Good Practices

IN ACCELERATING THE CAPTURE OF ILLICITLY-ACQUIRED ASSETS

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Foreword

ACTING DIRECTOR, UNICRI
Leif Villadsen

Asset recovery is undergoing a transformative shift, driven by the imperative to ensure that crime does not pay and that justice is served. This report delves into the various mechanisms that States can adopt to accelerate the confiscation of illicitly-acquired assets, showcasing the importance of asset recovery in the fight against organised crime and corruption, and in supporting development.

Asset recovery is not merely a legal exercise; it is a moral and economic necessity. The ability to swiftly and effectively recover assets stolen by criminal enterprises or corrupt officials has far-reaching implications. It deprives criminals of their ill-gotten gains, disrupts illegal activities, and restores resources to their rightful owners - often the State. In doing so, it strengthens the rule of law, promotes transparency, and fosters public trust in the justice system.

Countries leading the way in asset recovery have demonstrated innovative and robust approaches that serve as models for others. The United Kingdom and the United States have long been at the forefront, utilising civil asset forfeiture and other non-penal modalities to swiftly tackle organised crime. Ireland's collaborative efforts between tax and social welfare authorities exemplify the power of coordinated, multi-agency action. Italy's focus on extended confiscation and property-based confiscation highlights the breadth and depth of effective asset recovery strategies.

The United Nations conventions – UNCAC and UNTOC – provide a robust framework for these efforts, endorsing the adoption of such mechanisms and encouraging global cooperation. The success stories from countries like Peru and Colombia, which have embraced these practices, further illustrate the potential for significant impact.

UNICRI is strongly committed to supporting the adoption of these practices through advisory services, technical expertise, and training programs designed to promote legal reforms and enhance capacities. By leveraging its unique position and extensive experience, UNICRI helps countries build the necessary legal architecture and expertise to implement effective asset recovery measures.

As we continue to confront the evolving challenges of transnational crime and corruption, the insights presented in this report serve as a call to action. It is incumbent upon all States to embrace these best practices, ensuring that we not only uphold the principles of justice but also pave the way for a more equitable and secure world, contributing significantly to the achievement of the UN 2030 Agenda and its Goal 16 on peace, justice, and strong institutions.

Leif Villadsen

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Acronyms and Abbreviations

CAB: Criminal Assets Bureau

CAFRA: Civil Asset Forfeiture Reform Act

CARIN: Camden Asset Recovery Interagency Network

CBP: Customs and Border Protection

DHS: Department of Homeland Security

ECA: Economic Crime Act

EGP: Egyptian Pound

EU: European Union

EUR: Euro

FATF: Financial Action Task Force

FIU: Financial Intelligence Unit

FRISCO: Social Inversion and Fight against Organised Crime

GBP: British Pounds

ICE: Immigration and Customs Enforcement

IFF: Illicit Financial Flows

MLA: Mutual Legal Assistance

NCA: National Crime Agency

NCB: Non-Conviction-Based

OECD: Organisation for Economic Co-operation and Development

OSINT: Open-Source Intelligence

PEP: Politically Exposed Person

RUA: Recognition of Unexplained Assets

SAE: Sociedad de Activos Especiales

SWBO: Social Welfare Bureau Officers

UAH: Ukrainian Hryvnia

UK: United Kingdom

UNCAC: United Nations Convention against Corruption

UNICRI: United Nations Interregional Crime and Justice Research Institute

UNTOC: United Nations Convention against Transnational Organised Crime

US: United States

USD: United States Dollar

USSS: United States Secret Service

UWO: Unexplained Wealth Order

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SECTION 1

Introduction

The seizure, confiscation and recovery of illicitly-acquired assets are essential mechanisms to produce a tangible impact in the fight against both organised crime and corruption, at both the national and cross-border levels. The phrase, “follow the money” is no longer a simple *cliché*, but an *ethos* now often considered more important than obtaining a criminal conviction against a particular individual or group. Taking away the financial incentive for involvement in many criminal activities is considered by many asset recovery specialists to be the most effective manner to address illicit businesses, corruption, and other Illicit Financial Flows (IFFs). This includes, for example, activities such as drug trafficking, human trafficking, arms trafficking, counterfeiting, and money laundering, as well as less-often cited (but of increasingly topical importance) tax evasion and cross-border trade mis-invoicing.[1]

With the growing impact of IFFs on national and global markets, agencies have been forced to reimagine the fundamental approach to deterring illicit activities. Law enforcement and intelligence agencies increasingly recognise that effective deterrence should not be solely reliant on criminal convictions but should also target the true aim of many criminal acts: making a profit. Historically, the primary method to deprive criminals of assets acquired through nefarious means has been focused on ‘post-conviction confiscation’, although such convictions often take years to obtain.[2] With the rapid growth of the international drug trade, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) set out to establish the framework for ‘post-conviction confiscation’ in order to “deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing”.[3] The Convention sought to “eliminate the root cause of the problem”, including “the enormous profits derived”.[4] As criminal confiscation developed, driven by the growth of organised crime and drug trafficking, criminal actors became more adept at concealing their profits with sophisticated cross-jurisdiction banking practices.

The United Nations Convention against Transnational Organised Crime (UNTOC) further expanded the concept of confiscation by encouraging States to “consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.”[5] With growing support for ‘post-conviction confiscation’, countries endeavoured to expand their capabilities to recover criminal assets. In 2003, the United Nations Convention against Corruption (UNCAC) identified ‘Non-Conviction-Based (NCB) Confiscation’ by establishing, on the international stage, the importance of allowing the confiscation of property “without a criminal conviction in cases in which the offender cannot be

prosecuted by reason of death, flight or absence, or in other appropriate cases."[6] On a national level, non-conviction-based forfeiture[7] had already gained popularity in countries such as the United States, Antigua and Barbuda, and the United Kingdom.

Despite the endorsement of the rationale for promoting NCB forfeiture mechanisms on the international, regional, and national levels, and the expanding acknowledgement of the destructive impact of illicit financial flows – such as State assets being corruptly diverted away from needed infrastructure and other community services – many jurisdictions have been slow to adopt effective modalities to capture illicitly-acquired assets. In light of this, the United Nations Interregional Crime and Justice Research Institute (UNICRI) has developed this study on *Good practices in Accelerating the Capture of Illicitly-Acquired Assets*, to assist both policy makers and case practitioners in adopting and implementing such practices to not just follow the money, but also to efficiently and effectively capture it.

The information gathered for this report was collected not only through desk research but also through feedback from asset recovery practitioners, as well as operational practitioners and policymakers in various fields, including non-conviction-based forfeiture, unexplained wealth, plea bargaining (reconciliation), extended confiscation and value-based confiscation, and the general area of illicit financial flows.

1.1 DEFINITION AND IMPACT OF ILLICIT FINANCIAL FLOWS (IFFS)

Although there is no universally established definition of the term 'Illicit Financial Flows', the concept first emerged in the 1990s to refer to capital flight. Since then, the term has evolved to encompass a diverse array of activities and behaviours which are inherently complex and multifaceted.[8] The term IFFs is generally used to reference the cross-border movement of assets associated with illegal activity or more explicitly, money or other assets that have been illegally acquired.[9]

These assets can be generated through activities such as corruption, illicit commerce, or other serious crimes including, but not limited to, human and drug trafficking, smuggling, counterfeiting, racketeering, and terrorist financing.[10] The loss of capital due to corruption and illegal activities has catastrophic implications for development and basic societal needs and produces a growing deficit of trust between people and political institutions, as well as trust in the rule of law.

Such stolen funds result in the degradation of public infrastructure and mechanisms for basic health and education – this means fewer clinics, hospitals, schools, and fewer teachers, nurses and doctors, among others.[11]

Illicitly-acquired assets often undergo a complex process of transfers through financial institutions, both within and across national borders, in an effort to make them difficult to trace and recover. Most countries lack the operational or human resource capacity to effectively trace and recover such assets. In addition, few, if any, prosecutors in most countries possess forensic financial training to hunt down illicitly-acquired assets, and law enforcement offices have traditionally allocated too few resources to building up capacities for asset tracing. Instead, they have continued to operate within the traditional paradigm of focusing solely on establishing the culpability of individuals involved in criminal activity.

Strong legal mechanisms and adequate budgeting which empower investigators and prosecutors (often with the support of forensic financial analysts) to trace, seize, confiscate, and recover assets can dramatically influence a country's ability to combat organised crime activity and illicit financial flows. In cases involving the cross-border flow of illicitly-acquired assets, differences in evidentiary and procedural standards set by foreign jurisdictions may produce additional obstacles – what counts as adequate proof in Country X may not be sufficient for Country Y.

A survey conducted by the Organisation for Economic Co-operation and Development (OECD) between 2010 and 2012 on frozen and returned assets revealed that an estimated USD 1.4 billion of corruption-related assets had been frozen, while less than 11% of that figure (only USD 147 million) had actually been returned to their home countries.[12] In response to such muted recovery figures, many countries have adopted legal mechanisms to assist enforcement officials and prosecutors to be more effective in seizing and confiscating illicitly-acquired assets, and addressing IFFs, both at the national and cross-border levels.

THE PROCESS OF ASSET RECOVERY 1.2

Studies conducted on asset recovery reveal that law enforcement officials (including prosecutors) and judiciaries apply a variety of mechanisms to freeze, confiscate, and return illicitly-acquired assets. These mechanisms go beyond the traditional concept of relying solely (and waiting for) criminal convictions to recover assets. Countries have established accelerated mechanisms to seize and confiscate illicitly-acquired assets, such as civil confiscation, plea bargaining (reconciliation or negotiated settlement of criminal cases), extended confiscation and value-based confiscation, as well as expanded powers of tax and customs authorities. Although the underlying legal process varies on a case-by-case basis (and from jurisdiction to jurisdiction), the lifecycle of recovering stolen assets remains similar.

Deploying intelligence collection officers and analysts is often the first step to recovering stolen assets. During this phase, officials collect evidence, analyse leads, and trace the flow of money and property suspected of being the product of illicit activity. This can involve the review of Open-Source intelligence (OSINT) and government databases, such as vehicle registries, land registries, banking information, tax and customs databases managed by relevant governmental entities.

