
- Preventive confiscation does not constitute an *actio in rem* (*Corte di Cassazione*, judgment of 26 June 2014, n. 4880), but remains a personal preventive measure, since the social danger of the subject is transferred to the property. It also determines the "temporal scope" of preventive confiscation as it only applies to property acquired in the timeframe in which the social dangerousness of the subject has manifested itself (for instance during the time the subject served as public servant or has participated in the Mafia activities).
- The European Court of Human Rights (ECtHR or the Court), has ruled that the stringent procedural rights provided by Articles 6 (2)(3) and 7 of the ECHR do not apply to Italian preventive confiscation (see, for example, ECtHR (1994). Raimondo v. Italy, 22 February 1994. According to the ECtHR, this form of NCB forfeiture is not punitive but preventive and/or compensatory in nature. Consequently, the guarantees of criminal trials do not apply.

3.4 Object of the procedure: *in rem or in personam?*

Most countries actively applying NCB forfeiture laws have declared that they have put in place *in rem* models of NCB forfeiture. This is a type of judicial proceeding commonly used in common law countries that, unlike actions against persons (*in personam*), is brought against the property itself, which can be declared guilty. This legal construction has the purpose, among other things, to identify the subject of the procedure (thing or person) which, in turn, determines the standards and legal protection afforded to defendants in the confiscation procedure. If the object of the proceedings is a thing, procedural rights designed for individuals cannot be brought up by the defence.

From a legal standpoint, such an approach seems difficult to reconcile with principles operating in civil law jurisdictions where guilt remains a personal concept, while *in rem* actions exist in purely civil matters (not linked to crime). In practice, however, the authorities in charge of the enforcement of *in rem* NCB forfeitures in Latin America (mostly civil law countries) rarely limit their confiscation procedures based on such argument. On the contrary, such a practice has in some cases allowed the infiltration of punitive measures into civil confiscation mechanisms. In some Latin American NCB forfeiture laws, it is expressly requested from the prosecution to prove subjective and behavioural elements (typical of criminal actions against persons) in the context of civil actions against things.

Extinción de dominio, for example, has been conceived as *in rem*, but its judicial practice has shown some flexibility as it deploys both *in rem* and *in personam* mechanisms. Some complex forms of Extinción de dominio require in fact the analysis of elements similar to those establishing personal guilt

in criminal proceedings. In such cases, Extinción de dominio has displayed a retaliatory quality as it uses guilt, subjective and behavioural elements as the basis to confiscate lawful property, for instance through value-based confiscation mechanisms.[101]

In contrast, the U.S. civil forfeiture law requires, as a result of its *in rem* nature, the identification of a specific tangible or intangible asset (a thing) on which the action exclusively falls.[102] For that reason, it cannot be directed against substitute or replacement assets. Thus, the NCB forfeiture of subrogate assets and value-based confiscation through NCB forfeiture are not allowed in the U.S.[103] For example, the civil forfeiture of a house purchased with a bribe or of replacement property (e.g. the family house in lieu of the bribe that has been spent) would not be possible in the U.S.

3.5 Independent versus dependent NCB forfeiture regimes

Whether NCB forfeiture actions can or should be organised totally independently from criminal proceedings is a question that does not necessarily concern their adequacy in relation to human rights or other international standards. Both fully independent and subsidiary models of NCB forfeiture can comply with recognised standards depending on how their procedure is conceived, particularly with regard to the introduction of affirmative defences and the application of proportionality tests.

Nevertheless, judicial practice in Latin America has exposed shortcomings in relation to the establishment of NCB forfeiture regimes completely dissociated from criminal proceedings. Judicial practice exposes, for example, cases leading to the double prosecution of defendants or overlapping restraining measures when a defendant is the object of both civil and criminal procedures.[104] In the same vein, shortcomings in MLA matters have emerged in international cases with regard to the use of shared evidence in both procedures (see section 5).[105]

Only some NCB forfeiture actions in Latin America are brought by the same prosecutor in charge of the criminal case, which in principle ensures more

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101 In the U.S, the protection afforded to the defence in NCB forfeiture may trigger the application of criminal safeguards, see Cassella S. (2015). Civil Asset Recovery – The American Experience in Rui, J.P. & Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe, p. 24 and 25.

102 Cassella notes the unusual names of NCB forfeiture cases in the United States: United States v. $65,000 in U.S. Currency or United States v. 2005 Mercedes Benz E500. See Cassella S. (2015). Civil Asset Recovery – The American Experience in Rui, J.P. & Sieber, U. (eds.) Non-Conviction-Based Confiscation in Europe, p. 17.

103 This standard is in line with the FATF (new) Recommendation 4, which allows states to "[...] e) confiscate criminal property and property of corresponding value through conviction based confiscation [...]".

104 In the U.S., under the Fifth Amendment to the Bill of Rights, criminal defendants have the right to remain silent. When they face parallel civil forfeiture actions, they need to decide whether to invoke their right to remain silent in the civil procedure (so that what they says cannot be used against them in his criminal case) but in doing so forego their opportunity to defend their property. CAFRA allows defendants subject to criminal prose cution to ask that a related non-criminal case be stayed until the criminal case is over. See, 18 U.S.C. § 981(g).

105 MLA in criminal matters (speciality principle) can prohibit the requesting state to use of the evidence (for example bank records obtained through coercive penal measures) in NCB forfeiture cases.

efficient coordination of both cases. In contrast, most Extinción de dominio laws claim to be fully autonomous and implement procedures completely independent from the criminal trial against the offender. In some countries, there is a belief that this autonomy allows Extinción de dominio cases to take place completely on the fringes of the criminal aspects of the same case. Not only are clear coordination mechanisms useful, but in relation to due process requirements, they appear to be indispensable to protect the basic rights of the defence.

