

# Proceeds of Crime – In Rem Forfeiture

UN Model Law on in Rem Forfeiture (2011)

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# Origins and Principles

“The practice of civil *in rem* forfeiture has roots in ancient codes and commandments. It is found in the common law doctrine of deodand and in the laws of the nomadic agricultural Israelites.”

- [Baldwin, F.N.](#) (2000), "United States and Civil in rem Forfeiture: The History and Its Ancient Roots", *Journal of Money Laundering Control*, Vol. 3 No. 3, pp. 204-213. <https://doi.org/10.1108/eb027231>
- “To Return Funds to all” : Pablo j Davis  
[https://www.memphis.edu/law/documents/pablo\\_j\\_davis.pdf](https://www.memphis.edu/law/documents/pablo_j_davis.pdf)
- ‘The History of In Rem Forfeiture – a penal legacy of the past’ Il van Jaarsveld  
<https://uir.unisa.ac.za/bitstream/handle/10500/3694/Fundamina%20Van%20Jaarsveld%20finaal.pdf?sequence=1&isAllowed=y>

# Property rights have never been absolute

In early English law property was forfeited in eight ways :

1. By crimes;
2. By illegal alienations;
3. By non-presentation to a benefice, which is the non-payment of money to the church;
4. By Simony, which is the giving of money or a reward to any ecclesiastical dignity;
5. By non-performance of conditions;
6. By waste, which is the destruction of, or spoiling in a house or garden;
7. By breach of copyhold customs; and
8. By bankruptcy.”

(Hovenden Commentaries on the Laws of England in Four Books with an Analysis of the Work by Sir William Blackstone Vol 2 (1829) 419-421; Morrison (n 13) 267-286)

# FATF –revised June 21

- Recommendations 4 (Confiscation and provisional measures) & 38 International Cooperation
- 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 (4)
- Countries should be 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. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets (38)

# UN Model Law – in Rem Forfeiture (2011)

- The Model Law on In Rem Forfeiture is an initiative of the Legal Assistance Program for Latin America and the Caribbean (LAPLAC)
- Title of In Rem Forfeiture rather than commonly used Non-Conviction based forfeiture
- Model law procedure is sui generis: “a special legal proceeding is required without which it would take countries much too long to achieve an effective and efficient implementation of the mechanism.”
- “in rem forfeiture constitutes a novel mechanism and an effective answer to organized crime, since it focuses exclusively on the pursuit of all types of assets that make up the proceeds of criminal activity.”

# 9 Chapters

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III. Procedural aspects

IV. Proceedings

V. Evidence -

VI. Nullity

VII. Management and disposal of property -

VIII. International cooperation – includes a duty to cooperate

IX. Final provisions

[https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workin  
gggroup2/2011-August-25-26/V1185274e.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workin<br/>gggroup2/2011-August-25-26/V1185274e.pdf)

# General aspects

- Definitions
  - a) “Illegal activity”: All activity classified as criminal, even when no judgment has been issued, as well as any other activity that the legislature may deem subject to this Act.
  - b) “Proceeds”: Property derived or obtained directly or indirectly from illegal activities.
  - c) “Instruments”: Property used or intended to be used, in any manner, in whole or in part, for illegal activities.
  - d) “Good faith”: Diligent and prudent conduct, free from any negligence, in any act or legal transaction related to the property described in Article 6 of this Act.

# General

- Article 2. Concept. The in rem forfeiture is a property-related consequence of illegal activity whereby a judicial authority orders the surrender of ownership of the property referred to herein to the State without consideration or compensation of any kind.
- The judicial proceedings are directed against property not persons
- Retroactivity- applies regardless of whether the illegal activity occurred before the law enters force.
- Statutory limitations do not apply to in rem forfeiture.



# Applies to:

- a. Property that is the proceeds of illegal activities.
- b. Property that is the instrument of illegal activities.
- c. Property that is the physical object of illegal activities.
- d. Property derived from the partial or total transformation or conversion, whether physical or legal, of the proceeds, instruments, or physical object of illegal activities.
- e. Property of legal origin used to conceal property of illegal origin
- f. Property of legal origin commingled with property of illegal origin.

# Applies to:

- g. Property constituting an unjustified enrichment, when there exist elements that allow such property to be reasonably deemed to originate from illegal activities.
- h. Property constituting income, revenue, proceeds, earnings, and other profits derived from the property listed above.
- i. Property of legal origin whose value is equivalent to any of the property described in the preceding points, when it is not possible to locate, identify, confiscate, attach, or physically seize the latter.
- j. Property of legal origin whose value is equivalent to any of the property described in the preceding points, when the right of a third party acting in good faith to the same property is proven.