Special investigative techniques may also be employed depending on the need and available (albeit limited) resources; these techniques often require the authorisation of either a senior prosecutor or judge, or both, depending on the level of intrusiveness (e.g. electronic surveillance, search and seizure orders, bank account monitoring orders, etc.).

While officials investigate potential cases related to illicitly-acquired assets, it may be necessary to secure such assets to prevent or mitigate their movement, destruction, or disappearance. Considering this, orders for the freezing or seizure of such assets may be pursued.

Due to the nature of IFFs and other illicitly-acquired assets, as well as the common tactics used by criminal enterprises to conceal assets in foreign jurisdictions, international cooperation (e.g., obtaining an order for the freezing or seizure of such assets in that foreign jurisdiction) through Mutual Legal Assistance (MLA) is vital. However, it remains underutilised in the asset recovery process. In some cases, cross-border task forces have been established and have proven to be highly productive in capturing and sharing significant amounts of illicitly-acquired assets among countries.

Additional international cooperation, such as the need to gather evidence on those suspected of money laundering or other IFFs, may also be required prior to the seizure of assets. The extensive reach of personal and criminal networks may lead to the identification of additional assets, including those held by entities such as shell companies. In this context, the use of existing formal cross-border networks, such as the Egmont Group for Financial Intelligence Units, or informal networks, such as the Camden Asset Recovery Interagency Network (CARIN), has proven invaluable for facilitating cross-border cooperation.

SECTION 2

The UNCAC and UNTOC: provisions Related to Asset Recovery

Establishing a diverse array of legal mechanisms to pursue criminals and recover illicitly-acquired assets is essential to fighting both corruption and organised crime. Such measures not only eliminate the financial motivations behind criminal behaviour but also deprive criminals of their ill-gotten profits. The United Nations Convention against Corruption (UNCAC) introduced a broad framework of measures that States should or, in some instances must, implement to capture assets linked to acts of corruption.

Principal among the provisions, related to the recovery of illicitly-acquired assets within the UNCAC, are found in Articles 51 through 59. These include, for example, obligations to identify the true or beneficial owners of illicitly-acquired assets (Art. 52, par. 1),[13] the obligation to establish an effective financial disclosure system for public officials (Art 52, par. 5),[14] the obligation to recognise and give effect to orders for confiscation issued in foreign jurisdictions, including, where possible, orders for confiscation not based on a criminal conviction (Art. 54, par. 1(a) and 1(c)),[15] and (of course) the obligation to return any confiscated assets to the victim jurisdiction (Art. 57).[16] The UNCAC, however, does not prohibit two States from entering into agreements, on a case-by-case basis, to (where useful) share some of the assets, as a means to promote and incentivise cross-border cooperation (Art. 57, par 5).[17]

Similarly, Article 12 of the United Nations Convention against Transnational Organized Crime (UNTOC) highlights that:

> *States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention. (Par. 1)*

Paragraphs 2 and 5 of Article 12 also require States to adopt similar measures for the freezing and seizure of illicitly-acquired assets, as well as any income derived from such.

Perhaps among the most important provisions of Article 12, in terms of modern-day asset recovery, is found in Paragraph 7:

> *States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of judicial and other proceedings.*

This provision, significantly underutilised by many States, does not necessarily require States to reverse the burden of proof in non-confiscation-based forfeiture cases. States may, and should, still require prosecutors (whether in criminal or civil proceedings) to meet a minimum burden, demonstrating that any assets subject to seizure and confiscation are more likely than not linked to some form of criminality. This standard is common in most jurisdictions that have adopted civil confiscation procedures. Once this burden is met, then the burden shifts to anyone wishing to claim rightful title to the property in question, requiring them to show that they acquired the assets lawfully and in good faith.

It is important to note that Paragraph 7 of Article 12 does not obligate States to require individuals to prove the lawful origin of their assets in criminal proceedings. As evidenced in multiple jurisdictions worldwide, requiring individuals to demonstrate the lawful origin of their assets (once the State has met its burden of proof) can equally be done in civil proceedings entirely independent from any criminal proceedings.

Additionally, Article 12, Paragraph 8 of the UNTOC highlights to States that any provisions within national law should not prohibit third parties who acquired such property from demonstrating to the court that they did so in good faith, in which case their assets would not be subject to confiscation. This may include, for example, an individual who pays fair market value for a vehicle or real estate from a drug trafficker, without having any reason to suspect that the seller was involved in drug trafficking. Naturally, such "good faith" would, and should, be called into question if the individual did not pay fair market value, or otherwise would reasonably have known that the seller was involved in criminal activity.

Despite this fairly robust framework to recover assets, actual practice remains complex and elusive, and is not yet standard practice in most countries. This complexity often stems from a lack of inter-institutional coordination and cooperation. In some jurisdictions, police may be reluctant to share credit with prosecutors, banks (fearing the loss of valuable clients) may resist cooperating with police or prosecutors, and judges may be unwilling to order banks to disclose financial records of individuals suspected of money laundering. Additionally, information provided by financial intelligence units (entities that receive reports of suspicious financial transactions) may not be in a format that is useful (actionable) for police or prosecutors. In some jurisdictions, institutional "turf wars" may hinder the establishment of inter-institutional task forces to address major cases of corruption or organised crime. Aside from these issues, national laws may result in overlapping mandates with respect to the freezing, seizure, and confiscation of illicitly-acquired assets, as well their management when seized or confiscated.

Naturally, some of the abovementioned issues are further complicated by a lack of adequate training for those tasked with seeking to effectively and efficiently seize and confiscate illicitly-acquired assets, both at the national and cross-border levels. Many police and prosecutor offices, often focused solely on individuals suspected of criminality, simply lack the technical expertise required to trace and hunt down illicitly-acquired assets. This deficiency runs in concert with a lack of top-down institutional prioritisation to acquire and utilise such technical expertise.

Finally, while modern modalities may be available to practitioners in each country, legislators (and their staff) still need to understand the value and necessity of certain legal mechanisms (e.g., civil confiscation) to enable institutions such as police, prosecutors and judges to carry out their work with greater efficiency.[18]

SHARING OF ASSETS

Article 14 of the UNTOC leaves space and special consideration to concluding agreements for the sharing of assets on a case-by-case or regular basis, which may contribute to facilitating international cooperation (in particular when confiscation takes place in the framework of coordinated law enforcement operations).[19] The sharing of recovered assets may also occur at the national level. For example, in the United Kingdom (UK), assets are shared among the authorities that contributed to their recovery, while in Italy they are often entrusted to NGOs for social re-use projects.

RECOMMENDATIONS BY THE FINANCIAL ACTION TASK FORCE (FATF)[20]

The FATF 40 recommendations serve as a crucial tool in the global fight against corruption and money laundering, providing a comprehensive framework for countries to implement within diverse legal and operational systems.

RECOMMENDATION 4:

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (Non-Conviction-Based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

RECOMMENDATION 38:

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate [illicitly-acquired assets]. This authority should include being able to respond to requests made on the basis of Non-Conviction-Based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.

INTERPRETATION FOR RECOMMENDATION 38:

In the context of requests for cooperation based on Non-Conviction-Based confiscation proceedings, countries may not necessarily possess the authority to act on the basis of all such requests, but they should have the capacity to do so, at least in circumstances where a perpetrator is unavailable due to reasons such as death, flight, absence, or when the perpetrator's identity is unknown.

SECTION 3

Accelerated Mechanisms for Confiscation

IN REM CONFISCATION (CIVIL CONFISCATION) – THE GLOBAL TREND 3.1

In the context of asset forfeiture, there are several modalities predominantly used internationally: criminal forfeiture and civil or administrative forfeiture. Once sufficient evidence has been collected, court proceedings are initiated, most often in the form of a criminal case. Traditional practices usually include initiating a criminal case against a particular individual, accompanied by an order, although this is far too infrequent, issued by a criminal court judge to freeze or seize assets of that individual. While there are several modalities within the criminal justice sphere to accelerate the seizure and confiscation of assets, including, for example, the use of plea bargaining or reconciliation, additional modalities (albeit not necessarily as quick) in this sphere may be used to at least broaden the powers of prosecutors and the courts to effect the seizure and confiscation of assets on those involved in criminality. These can include the use of "extended confiscation" and "value-based confiscation," discussed later in this report.

However, with increasing frequency, jurisdictions are adopting and deploying *in rem* proceedings, in which the assets are considered to be "the defendant" (and anyone who might reasonably claim title to such assets – e.g., the titleholder of record – is notified of the proceeding). In such proceedings, the court does not have the power to convict someone of a crime or to deprive anyone of their liberty. The assets are ordered to be frozen or seized and the only determination to be made is whether the assets in question are linked to criminal activity. True *in rem* proceedings do not depend on the existence of any parallel or prior criminal case.

The above-mentioned forms of asset recovery share the same objectives and rationales: confiscating assets of illicit origin by the State and depriving criminals of the profits gained through criminal behaviour. In theory, this deters criminals from engaging in criminal conduct, while also compensating victims, whether individuals or the State. The fundamental difference between criminal confiscation and *in rem* or civil confiscation lies in the procedure (and often the speed) by which the assets are confiscated. Criminal confiscation methods require a criminal trial and conviction, often taking years to conclude, whereas civil confiscation proceedings frequently lead to a decision within less than a year regarding the permanent confiscation of the assets.

In *in rem* or civil confiscation proceedings, the State still bears the burden of providing proof, but often to a lower standard; in

many common law jurisdictions, the standard is often that it is "more likely than not" that the assets are linked to some form of criminality, essentially a balance of probabilities.[21]

Criminal Confiscation
Characteristics

- Requires adjudication of the person.
- Confiscation is only ordered if the person is convicted of a crime.
- High standard of proof, justified if determining criminal culpability of individual and potential exists to deprive such individual of his or her liberty, but unnecessarily justified when determining the link of assets to criminality.
- Often takes several years to secure a confiscation order.