3.6 Underlying behaviour: crime or something other?

As has been explained, NCB forfeiture laws were initially conceived to comply with the criminal policy objective that "crime does not pay" through civil rules (NCB forfeiture of proceeds of crime). However, NCB forfeiture laws are nowadays more ambitious and target various types of assets in the pursuit of ambitious policy objectives, as pointed out in section 3.2.

One example is the introduction of concepts and principles likely to increase the possibilities to recover illicit assets, for example by redefining the (human) behaviour that produces the illicit proceeds (the underlying behaviour). Indeed, Extinción de dominio introduces the substantive concept of "illicit activity" (as opposed to criminal offence) to include administrative faults or even conducts against social mores.

At the international level, however, standards are much stricter in this area. The behaviour that gives rise to the illicit assets is usually a crime in the penal sense of the term. The standards developed by the FATF refer to serious criminal offences as defined in FATF Recommendation 3.

Extinción de dominio practice relates to criminal offences in the vast majority of countries that implement it. In some countries, the concept of illicit activity has been interpreted[106] so as to include any form of behaviour capable of producing assets.[107] So far however, courts have not provided clear rules determining limits to the concept of illicit activities, making this practice one of the most controversial in the field of Extinción de dominio.[108]

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106 See, for example, Superior Court of Justice of Arequipa, Extinción de dominio Chamber, Resolution No. 20-2023 of October 25, 2023.

107 See for instance Art. 3.1 of the Peruvian Extinción de dominio law: "illicit activity: any action or omission contrary to the legal system [...]".

108 https://www.infobae.com/peru/2023/09/20/congreso-agenda-proyecto-fujimorista-que-evita-incautacion-de-bienes-a-investigados-fallecidos/.

4 NCB forfeiture and human rights

NCB forfeiture has raised concerns in different parts of the world, particularly in developing countries[109] in relation to the adoption of stringent rules disregarding human rights. In legal doctrine and judicial practice, numerous people, including judges,[110] jurists and politicians, have expressed concerns about the effects that some practices have on human rights, particularly in countries with institutional deficits.[111]

This section provides an introduction to the issues resulting from the tension between NCB forfeiture and human rights and assesses these criticisms in the Latin American context.

4.1 Human rights doctrines

Human rights are mandatory meta-principles enshrined in international instruments and in the vast majority of the constitutions of modern democracies.[112] Their protection is ensured at different levels, including through an international judicial apparatus devoted to their defence and interpretation. By becoming parties to human rights treaties, states undertake concrete obligations under international law (*pacta sunt servanda*[113]) aimed at actively protecting these rights. Consequently, internationally protected human rights take precedence over states' legislation, which must comply with human rights tribunals' evolving interpretations (control of conventionality[114]).

The introduction of such doctrines in confiscation law is relevant in view of their:

- **Supremacy.** International human rights treaties take precedence over the States Parties' laws (asset recovery laws included). States Parties to human rights treaties have a binding obligation to implement laws and practices in line with mandatory human rights.
- **Universality.** Human rights are equally applicable to all human beings in all parts of the world. The basic rules established by the ECtHR concerning NCB forfeiture may consequently guide states subject to the jurisdiction of any human rights tribunal.

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109 See, France, G. (2022). Non-conviction-based confiscation as an alternative tool to asset recovery. Lessons and concerns from the developing world. Transparency International Anticorruption Helpdesk, p. 1.

110 See the dissenting opinion of Judge Pinto de Albuquerque in ECtHR (2013). Varvara v. Italy, 29 October 2013: "Under the nomen juris of confiscation, States have introduced measures of criminal prevention ante delictum, criminal sanctions (accessory or even principal criminal sanctions), security measures in the broad sense, ad ministrative measures taken within or outside criminal proceedings and actual civil measures. Faced with this enormous range of responses available to the State, the Court has not yet developed a coherent jurisprudence based on principled reasoning".

111 Thome, G. (2019), Waging war against corruption in developing countries: how asset recovery can be compliant with the rule of law, p. 186 f.

112 Hendry, J. & King, C. (2015). How far is too far? Theorising non-conviction-based asset forfeiture. International Journal of Law in Context, 11(4), p. 9.

113 In Latin: "agreements must be kept."

114 The Inter-American Court of Human Rights (IACtHR) has developed and applies since 2006 the "Convention ality Control doctrine" which seeks to strengthen the supremacy of human rights treaties over domestic law – constitutions included – of the States Parties.

4.2 Jurisprudence of the European Court of Human Rights

The ECtHR has scrutinised the impact of confiscation laws on human rights over the last 30 years[115] and has developed a large body of jurisprudence helpful to conceptualise NCB forfeiture laws with a human rights focus.[116] The ECtHR's jurisprudence is however retrospective and a reaction to the different models of NCB forfeiture existing in States Parties vis-à-vis human rights. These are not directly applicable rules, but rather a set of doctrines balancing the relationship between NCB forfeiture laws and legally protected human rights.

The ECtHR has repeatedly held that the essence of NCB forfeiture is not punitive[117] and that the application of civil standards complies with the European Convention on Human Rights (ECHR).[118] NCB forfeiture is acknowledged as corrective or restorative, or even preventive, rather than of a punitive nature.[119] As a consequence, the applicable standards to its procedure are those of civil proceedings (balance of probabilities).

Yet, whether a State Party confiscation law is punitive or not is autonomously assessed by the Court following its own set of criteria. As a result, the ECtHR has ruled that NCB forfeiture can have punitive elements – which are subject to criminal procedural standards – even if it is classified in national law as a civil measure.[120]

Both penalties and NCB forfeitures are retrospective measures. However, a penalty is inflicted with the purpose of producing a detrimental effect on the individual. In contrast, NCB forfeiture does not seek to impose any harmful

115 The ECtHR has held that non-conviction based confiscation actions are non-punitive, wherefore the application of civil standards complies with the human rights standards under the ECHR, see ECtHR (1994). Raimondo v. Italy, 22 February 1994, para. 43; ECtHR (2001). Phillips v. the United Kingdom, 5 July 2001, para. 52; ECtHR (2002). Butler v. the United Kingdom. Decision as to the admissibility of application no, 41661/98, 27 June 2002, para. 12; ECtHR (1976). Handyside v. the United Kingdom, 7 December 1976, para. 62; ECtHR (2015) Gogitidze and others v. Georgia, 12 May 2015, para. 105, 121.

