

# WAGING WAR AGAINST CORRUPTION IN DEVELOPING COUNTRIES: HOW ASSET RECOVERY CAN BE COMPLIANT WITH THE RULE OF LAW

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*It is often said that criminals hardly ever mind financial penalties if they get caught, but on the other hand, they fear losing tangible assets. This is the underlying rationale for asset forfeiture approaches: forfeiting property can be a powerful detractor for crime and corruption. Assume that John was running a gambling operation or cooking drugs in a room he rented from a house belonging to a retired couple. This case naturally raises a lot of questions (e.g. should the whole house be seized and forfeited, and if so, what would happen to the couple?) and brings into focus not only the process through which property can be forfeited, but also the kinds of protections that should be provided to John, the couple, and potentially even, the house. This example also foreshadows wider tensions that emerge between deprivation of property, due process protections, and the social imperative to fight crime and corruption.*

*Asset forfeiture laws are powerful tools provided to law enforcement agencies in their quest to tackle crime and corruption by seizing ill-gotten assets. Various legal mechanisms empower authorities to recover assets. One such approach, which is enshrined as a non-mandatory requirement in the United Nations Convention Against Corruption (UNCAC), relies on measures that allow confiscation of assets without a criminal conviction. This is typically referred to as Non-Conviction Based asset forfeiture (NCB or NCBF), also called civil forfeiture.*

*But the use of NCB is controversial. Absent some protections, NCB can be problematic insofar as it encroaches on property rights while relying on*

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*lower procedural safeguards and human rights protections than normally applies to criminal proceedings. These concerns are heightened in countries where transparency and accountability structures leave a lot to be desired, such as developing countries, and where there are few prospects that NCB forfeiture will be used impartially to recover the proceeds and instrumentalities of corruption. These concerns have also led to calls for NCB to be used in conjunction with higher standards provided in criminal procedures.*

*Using established methods of legal analysis, this Article shows that NCB has been applied in a manner that avoids undermining constitutional and human rights protections. Drawing on examples from South Africa, Namibia, Botswana, Colombia, and the Philippines, the paper shows it is possible to put due process and Rule of Law safeguards in place to ensure NCB does not raise such constitutional challenge. The paper thus argues that it is helpful to frame NCB forfeiture in Rule of Law terms, because safeguards help ensure the long-term legitimacy and efficiency of asset forfeiture systems. But it is important to acknowledge there may be challenges to the implementation of these safeguards, as the analysis shows. Some of the more important challenges are considered, including the concept of 'political will', tensions between human rights and anti-corruption obligations, court systems and judicial independence (or lack thereof), and property rights protections.*

*The Article is structured as follows. After the introduction, a brief overview of asset forfeiture and NCB forfeiture mechanisms is provided. The paper then reviews how NCB is implemented in practice across some of the case studies. It then goes on to discuss the due process and Rule of Law concerns that NCB forfeiture raises and argue that strong Rule of Law safeguards (such as robust judicial structures and rights protections) are needed to mitigate these risks and guard against abuses. To illustrate these points, the Article reviews specific safeguards that developing and transitioning countries have put in place in NCB systems, such as the application of proportionality tests, compensation, measures to mitigate adverse impact in reverse onus provisions and to protect against self-incrimination, the right to appeal as well as other fair trial measures. The paper ends with a discussion of the challenges for a Rule of Law compliant NCB system.*

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## I. INTRODUCTION

*“I am not unaware of the challenges of fighting corruption in a manner consistent with respect for human rights and the Rule of Law.” (President Buhari, Nigeria)<sup>1</sup>*

Organized crime is a wide term that applies to any group criminal activity. An alliance between corrupt leaders and thugs (even from the police, for example) to embezzle public money could qualify as organized crime, provided they can curb criminal law.<sup>2</sup> Thus, there is a synergetic and fluid relationship between organized crime and corruption.<sup>3</sup> Criminal activity and the organized crime groups that perpetrate it tend to be primarily driven by the opportunity to generate financial gain. Such criminal groups also thrive and grow from the absence of regulation and enforcement or from socio-political instability. They often resort to bribes – the most common iteration of corruption– cooptation of political elites, coercion, racketeering money laundering and worse, to violence and terrorism, to achieve their goals. As the Home Office in the United Kingdom recognizes, “serious and organized crime [which includes among others drug, weapons and human trafficking, organized illegal migration, etc], is a threat to our national security, and costs the UK more than £24 billion a year.”<sup>4</sup> If that was not enough, internationally, criminal activity of this nature compounds a much larger developmental challenge. World Bank estimates suggest that USD 1 trillion is paid annually in bribes.<sup>5</sup> It has also been proposed that USD 1 to 1.6 trillion is lost to criminal activities, corruption and tax evasion per year, and that corrupt leaders

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1. His Excellency Muhammadu Buhari, President, Fed. Republic of Nigeria, Keynote Address at The Commonwealth Event: Tackling Corruption Together: A Conference for Civil Society, Business and Government Leaders (May 11, 2016).

2. Michael Levi & Nicholas Lord, *Links between Corruption and Organised Crime, and Research Gaps*, in NON-STATE ACTORS IN ASSET RECOVERY 39, 39 (Daniel Thelesklaf & Pedro Gomes Pereira eds., 2011).

3. *What is Corruption?*, TRANSPARENCY INT’L (2018), <https://www.transparency.org/what-is-corruption#define>.

4. HER MAJESTY’S GOVERNMENT, SERIOUS AND ORGANISED CRIME STRATEGY 5 (2013), <https://bit.ly/2ztBh2a>.

5. Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, in WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2005-2006, at 81, 83, [http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/21\\_Governance\\_and\\_Corruption\\_Kaufmann.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/21_Governance_and_Corruption_Kaufmann.pdf). For a criticism of these figures, see Matthew Stephenson, *It’s Time to Abandon the “2.6 trillion/5% of Global GDP” Corruption-Cost Estimate*, GLOBAL ANTICORRUPTION BLOG (Jan. 5, 2016), <https://globalanticorruptionblog.com/2016/01/05/its-time-to-abandon-the-2-6-trillion5-of-global-gdp-corruption-cost-estimate/>.

from developing countries loot USD 20 to 40 billion per year in bribes, misappropriation of funds, and other corrupt practices.<sup>6</sup> Global Financial Integrity (GFI), a leading institution in this area, estimates that USD 1.1 trillion left developing countries in Illicit Financial Flows (IFF) in 2013 alone.<sup>7</sup> Whether a country is looted by political leaders, or organized crime, or both, the consequences are similar. Organized crime, corruption, illicit wealth, and IFFs pose significant development challenges, as they deprive countries of funds to invest in health, education and infrastructure, and contribute to distrust in public institutions.<sup>8</sup> Indeed, the UN considers that the “illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, and the Rule of Law.”<sup>9</sup> Admittedly, this is particularly damaging when this theft is committed by those in power. Moreover, a significant part of the problem is that ill-gotten gains can seldom be recovered and returned. In the UK, national statistics suggest that in 2012-13, only 26 pence of every £100 of criminal proceeds was recovered.<sup>10</sup> As an Organisation for Economic Cooperation and Development (OECD) study measuring the funds frozen and repatriated to any foreign jurisdiction between 2006 and 2009 has shown, only four countries had returned stolen assets (USD 276 million in total). In 2012-2014, USD 147 million was returned to a foreign jurisdiction.<sup>11</sup> Put differently, only 1.6% of stolen assets frozen by OECD countries between 2006-2010 have been returned.<sup>12</sup> It is

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6. *See Fact Sheet on Stolen Asset Recovery*, WORLD BANK & U.N. OFF. ON DRUGS AND CRIME, [http://www.unodc.org/pdf/Star\\_FactSheet.pdf](http://www.unodc.org/pdf/Star_FactSheet.pdf) (last visited Oct. 20, 2018). THEODORE S. GREENBERG ET AL., *STOLEN ASSET RECOVERY INITIATIVE, STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* 1, 1 (2009). Note that determining the Illicit Financial Flow (IFF)-related loss to development, however, is fraught with difficulties, as it is hard to know whether IFF usage actually benefits development in the country of destination or origin. *See, e.g.*, Fredrik Eriksson, *Illicit Financial Flows: What losses for international development?*, U4 ANTI-CORRUPTION RESOURCE CTR. (Oct. 15, 2017), <http://bit.ly/2xSvPVu>.

7. Global Financial Integrity (GFI) defines IFFs as “illegal movements of money or capital from one country to another. GFI classifies this movement as an illicit flow when the funds are illegally earned, transferred and/or utilized.” *Illicit Financial Flows*, GLOBAL FINANCIAL INTEGRITY, <http://bit.ly/2xRzAKC> (last visited Nov. 2017).

8. GREENBERG, *supra* note 6, at 7.

9. Human Rights Council Res. 17/23, U.N. Doc. A/HRC/Res/17/23, at 2 (July 19, 2011).

10. Jane Croft, *Criminal asset confiscation laws under scrutiny*, FIN. TIMES (Aug. 22, 2016), <https://www.ft.com/content/0f3c4ba4-54b0-11e6-9664-e0bdc13c3bef#axzz414Uap4dt>.

11. Frozen assets, however, represent a much larger total. Australia, Switzerland, the UK, the US, France, and Luxembourg had frozen USD 1.1225 billion at the time of that survey. *See* OECD, *ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: MEASURING OECD RESPONSES* 88 (2014), [https://www.oecd.org/corruption/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries.pdf](https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf).

12. Between 2006 and 2009, approximately 276 million out of 1.225 USD billion frozen; and between 2010-2012, 147 million out of 1.398 billion USD frozen. *Id.*

worth noting, however, that these are considered to be conservative estimates, particularly in light of the vast sums of money – between USD 20 and 40 billion according to some sources – stolen each year. Recovering these assets is challenging, primarily because it is very difficult to establish a trail and locate them. Funds from the ‘victim’ country where they are plundered are mainly concealed overseas, facilitated by global ‘shadow’ financial systems such as tax havens and anonymous accounts or corporations.<sup>13</sup> Moreover, general, legal, and operational barriers hamper recovery.<sup>14</sup>

The significance and impact of criminal activity and large-scale looting of state assets raises important questions, foremost among which is the kind of response needed to disrupt and stop them. The imperative to fight organized crime and the offenses it engenders has led the authorities to focus on depriving those benefiting from such criminality, by taking the profit out of the crime.<sup>15</sup> In effect, investigators and prosecutors can use various tools to follow the money back to its point of origin and recover the assets, be it through domestic criminal prosecution and confiscation (sometimes called post-conviction based forfeiture); non-conviction based (civil) forfeiture; private civil actions (e.g. insolvency processes); and administrative confiscation.<sup>16</sup>

The United Nations Convention Against Corruption (UNCAC), which is widely ratified and legally binding, provides a framework for the recovery and return of stolen assets by calling on countries to freeze, seize and confiscate the proceeds of corruption and return them to the country of origin.<sup>17</sup>

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13. See Phyllis Atkinson, *Introduction* to INTERNATIONAL CENTRE FOR ASSET RECOVERY, TRACING STOLEN ASSETS: A PRACTITIONER’S HANDBOOK 19–22 (2009), [https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing\\_web-version\\_eng.pdf](https://www.baselgovernance.org/sites/collective.localhost/files/publications/asset-tracing_web-version_eng.pdf).

14. See KEVIN M. STEPHENSON ET AL., WORLD BANK & UNODC, BARRIERS TO ASSET RECOVERY: AN ANALYSIS OF THE KEY BARRIERS AND RECOMMENDATIONS FOR ACTION 3 (2011), <http://documents.worldbank.org/curated/en/204221468338390474/Barriers-to-asset-recovery-an-analysis-of-the-key-barriers-and-recommendations-for-action>.

15. It is, for instance, telling that the Preamble of South Africa’s Prevention of Organised Crime Act 121 of 1998 refers to the significance of organized crime to justify the introduction of asset forfeiture mechanisms.

16. For a detailed account of these mechanisms, see generally JEAN-PIERRE BRUN ET AL., WORLD BANK & UNODC, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS (2011), <https://star.worldbank.org/sites/star/files/Asset%20Recovery%20Handbook.pdf>. Of note: the term “civil forfeiture” is often used by common law jurisdictions instead of “NCB forfeiture.” However, “civil forfeiture” can be problematic, as civil law countries have equated this to a civil (private) action. Since asset forfeiture also requires mutual legal assistance, consistent use of terminology (“NCB”) is recommended. See Greenberg, *supra* note 6, at 95–97.

17. G.A. Res. 58/4, United Nations Convention Against Corruption (Oct. 31, 2003) [hereinafter UNCAC]. UNCAC entered into force in December 2005. As of June 2018, UNCAC has 186 state parties. All of the countries covered in this study have signed and ratified UNCAC, except for Botswana which has acceded but not yet ratified the Convention. *Signature and Ratification Status*, UNODC (June 26, 2018), <https://www.unodc.org/unodc/en/corruption/ratification-status.html>.

Under Article 54(1)(c), which itself is a non-mandatory obligation, the Convention encourages countries to consider taking measures “to allow confiscation of such 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.”<sup>18</sup> The Financial Action Task Force (FATF) also recommends that countries adopt “measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction 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.”<sup>19</sup> Property can refer to land, cars, houses or other material goods, while instrumentalities refers to any property which is implicated in the commission or suspected commission of an offence (such as a car that is used to transport drugs).

Non-Conviction Based forfeiture (NCB), which as the name implies, refers to the legal process allowing for the “restraint, seizure and forfeiture of stolen assets without the need for a criminal conviction,”<sup>20</sup> is seen as a ‘critical’ tool for recovering the proceeds and instrumentalities of corruption. Although the South African legislature and courts have justified the need for NCB on the basis that conventional remedies to fight crime have failed,<sup>21</sup> its utility and application are heavily contested. NCB has attracted criticism because it lifts due process protections for the accused. As critics have pointed out, suspected criminality can be punished without the normal due process protections enjoyed by a defendant in a criminal case.<sup>22</sup> NCB thus confers overbearing powers on the state, which may be worrying in situations where

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18. UNCAC, *supra* note 17, art. 54(1)(c). Meanwhile, it should be noted that other regional Conventions also address the criminalization of corruption and asset recovery. Article IX of the Inter American Convention Against Corruption concerns illicit enrichment, while Article XV touches on measures regarding property; *see* Organization of American States, Inter-American Convention Against Corruption (B-58), art. xv, Mar. 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M 724, [http://www.oas.org/en/sla/dil/docs/inter\\_american\\_treaties\\_B-58\\_against\\_corruption.pdf](http://www.oas.org/en/sla/dil/docs/inter_american_treaties_B-58_against_corruption.pdf). Moreover, Article 8 of the African Union Convention, though much more vague than other Conventions, covers Illicit Enrichment. *See* African Union Convention on Preventing and Combating Corruption art. 8, July 1, 2003, <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.

19. FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 10 (2018), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

20. GREENBERG, *supra* note 6, at xv.

21. *See NDPP v. Mohamed NO & Others* 2002 (4) SA 843 (CC) (S.Afr.); Prevention of Organised Crime Act 121 of 1998, *supra* note 15.

22. LIBERTY (THE NATIONAL COUNCIL FOR CIVIL LIBERTIES), PROCEEDS OF CRIME: CONSULTATION ON DRAFT LEGISLATION ¶ 5.1 (May 2001), <https://www.libertyhumanrights.org.uk/sites/default/files/jun-proceeds-crime-draft.pdf>.

there are no systems to keep it in check. This practice therefore raises concerns over the abuse of state power, since it is not inconceivable, for example, for it to be employed to target political opponents in certain situations.

Expectedly, NCB has been challenged in the courts, but as will be explored further in the paper, these challenges have been overruled in some jurisdictions. This is music to the ears of those advocating in favor of NCB and according to whom it provides investigators and prosecutors a speedy and efficient way to recover assets. Another positive is the wide scope of application of NCB, which can be used to forfeit assets in situations where the defendant or violator has fled the country, is dead, or is immune from prosecution (such as for Politically Exposed Persons (PEPs)), for example.<sup>23</sup>

Against this backdrop, this paper reviews how some jurisdictions—primarily South Africa, Namibia, Botswana and the Philippines (with some references to Colombia and Mexico as well)—have sought to address the abovementioned criticisms, especially those concerning lower standards and the absence of due process protection, by putting in place specific safeguards.<sup>24</sup> Protections can be built in NCB to prevent that property rights are undermined or the defendant's right to a fair trial lifted. Thinking back to Buhari's opening quote, the paper thus shows that NCB forfeiture can be implemented with good effect in a manner that is consistent with due process, human rights, and the Rule of Law.<sup>25</sup> Indeed, analysts recognize that an

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23. PEP is defined as “an individual who is or has been entrusted with a prominent public function [and who is in a position that] can be abused for the purpose of committing money laundering (ML) offences and related predicate offences, including corruption and bribery [ . . . ]” See FIN. ACTION TASK FORCE, FATF GUIDANCE: POLITICALLY EXPOSED PERSONS (RECOMMENDATIONS 12 AND 22) (2013), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>. The possibility of NCB to be used in situation of flight or death has given rise to competing interpretations. The ICHPR, for example, recommends that NCB be only used in cases of death, where the owner has fled, or is beyond the reach of criminal jurisdiction. See INT'L COUNCIL ON HUM. RTS. POL'Y & TRANSPARENCY INT'L, INTEGRATING HUMAN RIGHTS IN THE ANTI-CORRUPTION AGENDA: CHALLENGES, POSSIBILITIES AND OPPORTUNITIES (2010).

24. Although the Philippines is included as a case study, the paper does not fully consider the likely implications of Duterte's administration's impact on asset forfeiture and the prosecution of corruption.

25. Interestingly, Nigerian asset forfeiture is regulated by various laws at the same time. See Olusola Kazeem Amusa, Non Conviction Based Criminal Forfeiture and Right to Own Property in Nigeria – Enhancing the Benefits and Engaging the Problems (Sep. 16, 2008) (unpublished manuscript), <https://ssrn.com/abstract=1268806>. A new Bill that would make asset forfeiture more coherent is also in the offing. See A. Godwin Iheabunike, An Overview of the Proceeds of Crime Bill, A Legislative Drafting Perspective (Oct. 21, 2014) (unpublished manuscript), [https://www.academia.edu/16357192/AN\\_OVERVIEW\\_OF\\_THE\\_PROCEEDS\\_OF\\_CRIME\\_BILL\\_2014](https://www.academia.edu/16357192/AN_OVERVIEW_OF_THE_PROCEEDS_OF_CRIME_BILL_2014). NCB is said to have been used as well. Babajide Oladipo Ogundipe, *High Court Issues Non-conviction-based Forfeiture Orders*, INT'L L. OFF. (Aug. 28, 2017), <https://www.internationallawoffice.com/Newsletters/White-Collar-Crime/Nigeria/Sofunde-Osakwe-Ogundipe-Belgore/High-court-issues-non-conviction-based-forfeiture-orders>. That said, a limitation of this paper is that it does not consider Nigerian NCB practice and jurisprudence specifically.



NCB forfeiture system that provides the appropriate due process and Rule of Law safeguards can be an important tool in fighting against corruption.<sup>26</sup> One could also add that a Rule of Law compliant asset forfeiture system is more legitimate and sustainable. As this paper argues, Rule of Law safeguards prevent abuse in NCB.

For the purpose of this paper, the “Rule of Law” refers to the idea that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”<sup>27</sup> This definition encompasses various ingredients, such as the principles of legality, certainty, equality and access to justice. Inherent to the Rule of Law are various procedural safeguards —such as the right to a fair trial, the right to a defense and to a fair hearing, equality of arms, etc.

The Rule of Law requires that those in power do not have unfettered opportunities to create and/or impose measures that would restrict a person’s human rights (including to private property) and liberty. In principle, this is done through *ex ante* limitations on the scope of authority for decision-making bodies, and by ensuring that internal and/or external stakeholders can determine whether that decision-making is in line with due process and the scope of that authority.<sup>28</sup> Asset forfeiture, and particularly NCB, can lead to an imbalance between these two concepts, particularly in systems of laws where the Rule of Law is deficient. However, this Article offers guidance on how it is possible for countries to minimize prospects for abuse in NCB. In the process, the paper contributes to our understanding of how tensions between the need to fight corruption and recover assets while respecting civil and political rights can operate in practice.

The focus of the paper on developing countries and Rule of Law is particularly relevant for various reasons. First, UNCAC refers to the Rule of Law and due process of law to adjudicate property rights, both in the preamble and opening Articles on preventive measures.<sup>29</sup> Second, not only is UNCAC a treaty with broad application (and NCB a recommended measure, as noted), but it has been ratified by a majority of countries. Third, corruption

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26. Martin Collins & Colin King, *The Disruption of Crime in Scotland through Non-Conviction Based Forfeiture*, 16 J. MONEY LAUNDERING CONTROL 379 (2013); AJ van der Walt, *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause*, 16 S. AFR. J. HUM. RTS. 1 (2000); Colin King, *Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-conviction-based Asset Forfeiture*, 16 INT’L J. EVIDENCE & PROOF 337, 337–63 (2012).

27. TOM BINGHAM, THE RULE OF LAW 8 (2010).

28. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192–93 (2016).