Civil Confiscation
Characteristics

- Adjudication only of the link of assets to some form of criminality.
- Does not require (nor permit) adjudication of the criminal culpability of holder/owner of the asset.
- Lower standard of proof, often "balance of probabilities" – is it more likely than not that these assets are linked to some form of criminality?
- Often takes less than two years and, in most jurisdictions, less than one year to secure confiscation order.

Because a court does not have the authority, in civil confiscation cases, to convict anyone for a crime or to deprive anyone of their liberty, there is good reason to allow for this lowered burden of proof when simply making a determination as to the likely origin of certain assets.[22]

Civil confiscation also offers prosecutors the opportunity to resort to a separate civil proceeding where there may be other technical or procedural reasons that inhibit the advancement of a criminal case. This can include, for example, the death of the defendant, his or her flight from the jurisdiction, his or her unwillingness to participate in such proceedings or, as highlighted in Article 54(1) c of the UNCAC, "other appropriate cases." Such other appropriate cases may include, for example, where a defendant may hold significant political influence, rendering a criminal investigation impossible or unrealistic, or perhaps where the owner of the assets may be unknown (e.g., a courier may be caught transporting suspect assets, and the owner cannot be identified).[23]

Instances may arise in which the defendant may be considered "immune" from prosecution; however, immunity from criminal prosecution should not preclude an action against illicitly-acquired assets. In this regard, the UNCAC suggests that State Parties find the "appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention."[24]

Civil confiscation or forfeiture tools can be applied to these scenarios because it is an '*in rem*' action against the illicitly-acquired property, not the person, and/or a criminal conviction is not likely or possible.

It is important to note, however, that the existence of *in rem* civil confiscation legal frameworks need not depend on the above-listed circumstances. *In rem* proceedings are useful where a perpetrator has been acquitted of the underlying criminal offence due to a failure to meet the threshold of proof – e.g., in some common law jurisdictions requiring proof 'beyond a reasonable doubt.' Although there may be insufficient evidence to obtain a criminal conviction, there may be enough evidence, using the balance of probabilities standard of proof, to demonstrate the assets were acquired as a result of criminal activity. This allows courts to separate adjudication of the person from adjudication of the assets, with a lower burden of proof required for adjudication of the latter, and still, as justice and moral imperatives should dictate, recover assets linked to criminality.

In many jurisdictions, *in rem* proceedings reduce the time taken to reach a decision regarding asset confiscation from a period of years (as is seen in typical criminal cases) to a period of several months. This boosts public confidence in the efficiency of the justice system, particularly in asset recovery, and offers greater opportunity to demonstrate that recovered assets are being directed to address high-priority development needs, thereby showcasing how the justice system benefits citizens.

Despite the value of such accelerated *in rem* proceedings, prosecutors may still face challenges in establishing a sufficient link between the assets and their criminal origin. In most jurisdictions, the burden of proof remains on the State (prosecutors) to demonstrate this connection.

Furthermore, the specificity of what needs to be proven varies. Jurisdictions that mandate a direct link between the assets and a particular crime on a specific date have often rendered *in rem* proceedings ineffective. This is because many investigations cannot always uncover such a direct link between assets acquired as a result of a specific crime on a specific date.

On the other hand, other jurisdictions have adopted a more suitable approach

by requiring the State to demonstrate that the assets are linked to criminality in general. This may be coupled with evidence showing that the individual holding the assets lacks any other known source of income. Such an approach strikes a proper balance, particularly in cases where the determination does not involve the criminal culpability of anyone involved.

In many cases, illicitly-acquired assets are held by or transferred to complicit or unknowing third parties (for example, shell companies, romantic partners, family members or other friends) making it more difficult to initiate a criminal case against such individuals or legal entities (who or which may at best have only peripheral involvement in the original criminal act); these scenarios, in practice, discourage prosecutors from initiating a criminal case, and thus results in an unjust windfall for those holding such assets. With *in rem* or civil confiscation, proceedings against the assets themselves, prosecutors can overcome the above-mentioned scenarios.

Furthermore, in most jurisdictions, antiquated legal provisions still allow the illicitly-acquired assets to be transferred to heirs upon the death of the holder. While this may be a windfall for heirs, it contradicts the overriding principle that no one should benefit from criminal activity.

CIVIL CONFISCATION IN PERU

LEGAL CONCEPT OF *"EXTINCIÒN DE DOMINIO"*[25]

In August 2018, Peru introduced legislation to establish a novel form of civil confiscation to its legal apparatus. Known as *extinciòn de dominio* (roughly translated to "extinction of possession"), this legal mechanism allows Peruvian courts to issue orders for the recovery of assets in circumstances where the owner of the assets cannot be convicted of a particular crime.[26] Peruvian courts can only apply civil confiscation when a criminal conviction is not possible, making the approach more focused compared to other mechanisms.[27] The implementation of *extinciòn de dominio* in Peru has led to the establishment of a Specialised Prosecutor's Office, courts and judges responsible for handling such cases.[28]

THE CASE OF MOSHE ROTHSCHILD

The assets involved in this case were derived from contracts for the purchase of overvalued MiG-29 and Sukhoi Su-25 aircraft during the government of Alberto

Fujimori. The beneficial owner of the bank account was identified as Moshe Rothschild, a German-Israeli businessman who had fled to Israel to evade Peruvian jurisdiction and prosecution. Israel did not extradite Rothschild, and Peruvian authorities therefore could not proceed with a criminal case against him. Using the law on *extinciòn de dominio* (civil confiscation), a court determined that Rothschild was involved in receiving commissions from corrupt arms sales contracts between Belarus and Peru, resulting in the issuance of an order for confiscation. Ultimately, the government of Peru successfully confiscated assets valued at approximately USD 8.5 million.[29]

GENERAL COMMENTS ON PERU'S USE OF CIVIL CONFISCATION

Peru's civil confiscation law, partly modelled on a similar Colombian legislation, has been replicated in multiple Latin American countries, resulting in numerous successful asset recoveries valued at hundreds of millions in USD across the region. In Peru alone, between 2019 and 2021, assets worth over USD 25 million were recovered through the country's civil confiscation law.[30] The law enables prosecutors to recover assets even if the suspected perpetrator dies before a conviction or flees to another jurisdiction, and it allows prosecutors to recover illicitly-acquired assets regardless of who possesses them.

In the context of modern asset recovery, one significant deficiency, exposed by scenarios like fleeing to foreign jurisdictions, is the reluctance of many States to acknowledge civil confiscation orders issued by courts in other States, as mandated by the UNCAC and UNTOC conventions. This failure severely hampers cross-border cooperation in asset recovery and allows illicitly-acquired assets to continue circulating with impunity in States where offenders have fled. Unfortunately, despite some efforts within the European Commission, many European Union (EU) States still lag behind in both adopting civil confiscation laws and recognising foreign court orders for civil confiscation.[31] Similarly, other regions, such as the Middle East and North Africa, have yet to adopt civil confiscation laws, although some countries like Tunisia have prepared draft laws on the matter.

IRELAND: A MODEL FOR CIVIL CONFISCATION IN EUROPE

Ireland stands as a positive exception within the European Union, leading globally in civil confiscation procedure, as well as other forms of accelerated mechanisms for confiscation, for instance through empowered tax and social welfare authorities. Civil confiscation in Ireland marked a transition from a somewhat "reactive" confiscation model to a more "proactive" crime control strategy, as a response to organised crime.[32]

Through its Proceeds of Crime Act (enacted in 1995 and amended in 2005), Ireland defined proceeds of crime as any property obtained as a result of or in connection with criminal conduct; including foreign property and proceeds of foreign crime, and retroactively applies these definitions.

In civil confiscation proceedings, Ireland permits hearsay evidence, such as reports from concerned citizens or confidential informants, allowing for the collection of valuable information, especially when witnesses might be intimidated and hesitant to testify formally.

Ireland created the Criminal Assets Bureau (CAB) in 1996,[33] an entity independent from the Irish Police. The CAB was established to ensure that individuals do not benefit from any assets derived from criminal activity, focusing exclusively on the assets themselves. This, in and of itself, should represent a valuable model for other countries to follow. Endowed with the authority to take all necessary measures to seize and secure assets obtained through criminal means, the CAB operates with officials seconded from national police and other entities to ensure that it carries out its principal mission of tracing, seizing and confiscating illicitly-acquired assets. One key factor contributing to the CAB's success is its in-house access to multiple agency databases, including those of the Revenue Service and the Social Welfare authority. Information sharing is reciprocal: for example, the Revenue Authority provides CAB with information on one's declared revenues, while the CAB reciprocates by sharing relevant information it obtains in its investigations with the Revenue Authority to aid in tax enforcement efforts. Similar cooperation exists between the CAB and the Social Welfare authority, enabling the latter to address social welfare fraud.[34] The majority of staff working for or in connection with the CAB operate under strict anonymity rules for security reasons.