116 See: ECtHR (2013). Varvara v. Italy, October 29, 2013.

117 See dissenting opinion by judge Pinto de Albuquerque in ECtHR (2013). Varvara v. Italy, October 29, 2013: 'Under the nomen juris of confiscation, the States have introduced ante delictum criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures in rem'.

118 Gogitidze and others v. Georgia, 12 May 2015, para: 121 "[…] the Court reiterates its well-established case-law to the effect that proceedings for confiscation such as the civil proceedings in rem in the present case, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty […]".

119 Cf. Panzavolta M. & Flor R. (2015), A Necessary Evil? "The Italian-Non-Criminal System" of Asset Forfeiture, in: Rui, J.P. & Sieber U. (2015), Non-Conviction-Based Confiscation in Europe. Possibilities and limitations of Rules Enabling Confiscation Without a Criminal Conviction. Duncker & Humblot, Berlin, p. 11 f.

120 Fletcher, G. P. (2007). The Grammar of Criminal Law. American, Comparative and International. Volume One: Foundations, Oxford, cited in Rui, J.P. & Sieber, U. (2015). NCBC in Europe – Bringing the picture together, in: Rui, J.P. & Sieber U. (2015), Non-Conviction-Based Confiscation in Europe. Possibilities and limitations of Rules Enabling Confiscation Without a Criminal Conviction. Duncker & Humblot, Berlin, p. 250; Boucht, J. (2017). The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds. 1st Edition. Hart Publishing, p. 121 f.

burden on the proprietor of the asset subject to NCB forfeiture. It seeks to restore an illegal situation back to the state before the criminal act took place, i.e. it seeks to re-establish the *status quo ante*.[121]

Box 7: The anti-subversive doctrine and the Engels criteria

To determine whether NCB forfeiture is punitive, the ECtHR applies the so-called "anti-subversive (or anti-subversion) doctrine", referring to the 1976 case *Engels and others v. The Netherlands*.[122]

This doctrine establishes a set of criteria to determine whether a measure is a sanction in the penal sense of the term, therefore leading to the application of procedural safeguards as demanded by Art. 6(2) ECHR, imposing minimum defence rights in the context of criminal accusations.[123]

Under this doctrine, the concept of sanction is autonomously interpreted by the Court,[124] which means that it is not bound by the self-definition of NCB forfeiture laws as non-criminal.[125] The anti-subversion doctrine recalls that the autonomous interpretation exists to protect the letter and spirit of international human rights instruments.[126]

121 Rui, J.P. & Sieber, U. (2015). NCBC in Europe – Bringing the picture together, in: Rui, J.P. & Sieber, U. (2015), Non-Conviction-Based Confiscation in Europe. Possibilities and limitations of Rules Enabling Confiscation Without a Criminal Conviction. Duncker & Humblot, Berlín, p. 251. This key criterion is equivalent to that applied in civil cases of 'illegitimate enrichment' and thus an objective indicator of the restorative nature of NCB forfeiture.

122 ECtHR (1976). Engels and others v. The Netherlands, 8 June 1976. para. 81: "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (Article 6, Article 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (Article 6) and even without reference to Articles 17 and 18 (Article 17, Article 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal". See also Rui, J.P. & Sieber, U. (2015). NCBC in Europe – Bringing the picture together, in: Rui, J.P. & Sieber U. (2015), Non-Conviction-Based Confiscation in Europe. Possibilities and limitations of Rules Enabling Confiscation Without a Criminal Conviction. Duncker & Humblot, Berlin, p. 256.

123 In Welch, dealing with the retrospective application of a confiscation measure related to drug trafficking, which was considered by the British legislator as a preventive measure aimed at removing the value of the proceeds from possible future use in the drugs trade, the ECtHR held that confiscation amounted to a penalty within the meaning of Article 7 ECHR, and that therefore it could not have retroactive application. See ECtHR (1995). Welch v. The United Kingdom, 9 February 1995, para. 31. Similarly, the presumption of innocence was established in a case where an NCB forfeiture order issued against assets deriving from crimes for which the applicant had been previously acquitted. According to the ECtHR, this amounted to a determination of guilt without the applicant having been found guilty according to law, see ECtHR (2007). Geerings v. The Netherlands, 1 March 2007.

124 ECtHR (2022), Guide on Article 6 of the European Convention on Human Rights. Right to fair trial (criminal limb). Council of Europe. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.

125 When the law self-defines as criminal, on the contrary, this definition is decisive.

126 ECtHR (2020). Gestur Jónsson and Ragnar Halldór Hall v. Iceland, 22 December 2020, para. 76; ECtHR (2002). Janosevic v. Sweden, 23 July 2002, para. 65; ECtHR (1995). Welch v. the United Kingdom, 9 February 1995, para. 27.

The so-called Engels criteria – named after the 1976 leading jurisprudence – are used today to determine whether NCB forfeiture laws conceal sanctions within-self-proclaimed civil or administrative statutes.[127] States Parties are therefore not free to "decriminalise" their domestic procedures at their own discretion.[128]

The Engels doctrine introduces three key criteria to determine whether a set of proceedings amounts to a "criminal charge."[129] These criteria are to be assessed independently and not necessarily cumulatively.