29. UNCAC, *supra* note 17.

is transnational by nature, and thus international collaboration is a necessity.<sup>30</sup> This collaboration has led to several successful cases involving cross-border investigation, prosecution and return of assets, for example between Switzerland, the UK, the US, France, Nigeria, the Philippines and Equatorial Guinea, to name a few. In line with this, there has been growing focus on how countries of ‘destination’ of illicit financial flows (e.g. the UK, its dependencies, and other ‘offshore’ centers) should do more to tackle ill-gotten wealth. That said, it is also inevitable that ‘victim’ countries must also have strong systems in place to tackle corruption at its root, such as viable mechanisms to recover assets. Indeed, international asset recovery cases presented before the courts in the ‘destination’ countries must often meet certain demanding standards, but evidence must often be acquired overseas. Thus, developing the local investigative, prosecutorial and legal ecosystem in ‘victim’ countries is fundamental. Successful cases brought before the courts in ‘destination’ countries are intricately interlinked with the strength of the aforementioned ecosystem. As a result, the Article does not ignore the international dimensions of asset recovery, far from it, but recognizes that the domestic elements (both the laws and the local challenges affecting their proper implementation) require further attention. Fourth, and finally, while there is more research focusing on the legal framework and implementation challenges for asset forfeiture in developed countries, conversely, there appears to be less comparative research between developing countries that highlights good practice and identifies possibilities for cross-learning. This is another gap this paper aims to address.<sup>31</sup>

The Article proceeds as follows. Part II provides a brief introduction to asset recovery, further discussing the differences between post-conviction based (criminal) and non-conviction based (civil) mechanisms. Part III provides a descriptive overview of how NCB applies in practice across some jurisdictions, to guide the reader into the next sections. Part IV expands on the connection between NCB and the Rule of Law, and identifies the importance, in Rule of Law terms, of building safeguards throughout the NCB process. Using established methods of legal analysis, such as an examination of jurisprudence and relevant legislations, Part V reviews various safeguards that developing countries have put in place to address these risks. Finally,

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30. UNCAC Article 55 mandates that countries assist each other in exchanging information and in obtaining ownership of assets that are the proceeds, instrumentalities or objects of a convention offence or assets and in confiscating asset. UNCAC, *supra* note 17.

31. On research gaps and the impingement of asset forfeiture powers on due process, see, e.g., Collins and King, *supra* note 26.

Part VI. discusses four particular challenges that can undermine the implementation of a ‘Rule of Law compliant’ NCB system. Part VII. concludes this Article.

## II. ASSET RECOVERY AND NON-CONVICTION BASED FORFEITURE

### A. Asset recovery

The return of assets is a fundamental principle in UNCAC, with ‘asset recovery’ (also referred to as ‘asset forfeiture’) a treaty objective under Chapter V. However, asset recovery is an elusive concept in public international law, and no definition is provided in UNCAC. Two broad meanings tend to prevail: first, as a legal process by which states use each other’s coercive powers to confiscate and forfeit proceeds and objects of corruption; and second, as a mechanism which aims at limiting the transfer of ill-gotten assets internationally and enabling victim states to regain or obtain assets or substitute assets that are moved abroad.<sup>32</sup>

A clearer definition of asset recovery is the legal process through which “law enforcement and prosecutors [...] identify and trace the assets, linking them to the criminals and criminal activity and allowing for the seizure and confiscation of the criminal proceeds and the prosecution of the perpetrator.”<sup>33</sup> The result of asset recovery is that persons or entities that hold an interest in the specified funds or other assets at the time of the confiscation lose all rights, in principle, to the confiscated funds or assets. As noted in the opening section, there are a number of legal mechanisms to recover assets, with non-conviction and post-conviction/criminal forfeiture being most common.

Having defined asset recovery, and before diving into the specifics of non-conviction based forfeiture, what remains to be considered is how asset forfeiture actually works. . Various stages are involved: i) tracing and gathering of evidence, ii) freezing of assets; iii) confiscation of assets; and iv) forfeiture of funds/assets that are the proceeds of corruption. This distinction, however, does not consider the management (or preservation of value) of seized assets, and the return of assets to the state of origin post-confiscation.

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32. See RADHA IVORY, CORRUPTION, ASSET RECOVERY, AND THE PROTECTION OF PROPERTY IN PUBLIC INTERNATIONAL LAW: THE HUMAN RIGHTS OF BAD GUYS 22–29 (2014); Radha Ivory, *Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for Global Governance*, in CHASING CRIMINAL MONEY: CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 184 (Katalin Ligeti & Michele Simonato eds., 2017).

33. BASEL INSTITUTE ON GOVERNANCE, INTERNATIONAL CENTRE FOR ASSET RECOVERY, DEVELOPMENT ASSISTANCE, ASSET RECOVERY AND MONEY LAUNDERING: MAKING THE CONNECTION 6 (2011). See also *Glossary*, U4 ANTI-CORRUPTION RESOURCE CTR., <http://www.u4.no/glossary/>.

On this basis, the International Centre for Asset Recovery (ICAR) proposed a similar, four-stage process: i) pre-investigative phase (during which investigators decide whether or not an offense has taken place, and a perpetrator is identified); ii) the investigative phase (in which “the proceeds of crime are identified, located, frozen and evidence in respect of ownership collated”); iii) the judicial phase (when the investigation is completed and referred for trial, and which requires the judiciary to determine “whether enough persuasive evidence is provided, and whether the Rule of Law has been observed in the investigation phase”); and iv) the return phase (whereby property is returned to the rightful owner and disposed of).<sup>34</sup>

## B. Post-Conviction and Non-Conviction-Based Forfeiture

There are some important similarities and differences between post-conviction based and NCB forfeiture, and both approaches present their own set of advantages and disadvantages.<sup>35</sup>

On the one hand, they share some similarities – such as providing mechanisms to seize, freeze, and ultimately forfeit the proceeds and instrumentalities of crime to the state, typically through a court order. On the other hand, the procedures for NCB and criminal asset confiscation differ insofar as the latter requires a criminal trial and conviction, whereas the former does not. Criminal forfeiture involves an action against the defendant, whereas in NCB, a case is generally brought against the asset, not the person, which means the asset can be forfeited. Moreover, the standard of proof for securing a civil confiscation order is usually lower than that required for securing a criminal confiscation order, since the former relies on a ‘balance of probabilities’ test and does not require the prosecution to prove ‘beyond reasonable doubt’ that a crime was committed.<sup>36</sup>

NCB does not require proving the guilt of an accused party in order to secure forfeiture. Both the standard and the burden of proof lighten the load of the prosecution. With the civil standard of ‘balance of probabilities’ as the prevailing benchmark and the onus often shifting to the respondent to prove the lawful origins of their property, convictions and confiscations are arguably easier to secure. The scope of NCB allows assets to be recovered from people who are absent or dead, and it can be used to target assets that are either the proceeds of or derived from corrupt conduct or that were used in

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34. *Asset Recovery Fundamentals*, INT’L CTR. FOR ASSET RECOVERY, <https://cso.assetrecovery.org/guide/background> (last visited Nov. 2017).

35. See Appendix, *infra* p. 208–09.

36. See *Illegal Asset Confiscation*, TRANSPARENCY INT’L, <http://www.confiscation.eu/faq> (last visited Oct. 2017); see also BRUN ET AL., *supra* note 16, at 9.

illegal action. As such, civil forfeiture cases are not limited to property related to a particular transaction. Unlike criminal forfeiture, which does not affect property held by third parties, NCB can forfeit property of a third party who has no *bona fide* defense. NCB proceedings, moreover, can be filed before, during, or after a criminal case or even when there is no criminal charge.<sup>37</sup> As will be discussed in subsequent sections, NCB has been criticized in part for these very reasons.

It is worth noting that criminal cases provide the benefit of increasing societal recognition of the criminal nature of corruption, which often results in a sense of justice against the perpetrator. They also offer investigators with ‘aggressive’ means of gathering information and intelligence.<sup>38</sup> However, forfeiture under the criminal route must follow the assets to where they are hidden (to secure the evidence). Causality must also be established between the asset and the criminal activity.<sup>39</sup> This requires specialized skills, as well as significant financial and time commitment, which developing countries do not always have. Moreover, causality can be particularly hard to establish in cash-based societies (e.g. Nigeria, Indonesia, and Vietnam), where there may be few mechanisms for international cooperation between law enforcement agencies, and where the definition of the crime in one jurisdiction differs from that in another.<sup>40</sup> The ‘beyond reasonable doubt’ requirement makes it difficult to secure criminal convictions, and thus acts as a further obstacle to recover assets through this route. It is also the case that criminal forfeiture is incapable of dealing with cases where the main suspect has died, fled overseas, or enjoys immunity from prosecution. However, where criminal forfeiture can be used, a single proceeding generally determines if there is a conviction against the defendant and, if so, it is used to forfeit the assets at the same time.<sup>41</sup> These shortcomings explain the appeal of NCB.

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37. See GREENBERG ET AL., *supra* note 6, at 14. It is accepted that civil forfeiture should not become a proxy for finding individuals guilty of a crime. As the UK’s Home Secretary and Attorney General stated in 2009, “Care must be taken not to allow an individual or body corporate to avoid a criminal investigation and prosecution by consenting to the making of a civil recovery order, in circumstances where a criminal disposal would be justified under the overriding principle that the reduction of crime is generally best served by that route.” Civil forfeiture should therefore not be a replacement for the criminal law, but something which complements and supports it. *Asset Recovery Powers for Prosecutors: Guidance and Background Note 2009*, UK ATT’Y GENERAL’S OFF. (Nov. 29, 2012), <https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009>.

38. BRUN ET AL., *supra* note 16, at 11.

39. Abdullahi Y. Shehu, *Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria*, 3 INT’L L. RES. 186, 194 (2014).

40. It should be said, however, that requests for Mutual Legal Assistance (MLA) are often provided only in the context of criminal, not civil, procedures.

41. See GREENBERG ET AL., *supra* note 6, at 13–18.

### C. Civil forfeiture and ‘unexplained wealth’ laws

Several jurisdictions – such as Australia, Ireland, Colombia, the UK, South Africa, and Mauritius – have progressively introduced specialized NCB tools or confiscation laws, called Unexplained Wealth Laws or Unexplained Wealth Orders (UWOs).<sup>42</sup> In the UK, where UWOs were introduced in September 2017 through the Criminal Finance Act<sup>43</sup>, one of the conditions to serve an order is that the respondent is a PEP, or that there are reasonable grounds to suspect that the respondent has been involved in serious crime.<sup>44</sup> The introduction of UWOs in the UK is seen as an important step forward in bridging an important legal gap and would help curb the influence of the UK as a facilitator for global corruption.<sup>45</sup>

UWOs differ from traditional non-conviction based forfeiture models insofar as the proceedings are brought against the person (not an asset or property), and the state does not first have to prove that the property in question is the instrument or proceeds of a crime.<sup>46</sup> What must be shown is that, by a preponderance of the evidence, the owner is in possession of unexplained wealth. The burden of proof is then reversed, and the owner is required to explain the legitimate and legal origins of the assets in question. Failure to respond to such an UWO or an inadequate response can be used to facilitate a civil recovery against the assets. The potential constitutional and legal issues raised by UWOs—as discussed below—go some way towards explaining why only a handful of countries have fully embraced this mechanism.<sup>47</sup>

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42. On Mauritius, see Shalini O. Soopramanien, *Explaining the Unexplained Wealth Orders: (Mauritius) Good Governance and Integrity Reporting Act*, 39 STATUTE L. REV. 46 (2018) (discussing the UWO in Mauritius). See also Roopanand A. Mahadew, *The Good Governance and Integrity Reporting Act 2015: Mauritius Legislates Once More on Corruption*, 38 STATUTE L. REV. 170 (2017). See also BOOZ ALLEN HAMILTON, COMPARATIVE EVALUATION OF UNEXPLAINED WEALTH ORDERS, Final Report 52–53 (2011). Section 23 of South Africa’s POCA provides the framework for tackling unexplained wealth.

43. See generally Criminal Finances Act (2017) (UK).

44. Circular 003/2018: *Unexplained Wealth Orders*, UK HOME OFF. (Feb. 1, 2018), <https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders>.

45. Press Brief, Transparency International UK, *Unexplained Wealth Orders* (Oct. 13, 2016), <https://goo.gl/uQqTnw>. As NCB and UWOs are both civil asset recovery mechanisms and share a number of similarities, they are both considered in this paper where applicable.

46. However, there are countries—like Ethiopia—where the “possession of unexplained property” is a corruption offence proscribed by law. See generally Worku Yaze Wodage, *Criminalization of ‘Possession of Unexplained Property’ and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia*, 8 MIZAN L. REV. 45 (2014).

47. In Italy, the “12quinquies” Law, which contains the reversed burden of proof was declared unconstitutional after being in use for only two years. BOOZ ALLEN HAMILTON, *supra* note 42, at 52–53 (2011). See generally TRANSPARENCY INTERNATIONAL UK, EMPOWERING THE UK TO RECOVER

Like most asset forfeiture laws, UWOs target the proceeds derived from criminal activity. They are seen by some analysts as a powerful—yet controversial—tool for tackling corruption and organized crime and recovering assets.<sup>48</sup> This is because UWOs do not require the state to first prove criminal action, or to prove that the property is the instrument or proceeds of a crime. Moreover, at the heart of Unexplained Wealth Laws is the principle that a property owner must prove the legitimate source of his or her wealth. Whereas UWOs are civil measures, illicit enrichment tends to be a criminal offense, but some countries use UWOs in combination with illicit enrichment offenses.

A further point about the UWOs is that they show that the methods employed by different countries to recover assets do not always fall neatly into the non-conviction or post-conviction based categories. UWOs are civil mechanisms (as no conviction is required), but in the UK at least, there is no need for any civil or criminal proceedings to have been initiated beforehand, since only a suspicion of illicit wealth (or, technically, ‘reasonable cause to believe’), is enough to serve the UWO.<sup>49</sup> Colombian legislation also refers to its own asset forfeiture mechanism as being ‘autonomous’ or ‘independent’.<sup>50</sup>

#### D. Summary

After an initial overview of asset forfeiture, this section discussed the differences between non-conviction and post-conviction based forfeiture. NCB forfeiture is a civil mechanism which does not require a criminal conviction, and in which a case is brought against the asset, not the defendant. The standards of proof also vary, and it is often said that one advantage of NCB is that it does not require proving guilt beyond reasonable doubt to forfeit an asset, since it is merely necessary to prove it on a balance of a probabilities. As various jurisdictions continue to seek answers to fight corruption and organized crime, UWOs have been gaining appeal, with Mauritius and the UK the latest countries to introduce such a legal mechanism. UWOs are also a civil mechanism, but they target a person, instead of the asset. The evidentiary standards are also different, insofar as the state must only show by a preponderance of the evidence that the owner is in possession

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CORRUPT ASSETS, UNEXPLAINED WEALTH ORDERS AND OTHER NEW APPROACHES TO ILLICIT ENRICHMENT AND ASSET RECOVERY (2015).

48. See Barney Thompson, *Criminal Finance Legislation to Boost Fight Against Tax Evasion*, FINANCIAL TIMES (Sept. 29, 2017), <https://www.ft.com/content/f49469b0-a46a-11e7-9e4f-7f5e6a7c98a2>.

49. Criminal Finance Act 2017, c. 22, §§ 362A, 362B (UK).

50. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 18 (Colom.), as amended by L. 1849 julio 19, 2017, DIARIO OFICIAL [D.O.] (Colom.).

of unexplained wealth, following which the defendant must prove the illicit origin of the assets. As is discussed in Part IV, the lowering of evidentiary standards in NCB can raise serious concerns regarding due process, unless these are met with rigorous safeguards. Before that, however, it is fruitful to explain how NCB regimes work with concrete examples.

### III. NCB REGIMES

In a nutshell, the NCB forfeiture system provides a mechanism for freezing criminally tainted assets and criminal instrumentalities, and then forfeiting these to the state if so decided by the courts. A first step in the process is the investigative phase, which seeks to secure the necessary evidence that an asset is either proceeds of unlawful activities or an instrumentality of an offence. As noted, the investigation may be initiated as part of a criminal process (during which it may become clear that a civil proceeding is actually more appropriate), or it may be conducted independently from the criminal process depending on the circumstances. At that point, criminal and civil processes can thus be undertaken in parallel (e.g. one to target the individual criminally, another to recover the proceeds through civil mechanisms). For example, Colombian Law stipulates that NCB is to be carried out independently from criminal processes.<sup>51</sup> This is also true of the Philippines.<sup>52</sup> Meanwhile, Section 50(4) of South Africa's Prevention of Organised Crime Act (POCA) provides that a forfeiture order in NCB is not affected by the outcome of a criminal proceeding.<sup>53</sup> FATF guidelines (which are not binding) also provide for NCB to be implemented "in the context of criminal laws and proceedings, or through a separate system or law outside criminal proceedings."<sup>54</sup>

Where investigators/prosecutors are satisfied with the evidence, a court is often presented with a motion to freeze the assets (e.g. the cash in a bank or an expensive car that needs to be impounded), which the court grants (or

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51. *Id.*

52. Rule of Procedure in Cases of Civil Forfeiture, Asset Preservation, and Freezing of Monetary Instrument, Property, or Proceeds Representing, Involving, or Relating to an Unlawful Activity or Money Laundering Offense Under Republic Act No. 9160, as Amended, A.M. No. 05-11-04 SC, § 27 (Nov. 15, 2005). This states that "no prior criminal charge, pendency of or conviction for an unlawful activity or money laundering offense is necessary for the commencement or the resolution of a petition for civil forfeiture."

53. Prevention of Organised Crime Act 121 of 1998 (S. Afr.).

54. FIN. ACTION TASK FORCE, BEST PRACTICES ON CONFISCATION (RECOMMENDATIONS 4 AND 38) AND A FRAMEWORK FOR ONGOING WORK ON ASSET RECOVERY (2012), <http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf>.



not), often within a short timeline.<sup>55</sup> This is frequently done *ex parte* (without notice) if the defendant fails to meet the deadline and/or fails to appear in court. The court decision will often include the motivation for freezing the assets and identify a respondent/defendant. It may also propose a time period (especially when it is not already prescribed by law) during which the investigators can continue assembling evidence, and/or for the defendant to build his or her defense and prove the licit origins of his or her assets. Eventually, the court must rule on a case, either lifting the temporary order freezing the assets or forfeiting them to the state. Once a final forfeiture order is granted, the state is normally empowered to use the assets as it sees fit. Some countries, like South Africa, provide a centralized fund to help bolster law enforcement agencies, or to fund health or education projects.<sup>56</sup>

To illustrate this process, it is helpful to look in greater detail at the steps for undertaking NCB in practice. South Africa, Namibia, the Philippines and Colombia are similar insofar as they provide for a two-stage forfeiture procedure. Differences, meanwhile, mainly concern the type of constitutional protections and standards.

#### A. South Africa, Namibia, and Botswana

NCB forfeiture in South Africa and Namibia is conducted in two stages.<sup>57</sup> At the *preservation* stage, the National Director of Public Prosecutions (NDPP) may apply to the High Court for a preservation order, mandating that a property be seized, or preventing any person from benefiting from that property in any way. A third party or *curator bonis* administers the property if need be.<sup>58</sup> This is done if there are “reasonable grounds to believe that such property is the proceeds of unlawful activity or is an instrumentality of an offence.”<sup>59</sup> The preservation order is often served *ex parte*, or without notice to the affected persons. The Court may also grant a provisional order only, indicating a deadline by which this order may be opposed.<sup>60</sup> Moreover, a court is entitled to reject the order if it finds that it would be unconstitutional for a forfeiture order to be made.<sup>61</sup>

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55. This varies from jurisdiction to jurisdiction. In Switzerland, for example, the Prosecutor, not the courts, has the authority to freeze assets, but the courts are responsible for confiscating the assets.

56. In South Africa, this is called the Criminal Asset Recovery Account (CARA), as stipulated in Chapter 7 of South Africa’s Prevention of Organised Crime Act 121 of 1998 ch. 7.

57. On South Africa, see Prevention of Organised Crime Act 121 of 1998 ch. 5. On Namibia, see Prevention of Organised Crime Act 29 of 2004 ¶¶ 51, 59.

58. Prevention of Organised Crime Act 121 of 1998 § 38, ¶ 1, § 42 (S. Afr.).

59. *Id.* ¶ 2.

60. Vinesh Basdeo, *The Legal Challenges of Criminal and Civil Asset Forfeiture in South Africa: A Comparative Analysis*, 21 AFR. J. INT’L & COMP. L. 303, 316 (2013).

61. *Id.* at 317.

Once the preservation order is issued, then notice to all concerned participants must be served and the order must be published in the Government Gazette.<sup>62</sup> Under Article 39(3), any person who has an interest in the property subject to the preservation order may enter an appearance giving notice of his/her intention to oppose the making of a forfeiture order, or to apply for an order excluding his/her property from the operation. The order remains valid for 90 days from the day of publication, during which an application for a forfeiture order must be made. The preservation order expires past this deadline, but if a forfeiture order is submitted within this period, then the preservation order continues to operate until such time as the forfeiture order comes into effect.<sup>63</sup>

At the *forfeiture* stage, the burden continues to lie with the NDPP, but the standard is on a balance of probabilities, a higher standard than at the preservation stage, though still short of what is required in criminal cases.<sup>64</sup> Effectively, the court must be satisfied that the property concerned is an instrumentality of an offence, that it is the proceeds of unlawful activities, or that the property is associated with terrorist or related activities.<sup>65</sup> The NDPP must once more give 14-day notice of a forfeiture application to every person who entered an appearance at the preservation stage.<sup>66</sup> The burden is shifted at this stage, since parties with an interest in the preserved property may apply for the exclusion of such interests from the operation of the forfeiture order. The owner must prove, on a balance of probabilities, that the proceeds were legally acquired, for consideration, and that the innocent owner has, since POCA came into effect, neither known nor had reasonable grounds to suspect that the property is a proceed of a crime.<sup>67</sup> As will be discussed in length later on, it should also be noted that the courts apply a proportionality test to ensure there is no arbitrary deprivation of property.<sup>68</sup>

The two-stage forfeiture process described above in relation to South Africa and Namibia may be contrasted with that in Botswana, where the law does not provide for an interim preservation stage. Instead, the court may

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62. Prevention of Organised Crime Act 121 of 1998 § 39, ¶ 1 (S. Afr.).