Upon identifying assets possibly linked to criminal activity, including fraud, a CAB officer submits a request to the Court (not in a criminal proceeding) for an order prohibiting the disposal of the assets in question. The Bureau officer must establish, based on a civil standard of proof (balance of probabilities, i.e. that it is more likely than not), whether the assets constitute proceeds of crime, either directly or indirectly, without needing to demonstrate a direct link to a predicate offence. Naturally, the owner of the assets retains the right to present evidence to the contrary, along with any other individual claiming, for instance, ownership or partial ownership of the property. However, when the appeal is unsuccessful, the Court will proceed with the issuance of an order for confiscation, often also issuing discovery orders to disclose any other assets under the individual's control. The final step is to carry out the confiscation and transfer the assets to the State. In 2021, the Minister of Justice of Ireland established the Community Safety Innovation Fund, which is intended to use proceeds of crime identified by the CAB to fund innovative new projects to support community safety, in an effort to show that there is a direct link between the activities of law enforcement and the improvement of community safety.[35]

The successes of the mechanism have been significant: between 1996 and 2020, the CAB recovered approximately EUR 199 million, of which EUR 161 million was related to unpaid taxes, EUR 32 million were proceeds of crime, and another EUR 5 million were recovered from those abusing the country's social welfare system.[36]

COLOMBIA: THE FIRST COUNTRY TO INTRODUCE NON-CONVICTION-BASED FORFEITURE IN LATIN AMERICA

The Colombian law on *extinción de dominio*, which is the precursor of a similar law in Peru, was first introduced in 1996 (Law 333/1996), following the death of Pablo Escobar, and has since undergone several revisions. It is widely regarded as "the strongest weapon of the Colombian Government against corruption and organised crime,"[37] as it enables the State to confiscate proceeds of crime, even after the death of the perpetrator, based on unjustified disproportion between a person's actual wealth and reported income. It is asserted that "Colombia has a regulatory framework that far exceeds standards in this area and is probably one

of the most advanced in the region in terms of non-conviction based forfeiture."[38] For instance, when acquiring real estate, it is recommended to review the chain of ownership of the property for at least the 20 years prior to the current owner to verify its legitimate history of ownership.[39]

After facing criticism, particularly from human rights advocates, the Constitutional Court of Colombia rendered a decision regarding the special powers of the General Prosecutor's Office, affirming that the legal framework of *extinción de dominio* is a completely autonomous action independent of the criminal justice system. In 2014, *extinción de dominio* was modified (Law 1708)[40] to further streamline the procedure to reduce its duration (which had previously averaged five years)[41] and enhance protection of the rights of innocent third-party beneficiaries (who, for example, may have been unaware of the illicit origin of the assets in question). *Extinción de dominio* continues to operate autonomously and independently from any other civil, criminal or administrative procedures. It is *in rem* in nature and permits the seizure of, among others, instrumentalities of crime and legally-acquired assets of equivalent value (where the illicitly-acquired assets cannot be located). The structure in Colombia also allowed for the introduction of new specialised prosecutors, judges, and courts, further streamlining the efficiency of the framework.[42]

Recovered assets under *extinción de dominio* are transferred to the Fund for the Rehabilitation, Social Inversion and Fight against Organised Crime (FRISCO) through the *Sociedad de Activos Especiales* (SAE),[43] which allocates them as follows: 25% for the judiciary branch, 25% for the General Prosecutor's Office and 50% for the National Government.[44] Between 2014 and 2017, FRISCO managed seized and confiscated assets valued at over USD 1.5 billion,[45] while the value of assets seized and held by the SAE until 2022 was estimated at over USD 5.6 billion.[46]

This system has effectively deprived many criminals of their illicitly-acquired assets and, at the same time, has financed the work of the justice system as well as hundreds of social and related needs throughout the country. It is also the main reason why the system has been replicated throughout most of Latin America.

ADMINISTRATIVE CONFISCATION 3.2

The confiscation of proceeds of crimes (as well as the instruments used to commit such crimes) can be achieved through a variety of other legal mechanisms, as well as through different agencies – see, for example, the discussion above on Ireland's coordination with its Revenue and Social Welfare authorities. Unlike criminal or civil (*in rem*) confiscation mechanisms which typically require a court order, administrative confiscation is more often a non-penal mechanism used to seize assets for "the commission of an offence or infraction falling short of the requirements of a criminal offence."[47]

Administrative confiscation has been described as: "… a procedure for confiscating assets used or involved in the commission of the offense that have been seized in the course of the investigation; most often seen in the field of customs enforcement at borders… and applies when the nature of the item seized justifies an administrative confiscation approach (without a prior court review)."[48]

While administrative confiscation is often used by customs authorities, it can be employed in other administrative procedures, such as by a taxing or revenue authorities. This mechanism focuses on promoting the efficient use of resources by facilitating a prompt resolution, directly reducing the undue burden on a country's judicial system. Assets subject to administrative confiscation are managed directly by the seizing agency, typically without judicial involvement and without requiring a criminal charge.[49] Items that may be subject to administrative confiscation include, but are not limited to, personal property, such as merchandise, baggage, jewellery, art, furniture, cultural antiquities, and undeclared cash exceeding the value allowed to be transported under national laws.[50]

ADMINISTRATIVE CONFISCATION: USE AND APPLICATION BY THE UNITED STATES

Between 2014 and 2018, the U.S. Department of Homeland Security (DHS) confiscated an estimated USD 1.8 billion in cash, electronics and vehicles within the U.S.[51] Administrative confiscation is also strongly supported by anti-drug trafficking and anti-money laundering task forces within the U.S. Immigration and Customs Enforcement (ICE), the Customs and Border Protection (CBP),

and the United States Secret Service (USSS). In August 2020, U.S. customs, in cooperation with other federal and local law enforcement agencies, seized USD 27 million in undeclared currency bound for the Virgin Islands.[52] The CBP was able to seize the currency under bulk cash smuggling and "failure to declare" laws. Given that the assets exceeded the USD 10,000 threshold, which requires declaration upon entry to or exit from the country, they were legally presumed to be linked to criminal activity.[53]

CRITICISMS

In the United States, the proceeds of seized assets (e.g. bulk cash seized though administrative confiscation) are transferred into the Asset Forfeiture Fund, which is used to fund special programs and task forces across multiple federal law enforcement agencies. However, the application of administrative confiscation became a topic of contention with internal investigations and audits revealing inconsistent implementation.[54] A recent 2020 audit, reviewed all administrative confiscation cases made by DHS components between 2014 through 2018 and discovered instances of non-compliance and possible abuse by the seizing authorities.[55]

However, it should be noted that there are many procedural requirements aimed at safeguarding individuals against abuse, while avoiding burdening the courts with judicial actions when no person claims legal title. Such protections start from the assumption that administrative confiscation must be based on probable cause (which must be duly justified), and include, for example, strict time limits and notice requirements designed to protect the interests and rights of property holders.[56]

In an effort to further protect against abuse, DHS reportedly developed department-wide policies and procedures, which include the use of consistent Civil Asset Forfeiture Reform Act (CAFRA) notices and forms that meet federal plain language writing requirements, as well as consistent interpretation on managing CAFRA claims and the use of a Hold Harmless Agreement. This agreement entails the property owner waiving the right to file suit against the government and absolving the government of any wrongdoing). As of the drafting of this document, the DHS had not yet published its new policies.

ITALY'S ANTI-MAFIA CODE[57]

Since the second half of the 20th century, Mafia-related crimes in Italy have posed a significant challenge for local law enforcement and public order. To combat the growing impact of Mafia-related activities and deter criminal behaviour, policy makers in Italy developed a complex and robust anti-Mafia legal framework. This Code amalgamates several preventive measures concerning confiscation mechanisms, alongside directives for the disposition, management and societal allocation of assets seized or confiscated within the framework of anti-Mafia operations.

In the non-penal domain, seizures can be ordered when the assets in question are accessible to the suspect either directly or indirectly, and when the suspect's wealth exceeds their legitimate income and tax declarations. Importantly, individuals retain the right to demonstrate the legitimacy of these assets.[58]

Moreover, the Anti-Mafia Code permits preventive confiscation in cases of urgency, where assets are at risk of dispersal or loss, to be ordered prior to an official hearing.[59] The competent judicial authority has five days to decide on such requests submitted by relevant law enforcement entities. Considerations include instances where: (1) the owner of the assets under preventive proceedings fails to prove their lawful origin; (2) the declared income of the individual is disproportionate to their actual economic activities; and (3) there is evidence indicating the illegal origin of the assets. Preventive measures outlined in the Anti-Mafia Code can be carried out independently of criminal investigations and procedures, prioritising a swifter process. The underlying assumption is that seizure and confiscation are essential tools in the fight against organised crime, and should be applied based on conditions that are independent from a criminal court conviction and the direct linkage between criminal activity and specific assets.[60] These measures do not require proving responsibility for a criminal act; rather, they require an overall assessment of the social danger posed by the suspect, indicating a likelihood of continued illicit behaviour.[61] Such mechanisms extend beyond Mafia-related crimes to encompass other significant offences such as money laundering and corruption. An underlying presumption is that the assets in question were obtained unlawfully, evidenced by a stark disparity between the suspect's legally-declared income and their actual wealth.[62]

It is estimated that in 2012, measures of preventive confiscation amounted to EUR 1.2 billion.[63] Over the period August 2020 to July 2021, illicitly-acquired assets valued at EUR 1.9 billion were seized from criminal organisations in Italy.[64] In August 2022 alone, Italian law enforcement secured orders to confiscate assets estimated at over EUR 160 million (including more than 300 real estate properties) in connection with an investigation involving a businessman associated with organised crime.[65]

3.3 UNEXPLAINED WEALTH ORDERS (UWOs) AND ORDERS FOR RECOGNITION OF UNEXPLAINED ASSETS (RUAs)

For well over two decades, many Russian oligarchs and other anonymous millionaires have invested their illicit financial assets into foreign jurisdictions, purchasing multi-million-dollar homes, sports teams, news outlets, and other commodities in foreign jurisdictions.[66] This is one of the reasons why countries have created innovative mechanisms to deprive criminals of their illicit gains. For example, the United Kingdom created a mechanism to produce "Unexplained Wealth Orders" (UWOs).

Introduced by the Criminal Finances Act in 2017, Unexplained Wealth Orders can be sought by enforcement authorities when an individual's actual wealth appears to far exceed his or her reported wealth.[67] If the accused person(s) fails to respond with a "reasonable excuse", the Court may issue an order for confiscation of the assets in question.[68]

Reforms under the UK's new Economic Crime Act (ECA) also allow UWOs to be issued against property held in trust and other intricate ownership structures.[69] Given that money laundering investigations (and authorities with little financial investigative expertise) are limited in piercing trusts, shell companies and related entities behind which criminals hide, the mechanism allowing for UWOs overcomes some of these hurdles, while still placing the initial burden on the State to demonstrate any unexplained wealth.

UK'S INNOVATIVE MECHANISM OF UNEXPLAINED WEALTH ORDERS – FIRST DECISION HANDED DOWN

In February 2018, the High Court approved its first Unexplained Wealth Order, less than a month after the National Crime Agency (NCA) was officially authorised to apply for such an order. The case concerned a property in London which was purchased by a company based in the British Virgin Islands. The owner of the latter was the former Chairman of the International Bank of Azerbaijan, Jahangir Hajiyeva, who had been arrested and charged with various serious crimes in Azerbaijan.[70]

The High Court granted the application by the NCA of two UWOs against Hajiyeva's wife, who was believed to be holding the London property, among others, with a total estimated value of over GBP 22 million.