1. **The domestic classification of the law.** This criterion has a relative weight as the ECtHR examines the "substantive reality" of the statute.[130] That is, the concrete effects that the NCB forfeiture law provokes on human rights.[131]
2. **The nature of the charge.** This criterion takes into account the purpose of the proceedings.[132] Notably:
   - the severity of the measure that the defendant risks incurring;[133]
   - if the law has a punitive or other purpose;[134]
   - if the law is intended to protect interests that society usually protects through criminal law;
   - if the imposition of any measure depends on culpability;
   - how comparable procedures are classified in other States.[135]
3. The third criterion is quantitative and refers to the **severity of the measure** provided for in the NCB forfeiture law. This criterion is relative as the "decriminalisation" of petty fines and their inclusion in administrative confiscation law, for instance, was considered by the ECtHR to be a violation of the ECHR. What seems decisive for the Court is whether or not the statute has punitive characteristics, regardless of its value.[136]

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127 Common rationales classify NCB forfeiture laws as security measures, preventive measures, or as measures not aimed at the punishment of the culprit but at the neutralisation of criminal profit and at the removal of illegal proceeds from the licit economy.

128 ECtHR (1984). Öztürk v. Germany, 21 February 1984, para. 49.

129 ECtHR (1976), Engel and Others, 8 June 1976, para. 82-83. See also, ECtHR (2003). Ezeh and Connors v. The United Kingdom, 9 October 2003, para. 82.

130 ECtHR (2020), Gestur Jónsson and Ragnar Halldór Hall v. Iceland, 22 December 2020, para. 77-78, 85.

131 See also, ECtHR (1984). Öztürk v. Germany, 21 February 1984, para. 51. Also, in ECtHR (1980). Deweer v. Belgium, 27 February 1980, para. 44, the Court noted that it also has to look "behind the appearances and investigate the realities of the procedure in question."

132 ECtHR (2006). Walsh v. United Kingdom (Decision as to the admissibility of application no. 43384/05). 21 November 2006.

133 See also, ECtHR (1980). Deweer v. Belgium, 27 February 1980, para. 56; ECtHR (1983), Minelli v. Switzerland, 25 March 1983, para. 28; ECtHR (2007). Geerings v. The Netherlands, 1 March 2007, para. 41.

134 ECtHR (2007). Dassa Foundation and others v. Liechtenstein (Decision as to the admissibility of application no. 696/05), p. 17. Similarly, the Italian NCB forfeiture regime has been considered as non-criminal despite the fact that it introduces a peculiar system of rather burdensome 'preventive measures', both personal (i.e., limiting the liberty of persons) and patrimonial (i.e., touching upon their property), see Michele Simonato (2017), Confiscation and fundamental rights across criminal and non-criminal domains, Academy of European Law (ERA), p. 8 (note 30 f.).

135 This criterion was used in ECtHR (1995). Welch v. The United Kingdom, 9 February 1995, para. 29. It is also used at the country level for the determination of the non-criminal nature of confiscation by the Tribunals of the Principality of Liechtenstein, Decision N˚1 KG 2005.13-120, 7 February 2007. Available at: https://www.gerichtsentscheidungen.li/default.aspx?z=gTc3_- RVAIAQ8YjzJhdMyB_WdgmSYls36LUJFjQYo0jnhR7xeuy wipr5ux15ytym4yUBql0ipEOmlq-xw9fa0.

136 ECtHR (1984). Öztürk v. Germany, 21 February 1984, para. 54; ECtHR (2006). Jussila v. Finland, 23 November 2006, para. 31

4.3 Applicable human rights to NCB forfeiture

This paper does not seek to resolve the debates around the applicability of human rights doctrines to confiscation statutes. With a more practical focus, it examines the ECtHR's long-standing debate concerning the impact of NCB forfeiture laws on two key legally protected human rights: the right to property and the right to a fair trial. This section seeks to identify some applicable standards and define some conceptual limits to NCB forfeiture.

4.3.1 Property can be subject to "tolerable" limitations

The right to property is protected in Article 1 of Protocol 1 of the ECHR[137] and Article 21 of the American Convention on Human Rights (ACHR or Pact of San José)[138] as well as in other international instruments.[139] The protection offered to property is, however, not absolute and is subject to limitations of various kinds in practice.[140] Property is considered a "qualified right" under human rights doctrines, i.e. a non-absolute right that can be subject to legitimate and tolerable limitations.[141]

The protection offered to property in human rights instruments is of particular relevance when NCB forfeiture statutes target licit property (e.g. instrumentalities or replacement assets); namely, when it allows for the NCB forfeiture of licit property because it has been instrumentalised to commit, or has facilitated in any manner, the commission of a crime.[142] In these cases, property can suffer a tolerable and *proportionate* limitation as the right of citizens to see their property protected by the State is impaired by its criminal use.

Thus, under the form of a "measure of control" – as referred in Article 1 Protocol 1 of the ECHR – States Parties to human rights treaties are allowed to adopt

137 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 1. Protection of property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

138 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 1. Protection of property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

139 See American Convention on Human Rights (ACHR), Article 21 "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to social interest. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

140 Mataga, Z., Longar, M., Vilfan, A. & Grgic, A., (2007), The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols. Council of Europe. Available at: https://rm.coe.int/168007ff55. See also Inter American Court of Human Rights (IACtHR) (2008). Salvador Chiriboga v. Ecuador, May 6, 2008, para. 61.

141 Michele Simonato (2017), Confiscation and fundamental rights across criminal and non-criminal domains, Academy of European Law (ERA), p. 11.

142 Confiscation of the proceeds of crime is not subject to the same protection insofar as the property right is not consolidated in the perpetrator's patrimony in view of its spurious origin.

laws that impose limitations to licit property because it was or will be used to commit crimes.[143] The question of whether these limitations are tolerable, i.e. compatible with the minimum protection offered by the ECHR, is precisely the subject of the analysis of the Court.[144] It scrutinises in particular the legitimacy[145] of the objective pursued by the State Party's NCB forfeiture law and practice.[146]

A tolerable and legitimate limitation on the right to property must comply with the following basic principles: [147]

1. **Legality.** The limitation imposed on the right to property requires a legal basis. The NCB forfeiture law must be adopted following the relevant legislative procedure.
2. **Public interest.** NCB forfeiture must follow a public interest-related concern or significance.[148] The Court has repeatedly ruled that the fight against organised criminality, for instance, is a major criminal policy objective of preponderant public interest.[149]
3. **Proportionality.** NCB forfeiture laws must be applied proportionately.[150] The limitation imposed on the right to property must be adequate and confined to the relevant policy objective.