63. *Id.* § 40.

64. *Id.* § 50.

65. *Id.* § 1, ¶ 1. On the definition of instrumentality: “any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere”. However, the exact meaning of ‘instrumentality’ has been subject to debate and judicial review. See Basdeo, *supra* note 62, at 318.

66. Prevention of Organised Crime Act 121 of 1998 § 48 (S. Afr.).

67. *Id.* § 52.

68. See Basdeo, *supra* note 62, at 319–20.

grant a ‘final’ order on the first application by the Director of Public Prosecutions if it is satisfied, on the balance of probabilities, that the property is a proceed or instrument of crime.<sup>69</sup>

## B. The Philippines

The Anti-Money Laundering Act of 2001, as amended, deals with the forfeiture of monetary instruments, property, or proceeds relating to or involving unlawful activities committed by civil servants or private individuals.<sup>70</sup> Like in South Africa, forfeiture is carried out in two stages: a provisional asset forfeiture order and a freeze order.

In short, after collecting evidence and ensuring there are “reasonable grounds to believe that probable cause exists<sup>71</sup> that any monetary instrument or property is in any way related to an unlawful activity”, the Anti-Money Laundering Council (AMLC) presents to the appropriate regional trial court, through the Office of the Solicitor General, a verified *ex parte* petition for civil forfeiture.<sup>72</sup> The respondent is given notice of the petition in person, and he/she is given a chance 15 days to oppose the freeze order.<sup>73</sup> Where the respondent or his/her whereabouts are unknown, then the petition for forfeiture may be published in a newspaper of general circulation as deemed appropriate by the court.<sup>74</sup> Further to this, the court issues a provisional preservation order once it has determined that probable cause exists that the monetary instrument/proceeds involve any money laundering activity or unlawful activity. The court must do so within 24 hours of the filing of the

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69. Proceeds and Instruments of Crime Act 28 of 2014 ch. II, §§ XXV-XXVII (Bots.).

70. An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for Other Purposes, Rep. Act No. 9160 (Sept. 29, 2001) (Phil.), as amended by An Act Amending Republic Act No. 9160, Otherwise Known as the “Anti-Money Laundering Act of 2001” (Mar. 7, 2003) (Phil.), and strengthened by An Act Further Strengthening the Anti-Money Laundering Law, Amending for the Purpose Republic Act No. 9160, Otherwise Known as the “Anti-Money Laundering Act of 2001”, as Amended, Rep. Act No. 10365 (Phil.). Rep. Act No. 1379 also provides for ‘civil forfeiture’ provisions, but only applies to public officer or employees. See An Act Declaring Forfeiture in Favor of the State Any Property Found to Have Been Unlawfully Acquired by any Public Officer or Employee and Providing for the Proceedings Therefor, Rep. Act No. 1379 (June 18, 1955) (Phil.).

71. “Rule 10(2): Probable cause includes such facts and circumstances which would lead a reasonably discreet, prudent or cautious man to believe that an unlawful activity and/or a money laundering offense is about to be, is being or has been committed and that the account or any monetary instrument or property subject thereof sought to be frozen is in any way related to said unlawful activity and/or money laundering offense.” Revised Implementing Rules and Regulations, Rep. Act No. 9160, as amended by Rep. Act No. 9194 (Aug. 6, 2003) (Phil.).

72. Rep. Act No. 10365, *supra* note 71, § 9.

73. Where there is no opposition, then the Court can hear the case *ex parte*. A.M. No. 05-11-04 SC, *supra* note 54, § 8(a), § 9, § 10.

74. *Id.* § 8(a).

petition. The order is valid for 20 days, but effective immediately.<sup>75</sup> During this period, a summary hearing is scheduled, during which the respondent may, for good cause, show why the provisional asset preservation order should be lifted.<sup>76</sup> It should be noted that, during the freeze order, notice is also served in the same manner provided for the service of asset forfeiture orders.

In the same manner, the AMLC files through the Solicitor General a petition for a freeze order with the Court of Appeals, and there are also clear guidelines on how that should be done and published.<sup>77</sup> The application must outline the probable grounds and supporting evidence showing that the subject, monetary instrument, property, or proceeds are in any way related to or involved in an unlawful activity.<sup>78</sup> Where the Court of Appeals is satisfied about the verified allegations, it issues *ex parte* a freeze order or dismisses the petition outright.<sup>79</sup> The freeze order is effective immediately for a period of 20 days, during which time the court shall conduct a summary hearing, with notice to the parties, to determine whether or not to modify or lift the freeze order or extend its effectivity.<sup>80</sup> The twenty day freeze order may, on request of the AMLC, be extended for another six months, and the respondent is burdened to show by a preponderance of the evidence why this extension should not be granted. Notice of the freeze order must be provided in the same way as in the provisional asset forfeiture order.<sup>81</sup>

### C. Colombia

NCB forfeiture was implemented in Colombia in the mid 1990s as a way to curb the influence of organised crime<sup>82</sup> and encompasses the proceeds and instrumentalities of corruption and illicit activity.<sup>83</sup> By virtue of the

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75. A.M. No. 05-11-04 SC, *supra* note 53, § 11.

76. *See id.* § 12. The freeze order is lifted after its expiration, unless a money laundering complaint against the owner of the property or assets has been filed, or a civil forfeiture procedure against the frozen monetary instrument or property has been filed. In this case, the freeze order remains in effect until the money laundering case is considered finished. Upon expiration of the freeze order, the AMLC Secretariat issues a written confirmation to the affected person confirming the outcome of her assets.

77. *See id.*

78. *See* Rep. Act No. 9160, as amended by Rep. Act No. 9194, *supra* note 71 (defining unlawful activity in § 3(i)).

79. A.M. No. 05-11-04 SC, *supra* note 53, § 44.

80. *Id.* § 53.

81. *Id.* § 53.

82. Wilson Alejandro Martínez Sánchez, *La Extinción de Dominio y la Acción de Extinción de Dominio en Colombia, Perspectiva General*, in WILSON ALEJANDRO MARTÍNEZ SÁNCHEZ, UNODC, *EXTINCIÓN DEL DERECHO DE DOMINIO EN COLOMBIA* 21 (2015).

83. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 16 (Colom.), as amended by L. 1849 julio 19, 2017, DIARIO OFICIAL [D.O.] (Colom.).

‘timelessness’ of NCB forfeiture, a case can be brought forward for acts which took place even before the Constitution was instituted in 1991.<sup>84</sup>

Like in other countries, NCB forfeiture is undertaken in a two-stage procedure, starting with a preliminary phase (“*etapa inicial*” or “*preprocesal preparatoria*”), followed by a procedural or judgment phase (“*etapa de juzgamiento*”) before a specialised judge who is competent for asset forfeiture matters.<sup>85</sup> During the first phase, the Attorney General (“*Fiscalía General de la Nación*”) seeks to identify the assets, gather evidence to justify forfeiture, and identify any party with an interest in the property. It must also collect proof to ascertain the ‘absence of good faith’ on behalf of the defendant.<sup>86</sup> Building on this, the Attorney General can issue a request for a temporary freeze order by bringing the case before a judge, who can issue the implementation of preventive measures if need be.<sup>87</sup> The Attorney General bears the burden of proof, but any person who alleges to be the legal owner of the asset must discharge his/her responsibility by proving the origin of the asset (this is called the ‘dynamic’ burden of proof).<sup>88</sup>

Preventive measures, such as a temporary freeze of goods or property during the investigative phase are only valid for a duration of six months, after which the Attorney General must either discontinue the case or present a forfeiture order to the judge.<sup>89</sup> During the judgment phase, the law indicates that the defendant should be made aware of the charges against him or her and, in line with the ‘dynamic burden of proof’, be provided the opportunity to appeal and provide evidence in their defense.<sup>90</sup> Once notification of the temporary freeze order has been served to the defendant, interested parties have ten days to oppose the order and to provide the necessary proof supporting their claim. A judge has five months to gather additional evidence, and another month to rule on the case.<sup>91</sup> It is also interesting to note the legislation provides for an expedited forfeiture process, whereby the accused can come forward and refuse to lodge an appeal, in which case they become liable to financial compensation.<sup>92</sup>

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84. *Id.* art. 21; Martínez Sánchez, *supra* note 82, at 10.

85. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 116 (Colom.), as amended by L. 1849 julio 19, 2017, DIARIO OFICIAL [D.O.] (Colom.).

86. *Id.* art. 118.

87. *Id.* art. 123.

88. *Id.* art. 152.

89. *Id.* art. 89.

90. *Id.* art. 65.

91. *Id.* art. 141.

92. *Id.* art. 133.

NCB forfeiture in Colombia is said to be ‘independent’ and ‘autonomous’ from the penal process.<sup>93</sup> Effectively, this means that NCB forfeiture follows its own set of rules and procedures and thus differs from the penal process. Points of differentiation between NCB forfeiture and the criminal process include the ‘dynamic’ burden of proof versus a burden on the prosecution in criminal processes and the principle of ‘good faith’ versus the presumption of innocence in criminal procedures.<sup>94</sup>

#### D. Summary

In conclusion, this section explained how NCB forfeiture proceeds in practice across various countries. There are many similarities, though some country variations as well, most notably in Colombia. These differences, in turn, also help account for the idiosyncratic due process protections further elaborated upon below. Before that, the following section attempts to provide a greater overview of the kind of due process concerns inherent with NCB forfeiture, and hence justify the importance of the Rule of Law to keep asset forfeiture in check.

### IV. NCB AND THE NEED FOR RULE OF LAW SAFEGUARDS

#### A. NCB and due process concerns

NCB forfeiture attracts a great deal of debate. It has been argued that those who embrace NCB forfeiture have done so because they “believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond reasonable doubt, trial by jury, and appointment of counsel.”<sup>95</sup> With expediency, however, come serious human rights and due process concerns. It also raises questions concerning the use of state power. This section will review some of the criticisms of NCB, as well as the advantages it presents.

Views on the usefulness of NCB differ. One approach tends to consider NCB as a ‘frontal assault on due process’, which in turn raises serious ‘constitutional concerns’.<sup>96</sup>

First, some contend that NCB achieves the same objectives as criminal forfeiture, without the procedural safeguards and human rights protections

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93. Martínez Sánchez, *supra* note 82, at 21–24.

94. *Id.* at 24–25.

95. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law*, 42 HASTINGS L.J., 1325, 1329 (1991).

96. John Lea, *Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process*, 35 CAMBRIAN L.R. 81, 83 (2004); Deepak Gupta, *Republic of South Africa’s Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis*, 37 HARV. C.R.-C.L. L. REV. 159, 160 (2002).

that apply to criminal proceedings. Because of the lower standard of proof ('on a balance of probabilities'), it is argued that NCB allows the state to impose criminal punishment without establishing the guilt usually required for proceedings of this nature, and that this is done on the basis of "unspecified allegations."<sup>97</sup> In NCB processes, moreover, the burden is often shifted onto the defendant to prove his or her innocence by demonstrating the legitimate origin of the asset. While this may be more expedient for the fact-finding element of the process, shifting the burden of proof poses a substantial threat to the individual rights of the defendant. This view states that NCB should be regarded as a proper criminal law measure, attracting the full array of safeguards inherent to criminal proceedings, such as criminal standard of proof beyond reasonable doubt.<sup>98</sup>

Second, in the absence of a criminal conviction, civil forfeiture is also seen as an arbitrary interference with property rights.<sup>99</sup> Civil forfeiture is enforced against whoever holds or owns the affected property, regardless of his or her involvement in, or knowledge of, any crime, unless provisions are included in the law for that person to prove his or her innocence. Thus, NCB has the potential to impact (innocent) third parties, such as lenders, co-owners, or family members, for example where property they benefit from is seized without compensation or replacement.<sup>100</sup> The effect of NCB is far greater, it has been argued, when a law provides for forfeiture of both the proceeds and instrumentalities of a crime, since the scope of crimes covered is broader.<sup>101</sup> In other words, there is a danger of unjustifiable and disproportionate harm when property belonging to innocent third parties is forfeited because it is considered to be an instrumentality of a crime (an instrumentality may, for example, refer to a car that was used in the commission of a crime).

Third, and finally, although it may be claimed that NCB targets property and not individuals and has similar outcomes to criminal convictions, the negative effects on the respondent can still be wide-ranging, from the financial loss to the stigma of being associated with a crime (i.e., a person whose assets are confiscated may be viewed as 'convicted' in the eyes of the public).<sup>102</sup>

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97. LIBERTY (THE NATIONAL COUNCIL FOR CIVIL LIBERTIES), PROCEEDS OF CRIME, *supra* note 23, ¶ 4.3, 11.1.

98. Collins & King, *supra* note 26, at 381.

99. *Id.*

100. Van der Walt, *supra* note 26, at 6. As the author notes, however, the loss of property may be reasonable and justifiable when the measure is proportionate to the goal of fighting organized crime. See *id.* at 4 n.14. This point will be expanded further in the next section.

101. *Id.* at 18, 45.

102. The risk of stigmatizing the accused with allegations of involvement in criminal activity has

An alternate approach to NCB tends to justify its use on ‘pragmatic’ grounds.<sup>103</sup> First, NCB is seen as a more efficient and expedient tool to tackle corruption and organized crime than criminal confiscation mechanisms.<sup>104</sup> Indeed, “[t]here is, increasingly, a body of expert opinion from around the world holding the view that *in rem* actions are, in many circumstances, the most effective way to counter many forms of corruption, economic crime and other transnational organized crime.”<sup>105</sup> This is particularly helpful in countries—like South Africa, Colombia or the Philippines—where the reach and impact of organized crime is significant.<sup>106</sup> NCB, moreover, “offers a viable device to attack difficult problems, particularly for issues such as corruption in the developing world” where corrupt officials are often both legally and practically immune from prosecution.<sup>107</sup> One of the “indisputable” benefits of civil asset forfeiture, moreover, is that it increases the power of

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been mentioned. But jurisdictions must also be careful to ensure that civil forfeiture does not become a proxy for finding individuals guilty of a crime. It is well accepted by most asset forfeiture practitioners that NCB should not abrogate or substitute the criminal law or criminal processes. As the UK’s Home Secretary and Attorney General stated in 2009, “[C]are must be taken not to allow an individual or body corporate to avoid a criminal investigation and prosecution by consenting to the making of a civil recovery order, in circumstances where a criminal disposal would be justified under the overriding principle that the reduction of crime is generally best served by that route. . . .” *Asset Recovery Powers for Prosecutors: Guidance and Background Note 2009*, UK ATT’Y GENERAL’S OFF. ¶ 4 (Nov. 29, 2012), <https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009>. Civil forfeiture should therefore not be a replacement for the criminal law, but something which complements and supports it. See GREENBERG ET AL., *supra* note 6, at 29.

103. Van der Walt, *supra* note 26, at 8.

104. Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds*, 12 J. FIN. CRIME 8, 19 (2005). To back this up, the World Bank has declared that “non-conviction based confiscation, court-ordered reparations and restitution, and settlement agreements were used to return more assets than was criminal confiscation – commonly thought to be the main legal avenue for asset recovery.” LARISSA GREY ET AL., *STOLEN ASSET RECOVERY INITIATIVE, FEW AND FAR: THE HARD FACTS OF STOLEN ASSET RECOVERY 2* (2014). The usefulness of civil forfeiture mechanisms to tackle organized crime and corruption has also been noted, as one example, by the Colombian courts. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], diciembre 10, 2014, Sentencia C-958/14 (Colom.). It is also enshrined in the preamble of the South Africa Prevention of Organised Crime Act (POCA). Prevention of Organised Crime Act 121 of 1998 (S. Afr.).

105. COUNCIL OF EUROPE, *IMPACT STUDY ON CIVIL FORFEITURE* 13 (2013); see also Gupta, *supra* note 96 (referring to the “in rem fiction”).

106. See Thakira Desai, *Organized Crime in South Africa*, VOICE OF THE CAPE (Apr. 1, 2016), <http://www.vocfm.co.za/organized-crime-in-south-africa/> (South Africa); Hannah Stone, *Colombia Elites and Organized Crime: Introduction*, INSIGHT CRIME (Aug. 9, 2016), <https://www.insight-crime.org/investigations/colombia-elites-and-organized-crime-introduction/> (Colombia); Rob Attwell, *Criminals with a Cause: The Crime-Terror Nexus in the Southern Philippines*, THE DIPLOMAT (Apr. 11, 2017), <https://thediplomat.com/2017/04/criminals-with-a-cause-the-crime-terror-nexus-in-the-southern-philippines/> (Philippines).

107. Jeffrey Simser, *Perspectives on Civil Forfeiture*, in CIVIL FORFEITURE OF CRIMINAL PROCEEDS: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 13, 14 (Simon Young ed., 2009).



law enforcement to combat organized criminal activity, such as drug trafficking or prostitution rings, to name but a few.<sup>108</sup> Indeed, there are situations where it is not possible to obtain a confiscation order as part of a criminal case, e.g., when the suspect has fled or is dead. In such instances, civil forfeiture laws help the state recover the proceeds of crime, whether there is a criminal prosecution of a wrongdoer or not. Though as discussed in Section 4, this can also create a vicious cycle and incentivize the use by law enforcement of civil forfeiture.<sup>109</sup>

Second, it has been suggested that NCB shares many similarities with civil actions that seek criminal law outcomes, such as injunctions against abusive husbands or “anti-social behaviour orders, serious crime prevention orders and control orders to tackle low-level criminality and anti-social behaviour, serious crime, and terrorism, respectively.”<sup>110</sup> Moreover, it is argued, *in rem* procedures are well established in other areas, such as in maritime law, where an action can also be brought against a ship that has caused damage, for example, to obtain jurisdiction and security for certain claims.<sup>111</sup>

Third, it has been argued that there is no reason—either on the basis of principle or fairness—why forfeiture should not be based on a civil standard. As the Australian Law Reform Commission has argued:

[I]t is incorrect to view the recovery of the profits of unlawful activity as a part of the criminal justice process and, as such, justifiable only on the basis of a prior finding of guilt according to the criminal standard of proof beyond a reasonable doubt.<sup>112</sup>

Moreover, the Commission claims that the concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the one time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and vice-versa.<sup>113</sup> This latter point will be explored further in Parts IV and V when

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108. Gupta, *supra* note 96.

109. See Stefan D. Casella, *The Case for Civil Forfeiture: Why In Rem Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, 11 J. MONEY LAUNDERING CONTROL 8, 8–9 (2008).

110. Colin King, *Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction-based Asset Forfeiture*, 16 INT’L J. EVIDENCE & PROOF 337, 339 (2012).

111. See Bruce Paulsen & Jeffrey Dine, *Maritime Attachment and Vessel Arrest in the US*, THOMSON REUTERS PRACTICAL LAW 1 (2016), <http://us.practicallaw.com/w-001-8160>.

112. AUSTL. LAW REFORM COMM’N, CONFISCATION THAT COUNTS: A REVIEW OF THE PROCEEDS OF CRIME ACT 1987, REPORT 87, § 4.148, at 77 (1999).

113. *Id.* § 2.78, at 31.

considering how some jurisdictions have attempted to address this tension between private rights and the social imperative to fight corruption.

Fourth, NCB mechanisms have withstood constitutional challenges. South African jurisprudence accepts that NCB is a civil, not a criminal, process.<sup>114</sup> The courts have ruled that the statutory scheme whereby civil recovery of property is made possible through preservation and forfeiture orders is constitutional because it includes enough safeguards. Noting that conventional criminal penalties are inadequate to deter organized crime, Justice Cameron of South Africa argued that there is “no reason to approach the powers POCA [Prevention of Organised Crime Act, 1998] confers on courts with reserve. We should embrace POCA as a friend to democracy, the Rule of Law, and constitutionalism, and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them.”<sup>115</sup> In *Shalli v The Attorney-General* in the Namibian courts, Judge Smuts upheld the decision by a lower court and held that “although the remedy may contain some unusual features, [civil forfeiture] is in essence and in substance civil in nature.”<sup>116</sup> Likewise, in the Philippines, the Supreme Court stated that “forfeiture proceedings are actions *in rem* and therefore civil in nature,”<sup>117</sup> in large part because civil forfeiture does not terminate in the imposition of a penalty but merely in the forfeiture of ill-gotten properties in favor of the state.

The above arguments ignore the possibility that safeguards are sometimes built into NCB systems, as will be illustrated in the next section, so as to guard against abuse, and that these safeguards have satisfied the courts. Acknowledging the fact that NCB is both fraught with dangers and a helpful resource to tackle crime and corruption, Lord Steyn argues that “the rule of law is undermined if communities come to fear that the criminal law offers them no protection. . . . [I]n recent years civil injunctions, backed up by criminal penalties, have been extensively used to buttress the criminal law . . .”<sup>118</sup>

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114. See, e.g., *Falk v NDPP* 2012 (1) SACR 265 (CC); see also *King*, *supra* note 110.

115. *NDPP v Elran* (2013) (1) SACR 429 (CC) at 35 ¶ 70. Deepak Gupta has also highlighted that the preamble to South Africa’s POCA, which states that “no person should benefit from the fruits of unlawful activity,” could be construed as further proof of the civil and remedial, rather than criminal and punitive nature of NCB. See *Gupta*, *supra* note 96, at 172 (quoting Prevention of Organised Crime Act, No. 121 of 1998).

116. (POCA 9/2011) [2013] NAHCMD 5 (16 January 2013). It should be noted that even if one accepts such a framing for NCB relating to proceeds of crime, there is a risk for due process concerns to be greatly exacerbated with regards to the forfeiture of instrumentalities. This is because it could be seen as a highly punitive action where the forfeiture is not sufficiently linked to the criminal activity and isn’t proportionate in response.

117. *Republic of the Phil. v. Sandiganbayan*, G.R. No. 152154 (S.C., Nov. 18, 2003) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2003/nov2003/152154.htm>.