THE APPEAL – ESTABLISHING A PRECEDENT

Upon the issuance of the UWOs, Hajiyeva's wife submitted an appeal to the High Court on five grounds, including the argument that Hajiyeva's conviction was unreliable due to likely deficiencies in his trial in Azerbaijan, and that he could not be properly defined as a Politically Exposed Person (PEP).[71]

The English Court of Appeal upheld the UK's first UWO, establishing a strong precedent while proceedings continued in the case. The decision was viewed as significant for the concept of UWOs, demonstrating their potential as a powerful tool for financial investigations. Following the ruling, the defendant could no longer appeal the order and was required to comply and provide the NCA with financial records and information related to the properties against which the UWO was issued.[72]

WHEN CAN A UWO BE SOUGHT IN THE UK?

1. When there is reasonable cause to believe that:

   - The respondent holds the assets in question;
   - The value of the assets exceeds GBP 50,000;

and

2. When there are reasonable grounds for suspecting that:
   - The respondent's legitimate income would have been insufficient to obtain the asset(s); or
   - The assets have been obtained unlawfully;

and

3. The respondent is a politically exposed person, or there are reasonable grounds for suspecting that the respondent or a person connected with them is, or has been, involved in serious crime (in the UK or elsewhere).

It is important to emphasise that the UWO mechanism provides due process, allowing the respondent a reasonable period of time to respond to questions and counter any claims of illicitly-acquired assets by providing relevant statements and documents. Failure to comply without a reasonable excuse leads to the presumption that the property can be recovered.[73] Additional due process measures are built into the procedure to allow a respondent to challenge the issuance of a UWO, such as, for example, the opportunity to present new evidence to demonstrate that the assets have been legally acquired.

Similar to UWOs in the United Kingdom, Ukraine has established the mechanism for Recognition of Unexplained Assets (RUAs), to target the unexplained wealth of public officials or those associated with them. These mechanisms, designed to protect due process and avoid reversing the burden of proof, are increasingly prevalent and serve as valuable tools in addressing unexplained wealth.

UKRAINE

In Ukraine, Recognition of Unexplained Assets is employed to pursue unexplained wealth in both non-penal proceedings and criminal cases where a conviction verdict could not be reached. This occurs when an individual's wealth significantly exceeds their legal and declared income. Enforcement of an RUA leads to the confiscation and recovery of the unexplained wealth in question, including, where necessary, forfeiture of property corresponding to the same value.[74]

The standard of proof is the balance of probabilities (e.g., the State must first prove that it is more likely than not that the assets in question clearly exceed one's declared income), and the subjects of RUAs are public officials as well as people with a direct or indirect connection to a public official,[75] although there would be a rationale to apply RUAs to those not linked to public officials; private citizens, of course, can also have unexplained wealth.

Since its establishment (and in light of their non-retroactive nature), RUAs have reportedly been used in six cases, with three cases successfully adjudicated by the High Anti-Corruption Court of Ukraine.

In one case, assets worth approximately UAH 2.3 million and over USD 35,000 were transferred to the State budget; in a second case, real estate and land properties in the amount of approximately UAH 2.37 million were transferred to the State budget; and in a third case, assets valued at over UAH one million were transferred to the State budget.

The main features of using a RUA procedure are that:

- It can be used where the assets are valued above UAH one million;[76] and
- It can used in both *in rem* and *in personam* proceedings. *In personam* for the public officials, and *in rem* for the assets (notifying known title holders of the case).

Be it UWOs or RUAs, such proceedings are, again, generally quicker than a criminal trial (at least with respect to a final determination on the assets) and, for all practical purposes, succeed in getting illicitly-acquired (or non-reported) assets out of the hands of those likely involved in (or benefitting from) illicit activity. An additional benefit is that it shows that States are becoming more agile in demonstrating to a frustrated public that crime does not pay.

Still, despite provisions for UWOs in England, its application since January 2018 remains limited. As of the time of drafting of this study, only nine UWOs relating to four cases had been issued from January 2018 to February 2022.[77] Additionally, a risk assessment performed by the UK Government in December 2020 concluded that since 2017, instances of money laundering have likely increased, indicating that UWOs have not yet made a significant impact in deterring illicit activity, unlike the Irish civil confiscation model which has demonstrated greater effectiveness in combating financial crimes.[78]

Critics have also highlighted that the UWO mechanism has not yet been applied to complex cases where the defendant is part of, or has strong connections with, a foreign government – e.g., such as those involving thousands of multi-million-dollar properties in London alone.[79] While the UK should be commended for its introduction of UWOs (and many jurisdictions should consider replicating this mechanism), the degree of dedicated implementation of such provisions remains paramount.[80]

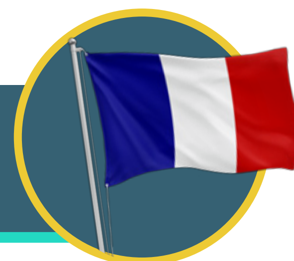
Such mechanisms need, and should, not be limited to the unexplained wealth of public officials; naturally, non-public officials also engage in illicit income-generating activity. Moreover, where the remedy is simply the recovery of unexplained wealth (the assets), and where the court has no jurisdiction to deprive individuals of their liberty or declare them culpable of a crime, there is no reason why such mechanisms need be linked in any way to criminal proceedings. However, State prosecutors and, more often, judges often face difficulty in understanding such mechanisms. Many judges simply have been taught that seizures and confiscations are the exclusive domain of the criminal justice realm, although other non-penal seizures and confiscations regularly take place outside of the criminal justice domain (e.g., in customs and tax proceedings).

TAX PROCEEDINGS 3.4

In many cases, due to the opaque and deceptive nature of criminal activity, prosecutors may be unable to establish a clear nexus between a suspect and possible crimes committed, making it challenging to pursue a criminal prosecution or access civil confiscation or unexplained wealth mechanisms.

Regardless of whether an income-producing crime may be successfully prosecuted, investigators should always be prepared to refer aspects of the case to tax entities and have good cooperation with such authorities. Jurisdictions with the highest degree of success in recovering illicitly-acquired assets are those in which police and/or prosecutors have established coordination and referral channels with tax authorities (e.g., in some jurisdictions, over 90% of illicitly-acquired, and frequently undeclared or under-declared assets, are recovered through referral to the tax authority).

FRANCE'S EFFECTIVE USE OF TAX LAWS TO CONFISCATE ASSETS



Appointed by former French President Hollande as the Budget Minister in 2012, Jerome Cahuzac was tasked with combating high-wealth tax avoidance in France. However, not long after his appointment, Chauzac was forced to resign in 2013 after reports emerged from an investigative website linking the minister to secret offshore bank accounts in Switzerland and Singapore containing over EUR 3.5 million.[81]

Cahuzac was later convicted of tax fraud and money laundering and ordered to pay approximately EUR 2.3 million in unpaid taxes, while his former wife was sentenced to two years in prison for her role in the scheme.[82] The case not only demonstrated how increased cooperation between countries (i.e., France, Switzerland and Singapore) can help investigations convict criminals, but also underscored how tax laws can be applied to recover illicitly-obtained assets. The case serves as an example of how tax authorities can assist law enforcement in ongoing investigations, and how tax laws can be leveraged in addressing corruption, bribery and the recovery of stolen assets.

While, in many jurisdictions, tax evasion is classified as a crime and can be pursued through the criminal justice process, it is essential to understand that tax authorities may be able to use their administrative powers to seize undeclared assets more swiftly, regardless of whether prosecutors may successfully obtain a conviction for tax evasion against an individual. A notable example is Al Capone, the infamous Chicago gangster, who faced suspicions of involvement in murder, extorsion, and bootlegging. Although in court prosecutors failed to prove Al Capone's involvement in these crimes (often for lack of available or willing witnesses), he was, nevertheless, convicted of tax evasion.[83]

Leveraging the authority of tax agencies and pursuing criminal cases for tax evasion or other forms of financial misrepresentation (such as manipulating transactions in a company's accounts or financial records to understate assets, income, or expenses to modify taxable revenue or deductible expenses), can be instrumental in seizing and confiscating illicitly-acquired assets.

Furthermore, tax authorities can significantly aid criminal investigators by conducting financial audits on suspicious accounts and bank records. Australia and the United States, as well as Ireland, are among the jurisdictions that have established innovative and useful tax laws to combat organised crime.[84] Aside from prosecutors referring certain financial aspects of cases to tax authorities, tax officials should be empowered and incentivised to share information obtained during tax audits with law enforcement. This information can be pivotal in prosecuting criminal cases related to corruption, bribery, embezzlement, money laundering or, of course, tax evasion. Financial investigators can seek assistance not only from tax authorities for assistance in investigating unexplained wealth, but also from other entities, such as social welfare administrators, whose databases contain declarations by citizens regarding their wealth – please see below.

ASSET RECOVERY AND SOCIAL WELFARE PROGRAMMES 3.5

Recent successful asset recovery practices have included inter-institutional coordination between investigators/ prosecutors and officials with access to social welfare databases. This is logical given that individuals suspected of money laundering or other income-generating crimes may also be involved in social welfare fraud. Such suspects may illegally claim to have low incomes to gain access to social welfare support.

In this context, investigators may more easily demonstrate to a court that an individual's actual assets far exceed their stated income, which can be corroborated with records from a social welfare database. Individuals seeking access to subsidised welfare programmes must declare their income, which often must be below a certain threshold. This information is particularly useful in cases involving "unexplained wealth" or "unjustified enrichment," as well as tax evasion. Many social welfare programmes have their own mechanisms for recovering improperly received welfare benefits, and these mechanisms are administrative in nature, not requiring a lengthy criminal trial. Therefore, police, prosecutors and other officials who, for multiple reasons, may face obstacles in pursuing a criminal case to recover assets, can regularly coordinate with social welfare authorities to recover assets more efficiently through an often-quicker administrative process.