143 The ECtHR held that "where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" [...] judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1." See ECtHR Gogitidze and others v. Georgia (2015), 12 May 2015, para. 94.

144 ECtHR (2022). Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Council of Europe, para. 149. Available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

145 ECtHR (1994). Raimondo v. Italy, 22 February 1994, para. 30. In this case, the fight against organised crime in Italy was considered a sufficient objective to justify preventive confiscation under the Italian confiscation law.

146 In ECtHR (2001). Phillips v. The United Kingdom, 5 July 2001 the ECtHR affirmed that the far-reaching confiscation approaches provided for in the UK legislation established a regulation that was proportionate to the requirements of the fight against the "scourge of drug trafficking."

147 See ECtHR (2002). Butler v. United Kingdom, 27 June 2002, para. 12.

148 ECtHR (1976). Handyside v. the United Kingdom, 7 December 1976, para. 62; ECtHR (2008). Saccoccia v. Austria, 18 December 2008, para. 86.

149 ECtHR (1994). Raimondo v. Italy, 22 February 1994, para. 30; ECtHR (2008). ECtHR (2008). Saccoccia v. Austria, 18 December 2008, para. 88.

150 ECtHR (2014). Paulet v. The United Kingdom, 13 May 2014, para 68,69; ECtHR (2014). Microintelect OOD v. Bulgaria, 4 March 2014, para. 42,49; ECtHR (2018). G.I.E.M. S.R.L. and Others v. Italy, 28 June 2018, para. 300 and ff.

Box 8: Proportionality and NCB forfeiture

Proportionality has acquired a preponderant role in the ECtHR's case law related to NCB forfeiture.[151] Under the general assumption that property can be subject to tolerable and legitimate limitations, and that these limitations are left to the discretion of States Parties, the Court endorses the application of a proportionality test whenever an NCB forfeiture measure interferes with a fundamental right.

Proportionality tests require the NCB forfeiture to strike a fair balance between competing rights, i.e. the public interest to confiscate criminal assets and the individual's right to peaceful enjoyment of their property.[152] The ECtHR's practice is rather tolerant in the determination of this balance[153] and proportionality is applied with some latitude.[154] Scholars observe that the ECtHR has shown a readiness to display considerable deference towards how states construct and use asset confiscation as a means of crime control.[155]

4.3.2 The right to a fair trial in NCB forfeiture procedures

Art. 6(1) ECHR[156] grants every person (or legal entity) the right to a fair trial.[157] Under this provision a defendant who faces either "allegations on civil rights and obligations" or "criminal charges" is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

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151 Michele Simonato (2017), Confiscation and fundamental rights across criminal and non-criminal domains, Academy of European Law (ERA), p. 11.

152 The ECtHR applies a less stringent proportionality test when the confiscation measures imposing limits to property are part of a broader criminal policy strategy against serious crimes, see ECtHR Gogitidze and others v. Georgia (2015), 12 May 2015, para. 108. 53 and 109-113.

153 ECtHR (1994). Raimondo v. Italy, 22 February 1994, para. 30: "The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organisation" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued."

154 Blanco, I. (2008). Universal Jurisdiction: Section IV International Criminal Law. Revue internationale de droit penal, p. 62. Available at: https://www.cairn.info/load_pdf.php?ID_ARTICLE=RIDP_791_0059&download=1.

155 Boucht, J. (2017). The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds. Hart Publishing, Oxford, p 53.

156 ECHR, Article 6. (Right to a fair trial): "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

157 See also Article 8 ACHR (Judicial Guarantees): "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any criminal accusation made against him, or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

The concept of a “fair trial” in Article 6(1) ECHR seems broader than the one in Article 8 ACHR, which refers only to “judicial guaranties”. Yet the basic content of both provisions, their structure and scope are similar. Both, Article 6(2) ECHR and Article 8(2) ACHR allocate additional safeguards to individuals subject to criminal proceedings (referred to as “criminal charges” in the wording of the human rights conventions[158]) such as the presumption of innocence and other classic defence rights[159] aiming at protecting the accused persons from the State’s interference in their personal liberty.

Reflecting the above, the protection offered in human rights instruments differentiate between two “fair trials” regimes or “limbs” defining different applicable standards[160]: a procedural set of (stringent) rules applicable to criminal proceedings and another, more “flexible” set designed to regulate civil or administrative procedures. Most NCB forfeiture laws are governed by the civil limb of the fair trial concept[161] as they are not designed to inflict sanctions[162] but to re-establish the *status quo ante*,[163] excluding retaliatory or punitive elements.[164]

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158 ECtHR (2014) Natsvlishvili and Togonidze v. Georgia, 29 April 2014, para. 103.

159 For example, the right to obtain a legal representation or interpretation, the right to supress evidence, among others.