118. JOHAN STEYN, *DEMOCRACY THROUGH LAW* 3 (N.Z. Ctr. for Pub. Law, 2002).

Although it is crucial that “expediency must not be allowed to prevail over justice” the ubiquitous nature of crime and corruption mean that civil forfeiture is “the least bad choice” for tackling them.<sup>119</sup> As has been recognized by the critics, a civil forfeiture system which provides all the requisite due process safeguards can play an important role in the fight against corruption.<sup>120</sup> We now turn to exploring why these safeguards are important, while Part IV illustrates how these safeguards materialize across different jurisdictions.

## B. The need for safeguards

As was mentioned in the Introduction, Tom Bingham defined the Rule of Law as the idea that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”<sup>121</sup> The Rule of Law is underpinned by various principles, such as *legality, legal certainty and equality*. Whatever degree of legality or legal certainty there may be, it is only when a system allows a person to hold its government to account and to assert his or her rights that the Rule of Law is fully applied. In other words, *access to justice and rights* is what brings the Rule of Law to life (and further distinguishes it from Rule *by* Law).<sup>122</sup> Access to justice, in turn, rests on a “system of courts . . . [in] which a person with sufficient interest may make a legitimate claim . . . [through] a fair trial or due process.”<sup>123</sup>

The Rule of Law requires a balance to be struck between the need to combat corruption and organized crime and the need to uphold individual rights of persons whose property is affected by forfeiture proceedings. As will be discussed in the next section, this is described as requiring proportionality between the restriction on rights and the goals pursued by the restriction. In other words, however challenging it may be, states have duties both to prevent and suppress corruption, and to ensure the right to a fair trial.<sup>124</sup>

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119. *Id.*

120. See, e.g., Collins & King, *supra* note 26; King, *supra* note 110, at 339 (citing civil forfeiture as an “innovative procedure . . . welcomed by law enforcement agencies [because it is] efficient and expedient . . .”); Van der Walt, *supra* note 26, at 1 (recognizing the importance of civil forfeiture in the “struggle against organised crime”).

121. BINGHAM, *supra* note 27, at 7.

122. Jeffrey Jowell, *The Rule of Law: A Practical and Universal Concept*, in RULE OF LAW SYMPOSIUM 2014: THE IMPORTANCE OF THE RULE OF LAW IN PROMOTING DEVELOPMENT 3, 6 (Jeffrey Jowell et al. eds., 2015).

123. *Id.*

124. Ivory, *Asset Recovery in Four Dimensions*, *supra* note 32, at 175, 194.

Because of the powers associated with it, NCB laws potentially create significant and arbitrary (i.e., legally uncertain) state powers to interfere with property rights in the absence of a criminal conviction. The state, which is also the applicant of these civil-like proceedings, has the resources of the police, the prosecution service, and the power to detain.<sup>125</sup> The powers conferred on the state mean that, where there is little judicial oversight and poor accountability, NCB could infringe due process rights, and might be diverted from its original intent of tackling corruption and organized crime and find itself becoming a tool of corruption. It is this overwhelming capacity to do harm that is worrying where state capacity is weak and/or where governments lack the ability to facilitate independent judiciaries. Where such safeguards are all but absent, this could even empower oppressive regimes.<sup>126</sup>

It is clear that robust judicial structures and rights protection are a *pre-requisite* to the effective implementation of NCB. Tackling corruption without regard for the rights of the accused, at best, leaves a state open to suspicion of the far-reaching powers employed in NCB and, at worst, allows for the state to abuse these powers for lack of safeguards, thereby extinguishing any initial claim to be upholding the Rule of Law through NCB. The effects of these outcomes can be particularly damaging for developing countries where, for instance, efforts to ensure the independence of the judiciary may be an ongoing struggle.<sup>127</sup>

Thus, as the international community pushes for an increased use of asset recovery and NCB, Rule of Law safeguards play an important part in preventing abuse in NCB. Safeguards prevent corruption and ensure the system is not diverted from its original objective.<sup>128</sup> These safeguards help build trust in NCB and thus contribute to its long-term sustainability and effectiveness. Specifically, if NCB is seen to be applied inconsistently by law enforcement, if it does not respect the rights of third parties, or if the forfeited funds are not transparently and defensibly reallocated (all of which due process requirements are designed to prevent), then confidence in the legitimacy

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125. Jean Redpath, *Forfeiting Rights? Assessing South Africa's Asset Forfeiture Laws*, 9 AFR. SECURITY REV. 15, 18 (2000).

126. See Gupta, *supra* note 96, at 160 (referencing South Africa, Gupta claims that “[t]he practice of civil asset forfeiture . . . raise[s] serious constitutional concerns . . . [and that] law enforcement measures threatening individual rights must withstand vigilant constitutional scrutiny lest South Africa’s transition entail a shift from one oppressive regime to another.”).

127. See *infra* Part VI.C.

128. The justification for these protections are more than just theoretical or aspirational, moreover. They are essential for the very existence of an effective NCB mechanism. See, e.g., Raylene Keightley, *Asset Forfeiture in South Africa Under the Prevention of Organised Crime Act 121 of 1998*, in CIVIL FORFEITURE OF CRIMINAL PROCEEDS: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 93, 96–97 (Simon Young ed., 2009) (discussing how the Bill of Rights affected POCA jurisprudence in South Africa by conferring duties on the state to “respect, protect, promote and fulfil these rights”).

of asset forfeiture and in the institutions tasked with undertaking it will dissipate. In turn, this would undermine its efficacy and could result in a direct and negative impact of NCB in the longer term. The risk of failing to ensure robust due process mechanisms is, therefore, that the continuing use of NCB by the state will be seen as neither appropriate nor effective.

This is why due process safeguards, including judicial independence, which sits at the heart of it, are essential. When Rule of Law compliant, NCB can aid the maintenance of a democratic society, but if unrestrained, it can become a tool of indiscriminate oppression.<sup>129</sup> In other words, while NCB can prove a vital mechanism in helping developing countries to root out the corruption and crime which so often thwart efforts to build a thriving democracy, its success in practice is dependent on stability within Rule of Law institutions, the robustness of a country's legal framework and democracy. Thus, removing many due process protections takes away the safeguards on which the Rule of Law depends. In the words of Jai Ramaswamy, Chief of the Asset Forfeiture and Money Laundering Section of the US Department of Justice, referring to challenges with asset forfeiture:

[I]f we want to do this right, it may take some time, but part of what we are trying to promote is the Rule of Law. It doesn't make us do any good [...] if we acquire these goods in a way that violate those basic tenets of fairness, due process, etc. That takes time; it can be frustrating [...] but I also appreciate that there is then public buy-in, there is legitimacy to what we've done; it doesn't look like we're running kangaroo courts...<sup>130</sup>

### C. Summary

NCB forfeiture is a tool that brings about its own set of detractors and supporters. Criticisms of NCB have mainly focused on the kind of constitutional challenges that emerge as a result of its application. Much of it stems from the alleged incompatibility between lower procedural safeguards and the very real potential for NCB to encroach on property rights. Detractors suggest that forfeiture results in severe punishment, and thus should use higher standards typically associated with criminal systems. On the other hand, one of the great advantages of NCB, it has been argued, resides in the ease that it provides the authorities to tackle organized crime and corruption, which could in turn make law enforcement action more impactful. Thus, an NCB system that is implemented in a Rule of Law compliant manner makes

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129. The fact that NCB is enshrined in a law goes some way towards making it Rule of Law compliant, particularly where the principle of accessibility and legal certainty is concerned (i.e. laws must be accessible, and so far as possible, intelligible, clear and predictable). The actual application of the Law also matters for Rule of Law purposes.

130. Jai Ramaswamy, Center for Strategic and International Studies, *Returning Stolen Assets: Current Issues and Future Challenges for the International Community*, Washington D.C. (Oct. 24, 2014).

it particularly more sustainable and legitimate. One question remains from this comparison: what standards can be put in place to limit the adverse effect of NCB? This is explored in the next section.

## V. NCB SAFEGUARDS IN PRACTICE

To ensure that NCB does not adversely affect property rights or third parties, jurisdictions under review have introduced various safeguard measures. These standards pertain to the need for establishing the lawfulness and proportionality of an asset forfeiture measure (and providing compensation when it is found that asset forfeiture disproportionately affects third parties and property owners). Other procedural safeguards include due process protections when the burden of proof is reversed (including through the use of the ‘innocent owner’ defense), the right to appeal and to receive legal aid and protection against self-incrimination.<sup>131</sup> Restricting the value of forfeited assets can also be utilized. These are reviewed in greater detail below.

### A. Proportionality as a means to protect property rights

An NCB system must balance public interests on the one hand and private interests and rights on the other, or said differently, it must balance “the desire to confiscate ill-gotten gains with appropriate safeguards for the protection of third party rights.”<sup>132</sup> The South African constitutional property academic, AJ Van der Walt, argues that when the violation of private rights is justified in light of the social function it accomplishes (e.g., crime-fighting), it is nevertheless imperative to take into account the unfair effect it could have on the violation upon innocent parties.<sup>133</sup> While it can hardly be denied that the state has a duty to combat organized crime, it raises the issue whether actions that require the enforcement of “harsh and unusual measures that detract from the ‘normal’ protection of individual rights in terms of international and constitutional law” can be justified.<sup>134</sup> Thus, can the public interest of a crime-free society trump the individual right to property, which is often guaranteed by constitutions<sup>135</sup>, and if so, how?

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131. The innocent owner defense allows a defendant to prove that he or she neither knew nor had “reasonable grounds to suspect that the property in which the interest is held, is an instrumentality of an offence” or proceed of a crime. *See, e.g.*, Prevention of Organised Crime Act 121 of 1998 § 52(3) (S. Afr.).

132. Anthony Kennedy, *Designing A Civil Forfeiture System: An Issues List for Policymakers and Legislators*, 13 J. FIN. CRIME 132, 148 (2006).

133. Van der Walt, *supra* note 26, at 9.

134. *Id.* at 10.

135. *See, e.g.*, CONSTITUTION OF BOTSWANA § 8; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 34, 58 (protecting individual from forfeiture of property and guaranteeing the peaceful enjoyment of property rights); THE CONSTITUTION OF THE REPUBLIC OF NAMIBIA art. 16; CONST. (1987), art. II, § 5,

Laws that interfere with human rights are sometimes considered necessary. A common way of asking whether a law that limits rights is justified (in this case, NCB and property rights respectively) is by ensuring that it is *lawful* (i.e., in the case of asset forfeiture, that the interference with property is authorized by law, which is itself legally certain). Related to this, rights can be curtailed when they are found to be *proportionate* to a goal sought. Proportionality can thus be used by courts and lawmakers to test the validity of laws that limit constitutional rights, and also to ascertain their justification or lawfulness.<sup>136</sup>

Concretely, proportionality can be used by the courts to determine whether the punishment for a crime is legitimate and fair, and in the case of asset forfeiture, whether an infringement of someone's rights through NCB is proportionate to the aims (fighting corruption). This is an important Rule of Law principle which ensures that the means by which ends are achieved are fair.

But some asset forfeiture laws, like those in South Africa, cover both instrumentalities and proceeds of crime.<sup>137</sup> In such circumstances, it may be considered that forfeiture of instrumentalities (a house from which a phone call to arrange for a drug deal was made by the accused, for example), would be disproportionate, in which case the proportionality test would aim to assess whether the legal measure (confiscation) is proportionate to the wrong (ending corruption and organized crime), and if the penalty imposed on the party is proportionate to the contribution to the offence. Proportionality is thus designed to address the risk that 'punishment' meted out on the accused

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art. III, § 1 (Phil.); S. AFR. CONST., 1996 § 25. It is interesting to note that while Article 34 rules out banishment (uprooting), life imprisonment and confiscation, it also authorises the Courts to forfeit goods that are the proceeds of illicit enrichment, undermine public finances as well as social norms.

136. Van der Walt, *supra* note 26, at 9. See also AUSTL. LAW REFORM COMM'N, TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENTS BY COMMONWEALTH LAWS, ALRC INTERIM REPORT 127, at 28 (July 2015). It should be noted that lawfulness of any deprivation of property is an inherent requirement of Art 1 of Protocol 1 to the European Convention on Human Rights. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 E.T.S. No. 009 [hereinafter ECHR-P1]. Moreover, Jurisprudence from the European Court of Human Rights (ECtHR) requires that the Court examines whether an interference with property is justified. It does this by addressing three questions: is the measure or interference lawful (provided by law, and compatible with the Rule of Law)? Does it pursue a legitimate aim (i.e. is it in the public interest)? And is it the measure proportionate to that aim? See COUNCIL OF EUROPE, *supra* note 105, at 18. The ECtHR found that there can be lawful interference with property right (under Article 1 of Protocol 1) if there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realized". James v. United Kingdom, 8 Eur. Ct. H.R. 123 (1984). There is significance jurisprudence from the ECtHR on Art 1 ECHR-P1 on proportionality. See, e.g., Grayson v. United Kingdom, 48 Eur. Ct. H.R. 30 (2008).

137. POCA defines an instrumentality as any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of POCA, whether committed within the Republic or abroad. See Prevention of Organised Crime Act 121 of 1998 § 1(1) (S. Afr.).

or third party through confiscation of proceeds of crime or instrumentalities, is too harsh, particularly if the accused has already been sentenced in a criminal case.<sup>138</sup>

As analysts have remarked, proportionality can be used to allay risks that the courts give in to social pressure or public sentiment and “treat the effect of the forfeiture in a predetermined, mechanistic manner . . . .”<sup>139</sup> Organized crime, terrorism and other similar crimes pose a serious social threat and can thus elicit strong public reaction against which innocent individuals may have no way of securing protection for themselves and their property. To help alleviate the threat against third parties whose rights are potentially undermined by NCB, a proportionality assessment becomes essential to ensure that NCB is trying to reach its aim, and does not unreasonably interfere with individual rights.<sup>140</sup> “In these circumstances . . . the courts have an important duty to ensure that the constitutional protection of individual rights is not swept away on a wave of populist support for effective crime-fighting, without placing unnecessary obstacles in the way of the crime-fighting authorities or lending unwarranted support to gangsters and criminals.”<sup>141</sup> This is the kind of balance that, according to Van der Walt, needs to be struck in making proportionality assessments. Of course, it is possible that a proportionality review could result in a judgment that forfeiture is indeed disproportionate and unfair and imposes an unreasonable or excessive burden on owners or third parties unless fair compensation is provided.<sup>142</sup>

As Van der Walt argues, though it is difficult to formulate general guidelines, proportionality tests in cases of asset forfeiture should question the importance of the public purpose served by the forfeiture and its practical effect on the property.<sup>143</sup> It should balance this against context-specific information, such as whether criminal prosecution against the defendant was feasible, whether these options were employed successfully or not, how the property was used in committing a crime and the seriousness of the crime,

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138. Van der Walt, citing Blaauw-Wolf, notes there is little clarity and substantial confusion about notions such as ‘the balancing of interests’ and ‘proportionality’. Van der Walt, *supra* note 26, at 41.

139. *Id.* at 45.

140. Third parties may include those who rely on the property and did not know, or did not reasonably suspect that the property was being used by the accused as an instrumentality of a crime; or an ‘innocent buyer’. *Id.* at 39.

141. *Id.* at 41.

142. *Id.* at 12–13. This decision will typically be taken by the courts when they deem that forfeiture equated to ‘regulatory taking’, or said differently, that it ‘goes too far’, thus justifying compensation. In carrying out a proportionality test, the Courts will judge whether a forfeiture decision – taking into account the context and relevant circumstances and facts – brings about a disproportionately unfair infringement or deprivation of a person’s property, and thus cannot be called reasonable or justifiable deprivation of property in the absence of compensation. *See id.* at 43.

143. *Id.* at 35.



whether loss for the individual has a benefit for society, etc. He also calls for courts to evaluate the rationality, fairness and justifiability of each case based on its merits.<sup>144</sup>

However, it should be noted that the proportionality test only functions if there are tangible interests to hold in the balance. In other words, finding that NCB would be unreasonably disproportionate “can only work in jurisdictions where the constitution protects private property against expropriation without compensation, and even then, only in those instances where the courts are willing to treat a disproportionate or excessive regulatory control of the use of property as an expropriation, despite the state’s intention to the contrary.”<sup>145</sup>

In practice, South Africa has enacted a two-step judicial test, one focusing on instrumentality, and another on proportionality.<sup>146</sup> This has “created a unique approach whereby the courts have conflated proportionality analysis into all aspects of an instrumentality case.”<sup>147</sup> In *Mohunram v. NDPP*, the court overturned a forfeiture order for a factory which was used partly for a legitimate business, and partly for a slot machine gambling operation. The latter was carried out without a license, for which the owners were arrested and charged.<sup>148</sup> First, the court considered whether the property concerned was an instrumentality and whether any interests should be excluded from the forfeiture order. Once the court had declared the property an instrumentality (as it was integral to the offence), it moved on to assess whether forfeiture of the factory would be a disproportionate interference with the rights of the accused.<sup>149</sup> The court intentionally carried out an instrumentality test first, followed by a proportionality test. In doing so, the court had to weigh the effect of forfeiture on the property owners against the purpose served by forfeiture (for example, deterring crime). Criminal penalties already imposed were also taken into account.<sup>150</sup> In this case, the court upheld an appeal that the criminal penalties sufficed and operating a casino without a license was not the kind of organized crime envisaged by the POCA chapter 6 regime,

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144. *Id.* at 44–45.

145. *Id.* at 40.

146. *See* S. AFR. CONST., 1996. In South Africa, proportionality is captured by the tension between section 25 of the Constitution (enshrining the right to property), and section 36 (which limits when rights in the Constitution can be restricted). *See id.*

147. Nkululeko Christopher Ndzengu, A Comparative Analysis of Aspects of Criminal and Civil Forfeitures: Suggestions for South African Asset Forfeiture Law Reform (2017), (unpublished Ph.D. dissertation, Neslon Madela Metropolitan University) (on file with South East Academic Libraries System), at 132.

148. *See Mohunram v. Nat’l Director of Pub. Prosecutions* 2007 (4) SA 222 (CC) (S. Afr.).

149. *Id.* ¶ 49.

150. *Id.* ¶ 65.

and thus forfeiture was considered disproportionate.<sup>151</sup> The attempts to limit the ‘draconian effects’ of POCA on individual property rights (which are adequately dealt with by existing criminal law) can, therefore, be seen in this jurisprudence.

Until the case of *NDPP v Salie*, the proportionality test had not been applied to proceeds of crime in South Africa because, if the court accepts that an act is criminal (such as running a brothel, as in this case), then the proceeds from the act will be tainted with this criminality, thus ruling out a legal claim to the property.<sup>152</sup> Nonetheless, in that case the court decided that the wide definition of ‘proceeds of unlawful activities’ in chapter 6 of POCA did warrant a balancing test so as to ensure the constitutionality of any forfeiture.<sup>153</sup> It found that forfeiture would not be disproportionate in that instance. An interesting question was raised by the court as to what would happen if the proceeds of a crime were invested in a socially beneficial project like a child nursery in a deprived area.<sup>154</sup> Forfeiture of the nursery would be difficult to reconcile with POCA’s aim of advancing the ends of justice by depriving criminals of their profits. This scenario is yet to be addressed but certainly raises some contentious points for any future proportionality assessment and illustrates the delicate balance courts must sometimes find in forfeiture cases.

In Namibia, the case of *Shalli v. The Attorney-General* also considered the question of proportionality.<sup>155</sup> Following the doctrine established in *Lameck v. The President of Republic of Namibia*,<sup>156</sup> Judge Smuts of the High Court held that even if NCB did infringe Article 16 of the Namibian Constitution (the right to property) it was a “proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose.”<sup>157</sup>

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151. *Id.* ¶ 154; see also *Nat’l Director of Pub. Prosecutions and Others v. Vermaak* 2007 (1) SACR 154 (SCA) (S. Afr.) (another example of proportionality); see *supra* text accompanying note 15 (additional context of POCA).

152. See *Nat’l Director of Pub. Prosecutions v. Salie and Another* 2015 (1) SACR 121 (WCC) (S. Afr.).

153. *Id.* ¶ 120.

154. *Id.* ¶ 137.

155. *Shalli v. The Attorney-General* [2013] NAHCMD 5 (Namib.).

156. *Lameck v. The President of the Republic of Namibia* [2012] NAHC 31 (Namib.) (relying heavily on the judgments of the Constitutional Court of South Africa).

157. *Shalli* [2013] NAHCMD 5, at ¶ 45 (Namib.).

Three important points should be noted from the South African and Namibian jurisprudence. First is the judicial engagement with the proportionality assessment, which is a positive development from a Rule of Law perspective as it involves the transparent weighing of important considerations. In other words, since the courts need to rule on the proportionality of a case, judicial review is a cornerstone of forfeiture decisions. As discussed in the next section, where there is no judicial review, this could severely undermine due process in forfeiture cases.<sup>158</sup> Second, the language employed by the Namibian court is clearly trying to align with the vocabulary of civil procedures, as opposed to criminal ones, by using terms such as “remedy” and “benefit” from “wrongdoing.”<sup>159</sup> By using this language, the procedure is one of restitution, rather than punishment. Deepak Gupta, who served as researcher in the NDPP, has highlighted such a framing as essential if courts want to avoid the “avalanche” of rights which come with the criminal process, and which would, therefore, have to form part of the proportionality assessment.<sup>160</sup> Third, the South African and Namibian jurisprudence seem to be in line with prescriptions of the African Charter on Human and People’s Rights (AFCHPR), which holds that any “encroachments” on property must satisfy a “two-pronged” test: they must be in the public interest and be lawful (or “in accordance with appropriate laws”).<sup>161</sup> In this context, “appropriateness” seems to entail a proportionality requirement.