This dynamic underscores the importance of having access to multiple institutional databases (e.g. business registry, land registry, vehicle registry, tax database, social welfare database, criminal records database) under one roof. This allows asset investigators to gain a comprehensive view of an individual's assets and those of known associates and/or family members, given that most launderers do not launder assets in their own name. Indeed, having a multi-institutional view of one's assets often leads to the identification of others who may be involved in a criminal enterprise.

THE SOCIAL WELFARE BUREAU OFFICERS (SWBOS) OF IRELAND

In their role of investigating and determining entitlement to social welfare payments for individuals engaged in criminal activity, SWBOs conducted numerous investigations in 2022, totalling over EUR five million. Of this amount, over EUR 700,000 was saved by ceasing payments to individuals found to be ineligible. Over EUR four million consisted of overpayments, which SWBOs were able to recover.[85]

In one notable example, SWBOs uncovered unexplained wealth at the residence of a jobseeker's allowance recipient and his girlfriend, who was receiving a one-parent family payment. They found EUR 70,000 in cash, luxury jewellery (including designer watches) and a luxury Audi Q7 valued approximately EUR 72,000 at the time of purchase. The investigation also revealed previously undeclared bank accounts in the individual's name, with unexplained deposits amounting to over EUR 85,000 in one of the accounts. As a result, the jobseeker's allowance was retroactively disallowed to 2009, leading to an assessed overpayment of EUR 125,000. Similarly, the one-parent family payment was also disallowed retroactively, resulting in an overpayment recovery of EUR 27,000.[86]

PLEA AGREEMENTS, RECONCILIATION OR OTHER NEGOTIATED SETTLEMENTS 3.6

In the context of asset recovery, practitioners are well aware that a criminal trial, and subsequent issuance of a final order to confiscate assets, often takes years; in cases involving complex money laundering, such cases may take, at the very least, several years, exacting costs and extensive human resources (as well as taxpayer money) for the State to conduct.[87] Such lengthy trials may also contribute to a sense by the public that "justice" is slow and ineffective. Practitioners also report that the longer the process, the more time and opportunity there is for defendants (with money or influence) to corrupt law enforcement or judicial officials, particularly in countries with extensive corruption and/or weak rule of law.

The concept of plea bargaining, or a negotiated settlement is a widely used mechanism in the context of asset recovery.

Plea bargaining (often referred as "reconciliation" in many countries) is the practice by which prosecutors may reach an agreement with the defendant in return for a lighter sentence. The theory, often a justified and practical one in light of heavy caseloads for courts and prosecutors, is that such agreements can reduce the burden and costs to the State of moving ahead with a criminal trial while allowing the defendant to receive an abbreviated case and a lighter sentence, which may, in some cases, be no more than time served in pre-trial detention (or perhaps a suspended sentence on condition that the defendant meets certain law-abiding parameters – e.g., proof of gainful employment – for a specific time period).[88] The practice of plea bargaining is typically, though not always, reserved for non-violent offenders. In the context of asset recovery, the defendant, in return for surrendering assets back to the State (or providing credible information to prosecutors regarding illicitly-acquired assets held by others), may receive either a lighter sentence, or charges may be dropped entirely.

Plea bargaining (still unfortunately not used in many jurisdictions) has nevertheless grown in popularity with at least 47 countries ratifying a mechanism to waive trials where an agreement is reached with the defendant.[89]

In the United States, scholars estimate that between 90 and 95% of all trials are processed through plea agreements.[90] The practice equips prosecutors with a vehicle to minimise State resources to resolve cases, while yielding a mutually accepted outcome with the defendant. Plea agreements, where properly implemented, can be used to not only expedite a trial, but also as a method of expediting asset recovery.

EGYPT'S SUCCESSFUL USE OF VRECONCILIATION AGREEMENTS[91]

As part of the technical expert advice provided to Egypt, the United Nations Interregional Crime and Justice Research Institute (UNICRI) recommended to Egyptian authorities to explore the avenue of a reconciliation agreement as a means to recover part of former high-level official embezzled funds.

In 2016, a reconciliation agreement was signed between the Illicit Gains Authority of Egypt and Hussein Salem (former advisor to the President), in an effort to recover EGP 5.8 billion. Salem agreed to return 78% of his assets, including multiple villas (at least eight) in the resort area of Sharm el-Sheikh, shares in several companies and cash, to Egyptian authorities in exchange for immunity from prosecution and permission to return to Egypt.

Salem had been convicted *in absentia* to 25 years in prison for various offenses, including misappropriation. However, within the reconciliation agreement, further legal action was not pursued, Salem's remaining assets were unfrozen, and his name was removed from Egypt's wanted list.

While hailed as Egypt's largest deal of this nature, criticism surfaced regarding the long-term deterrence of such agreements. Among other aspects, it was argued that tighter restrictions should have been imposed on the reconciliation process. Every case is different, and in this case, critics contended that some degree of imprisonment should have been imposed. Nevertheless, from an asset recovery perspective, it is unlikely that any assets would have been recovered without Egypt's use of reconciliation.

Some key caveats, resulting from actual cases, involving reconciliation or plea bargaining:

- Prosecutors should be obligated to disclose any evidence that is favourable to the defendant, regardless of whether the defendant has requested it. This ensures that defendants are informed of any exculpatory evidence that could affect their decision to accept a reconciliation or plea agreement.

- It should be obvious, but mechanisms must be in place to prevent prosecutors or police from inducing a plea by threatening physical harm or employing mental coercion that overpowers a defendant's will. Without such safeguards, the credibility of reconciliation or plea agreements could be undermined, leading to potential human rights abuses.

- To avoid the risk of coercion, a defendant's lawyer should have the opportunity to thoroughly explain the charged crimes before the defendant decides to plead guilty or enter into a reconciliation agreement.

- The use of reconciliation agreements to recover assets should strike a balance between deterring criminal activity and promoting the efficient resolution of cases for both the State and the defendant. However, whether this approach truly embodies justice will vary depending on the country and specific circumstances. For instance, high-profile defendants such as former high-level ministers involved in acts of corruption, or crime bosses overseeing multiple criminal activities, may warrant limited access to such agreements or should not be able to entirely avoid jail time through these agreements.

3.7 EXTENDED CONFISCATION

A number of jurisdictions have introduced "extended confiscation" as a valuable tool to recover illicitly-acquired assets. In most jurisdictions, extended confiscation means that where a defendant is convicted of a specific serious income-generating crime, the Court may then issue an order indicating that any assets acquired by the defendant over, say, the past five to ten years,[92] are now "presumed" to have been acquired illicitly, unless the defendant can demonstrate otherwise. Extended confiscation is unique in that the assets now presumed to have been acquired illicitly need not be linked to any specific crime and, based on the seriousness of the initial crime for which the defendant has been convicted, the burden now shifts to the defendant to demonstrate the licit origin of their assets, at least with respect to a limited recent time period.

The European Parliament and Council adopted Article 5(1) of Directive 2014/42/EU for extended confiscation, requiring Member States to enable the confiscation of property belonging to a convicted person when: (i) the crime is likely to give rise to economic benefit; and (ii) the circumstances of the case indicate that the property is derived from criminal conduct.[93]

THE NETHERLANDS: SUCCESSFUL USE OF EXTENDED CONFISCATION

In the spring of 2012, SBM Offshore N.V., a Dutch-based manufacturer of offshore oil drilling equipment, initiated an internal investigation into improper payments made to foreign sales agents in exchange for securing advantages or retaining business with state-owned oil companies.[94] As a result, SBM Offshore N.V. discovered that from 2007 through 2011, approximately USD 200 million in commissions were paid to foreign sales agents for their services.[95] The majority of these payments were directed to Equatorial Guinea, Angola and Brazil, constituting bribery.

To ensure that crime does not pay, Dutch law established an extended confiscation procedure. Through this procedure, a judge may impose a separate judgement and compel the accused to forfeit illegally obtained financial benefits to the State within the six-year period before the criminal act was committed.[96] Under this

form of extended confiscation, all the possessions and expenses made within this six-year period qualify for confiscation if there are no indicators that they were acquired through legal means; there is no need to prove they were acquired through illegal actions.[97]

SBM Offshore N.V. accepted a plea deal from the Dutch Public Prosecutor Service, agreeing to pay USD 240 million.[98] The amount consisted of a USD 40 million fine and a USD 200 million payment under article 36e of the Dutch Criminal Code, reflecting the illegally-obtained benefits that the company received over the years.[99] This case not only underscored the Netherlands' commitment to combating foreign corruption practices but also stood out as one of the largest extended confiscation cases in the country's history.

As with other confiscation mechanisms, the burden of proof may vary from jurisdiction to jurisdiction.[100] For example, in the Netherlands, Estonia and Cyprus, courts may 'presume' that other assets were obtained through criminal activity after a defendant is convicted of particular serious income-generating crimes. In Austria, extended confiscation is only allowed if it is deemed 'reasonable to assume.'[101] Additionally, States may differ in the time period applied, such as six years before the commission of the crime in the Netherlands; five years before indictment in Belgium, Hungary, Portugal, and Romania; and ten years before indictment in Bulgaria.[102]

Human rights considerations must also be taken into account. States should refrain from seizing or confiscating items that provide for basic necessities, including access to basic housing, food, healthcare, child support, and alimony. Some States address this by incorporating a catch-all provision in the law, granting the court discretion to refrain from confiscating assets presumed to have been acquired illicitly if doing so would cause "undue harm" to the parties involved. Such a catch-all provision proves beneficial across nearly all forms of confiscation, both penal and non-penal.