160 ECtHR (2012). Gregačević v. Croatia, 10 October 2012, para. 49.

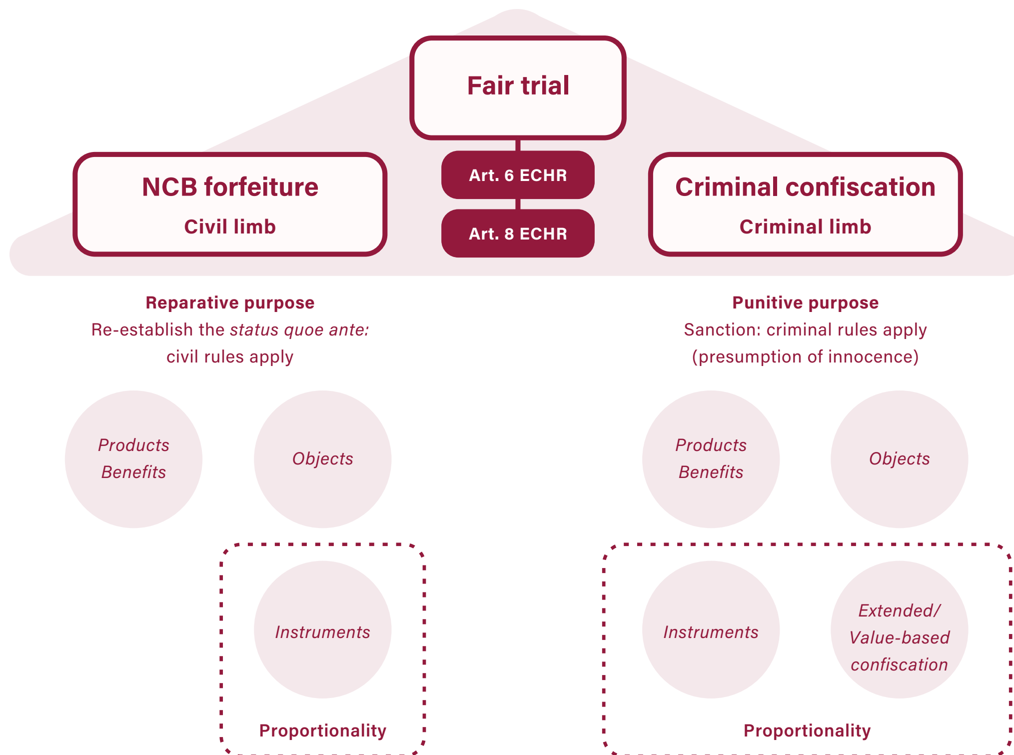
161 ECtHR (2015). Gogitidze and others v. Georgia 12 May 2015, para. 125: “[…] the forfeiture of property ordered as a result of civil proceedings in rem, without involving the determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of the provision in question [referring to the presumption of innocence as per Art. 6(2) European Convention on Human Rights].”

162 ECtHR (2015). Gogitidze and others v. Georgia, 12 May 2015, para. 105. In ECtHR (2002); Butler v. United Kingdom, 27 June 2002, para. 9: “the forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It follows that the proceedings which led to the making of the order did not involve ‘the determination […] of a criminal charge.” See also: ECtHR (1986). AGOSI v. the United Kingdom, 24 October 1986, para. 65; ECtHR (1994). Raimondo v. Italy, 22 February 1994, para. 43; ECtHR (2001). Riela v. Italy, 4 September 2001.

163 ECtHR (1995), Air Canada v. United Kingdom, 05 May 1995, para. 54.

164 See for instance ECtHR (1995). Welch v. United Kingdom. App n. 1744090, 09 February 1995, para. 28.

Figure 1: Assets subject to NCB forfeiture and criminal confiscation under the ECtHR's concept of a fair trial



4.3.3 Non-retroactive application of NCB forfeiture laws (*excursus*)

The principle of non-retroactivity prohibits the enforcement of *ex post facto* laws, i.e. laws that would allow individuals to be punished for conducts that were not criminal at the time they were carried out. Retroactivity is a manifestation of the principle of legality and may be triggered in confiscation law, thereby imposing a non-retroactive legal basis.

The definition of the applicable standard with regard to this principle is of particular relevance in the Latin American context as many countries seek to adopt NCB forfeiture laws to recover assets originating from crimes that occurred prior to the entry into force of such laws. Moreover, the non-retroactive prohibition argument has often been used to demonstrate the non-compliance of NCB forfeiture laws with protected human rights.

The long-established jurisprudence of human rights courts applies the same standard relevant to the concept of fair trial: the prohibition of retroactivity applies only to procedures inflicting sanctions and excludes those seeking to re-establish the *status quo ante*. In both cases a key factor is the determination of whether the NCB forfeiture law is a punishment deserving higher standards of proof or a *simple* civil action.

5 NCB forfeiture and international judicial cooperation

The serious crimes that NCB forfeiture aims to combat are often transnational in nature[165] and their prosecution might require the intervention of two or more states. An NCB forfeiture statute must consequently encompass clear rules allowing for efficient international cooperation.

Despite the fact that treaty law obliges countries to cooperate to the "greatest extent possible", recent global studies[166] expose shortcomings[167] in the international prosecution of NCB forfeiture cases, which often leads to the impossibility to perform MLA. These loopholes have appeared in relation to two main forms of judicial cooperation in criminal matters: MLA in obtaining preventive measures (seizures) and the international enforcement of judgments.[168]

While both forms of international judicial cooperation are mandatory in criminal confiscation,[169] in the context of NCB forfeiture, international cooperation largely depends on the discretion of the state asked to execute a foreign request of judicial assistance (the requested state).

Box 9: Extinción de dominio and mutual legal assistance

Extinción de dominio practice reveals a few examples of successful bilateral cooperation in cross-border seizures and other investigative measures. In 2023, the enforcement of a final Guatemalan decision of Extinción de dominio targeting assets of a politically exposed person (PEP) was "homologated" by the Supreme Court of Honduras.[170] This positive example of the use of the Extinción de dominio in cases of transnational political corruption adds to

165 Most preambles, explanatory reports and other official commentaries and documents on confiscation laws argue that they are necessary to address serious and international crimes. See for instance: Parlamento Latinoamericano y Caribeño (2018). Proyecto de ley modelo sobre extinción de dominio de Panamá. Available at: https://parlatino.org/wp-content/uploads/2020/03/PLM-extincion-dominio.pdf.

166 Betti, S., Kozin, V., Brun, J-P. (2021). Orders without borders: Direct enforcement of foreign restraint and confiscation decisions. International development in focus. Washington DC, World Bank. 55.