#### B. Compensation as a way to mitigate the impact of forfeiture

What should jurisdictions do when asset forfeiture has the potential of affecting property owners or third parties? Some jurisdictions have established that the interference with property involved in civil forfeiture should be accompanied by compensation when it affects third parties unfairly and unreasonably, or when it may restrict a person’s peaceful enjoyment of

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158. The European Court for Human Rights, once again, has overthrown certain appeals on the grounds that an applicant did not make use of certain procedural safeguards, notably the opportunity for judicial review and to present evidence that a property is acquired lawfully. *See e.g.*, *Silickienė v Lithuania*, App No. 20496/02, Eur. Ct. H.R. (ser. B) at 48 (2012); *AGOSI v. United Kingdom*, App. No. 9118/80, Eur. Ct. H.R. at 60 (1986) (on smuggling of coins to the UK); *Air Canada v. United Kingdom*, App. No. 18465/91, 20 Eur. H.R. Rep. 150 (1995) (on drug trafficking). Art 1, P1 and Art 6(1) ECHR had therefore not been violated given that it had been open to the applicant to initiate judicial review proceedings, but the latter had not done so.

159. *Shalli* [2013] NAHCMD 5, ¶ 22.

160. Gupta, *supra* note 96, at 178.

161. Organisation of African Unity, African (Banjul) Charter on Human and People’s Rights, CAB/LEG/67/3 (June 27, 1981). *See also* Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 335/2006, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (Feb. 4, 2010).

his/her right.<sup>162</sup> This situation may arise where assets that were frozen for the purpose of an investigation are not found to be criminal proceeds, for example. In other words, a court needs to inquire whether a particular forfeiture brings about disproportionate and unfair infringement on property “that it cannot be described as a reasonable and justifiable regulatory deprivation of property in the absence of compensation”.<sup>163</sup> In certain cases, it could also be the case that forfeiture is deemed to be unconstitutional without compensation.<sup>164</sup>

To this end, South Africa and Namibian legislation empowers courts to vary preservation orders to avoid inflicting ‘undue hardship.’<sup>165</sup> Under Section 47(1) of POCA, South African Courts can rescind a preservation order that relates to movable property if the person affected makes an application to the High Court which made the preservation order and satisfies the court “that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and that the hardship that the applicant will suffer as [a] result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.”<sup>166</sup> This is well illustrated in *Shalli v The Attorney – General*, where the applicant argued that Chapter 6 of Namibia’s POCA (on the forfeiture of property) violated his constitutional rights. Judge Smuts held that courts can reverse preservation orders where they are found to unduly interfere with a person’s rights and that reasonable living and legal expenses can be sought by an affected party.<sup>167</sup>

Thus, while jurisdictions address this issue differently, it is interesting to note that safeguards can be implemented to ensure that forfeiture orders do not harm defendants unduly, as shown by experience from South Africa and Namibia. Once the courts have established that forfeiting an asset is proportionate and determined where necessary that compensation is required, there remains other issues to address. These concern the standard of proof required to prove a case.

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162. Van der Walt, *supra* note 26, at 10–11.

163. *Id.* at 43.

164. *Id.* at 43.

165. See Prevention of Organised Crime Act 29 of 2004 (Namib.); Prevention of Organised Crime Act 121 of 1998 (S. Afr.).

166. Prevention of Organised Crime Act 121 of 1998 § 47(1) (S. Afr.).

167. *Shalli* [2013] NAHCMD 5, ¶ 22.

### C. Reversal of the burden of proof

NCB places the onus on the defendant to prove the lawful origin of the assets. As this reversal has been challenged in the courts on the principle that it undermines the presumption of innocence, this section is concerned with understanding how the burden of proof can be used in a lawful manner.

In cases involving prosecution by the state (normally criminal cases), it is usual that both legal and evidentiary burdens of proof rest with the prosecution to prove all of the elements of the case beyond reasonable doubt.<sup>168</sup> This principle is vital to ensuring presumption of innocence (a cornerstone of common law systems), which guarantees that a person cannot be unfairly treated or judged until enough evidence is provided to rebut that presumption.<sup>169</sup>

However, there are instances where the onus of proof can be reversed onto the defendant. This reversal is not uncommon, particularly in a range of criminal laws or offenses (e.g. terrorism offences, drug or child sex offenses).<sup>170</sup> Applied to asset forfeiture, many countries employing NCB have opted for ‘reverse onus’ clauses which shift the burden of proof from the prosecution to the defendant to varying extents. One of the advantages of NCB, from the state’s point of view, is not only that the standard of proof follows civil law requirements (‘on a balance of probabilities’), but also that, once probable cause is demonstrated by the prosecution, the burden then falls on the accused to demonstrate the legitimate origin of the property in question. Thus, reversing the onus should in principle lighten the load on the state prosecutor, and tends to make asset forfeiture altogether speedier.

It has been argued that the very effectiveness of forfeiture laws depends on the ability to reverse the onus of proof and require the defendant to prove the lawfulness of the property on the balance of probabilities.<sup>171</sup> As Anthony Kennedy, an asset forfeiture expert with the now-defunct UK Assets Recovery Agency also notes: “[t]he underlying thinking behind presumptions in civil forfeiture proceedings is that it is significantly easier for a person to establish that his property was lawfully acquired, or not acquired directly or indirectly from the commission of an offence, than it is for the authorities to

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168. GREENBERG ET AL., *supra* note 6, at 58–59.

169. Of course, there are variations in the standard and burden of proof between civil law and common law countries.

170. See AUSTRALIAN LAW REFORM COMMISSION, TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENTS BY COMMONWEALTH LAWS (ALRC REPORT 129) 271–72 (2016).

171. Anthony Smellie, *Prosecutorial Challenges in Freezing and Forfeiting Proceeds of Transnational Crime and the Use of International Asset Sharing to Promote International Co-operation: The Need for Global Standards*, 8 J. MONEY LAUNDERING CONTROL 104, 107 (2004).

establish the contrary.”<sup>172</sup> In fact, it may be unreasonable to expect the prosecution to be able to raise such evidence.<sup>173</sup> If the accused fails to produce enough evidence to rebut the presumption of guilt, then the presumption is converted into a fact, and freezing and forfeiture ensues. As discussed, in the context of asset forfeiture, shifting the burden of proof is one of the elements that makes NCB an attractive tool for law enforcement. Reversing the burden of proof is fraught with dangers, as it could undermine the fair trial rights of the accused, which ensure that anyone accused of a crime by the state—with its resources of the police and prosecuting offices—has the procedural right to a presumption of innocence and a right to a defense. In extreme circumstances, reverse onus provisions could therefore be used by authoritarian regimes to do harm where these safeguards are absent.

As Lord Bingham, a preeminent UK judge decided, one way to guard against abuse in reverse onus provisions is to apply proportionality tests to evaluate whether the reversal is justified.<sup>174</sup> The proportionality test applied to reverse-onus provisions must examine “the substance and effect of any presumption adverse to a defendant” and must be reasonable.<sup>175</sup> “Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, [and] maintenance of the rights of the defence . . . .”<sup>176</sup> Lord Bingham further observed that this test is context-specific, and that “[t]he justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.”<sup>177</sup> It remains to be seen how other courts in developing countries can heed these suggestions and apply such a test. It is worth noting, though, that there have been legal challenges against the presumption of innocence in various jurisdictions, but courts have found that reverse onus provisions are lawful on the condition that the presumption is restrictively worded, rebuttable, and reasonable.<sup>178</sup>

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172. Kennedy, *supra* note 132, at 140.

173. See *Attorney-General v Othomile* 2004 (1) B.L.R. 21 (CA) at 4 (Bots.). Without all the other safeguards adjoining NCB, this reasoning is fraught with dangers, since it could be used by authoritarian regimes to pass the burden of proving the legit origin of a good or property on to the defendant.

174. *Sheldrake v. Director of Public Prosecutions* [2004] UKHL 43, [20]–[21], ¶ 21 (appeal taken from Eng.).

175. *Id.*

176. *Id.*

177. *Id.*

178. GREENBERG ET AL., *supra* note 6, at 61. Reversal of the burden of proof is also encouraged by Article 12(7) of the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc A/RES/55/25 (Jan. 8, 2015). For legal challenges against the presumption of innocence, see generally *R v. Rezvi* [2002] UKHL 1 (appeal taken from Eng.); *R v. Benjafield* [2002] UKHL 2 (appeal taken from Eng.).

Another way to address the risk inherent with reverse-onus provisions is to vary the standard of proof throughout the asset forfeiture process. This is the case in South Africa, where the burden of proof at the *preservation* stage rests on the National Director of Public Prosecutions (NDPP), which must demonstrate that it has “reasonable grounds” to believe that the property is the proceeds or instrumentality of a crime.<sup>179</sup> At the *forfeiture* stage, the burden continues to lie with the NDPP, but the standard is on a balance of probabilities, a higher standard than at the preservation stage, though still short of what is required in criminal cases.<sup>180</sup> The burden is lower at the preservation stage since this is only a temporary order (pending lodging of a forfeiture order), which does not incur permanent forfeiture. This two-stage procedure thus brings in additional safety by ensuring that the state shows that its suspicions are justified (either as being reasonable or on the balance of probabilities). This process also restricts the state’s ability to initiate such proceedings without a certain level of proof. While that appears to be good practice, there have been suggestions that the standard of proof in civil cases (including, for example, in instances of criminal wrongdoing) should be based on criminal standards (e.g., ‘beyond reasonable doubt’).<sup>181</sup> As Lord Bingham has said, this would mean that “there may be times when the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard.”<sup>182</sup>

Although the jurisprudence in Botswana regarding reverse onus clauses is still in its early stages, it is noteworthy that the country permits reverse-onus provisions even where they extensively erode a citizen’s right to the presumption of innocence provided that the infringement of the right is proportional to the danger that the reversal of onus addresses.<sup>183</sup> The case of *Otlhomile v. the State*<sup>184</sup> concerned the conviction of a man accused of stock theft in the magistrate’s court, under a reverse onus clause in the Stock Theft Act.<sup>185</sup> In *Attorney-General v. Otlhomile*<sup>186</sup> the Court of Appeals accepted that the reverse onus clause was not constitutional, but found nonetheless that it was justified by the public interest and the rights of others.<sup>187</sup> Serving

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179. Prevention of Organised Crime Act 121 of 1998 § 38(2) (S. Afr.).

180. *Id.* § 50(1).

181. King, *supra* note 110, at 337.

182. B v. Chief Constable of Avon and Somerset, [2001] 1 WLR 340, 354.

183. Telephone Interview with Hon. Professor Justice OBK Dingake, Botswana (Jan. 2017). See also Rowland J.V. Cole, *Determining the Constitutionality of Reverse Onus Clauses in Botswana*, 16 AFR. J. INT’L & COMP. L. 236, 245–46 (2008).

184. *Otlhomile v. The State* 2002 (2) B.L.R. 295 (HC), at 2 (Bots.).

185. Stock Theft Act 21 of 1996, § 4 (Bots.).

186. *Attorney-General v. Otlhomile* 2004 (1) B.L.R. 21 (CA), at 5–6 (Bots.).

187. *Id.*

as a reminder of the cultural specificity of the weight afforded to certain factors in proportionality assessments, the view of the Court was that, as cattle constituted “one of the main elements of wealth, and a golden thread in the economic fabric of Botswana,”<sup>188</sup> the protection of cattle owners and the preservation of wealth was a legitimate interest against which the rights of the accused were to be weighed. After considering these factors, the Court held that the interference with the right was proportionate.<sup>189</sup>

Rowland Cole, a senior lecturer at the University of Botswana, argues that the Court of Appeal in *Otlhomile* missed the opportunity to offer an “overarching blueprint” for how reverse onus clauses were to be considered.<sup>190</sup> Instead of jumping ahead to the justification of the restriction of the presumption of innocence, the court should have first laid out *why* the reverse onus clause was initially accepted as unconstitutional. While it is important to note that *Otlhomile* is a criminal case, the lack of clear reasons may have implications for NCB. If reverse onus clauses are permitted in this arena without sustained justification, this could seriously harm the ability of NCB to be compliant with the Rule of Law.

Some countries have opted to introduce a partially reversed burden of proof.<sup>191</sup> Ukraine, a ‘lower middle income country’ according to the OECD, is one interesting example worth mentioning.<sup>192</sup> At the time of writing, the country has been preparing an NCB law as part of a wider drive towards ensuring the country’s compliance with relevant European and international standards and good practices in dealing with proceeds of crime, while also ensuring a fair trial and property rights.<sup>193</sup> The draft legislative proposal

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188. *Id.* at 5.

189. *Id.* at 6.

190. Cole, *supra* note 183, at 247.

191. Though not a developing country, Canada allows for a partially reversed burden of proof or a reduced burden of proof on the state, but this is limited to cases where an offender has been convicted of the offence which generated the original proceeds. Criminal Code, R.S.C 1985, c C-34, ss. 462.37, 462.38 (Can.). It should be noted, however, that the right to property in Canada does not enjoy the same constitutional protections as in other countries, though that is not to say there are no protections whatsoever. Sovereignty over private property is divided between different institutions, particularly the Parliament, provincial legislatures, and the Executive. The Canadian Charter of Rights and Freedoms does not directly protect property rights, but includes other safeguards, such as protection against unreasonable search and seizure of their property. Finally, the Bill of Rights, which is not a constitutional document, but a federal statute, recognizes the right to “enjoyment of property, and the right not to be deprived thereof except by due process of law.” See *Are Property Rights Property Rights Protected in Canadian Law?*, ALBERTA LAND INSTITUTE, <http://propertyrightsguide.ca/are-property-rights-protected-in-canadian-law/> (last visited Nov. 12, 2018).

192. *DAC List of ODA Recipients*, OECD, [http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC\\_List\\_ODA\\_Recipients2014to2017\\_flows\\_En.pdf](http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC_List_ODA_Recipients2014to2017_flows_En.pdf) (last visited Nov. 12, 2018).

193. DOVYDAS VITKAUSKAS ET AL., SUPPORT TO JUST. REFORMS IN UKR. & JUST. COOPERATION



adopts a novel practice in relation to the burden of proof. It places the initial burden on the prosecution to show probable cause,<sup>194</sup> which establishes a rebuttable presumption of illicit origin of the seized assets. The burden then falls on the defendant at the trial stage to rebut this presumption, according to the civil standard (‘balance of probabilities’). If the accused is able to discharge this burden—and this is where the novelty lies—then the onus *shifts back* to the prosecution to show ‘beyond a reasonable doubt’ that the assets have an illicit origin.<sup>195</sup> It might seem unusual to place such a high burden on the prosecution, where other countries have opted for less stringent civil standards. One EU-funded report suggests, however, that “given the lack of experience of the Ukrainian courts in dealing with the question of standards of proof, the somewhat higher bar on the prosecution to provide evidence might be interpreted as an additional procedural safeguard against abuse by law enforcement.”<sup>196</sup>

Such an awareness of the necessity of safeguards is encouraging and could work as an interesting example for those countries where the judicial system is not strong, and which are keen to introduce NCB laws. Indeed, the report states that, although these provisions are likely to be revised with experience, “it is a deep conviction of the experts that the *introduction of standards of proof* in the proposed NCBC regulation constitutes a *giant leap* in providing for more *practical and effective procedural rights* and obligations, restricting unfettered *judicial discretion*, and contributing more generally to more *clear and foreseeable* legal system in Ukraine.”<sup>197</sup>

A similar approach can be found in Colombia. As with South Africa, civil forfeiture there includes two stages: an investigation phase where the Attorney General (*Fiscalía General de la Nación*) collects and investigates evidence; and then a judgment stage, in which a specialized judge decides whether to forfeit the goods/property based on evidence collected by the Attorney General.<sup>198</sup> Similar to other jurisdictions, the standard of proof for the prosecutors is on the basis that there are “serio y razonable” (“serious and reasonable”) grounds to believe that probable cause can be inferred that goods emanate from or are destined for illicit activities.<sup>199</sup> In line with other countries, the general rule is for the prosecution to gather evidence to enact

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INTERNATIONALE, CONSOLIDATED POSITION OF PROJECT EXPERTS ON LEGISLATIVE PROPOSALS ON NON-CONVICTION BASED CONFISCATION (NCBC) IN UKRAINE (Sept. 7, 2016).

194. *Id.* at 8.

195. *Id.*

196. *Id.*

197. *Id.* (emphasis in original).

198. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 26, 33 (Colom.).

199. *Id.* art. 117.

forfeiture, while the asset owner must provide in the judgment phase evidence supporting his or her opposition to a forfeiture order, and/or showing that the goods were acquired in good faith.<sup>200</sup> The Colombian statutes refer to this as a ‘dynamic burden of proof,’ based on the “presunción de buena fe” (“presumption of good faith”).<sup>201</sup> Where no opposition is filed, the court may forfeit the asset based on available evidence.<sup>202</sup>

The principle of ‘good faith’ is characteristic of Latin American countries with civil law traditions. Reviewing a decision by a court of first instance and the Supreme Court, the Colombian Constitutional Court was asked to judge whether the authorities flouted ‘due process’ by forfeiting commercial premises without considering the interest of other third parties who had a stake in the premises and by failing to properly disclose forfeiture decisions. The Court decided that property was acquired in good faith and ruled that restrictions to due process only apply when it can be shown that a transaction is done through bad faith or based on misrepresentations (“*dolo*” and “*culpa grave*”).<sup>203</sup> Likewise, the Mexican Constitutional Court ruled, that NCB proceedings should not be considered criminal *per se*, and thus the presumption of innocence isn’t applicable.<sup>204</sup> It has, however, indicated that due process safeguards afforded defendants in civil cases should be provided, such as the “assumption of good faith.”<sup>205</sup>

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200. *Id.* art. 152.

201. *Id.* art. 7, 152. The Constitutional Court deemed this reversal to be constitutional. The Constitutional Court also held that the reversal is acceptable because it is a civil procedure and no penalty is imposed on the individual. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2003, M.P.: J. Triviño, Sentencia C-740/03 (Colom.). On the ‘presumption of good faith’, see Martínez Sánchez, *supra* note 83, at 24.

202. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 18 (Colom.).

203. Corte Constitucional [C.C.] [Constitutional Court], noviembre 5, 2014, M.P: L. Perez, Expediente T-821/14 (Colom.).

204. Extinción de Dominio. El Principio de Presunción de Inocencia no es Applicable al Juicio Relativo, Pleno de la Suprema Corte de Justicia [SCJN], Seminario Judicial de la Federación y su Gaceta, Décima Época, tomo I, Abril de 2015, Tesis 1a./J. 23/2015, Página 331 (Mex.).

205. *Id.* It should be said, however, that this decision is perceived to be a rigid interpretation by the Court, which clashes with jurisprudence from the Inter-American Court of Human Rights (IACtHR). *See* Baena-Ricardo et al. v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 72, ¶ 124 (Feb. 2, 2001). In *Baena-Ricardo et al. v. Panama*, the IACtHR concluded that the principle of presumption of innocence established in Articles 8.1 and 8.2 of the American Convention applies to any proceeding, even if it is not criminal in nature. *See* Org. of Am. States [OAS], *Pact of San Jose*, American Convention on Human Rights, Costa Rica, (November 22, 1969). This tension will need to be resolved, since the Mexican Supreme Court has held that all the Inter-American Court case law has binding effect. *See* Jurisprudencia Emitida por la Corte Interamericana de Derechos Humanos. Es Vinculante para los Cejuceesjueves Mexicanos Siempre que sea Àmàsmas Favorable a la persona, Pleno de la Suprema Corte de Justicia [SCJN], Seminario Judicial de la Federación y su Gaceta, Décima Época, tomo I, Abril de 2014, Tesis P./J. 21/2014, Página 201 (Mex.).

While reversing the burden of proof sits at the heart of civil forfeiture provisions, it also carries some risks. Experience from various countries shows that safeguards such as proportionality tests, and/or the application of different standards across the asset forfeiture process can be put in place to minimize these risks. However, fairness cannot be achieved without allowing defendants to appeal forfeiture orders, as discussed next.

#### D. Protection against self-incrimination

A central tenet of criminal justice systems, characteristic of many developing countries, is that any person who is charged with a criminal offense is entitled to be presumed innocent until proven guilty. A corollary right is that the accused is not compelled to give evidence during the trial. Protection against self-incrimination is particularly important when a criminal investigation is conducted parallel to a civil case. NCB forfeiture may be triggered by criminal action, so “there may be instances where criminal investigation and prosecution collide or proceed in parallel with the NCB forfeiture action”.<sup>206</sup> One way to address this is for legislators to indicate at which point NCB proceedings may start. For example, the law may indicate that civil forfeiture is to be used when criminal prosecution and forfeiture of proceedings are not possible, but it is more common and preferable for NCB to run simultaneously with the criminal trial.<sup>207</sup>

In some cases, the statutes may need to clarify whether a forfeiture case can proceed alongside a criminal case, but in such a way that compelled information from the asset owner is not used against him/her in a criminal case. Indeed, “[a]bsent some protections, there is a risk that an accused asset owner may be precluded from challenging the NCB asset forfeiture action for fear of incriminating himself, or would use discovery in the NCB asset forfeiture case to obtain information that would then be used to prejudice the criminal prosecution.”<sup>208</sup>

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206. GREENBERG ET AL., *supra* note 6, at 30.

207. Greenberg notes that NCB should be complementary to criminal prosecutions and convictions, and may precede a criminal indictment or parallel criminal proceedings. *See id.* Filipino Law, for example, provides for civil procedures to be conducted independently from criminal ones for unlawful activities provided by the law. A.M. No. 05-11-04 SC, *supra* note 54. The Colombian statutes (L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 18 (Colom.) amended by L. 1849, julio 19, 2017, art. 18) refer to NCB as being ‘autonomous’ from penal procedures, as has been confirmed by the Constitutional Court. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 1997, A. Carbonell, C-409/97 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2003, M.P. J. Triviño, Sentencia C-740/03 (Colom.). In reality, however, it is often seen as an ‘appendage’ of penal procedures, as asset forfeiture cases have often been assigned to prosecutors and judges that specialize in criminal law. *See* Martínez Sánchez, *supra* note 83, at 25.