3.8 VALUE-BASED CONFISCATION (CONFISCATION OF EQUIVALENT VALUE)

Value-based confiscation refers to the confiscation of assets valued equivalently to those obtained through illicit activity. In certain countries, this can be applied when assets of equivalent value are not directly linked to the crime for which the offender is being accused but are still linked to some form of criminality, such as through an extended confiscation order. Confiscation of equivalent value is outlined in Article 12(1)(a) of the United Nations Convention against Transnational Organised Crime.[103]

In some jurisdictions, a court may require prosecutors to demonstrate that they have made every reasonable effort to identify assets linked to the criminal activity but have been unable to locate them. Alternatively, the court may require evidence that the defendant has spent or otherwise disposed of the assets, such as by gambling them away. However, an increasing number of jurisdictions are eliminating this requirement. For example, once a conviction is obtained, the court may simply issue an order requiring the confiscation of any assets belonging to the defendant, up to the assessed value of illicitly-acquired assets, regardless of whether there is immediate proof that the assets were obtained through criminal behaviour.[104]

In this context, value-based confiscation responds to, at the very least, the moral imperative of nullifying any benefit the defendant may have derived from spending or otherwise disposing of illicitly-acquired assets by allowing the confiscation of legally-acquired assets. Naturally, value-based confiscation can be combined with other measures, such as plea bargaining (reconciliation); the defendant may agree to surrender assets to the State (whether legally-acquired or not) in return for settlement of the case. According to the EU, implementing NCB confiscation systems, like value-based confiscation along with expanding the scope of offences covered by such mechanisms, would enable Member States to increase their recovery rates and more effectively deprive criminals of their illicit gains.[105]

However, the drawback of value-based confiscation, like other forms of criminal law-based confiscation, is the need for an initial criminal conviction, which can be time-consuming (often taking years), unlike civil confiscation, which typically concludes in less than one year.

Regardless of the existence of civil confiscation in a jurisdiction, it is generally sound policy to empower prosecutors to pursue value-based confiscation and incentivise judges to issue orders for it.

While value-based confiscation should ideally be a fundamental component of

every country's policy and criminal justice practice, its actual implementation varies significantly from one jurisdiction to another. Unfortunately, some jurisdictions limit the number of crimes to which value-based confiscation orders can be imposed. Others still require a direct link between all confiscated assets and a specific crime, which contradicts the moral imperative of depriving criminals of financial benefits derived from their illicit activities. Consider a scenario where a defendant has already spent or disposed of illicitly-acquired assets, such as by gambling, hiring sex workers or purchasing luxury items that are later rendered worthless.[106] Is it fair or justifiable not to go after a defendant's legally-acquired assets of equivalent value in such cases?

These differing criteria pose significant obstacles for international cooperation in the field of asset recovery and can drastically slow down, or render completely impossible, successful recovery efforts.

Recognising these challenges, the United Nations Convention Against Transnational Organised Crime addresses them through Article 12, which encourages the adoption of value-based confiscation. Such adoption would produce more harmonised legislation on value-based confiscation across multiple jurisdictions.[107]

UNIQUE-PROPERTY-BASED CONFISCATION 3.9

In many cases, specific circumstances may justify or require the confiscation of particular properties, such as illicitly-acquired cultural assets, which often lack easily quantifiable monetary values, or potentially volatile assets (e.g., virtual assets). In such scenarios, the confiscation of assets can be based on a particular property (such as cultural assets or a unique piece of real estate or art) which is the subject of litigation, or the confiscation and sale of such unique assets for purposes of paying a set amount determined by the Court.[108] Unique-property-based confiscation may be used to seize property that is the product of criminal behaviour, or instrumentalities used for its commission.[109]

In some jurisdictions, this form of confiscation still requires a criminal conviction and is often restricted to assets registered in the defendant's name or that of another person or entity, for which the State has proven the defendant's beneficial ownership. However, establishing the link between a specific piece of property and the underlying offence can be problematic. Offenders frequently conceal or disguise the illicit origin of such assets by converting, transferring, or blending them with legitimate assets. Additionally, some assets may be at risk of dissipation.[110] Similarly, proving that the defendant is the actual "beneficial owner" of an asset registered under the name of another individual or entity presents difficulties,

as individuals involved in money laundering typically avoid direct ownership.

Returning stolen or looted cultural artefacts to their country of origin has increasingly become a topic of growing concern. Countries devasted by wars or colonialism are advocating for the ownership and return of cultural artefacts that are housed in museums or private collections. Law enforcement agencies and politicians have shifted resources to recover stolen assets, viewing cultural heritage as a basic human right. Beside constituting a 'war on culture', the trade in looted artefacts (for instance, from Syria and Iraq) represents a major source of income for terrorist groups.[111]

THE VEILED HEAD OF A FEMALE: THE UNITED STATES, LIBYA AND THE SUCCESSFUL RETURN OF UNIQUE CULTURAL ASSETS

In January 2022, Libya celebrated the return of the Veiled Head of a Female, an ancient marble head worth over USD one million.[112] The return was made possible through a plea agreement (see sections above) in which a purported billionaire, Michael Steinhardt, surrendered multiple stolen artefacts, previously on loan to museums or part of his private collection, in exchange for avoiding criminal charges.[113] The Veiled Head of a Female was the first of 180 antiquities, valued at approximately USD 70 million, seized by US authorities, and ultimately returned to their place of origin in modern-day Libya.[114]

The plea agreement between US authorities and Steinhardt served as a catalyst for the smooth and rapid return of multiple artefacts to several countries, including Greece, Italy, Jordan, Lebanon, Libya and Turkey. This agreement paved the way for their expedited repatriation, which otherwise might have been delayed due to prolonged evidence retention during a criminal trial.[115]

The return of the Veiled Head of a Female, alongside several other valuable artefacts to their countries of origin, marked the first step towards reuniting priceless cultural pieces to their homelands, thereby reconnecting people to their heritage. The retrieval of these 180 artefacts was also one of the largest cultural asset recovery endeavours, serving as a firm reminder to collectors and museums

neglecting to sufficiently verify the legal provenance of such assets. It underscored the heightened commitment of authorities to investigate, seize and confiscate unique-property assets. This is particularly relevant amid ongoing discussions about how "white-collar" crime might fund, directly or indirectly, terrorism and the growing calls to address the colonial looting of cultural assets.

Unlike a value-based confiscation system, unique-property-based confiscation intentionally sets aside any debates about the particular value of the asset; there is no need to estimate the value of the asset in question. This holds true not only for cultural assets, but also for certain other unique assets, such as pieces of art, rare diamonds or, in some cases, unique pieces of real estate. Where the asset is not of particularly cultural significance, it is often sold. In some cases, the proceeds benefit the victims of a defendant's crimes, or are, increasingly, directed to high-priority development needs. For unique cultural assets, they are typically not liquidated. Instead, as seen in several cases, they are handed over to a national museum in the country from which they originated. In practice, this often involves transferring the cultural asset over to the Embassy of the country from which the asset had been looted, which then co-ordinates its return.

Unique-property-based confiscation often becomes the primary recourse when dealing with illicitly-acquired cultural assets. Cultural assets have profound sentimental value to a region or a State's heritage, so prosecutors must always be aware of this and take extra precautions in handling and preserving such assets. For States that have suffered significant losses of cultural assets due to conflict, looting, extensive corruption, and colonialism, this priority becomes even more critical. It also imposes a heavier and necessary burden, perhaps justifiably, on national museums and smaller art galleries worldwide to thoroughly investigate the provenance of items in their collections and to proactively engage with authorities when legal provenance cannot be fully determined. Consequently, this underscores the pressing need for each country to monitor the possible existence of looted cultural assets within their jurisdictions, whether in museums, smaller galleries, or private collections, as the acquisition of such assets is often linked to the financing of terrorism and other serious crimes. Therefore, the seizure and confiscation of such assets are of increasing importance.

SECTION 4

Innocent Third Party Considerations

In both penal or non-penal contexts where assets are to be seized and confiscated, safeguarding the rights of third parties who have acted in good faith is paramount. Third-party good faith beneficiaries should be legally entitled to receive notice of proceedings involving the seizure and confiscation of assets in which they may legitimately claim an interest.

In scenarios where a drug trafficker uses their profits to purchase real estate and subsequently sells it to a third party who may be unaware of the property's illicit origin, that third party, if having acted in good faith, should be entitled to demonstrate to the court that he or she acted in good faith. This may include, for example, providing evidence that the third party could not have reasonably known that the seller was a drug trafficker and that the third party paid a fair market value for the property. The legal framework in each country must allow the court to consider the circumstances surrounding the property's acquisition. For instance, if the third party is revealed to be the sibling or business partner of the drug trafficker, their status as "good faith" beneficiary would understandably be questioned. Similarly, if the fair market value of the property is, say, USD 100,000, and the third party paid a nominal amount of USD 5,000, or cannot provide proof of a bank transfer for the purchase, doubts about their good faith arise. However, if the court is satisfied that the third party acted in good faith, it may issue an order allowing the third party to retain ownership of the property.

WHO IS A "GOOD FAITH THIRD PARTY BENEFICIARY"? UNITED STATES OF AMERICA V. MELISSA SINGH[116]

The case against David Nicoll, former President of a New Jersey-based Biodiagnostic Laboratory Services, set a precedent on asset recovery and third-party rights. The blood testing laboratory became the centre of a bribery and kickback scheme, wherein physicians received bribes for referring patients' blood samples to the laboratory. As part of a plea deal following the criminal trial, all rights, titles and interests in the properties listed were confiscated, including a Manhattan condominium valued at approximately USD 700,000.

The Manhattan condominium was purchased by Melissa Singh, Nicoll's romantic partner, with funds provided by Nicoll from the company's illicit activities. Despite having exclusive possession of the property and holding title at the time of the proceedings, Singh filed a third-party petition to the court, claiming that the unit was never controlled by Nicoll.

Singh's appeal was dismissed by the District Court primarily because it was proved that the money used to purchase the condominium was gifted to her by the defendant, Nicoll, whose funds were illicitly obtained. This evidence indicated that Singh did not acquire the property in good faith (*bona fide* innocent third party).[117]

Other scenarios may arise, such as when a defendant passes away during the criminal proceedings, and their assets are inherited by family members. The principle that no one should benefit from illicit activity should remain paramount; no one, not even inheriting family members, should benefit from such activities. However, in certain cases a court may exercise discretion and consider an inheriting family member as a good faith third-party beneficiary.