167 Initial shortcomings in the MLA procedure generally led to a decision refusing to perform MLA in the requested state, which is generally based on human rights and rule of law considerations, e.g. that foreign procedures do not meet the requested state's standards regarding fair trial. See for an example the Swiss Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (IMAC) Article 2 and Article 74a which expressly mentions human rights deficits in the requesting state as a reason impeding MLA. These provisions are explained at https://www.bj.admin.ch/dam/rhf/en/data/strafrecht/wegleitungen/asset-recovery-e.pdf. IMAC Article 74a is the main provision in the Swiss legal framework to effect foreign proceeds of crime returns.

168 Betti, S., Kozin, V., Brun, J-P. (2021). Orders without borders: Direct enforcement of foreign restraint and confiscation decisions. International development in focus. Washington DC, World Bank. 59 ff.

169 Art. 54(1) UNCAC.

170 Supreme Court of Guatemala (2023), Juzgado de letras de privación de dominio de bienes de origen ilícito con jurisdicción nacional, Nota de Remisión n. 339-2023.

the list of corruption-related accounts recovered by Peru in recent years from international financial centres such as Switzerland and Luxembourg.[171]

The enforcement of provisional measures in relation to illicit assets located abroad has become more frequent in Extinción de dominio. Countries such as Panama, Spain, Andorra and Chile, which do not have an equivalent Extinción de dominio law, have been able to enforce such requests from other states through MLA in criminal matters.[172]

5.1 NCB forfeiture and the concept of "criminal matters"

As NCB forfeiture can exist in criminal, civil or administrative matters, the question has arisen as to which would be the best channel for cooperation in international cases. Contrasting responses are seen in the Latin American judicial practice, which have their origin in the misconception that the application of civil standards would trigger the use of international cooperation in civil matters. The Extinción de dominio Model Law, and several Extinción de dominio country laws, seem to promote the creation of a channel of judicial cooperation between countries implementing this type of law.

NCB forfeiture targets assets originating from criminal offences that are normally dealt with through cooperation in criminal matters in the international context.[173] It is widely admitted today that NCB forfeiture laws play a key auxiliary role to criminal prosecution and are *de facto* law enforcement tools.[174]

Although various rationales are frequently evoked, in practice, NCB forfeiture laws objectively assume a function ordinarily dealt with by criminal law.[175]

Against this backdrop, international judicial practice generally admits that the concept of "criminal matters" (as opposed to the narrow concept of criminal proceedings) in international judicial cooperation also encompasses the possibility to cooperate in NCB forfeiture international procedures.[176]

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171 Several Peruvian Extinción de dominio judgements have been successfully enforced in Switzerland and Luxembourg through MLA in criminal matters, see footnote 34.

172 In response to an MLA request from the Peruvian authorities, the judge of the 5th Court of Guarantees of Santiago (Chile), ruling on criminal matters, ordered on 25 November 2022 the seizure and registration of a vehicle involved in a Peruvian investigation of Extinción de dominio.

173 There is, on the other hand, strong interest in using cooperation in criminal matters, which is mandatory and generally free of charge, whereas civil cooperation is generally costly.

174 Swiss Federal Office of Justice (2009). International Mutual Assistance in Criminal matters, Guidelines, p. 62. See also Council of Europe (2005). Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, p. 1 and 11. Available at: https://rm.coe.int/16800d3813.

175 Switzerland, for example, has enforced several Peruvian forfeiture decisions using the bilateral Swiss-Peruvian treaty on criminal matters, see for an example the Decision of the Swiss Federal Criminal Tribunal of April 4, 2023, DFT RR.2021.202 (Moshe / Rovno Ltd. case).

176 See a similar interpretation in Swiss Federal Office of Justice (2009). International Mutual Assistance in Criminal matters, Guidelines, p. 9.

5.2 International enforcement of NCB forfeiture judgments

In treaty law,[177] a requested state that has received a request from a requesting state for the execution of a final confiscation order targeting criminal assets situated in its territory shall, "to the greatest extent possible" within its domestic legal system, do one of the following:

- Submit the foreign request to its competent authorities, with a view to giving effect to it (direct enforcement).
- Submit the foreign request to its competent authorities to obtain an order of confiscation and, if such order is granted, give effect to it (indirect enforcement).

This model of international cooperation is mandatory only with regard to criminal confiscation. UNCAC, however, has cautiously introduced semi-binding legal provisions specifically designed to guide MLA procedures involving NCB forfeiture in international corruption cases.[178]

More recently, an important development has taken place in the area of soft law. The revised FATF Recommendation 38 (Mutual Legal Assistance: Freezing and Confiscation[179]) introduces the obligation to cooperate in NCB forfeiture international procedures. Its interpretative note 1 indicates that the obligation to cooperate includes both requests for seizure and search for evidence and requests for the enforcement of foreign NCB forfeiture judgements.

Interpretative note 2 also promotes the "direct" execution of foreign decisions so that they are "merely" enforced in the requested State. The interpretative note specifies that requested States "should be able to rely on the findings of fact in the foreign order" and that "enforcement should not be made conditional on conducting a domestic investigation". The model of cooperation adopted by the FATF Recommendation operates within the field of international judicial cooperation in criminal matters.

Our research into this matter shows that most Latin American states cannot directly enforce foreign judgements and must instruct their authorities to (re) open national NCB forfeiture cases to obtain a confiscation order domestically. In such cases, prosecutors often re-litigate the cases, with all the evidentiary difficulties that entails. In a recent international case between Peru and Mexico, Peru requested in 2020 the enforcement of a final Extinción de domino judgment directed against a corrupt account of a Peruvian PEP in the Mexican financial centre.[180] The Mexican prosecutor's office specialised

177 This formula is used in all United Nations conventions, see for instance Art. 55 (1) UNCAC.

178 Judicial cooperation in NCBF-cases is considered a "good practice" under the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (see CAC/COSP/IRG/2021/7).