208. GREENBERG ET AL., *supra* note 6, at 30.

The South African courts have ruled that there is no privilege against self-incrimination because the evidence in civil litigation is not compelled.<sup>209</sup> As a result, defendants are much more reluctant to contest a case because the statements which they make may be used against them in a subsequent criminal case. Furthermore, POCA can be applied retrospectively so as to recover proceeds that were acquired before the law came into force.<sup>210</sup> The head of the Asset Forfeiture Unit, Willie Hofmeyr, cites these aspects of NCB as advantages which enable it to be a “powerful weapon against crime, and especially corruption.”<sup>211</sup> It should be noted that while the South African POCA regime appears heavily weighted in favor of the state in this respect, the protection afforded to innocent owners is much more robust than in other jurisdictions, as discussed in Section E.

#### E. Challenging forfeiture orders and right to appeal

This section evaluates safeguards that allow defendants to challenge forfeiture decisions. Within the two-stage procedure in South Africa or Namibia are mechanisms that provide any interested person a wider window in which to raise their intention to oppose a forfeiture order or to apply to have their interest excluded from the operation of the order.<sup>212</sup>

In South Africa, POCA requires that the National Director shall, as soon as practicable after a preservation order is served, “give notice of the order to all persons who have an interest in property which is subject to the order.”<sup>213</sup> If a person upon whom the notice has been served intends to oppose the order or apply for an exclusion of his/her interests from the operation, then they must give notice of this intention within 14 days after having been served the notice.<sup>214</sup> Any other interested persons wishing to oppose the order must do so within 14 days of the notice appearing in the *Gazette*.<sup>215</sup>

In applying for an ‘exclusion order’ to the High Court, the applicant

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209. Willie Hofmeyr, *The Effective Use of Asset Recovery*, 39 COMMONWEALTH L. BULL. 1, 59, 63 (2013).

210. *Id.*

211. *Id.* at 62.

212. Prevention of Organised Crime Act 121 of 1998 § 39(3) (S. Afr.).

213. *Id.* § 39(1)(a).

214. *Id.* §§ 39(4)(a), 48.

215. *Id.* § 39(4b). Namibia follows a very similar process. Some noticeable differences are that the preservation order expires 120 days after its publication in the Government Gazette, and that an applicant has 21 days to lodge an order excluding their interests in a property or declaring their intention to oppose forfeiture proceedings. Prevention of Organised Crime Act 29 of 2004 §§ 52(3), 59, 63 (Namib.). Unlike in South Africa and Namibia, respondents in Botswana do not have as much time to respond to orders against their property. Under the Proceeds and Instruments of Crime Act 2014, the Directorate of Public Prosecutions can apply for a forfeiture order straight away. Proceeds and Instruments of Crime Act 28 of 2014 ch. II, sec. VI (Bots.).

seeks to exclude certain interests in property which is subject to the order from the operation.<sup>216</sup> the person affected by the civil forfeiture (the innocent owner) must prove, on a balance of probabilities, that the proceeds were acquired legally, for consideration and that he or she has, since POCA was introduced, neither known nor had reasonable grounds to suspect that the property is the proceeds of an unlawful activity.<sup>217</sup> Where the interest is an instrumentality of an offence, the requirements are the same, except that the ‘innocent owner’ must prove that he or she neither knew nor had reasonable grounds to suspect that property is an instrumentality.<sup>218</sup> The Act also requires that, where an alleged offence occurred before POCA was in place, he or she has taken all reasonable steps to prevent the property concerned from being used as an instrumentality of an offence as defined in Schedule 1 of POCA.<sup>219</sup> This process has been referred to in the literature as the ‘innocent owner defence’.<sup>220</sup>

Likewise, Section 63 of Namibia’s POCA stipulates that the High Court may exclude certain interests in property which are subject to an order if it finds, on a balance of probabilities, that a defendant’s interest in the proceeds or instrumentalities has been acquired legally and for consideration, at a time when they did not know and did not have reasonable grounds to suspect that the property constituted an instrumentality of an offence or the proceeds of a crime.<sup>221</sup> Section 65 deals explicitly with the protection of interests of third parties in forfeited property.<sup>222</sup> It requires that the person must apply for an order excluding his or her interest in the property from the operation of the order.<sup>223</sup> The application must be accompanied by an affidavit which, among other things, requires details of the nature and extent of the applicant’s right, title, or interest in the property as well as the time and circumstances.<sup>224</sup> It should be noted that these exclusion orders can be appealed. In Namibia, POCA states that “any preservation of property order and any order authorising the seizure of the property concerned or ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 61(1) remains in force pending the outcome of an appeal

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216. Prevention of Organised Crime Act 121 of 1998 sec. 52 (S. Afr.).

217. *Id.* § 52(2)(a).

218. *Id.* § 52.

219. *Id.* § 52(2)(a). 34 criminal offences are listed in the Schedule. *Id.* at sch. 1.

220. *See, e.g.,* Willie Hofmeyr, *supra* note 209, at 59–63.

221. *See* Prevention of Organised Crime Act 29 of 2004 § 63(2), 63(3) (Namib.).

222. *Id.* § 65.

223. *Id.* § 65(2).

224. *Id.*

against the decision concerned.”<sup>225</sup> These sort of appeal mechanisms are embedded within many asset forfeiture laws. For example, in the Philippines, “an aggrieved party may appeal the judgment to the Court of Appeals by filing within fifteen days from its receipt a notice of appeal with the court which rendered the judgment.”<sup>226</sup> This is in line with a judgment from the Supreme Court, which stated that the “essence of due process is to be found in the reasonable opportunity to be heard and to submit any evidence one may have in support of one’s defense.”<sup>227</sup> What the law prohibits is not merely the absence of previous notice but the absence thereof and the lack of opportunity to be heard.<sup>228</sup> Finally, Colombian asset forfeiture laws also provides for ample possibility of appeal against forfeiture decisions.<sup>229</sup>

It should be noted that while guidance generally prescribes the duration of time within which an appeal can be lodged, some courts have also ruled that cases are not judged swiftly enough. For example, the Constitutional Court of Colombia ruled in a recent decision that there should be term limits to NCB proceedings. Specifically, it considered an illicit enrichment proceeding against an appellant, which began in 1986.<sup>230</sup> In line with case law from the Inter-American Court of Human Rights (IACHR), which outlines three considerations concerning the length of a case, such as the complexity of a dispute, the procedural activity of the plaintiff, and the conduct of public authorities, the Court concluded that the case—which had gone for over 15 years—was not conducted within a reasonable time frame (“*plazo razonable*”).<sup>231</sup> Related to this, courts have also annulled forfeiture decisions on the grounds that the public authorities did not comply with legal requirements to publish forfeiture proceedings.<sup>232</sup> Thus, while the right to appeal is crucial to safeguard the integrity of NCB, there may be cases where a defendant also needs to have access to legal aid in order to ensure a fair trial.

#### F. The right to legal aid

Legal aid is the right to legal advice and representation for people who

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225. *Id.* § 66.

226. A.M. No. 05-11-04 SC, *supra* note 53, § 34.

227. *Batongbakal v. Zafra*, G.R. No. 141806, 448 S.C.R.A. 399, 410 (Jan. 17, 2005) (Phil.).

228. *Republic of the Philippines vs. Sandiganbaan*, G.R. No. 152154, (July 21, 2003) (Phil.), citing *Mutuc vs. Court of Appeals*, 190 S.C.R.A. 43 (1990) (Phil.).

229. *See* L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] chapter V, art. 38, art. 39 (Colom.).

230. Corte Constitucional [C.C.] [Constitutional Court], julio 28, 2016, Sentencia SU394/16 (Colom.).

231. *Id.*

232. Corte Constitucional [C.C.] [Constitutional Court], noviembre 5, 2014, Sentencia T-821/14 (Colom.).

would otherwise be unable to access or afford it. It is assumed that legal aid underpins the realization of most other safeguards discussed above. NCB raises a particularly vexing question about whether the claimant should be given access to forfeitable assets (frozen or seized) to pay either for living expenses or for legal assistance. Allowing access to such assets is controversial in principle and in practice.<sup>233</sup> The principle argument was advanced by the United States Supreme Court in the case of *Caplin & Drysdale v. United States*, where it held that allowing access to assets in forfeiture proceedings was akin to allowing a bank robber to rely on the stolen money. This was held to be the case even though the accused had not been convicted.<sup>234</sup> The practical reason is as follows: if NCB is to be conceptualized as a form of restitution, or returning property to its rightful owner, then spending funds on legal fees would undermine this.<sup>235</sup> In other words, if the accused were to be permitted to rely on the assets in question, then one of the main justifications for NCB forfeiture would be meaningless in practice.

Although the Colombian asset forfeiture law provides for the right to legal assistance for vulnerable people, it also proscribes the claimant's use of seized or frozen assets for legal fees or living expenses.<sup>236</sup> In South Africa, meanwhile, the case of *NDPP v Meir Elran* recognised that “[i]n an attempt to soften the blunt effect [NCB] has on fundamental rights, POCA makes allowance for payment of living and legal expenses from the seized assets during the currency of the preservation order.”<sup>237</sup> A defendant can use frozen assets to cover his defense, within limits. A court shall not make provisions for such expenses unless it is satisfied that the person cannot meet the expenses without using assets that are not frozen. Moreover, courts also require that the respondent declares all his or her interests in the property under oath. Also, legal expenses should not be paid out of frozen property in a way that exceeds prescribed maximum allowable cost for the service. Finally, the NDPP can also apply for the legal expenses to be taxed.<sup>238</sup>

The South African approach follows the recommended guidance provided by the Stolen Asset Recovery Initiative (StAR), which highlights an important contradiction if recourse to the assets under question to fund legal

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233. See Gupta, *supra* note 96, at 175.

234. *Caplin v. U.S.*, 491 U.S. 617, 629–30 (1989).

235. GREENBERG ET AL., *supra* note 6, at 75.

236. See L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 14. (Colom.). Art. 14 encompasses people who are vulnerable due to poverty, gender, incapacitation, ethnic or cultural diversity, or any other similar condition.

237. Such allowances must be reasonable, and the applicant must meet certain requirements which are set out at para. 44 of the judgment. *National Director of Public Prosecutions v. Elran* 2013 (56) CCT 12 (CC) at 25 (S. Afr.).

238. Kennedy, *supra* note 104, at 143.

costs are not permitted even as a last resort.<sup>239</sup> It is argued that “the forfeiture action quickly becomes pointless if the victim (the state in corruption cases) is paying the full costs for a claimant who has nothing to lose by litigating until the restrained funds have been completely depleted.”<sup>240</sup> Thus, “[w]ithout that limitation, a violator has every incentive to delay resolution of the forfeiture case until the seized assets have been dissipated.”<sup>241</sup> However, legislators in some jurisdictions have implemented yet another safeguard to limit the potential adverse effect of NCB, by introducing a threshold over which criminal, and not civil standards must apply in civil forfeiture proceedings.

### G. Restricting the value of forfeited assets

Experience from the U.S. shows that additional safeguards that expand beyond the realm of due process can be put in place to avoid abuse against arbitrary deprivation of property. In the U.S., NCB has come under heavy criticism, particularly for what some see as arbitrary ‘policing for profit’ or ‘stop and seize’ practices by law enforcement. In fact, it has been argued that a vast majority of states as well as the federal government, explicitly allow law enforcement agencies to benefit from the “war on drugs” by keeping the proceeds from civil asset forfeiture.<sup>242</sup> Moreover, as was previously discussed, NCB may be appealing for the police and prosecution, but in the process “give[s] rise to a number of issues surrounding the diminution of the rights of the individual in favour of concern for efficiency and expediency”.<sup>243</sup>

Some state legislatures have responded to this challenge by introducing a threshold over which seizure can only happen following a criminal conviction by a court.<sup>244</sup> Whilst it could be said this undermines the very effectiveness of NCB up to a certain point, admittedly, the interest of this move is to ensure that proper due process guarantees allowed for in the criminal realm are provided. This example is interesting to consider, since it could also be used in other jurisdictions which face similar concerns about the overbearing

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239. GREENBERG ET AL., *supra* note 6, at 76.

240. *Id.* at 77.

241. *Id.*

242. Marian R. Williams, *Civil Asset Forfeiture: Where does the money go?*, 27 CRIM. JUST. REV. 321, 322 (2002).

243. King, *supra* note 110, at 363.

244. See, e.g., Kerry Jackson, *New asset forfeiture law will protect property of innocent Californians*, ORANGE COUNTY REG. (Oct. 7, 2016), <http://www.ocregister.com/articles/law-731407-money-asset.html>; Johnathan Silver, *Civil Asset Forfeiture debate pits property rights advocates against law enforcement*, TEX. TRIB. (MAR. 3, 2017), <https://www.texastribune.org/2017/03/03/civil-asset-forfeiture-property-rights-law-enforcement/>.



role of NCB. However, the question over where to draw the line between law enforcement priorities, due process, and property rights is far from settled.

#### H. Summary

This section has shown how various countries have put in place safeguards to address some of the criticisms levelled against NCB, particularly the infringements against several basic rights. These relate to the importance of lawfulness and the principle of proportionality, the right to compensation in case of forfeiture, differing standards when shifting the onus of proof, the right to appeal decisions, measures to address self-incrimination, and access to legal aid. Recent proposals from the US in which forfeiture over a certain value would only happen with a criminal conviction also provides interesting options for consideration in other jurisdictions. Thus, “in defined circumstances (reasonable limits, other corroborative evidence, case by case assessment, opportunity for rebuttal), [establishing the presumption that property is criminally acquired] may be compatible with human rights.”<sup>245</sup>

These safeguards have helped these jurisdictions prevent abuse in NCB forfeiture. In some cases, such safeguards have also been challenged in courts. The courts have therefore played an important role in shaping the nature and scope of application of these safeguards. As the next part discusses, their practical application may be undermined for various reasons. These reasons include political will, the extent to which corruption and human rights agendas overlap, the nature of court systems, and the extent of judicial independence and the nature of property rights regimes.

### VI. IMPLEMENTATION CHALLENGES

There are numerous factors that can affect implementation of asset forfeiture and NCB. To sum these up, StAR has identified a number of conditions that developing countries should put in place to facilitate asset recovery without which the effective recovery of stolen wealth and return of assets could be hampered: effective laws and institutions, which includes a strong legislative and regulatory framework, together with institutions that have operational independence; investigation and pursuit of cases, which in turn, could be said to depend largely on political will; effective interaction among agencies; informal practitioner-to-practitioner cooperation as well as better international cooperation mechanisms, including through Mutual Legal Assistance (MLA) requests; and development of the capacity of practitioners.<sup>246</sup>

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245. INT’L COUNCIL ON HUM. RTS. POL’Y & TRANSPARENCY INT’L, *supra* note 23, at 68.

246. GREY ET AL., *supra* note 104, at 51–53; GREENBERG ET AL., *supra* note 6; BRUN ET AL., *supra*

Further discussion of all these issues is beyond the scope of this paper, however. Instead, this section focuses on the type of challenges which undermine not so much the practical implementation of NCB of the type described above, but rather the implementation of the aforementioned due process safeguards, particularly in a developing country context. Four issues that seem pertinent to this end are considered: political will and understanding incentives/disincentives for change; the possible conflict between human rights and anti-corruption commitments, weak court systems and lack of judicial independence, and property rights regimes.

#### A. 'Political will' or the political economy of change

NCB is as good and effective as the environment it operates in, and this, in turn, is largely dependent on the depth of commitment (or 'political will') that exists around asset forfeiture.<sup>247</sup> Political will is fundamental to the discussion of this paper, since it is often taken as a proxy for what a country or regime actually does in practice to tackle corruption (which, everyone agrees, must be tackled). This is because those with power, who can bring about changes, 'control the controls', such as control over money laundering, prosecution, and asset recovery.<sup>248</sup> The legal academic John Hatchard has identified several types of political will, which vary between and within countries: active political will; no political will; shifting political will; and transnational political will.<sup>249</sup> The latter seems particularly relevant in the context of UNCAC, since asset forfeiture often takes an international dimension.

It has also been argued that political will is essential in fighting corruption (and by extension, to applying asset forfeiture laws), since the pursuit of high-level corruption is ultimately a political decision which requires high-level leadership.<sup>250</sup> Conversely, lack of political will often result in obstructions to reform. It could mean, for example, that an asset forfeiture bill is stalled by the legislature, or that the legislation is passed but implementation

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note 16.

247. Interview with Hon. Professor Justice OBK Dingake (Apr. 2017). Vested interests, it is argued, have too much to lose from asset forfeiture laws. Support and commitment from politicians is essential for NCB, but may be difficult to secure where they are themselves guilty of corruption crimes and where they fear asset forfeiture laws could be used against them.

248. JOHN HATCHARD, *COMBATING CORRUPTION: LEGAL APPROACHES TO SUPPORTING GOOD GOVERNANCE AND INTEGRITY IN AFRICA* 28–29, 279 (2014).

249. *Id.* at 29–33.

250. This was well recognized by former Prime Minister Cameron of the UK in the preamble of the UK Anti-Corruption Summit. See David Cameron, *The fight against corruption begins with political will*, *GUARDIAN* (May 11, 2016), <https://www.theguardian.com/commentisfree/2016/may/11/fight-against-corruption-begins-with-political-will>.

is deficient (e.g. because legislative or political hurdles are created to stop proper implementation of the law). Absence of political will can also refer to the extent to which investigators, prosecutors or judges pursue a particular case and apply asset forfeiture laws in an impartial manner.

However, there is a risk of boiling everything down to political will. The renowned anti-corruption academic Michael Johnston has equated ‘political will’ to “magical thinking”, calling instead for measures that “address[] corruption as a systemic problem requiring systemic political change”.<sup>251</sup> Others have suggested that blaming lack of political will is a typical principal-agent problem, and have suggested more nuanced approaches that complement political will with, for example, the contribution of collective action theories.<sup>252</sup> Tackling corruption requires understanding corruption as a principal-agent problem with “political will” at its core, a collective action one, and also acknowledging that “corruption often persists because [it is thought] to solve[] problems.”<sup>253</sup>

Yet another approach consists in further dissecting political will by understanding the locus of change. Fighting corruption and recovering assets, we are told, can depend on how leadership from above, from below, or from outside materializes in practice and indeed how these three levels overlap.<sup>254</sup> On the former, it is important to acknowledge that some countries (e.g. Haiti) are simply unable to recover assets, while in other cases, there is an unwillingness to act. But timing may also be an important variable affecting the outcome of asset recovery. Specifically, political transitions, like in Ukraine or the Arab Spring, often create the conditions for reaping results on asset recovery.<sup>255</sup> ‘Leadership from below’ refers to the importance of popular support for the strife against corruption and asset recovery.<sup>256</sup> Finally, ‘leadership from outside’ is the prerogative of international organizations, civil society, and the media. International pressure, including threats of financial

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251. Michael Johnston, *Michael Johnston: Relying on ‘political will’ to fight corruption is magical thinking*, FCPA BLOG (Dec. 20, 2017), <http://www.fcpablog.com/blog/2017/12/20/michael-johnston-relying-on-political-will-to-fight-corrupti.html>.

252. Heather Marquette & Caryn Peiffer, *Corruption: Unpacking the Black Box of Political Will*, DLP: OPINIONS (Jan. 12, 2015), <http://www.dlprog.org/opinions/corruption-unpacking-the-black-box-of-political-will.php>.

253. *Id.*

254. ANDREW MARSHALL, CENTER FOR GLOBAL DEVELOPMENT, WHAT’S YOURS IS MINE: NEW ACTORS AND NEW APPROACHES TO ASSET RECOVERY IN GLOBAL CORRUPTION CASES 24–30 (Apr. 2013), [https://www.cgdev.org/sites/default/files/whats-yours-is-mine\\_0.pdf](https://www.cgdev.org/sites/default/files/whats-yours-is-mine_0.pdf).

255. *Id.* at 25–26.

256. Marshall gives the example of ordinary Nigerians who, jaded by corruption, collaborated with one of the anti-corruption agencies, the EFCC, which was seen as credible by the majority. This, in turn, provided the Commission with information to initiate investigations. Of course, whether the EFCC acted on this is another matter. *See id.* at 26.

sanction, can be a driver of change, as was the case in Nigeria. But without domestic support and energy, there are slim chances of success.<sup>257</sup>

Thus, bringing all of this together, understanding the political economy of change and the incentive/disincentive systems for addressing corruption is a vital step if we are to successfully recover assets. Indeed, support and commitment from politicians, judges, prosecutors, and investigators are essential for asset forfeiture, but may be difficult to secure where they are themselves guilty of corruption crimes and where they fear asset forfeiture laws could be used against them. There may be strong vested interests opposing reforms. This means that governments that demonstrate a strong willingness to tackle corruption and recover assets “may have to establish strong political legitimacy before they can galvanize” trust and public support.<sup>258</sup> “Where a government does succeed in establishing such legitimacy,” it often faces a number of constraints, such as not hurting the economic elites who may have contributed to political reconstruction and reconciliation, and/or who may be in power.<sup>259</sup> This explains why it is often easier for states to recover assets from previous regimes, cover crimes committed in the past, and/or to use anti-corruption and asset forfeiture laws in a way to undermine political opposition.<sup>260</sup> For example, Nigeria has been successful at recovering assets from previous political leaders (Sani Abacha and Joshua Chibi Dariye, which required international collaboration), and is in the process of prosecuting a former Minister of Petroleum Resources for corruption, Diezani Alison-Madueke, with the view to recover the gains she is accused of having embezzled through the criminal system.<sup>261</sup>

Identifying the best approach to tackling corruption is a natural first step. Applied to asset forfeiture, it may help understand the bottlenecks, and opportunities for change. Such an analysis helps us understand the political or discrete interests that may drive asset forfeiture, as was illustrated with the above reference to the US. Beyond this point, however, there are other challenges that could undermine the proper application of due process safeguards in asset forfeiture that deserve further consideration. First of these is the tension that may emerge between anti-corruption and human rights obligations.