As mentioned previously, other considerations regarding third-parties may include halting seizure or confiscation if such acts would result in depriving someone of basic living conditions or other human rights. For example, an order for seizure or confiscation might be reconsidered if it would deprive a child of maintenance or render someone homeless.[118]

R AHMED AND QURESHI: GENERAL CONSIDERATIONS WHEN WEIGHING WHETHER SOMEONE IS A GOOD FAITH THIRD PARTY BENEFICIARY, AND WHETHER ORDERS FOR SEIZURE AND CONFISCATION MAY CAUSE UNDUE OR UNINTENDED HARM[119]

This case took place in the United Kingdom. The legal basis used for an appeal in the case was Article 8 of the European Convention on Human Rights, which *inter alia* states that "everyone has the right for respect of his private and family life, his home and correspondence" and that "there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country."

The appellants argued that the confiscation order issued at the trial level was disproportionate and infringed upon the rights of innocent family members, particularly the children. While the appellants did not succeed in their appeal for

other reasons, the Appeals Court identified the standard to be applied in such cases. Reference was made to case R v. Benjafield (2003), where a court may need to balance conflicting interests. This involves, ensuring, on one hand, that crime does not pay, while also ensuring, on the other hand, that there is no inadvertent injustice to innocent third parties.

This decision provides guidance that many jurisdictions may find valuable, as it emphasises the importance of granting courts the discretion to safeguard the interests of innocent third parties, and prevent inadvertent harm resulting from seizure and confiscation orders.

Conclusion

This report highlighted several different mechanisms that States can adopt to accelerate the confiscation of illicitly-acquired assets, including mechanisms within the civil confiscation domain. Civil asset forfeiture and other non-penal modalities are indeed key tools that are increasingly used worldwide to help law enforcement more effectively and efficiently fight organised crime and deprive criminals of their illicit gains, with due consideration to the legitimate interests of innocent third parties, such as children or other individuals whose property might be illicitly used without their knowledge or consent.

The adoption of such mechanisms is also endorsed by the UNCAC and UNTOC Conventions and widely used by a number of jurisdictions globally, such as, to cite a few, the United Kingdom, the United States, Ireland, Peru and Italy, which set internationally-recognised good practices. Accelerating the capture of illicitly-acquired assets can take many forms and include, for example, *in rem* confiscation, where the assets themselves are the 'defendant'. Additionally, coordination with tax social welfare authorities can prove to be very effective in accelerating the seizure, confiscation and recovery of illicitly-acquired assets. Other forms include extended confiscation and property-based confiscation, particularly for assets with deep historical and cultural value.

These mechanisms, both individually and collectively, have proven to produce more tangible results in the recovery of assets linked to criminality. They also reinforce public perceptions of the efficiency of the justice system, especially where there is transparency regarding the ultimate disposition of any recovered assets, such as directing them to high-priority development needs. States should consider adopting these mechanisms, in the interest of both efficiency and justice.

ENDNOTES

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4. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), https://www.unodc.org/pdf/convention_1988_en.pdf

5. United Nations Convention against Transnational Organized Crime (2000), https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html

6. United Nations Convention Against Corruption (2003), https://www.unodc.org/unodc/en/treaties/CAC/

7. For purposes of this study, the term ‘confiscation’ and ‘forfeiture’ will be used interchangeably.

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11. See: UNICRI’s series of IFFs reports, available at: http://www.unicri.it/publications and https://unicri.it/Publication/Illicit-Financial-Flows-Asset-Recovery-Eastern-Partnership-Region

12. Organisation for Economic Co-operation and Development (OECD). (2014). *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* https://www.oecd.org/corruption/illicit_financial_flows_from_developing_countries.pdf

13. As is commonly known, those who launder assets typically do not launder them in their own name, but through other individuals or entities, such as shell corporations.

14. A significant weakness within many, if not most, jurisdictions is not that there is a lack of a financial disclosure system for public officials, but that effective, dissuasive sanctions are not imposed for any violations (non or insufficient disclosure) of such mechanisms.

15. In actual practice, many jurisdictions still do not recognise orders for confiscation issued by other UNCAC Member States; many of these include orders for confiscation issued in criminal cases by a foreign jurisdiction, with the receiving jurisdiction often indicating that the request is “incompatible” or “inconsistent” with their national law, with no other reason given. Additionally, where a court order for confiscation has been issued in a civil confiscation case, the receiving jurisdiction will deny the request to give effect to that order on the grounds, if any is given, that it is also “incompatible” or “inconsist-

ent" with national law. While, in some cases, an argument could be made that, in either the original criminal or civil case which produced the order for confiscation may not have allowed for adequate due process of the defendant or title holder of the property in question, there is little evidence to suggest that foreign jurisdictions asked to give effect to such orders make any effort to seek such clarity from the requesting jurisdiction as to whether there was adequate due process provided. This of course is wholly inconsistent with Article 51 of the UNCAC which clearly indicates that "States Parties shall afford one another the widest measure of cooperation and assistance" on asset recovery. Unfortunately, many EU Member States (in which corrupt officials from outside the EU have placed their assets) lag far behind, in actual practice, in working with their counterparts from outside the EU to actually give effect to orders for confiscation issued by those foreign jurisdictions and to return such illicitly-acquired assets.

16 Many asset recovery practitioners report that jurisdictions will often "grab headlines" with respect to criminal or laundered assets they may have seized, although such jurisdictions also have a very low rate of actually returning such assets.

17 Of some note is the slight increase in the practice of channelling the return of assets (if any are returned) through, for example, national aid agencies or some other transparent mechanism to help ensure that any returned assets are not corruptly diverted again. See: UK to return $5.8m to Nigeria from politician's stolen assets. (2021). *Aljazeera*. https://www.aljazeera.com/news/2021/3/9/uk-to-return-5-8-mln-to-nigeria-from-politicians-stolen-assets#:~:text=The%20United%20Kingdom%20and%20Nigeria%20have%20signed%20a,who%20was%20jailed%20in%20London%20for%20money%20laundering. Still, many, if not most, jurisdictions fail to engage in such discussions, retaining old practices of simply denying requests, based on nebulous grounds, for the return of assets. There is a parallel between this scenario and the one being played out, for example, with Libya, in which billions in assets have been frozen by Member States since the year 2011 (over 12 years as of the time of drafting of this report), and yet, despite numerous humanitarian needs in that country (extensive and pervasive lack of medical care – e.g., for those with cancer and diabetes – and educational resources – e.g., children without schoolbooks or adequate lunches), many Member States are refusing to channel the return of frozen Libyan assets back to the country to address such high-priority development needs, even if channelled through highly transparent mechanisms that will ensure that the funds or other support (nurses, doctors, dialysis machines, teachers, schoolbooks, and school lunches) will reach the vulnerable groups who need such support.

18 Among the values legislators fail to recognise is that the recovery of assets can produce significant amounts to fund high-priority development needs in the country – e.g., in the health, education and infrastructure sectors. This no doubt would be a message valuable for legislators to convey to their constituents.

19 Recommendation 38. *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation - The FATF Recommendations*. (2023). https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf

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22 Officials in countries where civil confiscation is a new concept often express the concern that the right to property is a constitutional right; to not allow the seizure and recovery of assets, even in civil confiscation cases, would of course lead to an erroneous interpretation of the constitutional right to one which allows citizens to keep illicitly-acquired assets.

23 Although in cases in which a title holder might not be identifiable, separate "administrative" mechanisms may exist for accelerated confiscation of the assets; in some jurisdictions this may be publication of information concerning the assets on a public institution website (and/or at the location of seizure), indicating that the assets will be confiscated within a certain number of days, say 60 or 90, if no one comes forward to demonstrate ownership.

24 UNCAC Article 30.

25 See: *Decreto Legislativo N.° 1373*. (2018). Government of Peru. https://www.gob.pe/institucion/congreso-de-la-republica/normas-legales/936641-1373

26 *New specialised courts to apply novel extinción de dominio legislation in Peru*. (2019). https://baselgovernance.org/news/new-specialised-courts-apply-novel-extincion-de-dominio-legislation-peru

27 Bright Line Law. (2020). *The Use of Non-Conviction Based Seizure and Confiscation*. https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3

28 A similar approach is also in place in Colombia, see: (*Ley 1708 de 2014*. (2014). Government of Colombia. https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=56475); France, G. (2022). *Non-conviction-based confiscation as an alternative tool to asset recovery*. https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022.pdf. Read more about the Ibárcena case: *Subsistema de Extinción de Dominio del Poder Judicial recuperó más de S/173 millones a favor del Estado*. (2022). Poder Judicial Del Peru. https://www.pj.gob.pe/wps/wcm/connect/sneed/s_sneed/as_prensa/as_noticias/cs_n_recupera173millones, Solorzano, O. (2019). *Landmark Asset Recovery Case Puts Peruvian Non-Conviction-Based Confiscation Legislation to the Test*. Basel Institute on Governance. https://baselgovernance.org/blog/landmark-asset-recovery-case-puts-peruvian-non-conviction-based-confiscation-legislation-test and *Fiscalía logra se declare fundada demanda para recuperar más de US$ 3 millones desde banco suizo*. (2022). Ministerio Público Fiscalía de La Nación. https://www.gob.pe/institucion/mpfn/noticias/633577-fiscalia-logra-se-declare-fundada-demanda-para-recuperar-mas-de-us-3-millones-desde-banco-suizo

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30 France, G. (2022). *Non-conviction-based confiscation as an alternative tool to asset recovery*. https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022.pdf

31 "As regards the envisaged common rules, the Commission has emphasized that the European Court of Human Rights has repeatedly considered Non-Conviction Based

confiscation (including civil and administrative forms) and extended confiscation to be consistent with Article 6 ECHR and Article 1 of Protocol 1, if effective procedural safeguards are respected." See: *Common rules for non-conviction based confiscation*. (2023). European Parliament. https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-rules-for-non-conviction-based-confiscation#:~:text=As%20regards%20the%20envisaged%20common%20rules%2C%20the%20Commission,Protocol%201%2C%20if%20effective%20procedural%20safeguards%20are%20respected.

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UNICRI, Viale Maestri del Lavoro, 10, 10127 Torino – Italy
Tel: + 39 011-6537 111 / Fax: + 39 011-6313 368
Website: www.unicri.org
Email: unicri.assetrecovery@un.org

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