179 Recommendation 38 reads: "Countries should have in place measures, including legislative measures, to take expeditious action in response to requests from foreign countries seeking assistance in identifying, tracing, assessing, investigating, freezing, seizing and confiscating criminal property and property of corresponding value. These measures should also enable countries to recognize and enforce foreign freezing, seizure or confiscation orders [...]."

180 See https://www.gob.pe/institucion/mpfn/noticias/544232-fiscalia-de-extincion-de-dominio-recuper-mas-de-1-5-millones-de-dolares-de-cuenta-bancaria-del-ex-ministro-victor-malca-villanueva/.

in Extinción de domino opened a local case in 2021; at the time of writing the case remains stalled due to, among other things, an alleged lack of evidence regarding the corruption offence that occurred in Peru. Although corrective measures are being put in place in both requesting and requested states, the Mexican enforcement mechanism does not seem to comply with the new standard set out in the recent amendment of FATF Recommendation 38.

Box 10: Enforcement of NCB forfeiture in transnational corruption cases: the "obligation to consider"

UNCAC[181] requests States Parties to "consider taking such measures as may be necessary to enable the confiscation of such property without a conviction, in cases where the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases." The model of NCB forfeiture postulated in UNCAC seems to refer to the subsidiary model examined above.

The obligation to consider under UNCAC is a *quasi-binding* obligation for the requested State.[182] The UNCAC Official Commentary notes that Art. 54(1)(c) introduces limited legal obligations for requested States,[183] as it incorporates an "obligation to consider" encompassing a mandate to evaluate, in good faith, the execution of the request in accordance with its domestic law and its international commitments.

The "obligation to consider" generally involves a *prima facie* analysis of the foreign MLA request and the requirement to provide a sufficient basis for a decision to refuse cooperation.[184] A blunt refusal does not seem to be in line with the international commitments under UNCAC (or FATF Recommendation 38).

In the same vein, the International Court of Justice (ICJ) has confirmed in *Djibouti v. France*[185] that requested states maintain the right to refuse MLA, but their discretion must be exercised only in exceptional cases (*ultima ratio*).

The international standard therefore requires that MLA be provided to the "fullest extent possible", in good faith, and that a refusal may be made in limited and justified occasions only.

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181 See Art. 54 UNCAC "Mechanisms for recovery of property through international cooperation in confiscation."

182 United Nations Office on Drugs and Crime (UNODC) (2009). Technical Guide to the United Nations Convention Against Corruption. United Nations, New York, p. 207 f. Available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf.

183 Rose, C., et al. (2019). The United Nations Convention Against Corruption: a commentary. 1st Edition. United Kingdom: Oxford, p. 12.

184 United Nations Office on Drugs and Crime (UNODC) (2012). Manual on Mutual Legal Assistance and Extradition, p. 70. Available at: https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_S.pdf.

185 International Court of Justice (2006). Certain questions of mutual assistance in criminal matters, Case Djibouti v. France. Judgment, I.C.J. Reports, p. 177. Available at: https://www.icj-cij.org/sites/default/files/case-related/136/136-20080604-JUD-01-00-EN.pdf.

6 Concluding remarks

The purpose of this paper is to encourage Latin American legislators in their efforts to fight economic criminality and to provide them with the technical arguments for adopting effective and fair NCB forfeiture regimes.

The discussion above shows that it is possible to strike a fair balance between the various interests at stake and to adopt NCB laws compatible with fundamental rights. To this end, this contribution has explored some elements of a broader, more complex and controversial discussion regarding the introduction of human rights doctrines into the debate on asset recovery laws.

Recent studies and international case law in various parts of the world have revealed that compatibility with human rights doctrines is an essential element of the legitimacy and sustainability of asset recovery laws in general. In the case of NCB forfeiture, it is additionally a key element in the area of international judicial cooperation and a critical element that speaks in favour of its general acceptance as a suitable asset recovery tool.[186]

In the search for an adequate NCB forfeiture law for Latin American countries, this working paper concludes that Extinción de dominio appears to be a suitable option to consider. Over several decades, a robust body of rules has arisen that strike what can be considered an appropriate balance between limitations imposed on individuals' rights and criminal policy objectives. Extinción de dominio is a versatile piece of legislation that can be adapted to various criminological environments. Initially inspired by the U.S. civil forfeiture law, Extinción de dominio has undergone several changes in its incorporation into legal frameworks of countries with a civil law tradition. It is fair to conclude that nowadays, Extinción de dominio is one of the most comprehensive NCB forfeiture laws worldwide, combining two approaches to the same subject: the pragmatism of the Anglo-Saxon world (common law) and the stringent safeguards granted to individuals in countries with a civil law tradition.

However, Extinción de dominio practice is not aligned in the Latin American countries that have enacted it. Certain countries do not sufficiently use Extinción de dominio or reduce its scope of application to just a few crimes. Others, in turn, have implemented practices that have raised criticism with regard to human rights, particularly in terms of proportionality. In several countries, Extinción de dominio continues to be the object of intense constitutional debate, while successes and setbacks are regularly reported.[187]

In sum, while Extinción de dominio continues its expansion in Latin America, shortcomings in its application persist. While new standards emerge (such as those of the FATF or human rights tribunals), the Model Law should be

186 See for an example the Decision of the Swiss Federal Criminal Tribunal of April 4, 2023, DFT RR.2021.202 (Moshe / Rovno Ltd. case).

187 The Peruvian Ombudsman recently filed an action of unconstitutionality against the Peruvian Extinción de dominio law, arguing that some of its provisions violate human and constitutional rights. See https://larepublica.pe/politica/judiciales/2024/08/08/defensor-del-pueblo-josue-gutierrez-quiere-traerse-abajo-la-ley-de-extincion-de-dominio-tribunal-constitucional-691474.

adapted to guide states wishing to implement it while guaranteeing the sustainability and legitimacy of the law. Whether or not Extinción de dominio will become a global tool depends on whether its standards are equally recognised around the world.

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