# Additional points

- Article 7. Transfer upon death. The property referred to in the preceding article is not legitimized by the death of the owner. Consequently, such property is subject to in rem forfeiture.
- Article 8. Legal acts. No legal act performed in regard to the property listed in Article 6 legitimates such property, with the exception of the rights of third parties acting in good faith.
- Article 9. Non-invocability of secrecy or confidentiality. Banking, currency exchange, stock exchange, and tax secrecy shall not be invoked, and access to the information contained in databases may not be hindered, in accordance with domestic law.

# Procedural guarantees

“Any actions that restrict fundamental rights shall be taken by court order. In urgent cases or other cases of duly established need, the competent authority may take such measures, which must be submitted for subsequent review as soon as possible.”

“Res judicata. The affected party may prove that a favorable judgment with the force of res judicata has been issued because the parties, object, and cause are identical.”

“Presence at the proceeding. A guardian ad litem shall be appointed to represent the interests and ensure the full exercise of the rights of affected parties who are not present and those who are unknown at the time of the proceedings.”

# Rights of Interested Parties

- “a. To have access to the proceedings, directly or through the presence and representation of an attorney, from the time notice of the in rem forfeiture request is served or preventive measures are implemented.
- b. To be informed in clear, comprehensible terms of the factual and legal grounds upon which the proceedings are based.
- c. To submit and request evidence, and to participate extensively in the defense of his rights.
- d. To dispute the allegations being made as to the property.
- e. To waive the evidentiary phase of the proceedings and opt for a summary judgment of in rem forfeiture.”

# Initiating the proceedings

The competent authority shall file a request which shall include the following:

- a. Factual and legal grounds for in rem forfeiture.
- b. Identification, tracing and location of the property.
- c. Direct and circumstantial evidence supporting the claim.
- d. Request for any proceedings deemed necessary.
- e. Information about preventive measures taken.
- f. Request for preventive measures.
- g. Information available as to the identity and location of potential affected parties and their connection to the property.
- h. Description of the actions taken during the initial phase, which must be kept secret or confidential in accordance with the law.

# Evidence

- The judgment declaring in rem forfeiture shall be based on the legal, timely submitted evidence and the order is based on what has been alleged and proven by a “preponderance of the evidence”.
- All direct and circumstantial evidentiary material that is relevant, pertinent and useful shall be admitted.
- The evidence shall be considered as a whole and according to the rules of reasoned judgment.
- Each party is responsible for proving the grounds supporting its position.
- Common knowledge and indefinite claims or denials do not require proof.
- Illegal evidence: all evidence obtained in a manner that violates basic rights, without prejudice to the application of relevant guidelines on exceptions to the rules on excluded evidence.

# Un Model Law 10 years on

- Speaking at an UNGASS preparatory panel in November 2020 on [optimizing cooperation and assistance mechanisms, especially those involving vast quantities of assets](#), Oscar Solorzano explained that international standards over the last 20 years have positioned non-conviction based confiscation as a suitable mechanism for states to recover the proceeds of corruption.
- However, he pointed to problems with international cooperation in enforcing asset recovery decisions based on non-conviction based confiscation. Discrepancies between national laws have led to some requested states refusing mutual legal assistance in such cases.
- This, he said, is despite the fact that Article 46 of the UNCAC requires States Parties to afford mutual legal assistance “to the fullest extent possible.” This implies making sincere efforts to apply principles that support the prosecution of crimes and the recovery of assets.
- Solorzano gave positive examples where Peru, whose non-conviction based confiscation law is known as *extinción de domino*, was able to recover millions of dollars of stolen assets from Switzerland and Luxembourg despite these jurisdictions not having a comparable law. He noted that in his opinion, the proactive attitudes of both requesting and requested states was fundamental to achieving this "paradigm shift".
- [Spotlight on non-conviction based confiscation at UNGASS preparatory meeting | Basel Institute on Governance \(baselgovernance.org\)](#) ( accessed 2/12/21)



# Case Study: The Nun (Peru)

Nelly Marion Evans Risco, a British-Peruvian woman, held funds in a bank account in Switzerland.

Although the funds could not be definitively shown to be the proceeds of illicit activities the Peruvian law of on non-conviction based confiscation of illicit assets, *extinción de dominio*, permitted the court to forfeit funds which on the balance of probabilities would be applied in future to a criminal use namely for the terrorist activities ( cf s303Z1 POCA 2002).

In the initial phase of the proceedings the prosecutor was greatly assisted by two aspects of the law namely that proof is on the balance of probabilities and once an order is made there is a partial shift of the burden of proof onto the party holding the funds.

[https://baselgovernance.org/sites/default/files/2021-06/Case%20Study%20The%20Nun\\_EN.pdf](https://baselgovernance.org/sites/default/files/2021-06/Case%20Study%20The%20Nun_EN.pdf) (accessed 2/12/21)