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257. *Id.* at 29.

258. Abdullahi Y. Shehu, *Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria*, 3 INT'L L. RES. 186, 192 (2014).

259. *Id.*

260. *See id.*

261. Akin Kuponiyi, *Court orders forfeiture of \$153,310,000 belonging to Alison-Maduekwe*, PM NEWS (Jan. 6, 2017), <http://www.pmnewsnigeria.com/2017/01/06/court-orders-forfeiture-of-153310000-belonging-to-alison-maduekwe/>.

## B. Conflicting duties? Reconciling anti-corruption and human rights obligations

That corruption undermines the enjoyment of constitutional and human rights is a trite point and is well recognized by both the Courts and in the wider literature.<sup>262</sup> Evidence also suggests that countries with high rates of perceived corruption are also countries with a poor human rights record.<sup>263</sup> From a legal standpoint, states have an obligation to respect, protect and fulfil human rights, and they also have international obligations to act against corruption. As a result, there is an apparent contradiction between international laws that require states to “enhance” their powers for confiscation and co-operation in corruption cases and international standards that require governments to ensure individual rights, such as due process.<sup>264</sup> Thus in committing themselves to enabling asset recovery, states may place themselves in a position that appears to show a conflict between their international obligations.<sup>265</sup>

Some countries have tried to resolve this tension “by reference to [domestic] constitutional rules or principles of statutory interpretation.”<sup>266</sup> For example, the Colombian NCB law makes clear that its provisions should be applied in line with international and constitutional human rights obligations that are compatible with asset forfeiture.<sup>267</sup> This suggests there is ample room for decisions by the court of which provisions fall under this category or not. Though there is relatively little Colombian jurisprudence, Section 4 discussed cases that were deemed constitutional and in line with due process.

While domestic legislation may refer to international law, the former takes precedence over the latter. Anti-corruption treaties often call on states to enact anti-corruption tools in line with fundamental principles of their domestic laws. For example, the 1998 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the ‘Drug Trafficking Convention’) incorporates human rights protections, but by reference to the constitutional protections available in the domestic law of the parties. As per

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262. See, e.g., *South African Ass’n of Pers. Injury Lawyers v. Heath* 2001 (1) SA 883 (CC) (S. Afr.); MAGDALENA S. CARMONA, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION (Robert Archer ed., 2009).

263. Todd Landman & Carl Jan Willem Schudel, *Corruption and Human Rights: Empirical Relationships and Policy Advice* 13 (July 29, 2007) (Int’l Council on Hum. Rts. Pol’y, Working Paper).

264. See Ivory, *Asset Recovery in Four Dimensions*, *supra* note 32, at 193–94.

265. NDIVA KOFELE-KALE, COMBATING ECONOMIC CRIMES: BALANCING COMPETING RIGHTS AND INTERESTS IN PROSECUTING THE CRIME OF ILLICIT ENRICHMENT 132 (2013).

266. See Ivory, *Asset Recovery in Four Dimensions*, *supra* note 32, at 194.

267. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 4 (Colom.).

Article 3(1), the penal provisions are made “subject to [the party’s] constitutional principles and the basic concepts of its legal system.”<sup>268</sup> Professor Hatchard also argues that domestic legal frameworks, particularly constitutional rights, provide a viable means to enforce the rights of victims, and thus are a promising strategy for fighting corruption.<sup>269</sup>

The International Council on Human Rights Policy (ICHRP) and Transparency International (TI) have gone further by arguing that the apparent tensions alluded to above have been “exaggerated,” and are in fact based on a “narrow range of concerns.”<sup>270</sup> Anti-corruption practice can conflict with human rights, but “in most actual cases, they are carried out in conformity with the law while respecting human rights.”<sup>271</sup> Reinforcing the importance of safeguards discussed in this paper, the ICHRP and TI further argue that the offense of illicit enrichment can, in defined circumstances, be compatible with the presumption of innocence, just as the use of investigative techniques and privacy rights on the one hand, and asset recovery (including NCB) and property rights on the other can also be compatible.<sup>272</sup> Under certain conditions, such as reasonable limits, additional corroborative evidence on a case, careful consideration of the facts (including through a case-by-case assessment), and a fair trial, the presumption that property was criminally acquired may be compatible with human rights. The ICHRP concludes that that the punitive character of civil forfeiture means that those subject to asset forfeiture should be afforded procedural safeguards provided for in criminal cases.<sup>273</sup>

Yet, even as this debate appears unresolved, there have been increasing efforts to link human rights and anti-corruption discourses. The relative lack of success in enforcing anti-corruption laws and prosecuting acts of corruption could be improved “with the help of human rights arguments and instruments.”<sup>274</sup> Specifically, since corruption is often seen as a victimless crime, it has been argued that a human-rights based approach can help to focus on the social implication of corruption and turn victims of corruption into right-

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268. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3.(1)(c), Dec. 20, 1988–Dec. 20, 1989, 95 U.N.T.S. 1582.

269. HATCHARD, *supra* note 248, at 111–12.

He provides the example given of a litigant who could argue that his/her constitutional right to a fair hearing before an independent and impartial court has been infringed, which in turn opens up the possibility to bring a constitutional case to enforce these rights.

270. INT’L COUNCIL ON HUM. RTS. POL’Y & TRANSPARENCY INT’L, *supra* note 23, at 63–64.

271. *Id.* at 64.

272. *Id.* at 72.

273. *Id.* at 69.

274. Anne Peters, *Corruption and Human Rights* 8 (Basel Inst. on Governance, Working Paper No. 20, 2015).

bearers. Professor Hatchard also notes that a human rights framework can help “personalise” corruption by increasing public awareness about it as a violation of basic rights, which in turn is likely to foster support for remedial action.<sup>275</sup> The UN, meanwhile, has sought to clarify the priority between anti-corruption and human rights obligations by advocating for a human rights-based approach to asset forfeiture. Accountability, transparency, and participation (which are both anti-corruption and human rights principles) can help improve prevention and detection procedures at the countries of origin and the fair administration of justice.<sup>276</sup> Further, the UN notes that “under certain conditions[,] a successful procedure of asset repatriation might remedy the State’s corruption-related failure to [comply[]] with human rights obligations.”<sup>277</sup> It also argues that:

[A] human rights-based approach to the asset-recovery process not only demands that countries of origin make every effort to achieve the recovery and repatriation of proceeds of corruption for implementation of their international human rights obligations, it also demands that recipient countries understand repatriation not as a discretionary measure but also as a duty derived from the obligations of international cooperation and assistance.<sup>278</sup>

Thus, the often-cited contention that asset forfeiture, and NCB specifically, may conflict with human rights may hold some truth in certain conditions. However, as was discussed, this tension is not necessarily insurmountable. As this paper showed, with respect to asset forfeiture and NCB specifically, the presence of key safeguards is vital if human rights are to be respected. Moreover, as evidenced by the above discussion, the human rights agenda as a whole can further the cause of asset forfeiture. However, consideration needs to be given concerning the role of the courts and justice systems as ultimate guarantors of the proper application of said safeguards.

### C. Court systems and judicial independence

As was identified in previous sections, political will (and the underlying political economy, incentives and disincentives for change), should not be taken for granted. Judicial independence is often a constitutional guarantee, so it follows that efficient court systems, with provisions (such as the process

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275. HATCHARD, *supra* note 248, at 111–12. *See also* Peters, *supra* note 274, at 29.

276. Comprehensive Study on the Negative Impact of the Non-Repatriation of Funds of Illicit Origin to the Countries of Origin on the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, Rep. of the U.N. High Commissioner for Human Rights, ¶ 63, U.N. Doc. A/HRC/19/42; Human Rights Council, 19th Sess. (Dec. 14, 2011).

277. *Id.* ¶ 23.

278. *Id.* ¶ 26.

of appointing judges) to uphold judicial accountability, integrity, and independence are key to fighting corruption<sup>279</sup> and vital for NCB to be properly implemented. In effect, independent courts are able to reduce opportunities for corruption and impose constraints on ruling elites and kleptocratic groups. This section looks at the challenges for implementing these standards in practice.

For NCB to work well, the various checks and balances presented in Section 4 must be implemented and applied in practice, which in turn, relies on a fair and impartial judiciary.<sup>280</sup> If a judge or a court is compromised, then this raises the possibility that safeguards which rely on strong court systems might not work.

Various studies and experience surveys have pointed to low levels of trust in courts, which in turn undermines their key functions, such as securing citizen's and property rights.<sup>281</sup> More recent data from the World Economic Forum (WEF) suggests that developing countries lag behind developed ones where judicial independence is concerned.<sup>282</sup> Notable outliers include South Africa (with a score of 5.44/7) and Namibia (4.81/7) for 2016.<sup>283</sup> Political scientists Drew Linzer and Jeffrey Staton also provide an alternate ranking of judicial independence, which is topped by developing nations, but where South Africa and Namibia also fare relatively well.<sup>284</sup> These results parallel the Index of Public Integrity (IPI), which captures the extent of impartial and non-corrupt judiciary systems that constitute legal constraints on government power and are thus key elements of effective control of corruption.<sup>285</sup>

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279. See, e.g., G.A. Res. 58/4, art. 11, U.N. Doc. A/RES/58/4 (Oct. 31 2003) (citing an independent judiciary as playing a crucial role in combating corruption); Organization of African Unity, African Charter on Human and Peoples' Rights art. 7, Oct. 21, 1986 (creating individual rights to appeal to competent national organs and an impartial court or tribunal).

280. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 9 (Colom.). Colombian laws state that representatives of the judiciary are independent and autonomous. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] art. 111 (Colom.). In addition to establishing the principle of judicial independence and impartiality, asset forfeiture laws also highlight the importance of judges, insofar as they are responsible for checking the legality of provisional measures issued by the Attorney General.

281. Siri Gløppen, *Courts, Corruption and Judicial Independence*, in CORRUPTION, GRABBING AND DEVELOPMENT: REAL WORLD CHALLENGES 68 (Tina Søreide & Aled Williams eds., 2014).

282. See WORLD ECONOMIC FORUM, THE GLOBAL INFORMATION TECHNOLOGY REPORT 2016: INNOVATING IN THE DIGITAL ECONOMY 204 (Siljia Baller et al. eds., 2016). These findings are based on the following question: In your country, how independent is the judicial system from influences of the government, individuals, or companies? [1 = not independent at all; 7 = entirely independent].

283. *Id.* Colombia scored 2.69/7 and The Philippines 3.73/7. As a point of comparison, the UK scored 6.21/7.

284. Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948-2012*, 3 J.L. & CTS. 223, 237 (2015).

285. See generally *Index of Public Integrity*, EUR. RES. CTR. FOR ANTI-CORRUPTION & ST. BUILDING, <https://integrity-index.org/> (last visited Nov. 13, 2018). The Index reflects six components that can contribute to control of corruption.



On this Index, South Africa scores 8.53 for judicial independence, Namibia 7.50, Botswana 6.68, Colombia 3.90 and the Philippines 5.23.<sup>286</sup> These statistics would seem to be consistent with experience from South Africa and Namibia, where, as seen, the courts play an important role in NCB.

Various issues may help explain why trust in courts is relatively low, chief of which is lack of judicial independence. Although it is said that the Philippines enjoys relatively strong levels of judicial independence, verdicts have reportedly been skewed by the fact that judges and lawyers often depend on local power holders for basic resources and salaries.<sup>287</sup> “[T]he sway of rich and powerful entities has frequently influenced the prosecution, conviction, and sentencing in countless civil and criminal cases. Consequently, courts often made decisions in favor of the rich and powerful.”<sup>288</sup> Whilst justice may sometimes be coopted, the courts (particularly the Supreme Court) have sought to assert their independence from Presidents, who are responsible for appointing judges. Former President Aquino replaced many judges appointed by his predecessor.<sup>289</sup> Though there is no data to support this, it could be surmised that this lack of independence may adversely impact implementation of NCB, particularly where the courts need to settle a decision involving the rich and powerful.

In Botswana, there have been allegations that some cases before the courts have been politically motivated.<sup>290</sup> Moreover, a series of defining

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286. *Id.* It should be noted that data stems from the Global Competitiveness Database developed by the World Economic Forum (WEF). This indicator asks the question “To what extent is the judiciary in your country independent from influences of members of government, citizens, or firms? [1 = heavily influenced; 7 = entirely independent]. The indicator has been standardized and transformed to be in range between 1 and 10 with 10 implying the highest judicial independence.” *IPI Methodology at a Glance*, EUR. RES. CTR. FOR ANTI-CORRUPTION & ST. BUILDING, <https://integrity-index.org/methodology/> (last visited Nov. 13, 2018).

287. *See, e.g., Philippines: Freedom in the World (2016)*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2016/Philippines> (last visited Oct. 18, 2018). *But see* ARIANNE T. FERRER & JANICA C. MAGAT, *BLIND JUSTICE: A CASE FOR JUDICIARY IMPARTIALITY IN THE PHILIPPINES SUPREME COURT* 10 (2015), [http://nap.psa.gov.ph/ncs/11thNCS/papers/invited%20papers/ips-21/01\\_Blind%20Justice%20A%20Case%20for%20Judiciary%20Impartiality%20in%20the%20Philippine%20Supreme%20Court.pdf](http://nap.psa.gov.ph/ncs/11thNCS/papers/invited%20papers/ips-21/01_Blind%20Justice%20A%20Case%20for%20Judiciary%20Impartiality%20in%20the%20Philippine%20Supreme%20Court.pdf); Artemio V. Panganiban, *Judicial Independence*, INQUIRER (Jan. 31, 2016), <http://opinion.inquirer.net/92482/judicial-independence>.

288. BERTELSMANN STIFTUNG, *BTI 2016 – PHILIPPINES COUNTRY REPORT 9 (2016)* [hereinafter *BTI*], [https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI\\_2016\\_Philippines.pdf](https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Philippines.pdf).

289. *Id.* at 10.

290. *See, e.g.,* Khonani Ontebetse, *DCEC Follows Guma, Olopeng Money Trail to Zimbabwe*, SUNDAY STANDARD (Aug. 9, 2015), <http://www.sundaystandard.info/dcec-follows-guma-olopeng-money-trail-zimbabwe>. This relates to a recent case that has come before Botswana’s subordinate courts, *DCEC v. Moyo and Olopeng*, in which both of the defendants are Members of Parliament for the ruling party. Moyo is said to have exposed various issues of maladministration, lack of governance and abuse

cases may be interpreted as a sign that the Executive is seeking to exert its authority over institutions tasked with investigative powers. In *Law Society of Botswana and O Motumise v President of Botswana and Others*,<sup>291</sup> the Attorney General argued that the President has the ultimate power to appoint and reject nominees from the Judicial Service Commission for the appointment of Judges (although this generated a lot of debate within the High Court, with some Justices suggesting the President should act in accordance with the recommendation of the Judicial Service Commission).<sup>292</sup> In *The Botswana Gazette v The Director of Public Prosecutions*, the DPP argued that it is not autonomous and independent of the Attorney General, whereas in principle it should be. The Attorney General, whilst considered a Public Servant, is directly appointed by the Executive.<sup>293</sup> These judgments could ultimately impact funding for the courts, the appointment process, and who makes the decision to prosecute and how, all of which have important implications for the application of NCB.

In addition to judicial independence (or lack thereof), court delays are also significant for NCB. Cases that fail to be swiftly resolved could undermine the legitimacy and effectiveness of asset forfeiture, since it often requires a flexible and responsive court system. Statistics from the Philippines are quite revealing. Court delays, it is argued, are the result of too many cases being tried by too few courts and judges.<sup>294</sup> As of September 2015, the special anti-corruption court had a backlog of more than 3,000 cases.<sup>295</sup> Moreover, 90 percent of cases of all types (of which 17 percent concerned ownership of land) handled by the Supreme Court in 2012 took more than 20 years to make their way through the system of hearings and appeals to higher courts.<sup>296</sup> There is also a high staff turnover rate, which puts further pressure

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of government expenditure. It should be noted that this case is ongoing, and so it is premature to make a concrete judgment.

291. *Law Soc'y of Botswana v. The President of Botswana* [2017] B.W.C.A. 3, 11. (Bots.).

292. See, e.g., Caroline James, *Court Diary: Law Society of Botswana v President of Botswana*, SOUTHERN AFRICA LITIGATION CENTRE (Nov. 10, 2015), <http://www.southernafricalitigationcentre.org/2015/11/10/court-diary-law-society-of-botswana-v-president-of-botswana/>; *Botswana: Appointment of High Court Judges and Procedures of the Judicial Service Commission*, SOUTHERN AFRICA LITIGATION CENTRE (Apr. 28, 2017), <http://www.southernafricalitigationcentre.org/2017/04/28/botswana-appointment-of-high-court-judges-and-procedures-of-the-judicial-service-commission/>.

293. Telephone Interview with Hon. Professor Justice OBK Dingake, Botswana (Apr. 2017). The litigation in this matter is ongoing.

294. Neal H. Cruz, *PH Has Slowest Justice System in the World*, INQUIRER (Nov. 24, 2014), <http://opinion.inquirer.net/80394/ph-has-slowest-justice-system-in-the-world-2>.

295. *Philippines: Freedom in the World*, FREEDOM HOUSE, *supra* note 287.

296. Resolution Directing the Proper Senate Comm. to Conduct an Inquiry, in Aid of Legis., Of the U.S. House Committee Report that an Outdated and Inefficient Land Administration System has Resulted in Fraudulent Land Titles and Widespread Land Grabbing in the Philippines, P.S.R. No. 1559 1 (Sept. 2,

on the system and results in excessive delays and backlogs.<sup>297</sup> In addition to low salaries for judicial officials, bribery and interference in court proceedings by government and military officials are often given as reasons for the delays.<sup>298</sup> But “the dilatory tactics by the defense and the lackadaisical attitude of the judges,” it is claimed, are also to blame.<sup>299</sup> Judges postpone cases indefinitely, and “[i]ronically, the appellate courts themselves, including the Supreme Court, abet the delays [by being] too quick to issue temporary restraining orders.”<sup>300</sup> In principle, however, the Constitution of the Philippines provides for a right to a speedy, fair, and impartial trial of an accused.<sup>301</sup>

Thus, there may be various impediments to judicial independence, especially concerning the court’s institutional, financial and administrative autonomy, which in turn may affect a court’s ability to act as a safeguard against improper application of NCB laws.<sup>302</sup> The relative lack of trust in courts highlighted above contrasts with the prominent role they play in the asset forfeiture process, such as issuing freeze orders and hearing challenges against forfeiture orders, to interpreting legislation and ensuring that forfeiture cases follow the principle of proportionality, to testing the constitutionality of forfeiture decisions.

Though this article lacks space to explore these measures in full, various measures can be put forward to address the abovementioned challenges. Interestingly, the abovementioned IPI suggests that countries that score poorly on the judicial independence ranking can consider introducing tenure for judges and entrusting the appointment and sanctioning of judges to professional bodies, validated by a two-thirds majority in Parliament, as well as introducing conflict of interest policies. It also calls on the importance of

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2015), <https://senate.gov.ph/lisdata/2214818854!.pdf>. See also Press Release, USAID, *USAID Announces New Effort to Tackle Property Rights Issues in the Philippines* (Aug. 21, 2015), <http://us.gov.info/2015/08/21/usaaid-announces-new-effort-to-tackle-property-rights-issues-in-the-philippines/>.

297. See BTI, *supra* note 288, at 10 (discussing replacement of Supreme Court judges).

298. *Id.* at 9.

299. Cruz, *supra* note 294.

300. *Id.* See also MCRC, ADDRESSING CASE CONGESTION IN THE PHILIPPINES JUDICIAL SYSTEM THROUGH OUT-OF-COURT SETTLEMENTS OF DISPUTES 1, [http://www.academia.edu/8349825/Addressing\\_Case\\_Congestion\\_in\\_the\\_Philippine\\_Judicial\\_System\\_through\\_Out-of-Court\\_Settlement\\_of\\_Disputes](http://www.academia.edu/8349825/Addressing_Case_Congestion_in_the_Philippine_Judicial_System_through_Out-of-Court_Settlement_of_Disputes) (examining why court delays are so prevalent in the Philippines and offering a potential solution).

301. See, e.g., CONST. (1987), art. III, § 14(2) (Phil.). This appears to apply to criminal prosecutions, not so much civil cases. See also *id.* art. VIII, § 15. The Constitution also prescribes that cases in front of the Supreme Court should take no more than 24 months, no more than 12 months for appellate courts, and no more than 3 months for lower courts (all counted from the date of submission for resolution of the cases).

302. HATCHARD, *supra* note 248, at 206.

ensuring prosecutions are free from political intervention.<sup>303</sup> Along similar veins, standards on appointment and lustration of judges call for focusing on: the introduction of standards covering appointments, removal, tenure mechanisms, and conduct and discipline; limiting terms in office; guarantees against undue political influence; reducing political (executive) influence on judicial selection; minimizing political influence on judges' tenure and conditions; protecting judges' budgets and administration; and increasing judges' competence and professional norms, etc.<sup>304</sup> Thus, judicial independence, appointment and tenure matter, since their absence or scarcity could infringe on the right to a fair trial. As was discussed, judges and courts have an important role in ensuring that property rights are properly respected. However, in certain conditions or contexts, this is a challenging endeavor, as the paper next explores.

#### D. Property Rights

As already discussed, some countries have constitutionally enshrined property rights protections prescribing that there can be no deprivation of property except in terms of law of general application, and more generally, that no law may permit arbitrary deprivation of property. Yet, given the intrinsic powers associated with it, NCB may undermine these rights. Nowhere is this more apparent than in the United States, where there is a flurry of opposition to civil forfeiture laws because, it is argued, they trespass on property rights, where property refers to land, cars, houses, and other kinds of movable and immovable goods. Courts thus have an important role to play in ensuring that NCB does not encroach on property rights, e.g. through proportionality tests.<sup>305</sup>

The Mo Ibrahim Foundation has tracked the extent to which governments protect and enforce private property rights and contracts. Data for

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303. *Why Do We Need an Index of Public Integrity?*. EUR. RES. CTR. FOR ANTI-CORRUPTION & ST. BUILDING, <https://integrity-index.org/about/> (last visited Nov. 13, 2018).

304. See U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* (1985), <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>; Int'l Bar Ass'n, *Minimum Standards of Judicial Independence* (1982), <https://www.ibanet.org/Document/Default.aspx?DocumentUId=bb019013-52b1-427c-ad25-a6409b49fe29>. The principles of judicial independence are enshrined in various international instruments, frameworks and conventions. See also GEOFFREY ROBERTSON, *JUDICIAL INDEPENDENCE: SOME RECENT PROBLEMS* 4 (2014); Gloppen, *supra* note 281, at 75–77.

305. Karis Ann-Yi Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CAL. L. REV. 1635, 1672–73 (2002).

South Africa, Botswana and Namibia suggests that, from 2000 to 2016, property rights protections have come under increasing stress.<sup>306</sup> Various challenges may help explain why safeguarding property rights regime is challenging in practice.

It has been pointed out that some political and economic elites may have an interest in having a weak property rights regime. They may take an active part in “[the] nexus of corrupt internal accumulation and illicit capital outflows,” and thus may work to ensure the rules of the game benefit them directly.<sup>307</sup> These elites, which control considerable resources at home but place much of the proceeds overseas, thus may have a vested interest not to strengthen property rights since this also undermines asset forfeiture in international collaboration through MLA requests.<sup>308</sup> In these conditions, it is the case that weak property rights protections will make more drastic NCB laws and action easier, which in turn could give rise to abuses and undermine the legitimacy of NCB. Though, judging from the criticisms of NCB that arise in the United States, for example, the issue would also appear to stem from the actual scope of civil forfeiture statutes, which, it is argued, grants the police force power to arbitrarily seize and forfeit property with little accountability, checks, or balances.<sup>309</sup> Thus, in addition to greater accountability in how property rights are forfeited and managed in deed/land registries, clear expropriation laws and a right to appeal are also important safeguards.

However, in most countries, identifying the actual property owner is challenging. This is especially so in countries that lack land registries linking property to an owner. Some estimates suggest that only 30% of land rights are registered or recorded worldwide.<sup>310</sup> In the Philippines, for example, land information has been neglected, and statistics show that, as of 2007, about

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306. *Ibrahim Index of African Governance*, MO IBRAHIM FOUND., <http://iiag.online/> (last visited Aug. 2018). The indicator for property rights is itself a composite indicator from four sub-indicators from various sources evaluating property rights and regulations; property freedoms; protection of property rights; and property rights. With the exception of Botswana, the indicator dipped between 2000 and 2010, before picking up slightly by 2016. South Africa: 86.9 (2000); 80.3 (2010); 85.4 (2016); Botswana 89.2 (2000); 90.9 (2010); 85.0(2016); Namibia 74.8(2000); 62.1(2010); 69.5(2016).

307. Mick Moore, *The Practical Political Economy of Illicit Flows*, in *DRAINING DEVELOPMENT? CONTROLLING FLOWS OF ILLICIT FUNDS FROM DEVELOPING COUNTRIES* 457, 474 (Peter Reuter ed., 2012).

308. *Id.* at 474–75.

309. See, e.g., *Asset Forfeiture Abuse*, AM. C.L. UNION, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse>.

310. *Land*, WORLD BANK, <http://www.worldbank.org/en/topic/land> (last visited Nov. 2017).

46% of the country's land parcels remained untitled.<sup>311</sup> Moreover, "the country's record of land ownership weakens security of tenure; opens the existing land administration system to abuse; and denies the public, its commercial enterprises, and government a complete view of land ownership, impacting performance across sectors."<sup>312</sup> The result is that it may be difficult to ascertain whether property may be the proceeds of a crime or an instrumentality of an offence, not to mention the added developmental benefits of land tenure, such as using land as collateral for a loan. The land ownership problem is compounded by a number of outdated and inconsistent laws and regulations touching on various aspects of land administration, such as surveying and mapping, land classification, etc. Moreover, the mandate of various institutions overlap, thus hampering collaboration.<sup>313</sup> This results in "a strong propensity for arbitrariness and corruption, [which in turn] increase the transaction costs that consistently cause conflicts with informal settlers."<sup>314</sup>

South Africa has a much more advanced property rights system compared to other countries under review. Indeed, the South African legal system protects and facilitates the acquisition and disposition of all property rights (e.g. land, building, mortgages, etc.). The Constitution only allows for expropriation for public purposes (e.g. to build a road) at market values, with some exceptions.<sup>315</sup> Although a strong property rights system probably goes some way towards explaining why NCB forfeiture is prolific in South Africa, concerns have been raised about how well property rights are guaranteed. It is argued that the current ANC Government has embarked on a wealth redistribution policy which would allegedly disproportionately affect white South Africans by changing land tenure policies.<sup>316</sup> Moreover, the South African Institute of Race Relations argues that among other things, business-related legislation since 2013 has weakened property rights.<sup>317</sup> It also claimed that

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311. Claudia Buentjen et al., *Building Modern Land Administration Systems*, ASIAN DEV. BANK: KNOWLEDGE SHOWCASES, Apr. 2015, at 1, <https://www.adb.org/sites/default/files/publication/158137/ks062-modern-land-administration.pdf>.

312. *Id.*

313. *Id.* Note that a Land Administration Act has been debated in Congress, but remains to be implemented. It would allow for a single agency to have quasi-judicial powers to settle private property disputes.

314. BTI, *supra* note 288.

315. These exceptions concern land reform that is required to address imbalances created by South Africa's history with Apartheid. In such cases, expropriation at less than market value may be considered, but the Constitutional Court has a role in deciding what is just and equitable in such circumstances. See Johan van der Merwe, *Expropriation – What Does the Constitution Say?*, GROUNDUP (Mar. 5, 2018), <https://www.groundup.org.za/article/expropriation-what-does-constitution-say/>.

316. Dave Steward, Executive Director, FW de Klerk Foundation, Address to the Conference on Land Ownership in South Africa at Hakunamata, Gauteng (May 31, 2013).

317. Anthea Jeffery, *The ANC Govt's War on Economic Rationality*, POLITICSWEB (March 27, 2014), <http://www.politicsweb.co.za/news-and-analysis/the-anc-govts-war-on-economic-rationality>.

the Government's green paper on land reform could undermine both property rights and the Rule of Law.<sup>318</sup>

More recently, the 2016 Promotion and Protection of Investment Act, has been criticized for undermining property rights, particularly through expropriations.<sup>319</sup> Whereas prior legislation includes a number of safeguards, it is argued that the new law makes "provisions for the state to take possession of property after conducting an investigation into the merits of expropriation and the issuing a notice of intention to expropriate" without a court order.<sup>320</sup> The government can also delay paying compensation until possession has been passed to the state.<sup>321</sup> As of 2018, the government has pushed ahead with plans to amend the Constitution to allow land expropriation *without* compensation.<sup>322</sup> This could throw the legality of NCB into disarray, since as discussed further above and highlighted by T.J Van der Walt, without compensation, expropriation could be akin to 'regulatory taking'.<sup>323</sup> More generally, these steps exemplify tensions between a property rights regime on the one hand, and a strong and independent court system on the other, which plays an important role in interpreting the aforementioned legislation to ensure that it does not open the door to abuses in asset forfeiture cases.

Land is not the only asset that can be forfeited in NCB cases; other assets may include cars, money, buildings, or other high-value goods. As was explained, it may be difficult for courts to use land registries in forfeiture

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The Institute identifies itself to be a "classically liberal think-tank promoting the ideas and policy solutions necessary to the investment and economic growth that will free South Africa's people from unemployment, dependency and poverty." See *About Us*, IRR, <https://irr.org.za/about-us/about-us> (last accessed Dec. 31, 2018).

318. Anthea Jeffery, '*Green Monster*' Could Wreck Both Property Rights and the Rule of Law, IRR (Sept. 1, 2011), <http://irr.org.za/reports-and-publications/research-policy-brief/research-and-policy-brief-2018green-monster2019-could-wreck-both-property-rights-and-the-rule-of-law-1st-september-2011>; see also John Kane-Berman, *Property Rights: New Threats, Lost Opportunities, and New Challenges*, IRR (Mar. 30, 2011), <http://irr.org.za/reports-and-publications/research-policy-brief/research-and-policy-brief-property-rights-new-threats-lost-opportunities-and-new-challenges-31st-march-2011>.

319. Gaye Davis, *SA's New Investment Legislation Slips in Under the Radar*, EYEWITNESS NEWS (2015), <https://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law>; see also H MATTHEE, SOUTH AFR. MONITOR, THE ANC'S HYBRID REGIME, CIVIL RIGHTS AND RISKS TO BUSINESS: DEMOCRATIC DECLINE AND STATE CAPTURE 27-33 (2014), <http://sa-monitor.com/wp-content/uploads/2014/12/SAM-Year-end-2014-final.pdf>.

320. Ray Mahlaka, *Are South Africa's property rights under risk?*, MONEYWEB (Jan. 26, 2015), [http://www.publicworks.gov.za/PDFs/NewsPapers/2015/2015-01-26/Moneyweb\\_26January2015.pdf](http://www.publicworks.gov.za/PDFs/NewsPapers/2015/2015-01-26/Moneyweb_26January2015.pdf).

321. *Id.*

322. See Milton Nkosi, *Is South Africa's Land Reform an Election Gimmick?*, BBC (Aug. 11, 2018), <https://www.bbc.com/news/world-africa-45099915>; *South Africa to Amend Constitution to Allow Land Expropriation*, BBC (July 31, 2018), <https://www.bbc.co.uk/news/world-africa-45026931>.

323. Van der Walt, *supra* note 26, at 13.

orders without the risk of causing undue harm to a third party. Ideally, the law should clarify whether all of the land can be forfeited, or only the parcel in issue. It should also identify substitute assets to address situations in which it is not possible to locate or execute the seizure of property declared subject to forfeiture. Where property cannot be located and forfeited, the courts can resort to value-based confiscation, which is based on the value of benefits derived from criminal conduct and leads to imposing a financial penalty.<sup>324</sup> For example, Filipino courts cannot enforce a civil forfeiture order demand that the offender pay an amount equal to the value of the property or asset.<sup>325</sup> Likewise, a Colombian judge may order the forfeiture of substitute property or goods owned by the same person and of equal value.<sup>326</sup> Another alternative is to target the individual directly, since the government can obtain a personal judgment against an individual, not the property, if the latter is unavailable.<sup>327</sup>

Thus, courts and judicial independence intrinsically affect property rights. Where asset forfeiture is concerned, deed registry and strong expropriation laws are important to protect property rights. But so is an independent judiciary which is able to undertake a proportionality analysis, hear appeal processes and ensure the defendant's right to a fair trial, to name a few. In the words of the academic AJ Van der Walt, summing up the requisite conditions for NCB, the courts can only find that NCB is unreasonably proportionate in jurisdictions where private property is a constitutional right and where no expropriation can happen without compensation, and "where the courts are willing to treat a disproportionate or excessive regulatory control of the use of property as an expropriation, despite the state's intention to the contrary."<sup>328</sup>

## E. Summary

It is clear from the above discussion that the implementation of NCB is not simple, much less ensuring that due process safeguards are in place. Constitutional challenges are often raised on the basis that NCB conflicts with human rights, but as was discussed, the tension between the two is not insurmountable. Moreover, as is often the case, 'political will', or lack thereof, is

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324. See BRUN ET AL., *supra* note 16, at 65–66; see also WORLD BANK, MODULE 5 ASSET RECOVERY PROCESS AND AVENUES FOR RECOVERING ASSETS, <http://pubdocs.worldbank.org/en/824561427730120107/AML-Module-5.pdf>.

325. Rep. Act No. 9160, as amended by Rep. Act No. 9194, *supra* note 71, § 12(c).

326. L. 1708, enero 20, 2014, DIARIO OFICIAL [D.O.] (Colom.), as amended by L. 1849 julio 19, 2017, DIARIO OFICIAL [D.O.] art. 3 (Colom.).

327. GREENBERG ET AL., *supra* note 6, at 14.

328. Van der Walt, *supra* note 26, at 40.



a significant factor accounting for how change happens. A lack of judicial independence can undermine NCB, and more specifically, prevent a court from acting as a guarantor that NCB will not be improperly or impartially applied. However, a missing or poorly developed property rights regime can also constitute a challenge for NCB, insofar as it prevents the rightful owner of a property from being identified.

## VII. CONCLUSION

The scale and scope of transnational corruption and organized crime pose a great challenge for most ‘victim countries’ where these illicit financial flows originate. This challenge is compounded by difficulties for any jurisdiction to investigate, prosecute, and eventually forfeit ill-gotten proceeds, not least because most funds are kept overseas in tax havens. This is demonstrated by the very low amount of assets recovered and returned to the victim countries to date. Though various jurisdictions have started collaborating in the investigation and prosecution of ill-gotten gains, at times with some success, from a developmental point of view, it is clear that victim countries in the developing world also must develop the right legislative framework that allows for confiscation of assets, together with proper funding and technical capacity of asset recovery efforts. Indeed, various legislative instruments, from UNCAC to FATF encourage countries to develop asset forfeiture legislation, including of the kind that does not require a criminal conviction, and which are particularly useful in cases where the offender is absent, dead, or cannot be identified.

Following the introduction, Part II provided an overview of asset forfeiture, and particularly the differences between non-conviction-based (civil) forfeiture, and conviction-based forfeiture mechanisms. It also distinguished these from a more recent type of civil forfeiture mechanism, which requires that a defendant proves the licit origin of what is presumed to be ‘unexplained wealth.’ To set the stage for further discussions, Part III provided an overview of various NCB regimes in developing country jurisdictions, namely South Africa, Namibia, Botswana and Colombia. Part IV, meanwhile, showed that NCB raises important constitutional concerns with regards to due process, and hence argued that safeguards are needed to mitigate the risk this could have on due process and the Rule of Law. The paper argued that this matters for the long-term viability and legitimacy of asset forfeiture efforts. Based on an analysis of laws and available jurisprudence, Part V immersed the reader in illustrations of how the jurisdictions of interest for this study manage to address due process concerns, and specifically the kind of safeguards they have put in place to do so. These regard proportionality tests to establish the lawfulness of a forfeiture measure, the importance of

compensation in cases where forfeiture cannot be prevented, and from a procedural point of view, the establishment of various standards (e.g., ‘reasonable grounds to believe’ and ‘beyond reasonable doubt’) to mitigate the effect of reversing the onus of proof. It was also shown that appeal mechanisms, protections against self-incrimination, and the right to legal aid are essential components of NCB. Final consideration was also given to suggestions emerging in the US to cap the value of assets forfeited through civil mechanisms. There is a need to acknowledge the wider socio-political and institutional context that affects the application of NCB laws. Though NCB is naturally hampered by a number of financial and technical issues, implementing due process safeguards can also be a challenging endeavor. As was reviewed in Part VI, there are at least four such issues that need to be taken in consideration: the role and extent of ‘political will,’ the extent to which a human rights approach can help tackle corruption, the nature of a country’s court system, the importance (or lack thereof) of judicial independence, and finally, property rights regimes. NCB mechanisms thus can be a useful tool to implement asset forfeiture. But it is not without risks, since it may impact legal rights. This is why Rule of Law safeguards are vital and go a long way in helping jurisdictions prevent abuses of NCB. As reviewed, the type of safeguards varies. The courts play a leading role in determining that asset forfeiture laws are sufficiently accessible, precise, foreseeable, and lawful. They also carry out proportionality tests to ensure that the means are suitable, appropriate, or no more restrictive on human rights than necessary. Experience from selected jurisdictions shows that substantive and procedural guarantees can be put in place to mitigate adverse impact of NCB. It follows that asset forfeiture in developing countries should not only focus on technical skills, but also on ensuring that there is an enabling environment for these safeguards to take root. Transversal approaches that aim to address judicial independence and property rights, for example, can generate positive externalities with respect to asset forfeiture, albeit at times indirectly.

The ever-growing body of anti-bribery laws and conventions enshrine the idea that corruption is inimical to the Rule of Law, as previously noted. Suppression conventions like UNCAC also tend to call for countries to adopt criminal and civil measures, such as asset recovery, to curb corruption in various forms, illicit enrichment, and money laundering. Yet, there appears to be little guidance offered on *how* this can be achieved in a manner that is compliant with the Rule of Law, or the actual challenges that may be encountered on the way. This paper has aimed to bridge this gap.

The scope of this paper is intentionally narrow, focusing specifically on domestic systems and legal frameworks. However, it is important to acknowledge the different issues which this paper did not address, but that

warrant further attention, and which cut across both domestic and international dimensions. First is that of transparency within the management of forfeited assets, for example where a developing state successfully forfeits some property, but lax laws are unclear about how those goods or funds should be managed. A second issue is that of asset return and compensation of victims. As the final stage in the asset forfeiture and return cycle, this is starting to garner increasing attention. International frameworks, such as UNCAC and FATF, address this particular issue, but much remains to be done at the international and domestic levels to ensure this is properly applied in practice. Further research could help evidence both the state of play on asset return and compensation to victims, as well as the kind of Rule of Law questions and challenges (e.g. concerning transparency and fairness) that it raises. Yet another issue which was not explored in this paper is the extent to which NCB forfeiture can be considered to be effective in fighting organized crime and corruption. As mentioned, NCB is widely favored in some jurisdictions (such as South Africa), but there appears to be little evidence of how often NCB mechanisms are employed and with what effect they can be used for policy and advocacy purposes. There is much less evidence on the more ‘pernicious’ uses of asset forfeiture and NCB specifically, the possibility of which was referred to in this article. A final limitation of this paper is that it leaves out some developing countries, such as Nigeria, which admittedly have NCB laws in place.

As the world continues to bear witness to corruption scandals, large and small, the authorities and criminals continue playing cat and mouse, while legislators and anti-corruption activists keep looking for more effective mechanisms to fight corruption and recover ill-gotten proceeds. Unexplained Wealth Laws provide the possibility for authorities to bring proceedings against the person, and not the asset as is the case with NCB forfeiture, without the need to prove that the property is an instrument of proceeds of a crime. Instead, the owner or defendant must prove, on the preponderance of the evidence, the lawful origin of the property and the means by which it was obtained. This measure is often triggered when the authorities suspect the respondent’s income would not be enough to obtain such property. Country-specific iterations are possible. In the UK, various UWOs have been served only a few months after the law came into effect in early 2018. This measure holds many promises and is akin to the ‘next frontier’ in asset forfeiture because it provides law enforcement with stronger tools to seize corrupt property and to act where there is suspicion of unexplained wealth. But it will be important for the anti-corruption community at large to keep a watchful eye over the kind of legal, Rule of Law, and due process issues that may arise –

including on transparency and public access to information – to evaluate the impact of such a tool, and eventually, to share lessons from its application.

## APPENDIX

*Table 1: Comparing Post conviction and Non-conviction based forfeiture regimes*

	<b>(Post) Conviction-based Confiscation/Forfeiture</b>	<b>Non-Conviction based Forfeiture</b>
Objective/ description	An order can be made by the court to confiscate assets following a criminal conviction.	Assets can be confiscated without a criminal conviction. Purpose is to deprive individuals from acquiring or benefiting from unlawful activities, even where there may be insufficient evidence to establish a criminal offence.
Target of order - individual or property	Action is against a person	Action is against property/assets/'the thing' (unless an 'Unexplained Wealth Order' procedure is used) <sup>329</sup>
Legal Process	Part of the criminal process	Judicial action filed by a government (it can be filed in parallel to a criminal procedure).
Who bears the burden of proof	Government (proceedings are undertaken by public prosecutors)	Some jurisdictions require the authorities to show 'probable cause' or 'reasonable grounds' (low standards) to believe illicit origin to allow for seizure. The court then assesses whether that burden has been met, and may shift the burden on to the respondent to demonstrate the legitimate origin of her property. <sup>330</sup>

329. The literature often tends to distinguish between '*in personam*' (in-person) and '*in rem*' (i.e. against 'the thing') forfeiture. In the latter case, the assumption is that the 'thing' is the offender, and in practice, a person still needs to be identified for the proceeding. However, this view has been challenged, and been branded a 'fiction', including by US Courts. For more on this 'fiction', see Gupta, *supra* note 96, at 163 (quoting *Austin v. United States*, 509 U.S. 602, 615 (1993)).

330. GREENBERG ET AL., *supra* note 6, at 58.

Standard of proof	Beyond reasonable doubt (or 'intimate conviction')	Preponderance of the evidence (i.e. <i>Establish that unlawful conduct occurred on the "balance of probabilities"</i> )
Need to prove a criminal charge/criminal conviction	Yes	No
Need to prove that property is instrument of crime	Yes	No. However, the civil burden of proof requires the Government to provide that it is more likely than not that the defendant possesses unexplained wealth.
Timing of order	Imposed as part of a sentence in criminal proceedings following a conviction	Filed before, during, or after criminal proceedings, regardless of the outcome of such proceedings, or even in circumstances where no criminal charge against a person is made