

# Supporting stakeholders in adopting non-conviction based forfeiture as a tool for asset recovery

Recommendations of the Lisbon Conference, 5 –7 July 2022

## BACKGROUND

The “Supporting stakeholders in adopting non-conviction based forfeiture as a tool for asset recovery” programme is an initiative of the International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance. Funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State, the programme explores the potential for innovation in asset recovery through non-conviction based forfeiture (NBCF) mechanisms. It seeks to increase the number of countries adopting and implementing NBCF.

The beneficiaries are 10 countries divided into three clusters: the Latin America group that includes Brazil, Colombia and Chile, the Sub-Saharan Africa group that includes Kenya, Sierra Leone and Zambia, and the group of Lusophone countries that includes Angola, Cape Verde, Mozambique and East Timor.

In the context of the Lusophone cluster, a conference entitled “**Support for the adoption of non-conviction based forfeiture as a tool for asset recovery**” was held in Lisbon on 5, 6 and 7 July 2022.

The conference had a face-to-face and online format on the first day and face-to-face on the second and third days. The latter two days were intended only for the direct beneficiaries in the Lusophone cluster.

**Several topics arose, namely:**

1. Harmonisation of legislation and its proper implementation
2. Integrated approach and coordination between institutions
3. Speed and autonomy
4. International judicial cooperation
5. Multidisciplinary approach – creating new mechanisms
6. Investment in training

This document highlights the key recommendations that emerged from the discussions over the three days. The aim is to guide judicial authorities and law enforcement in applying effective, integrated and coordinated approaches to asset recovery. This will help to prevent and combat serious financial crimes such as corruption and money laundering.

**Note:** This document is a translation of the original Portuguese post-conference recommendations, available at: [baselgovernance.org/publications/Lisbon-Conference](https://baselgovernance.org/publications/Lisbon-Conference). In some cases, legal concepts do not translate easily into English, due to the existence of different legal frameworks and traditions. In particular, the Portuguese term “confisco civil” is here translated not directly as “civil confiscation” but as “non-conviction based forfeiture” or “NCBF”.

In case of doubt, please refer to the original Portuguese version and do not hesitate to contact the ICAR team for clarification at: [info@baselgovernance.org](mailto:info@baselgovernance.org).



# INTRODUCTION

## Organised and transnational crime – an illicit business moving huge sums of money

- Over the past 30 years, the international community has focused its attention on the confiscation of profits of serious financial crimes. Crimes such as corruption, drug trafficking, money laundering and others driven by a strong profit motive have become the focus of attention.
- Mechanisms such as asset forfeiture or confiscation have evolved to be able to combat these crimes more effectively. But there is still a long way to go, so quick and effective responses need to be developed.

## What is the importance of asset recovery in preventing and fighting crimes such as corruption?

- First, **deterrence as opposed to impunity**. If people who commit these criminal activities are confident that – even if they are caught and convicted – they and their families will still be able to enjoy the illicitly obtained wealth, they will be more likely to commit these crimes. In contrast, the recovery of illicitly obtained assets helps to prevent and deter acts of corruption, since it becomes an act of higher risk and lower return.
- Second, by convicting corrupt officials and recovering illicitly acquired assets, countries can leverage these funds for the **development and strengthening of their criminal justice system**. The result is integrity, trust in government and a stronger rule of law.

**Non-conviction based forfeiture (NCBF)**, although it requires a link between an asset and illegal conduct, does not require a criminal conviction. This fact allows its use in cases where obtaining a criminal conviction would not be feasible.

Because it is applied outside the criminal process, and what is at stake is not someone's criminal responsibility but the (illicit) status of property, it is not subject to the principles and rules that apply in criminal proceedings. These include the presumption of innocence and the standard of proof beyond reasonable doubt, among others.

This facilitates confiscation of assets in cases where it is demonstrable, through the balance of probabilities standard of proof, that they are derived from illicit activity, but where criminal conviction, obtained through proof beyond a reasonable doubt, would not be achieved.

### What is NCBF?

- An *in rem* legal action directed against assets independently of the criminal proceedings.
- An essential tool in preventing criminal enrichment.
- A tool that is agile, practicable and respectful of people's rights and guarantees.
- An autonomous proceeding.

NCBF is a lawful and **preventive** measure for recovering assets and is therefore an essential tool for preventing criminal enrichment. It is also a very efficient way of recovering assets without having to resort to lengthy criminal proceedings that, because they require the asset to be linked to the suspect and a specific illegal act, may prevent forfeiture.

NCBF is extremely important because it touches the cornerstone of any evolved legal system → **preventing crime from paying off.**

It is therefore one of the main elements in the fight against corruption and other crimes that generate large sums of money.



# RECOMMENDATIONS

## 1) Harmonisation and correct application of legislation

The **harmonisation of existing legislation** (at both international and national levels) is essential for good cooperation and the proper functioning of these mechanisms.

It is essential to ensure **harmonised regulation** that aligns with experience. National authorities should implement international regulations and standards effectively to prevent criminals from moving assets to jurisdictions with weak and ineffective regulations.

Competent authorities should closely monitor developments in this area (**proactivity** – see below), and consult widely with specialised authorities to better understand the impacts of specific policies.

International law harmonises “downwards”. This means states are free to apply their own laws and rules as long as they respect the **international minimum standard**. They can be more robust if they wish. This helps to ensure that the particular characteristics of each country’s system are safeguarded. Mechanisms must be correctly adapted to these national specificities.

There should also be a **limitation on domestic laws** on confiscation so as not to restrict international law. To this end, the principle of primacy (precedence) should be applied, which states that the rules governing NCBF processes should prevail over any other provisions set out in the criminal, civil or administrative procedural codes.

It is important that the **legislative terminology base** is aligned and consistent across countries to avoid problems in interpreting concepts or difficulties in translation. This problem stems in part from the differences in terminology between different legal systems, which need to be overcome.

Special attention should also be paid to harmonising the various laws in line with the **FATF Recommendations and the UNCAC provisions** in this area.

It is necessary to **make better use of the existing legislation**, since it is very common to have laws that are well drafted but incorrectly applied. The focus needs to be on the evaluation of the law in action. We should improve the application of the laws that already exist instead of creating additional mechanisms that are increasingly aggressive but that bring no benefit to states, and may even threaten people’s fundamental rights. If there are legislative gaps in certain areas of some legal systems, these failures need to be redressed as soon as possible with well-drafted laws.

**“The biggest problem is not creating the laws, but applying them correctly.”**

Euclides Dâmaso, Retired Deputy  
Prosecutor General of Portugal

Finally, there should be a **greater focus on fundamental rights** to ensure that the constitutional rights of actors and third parties in the process are not disproportionately affected. It is also important to respect fundamental rights and minimum due process guarantees to ensure that judgments can be enforced abroad.



## 2) Integrated approach / coordination between the various institutions

Institutions and bodies involved in asset recovery should **work as a network, in a coordinated manner**. This will enable them to be more efficient and be able to recover assets more quickly and with less expenditure of resources.

In Portugal, for example, the role of the Court of Auditors should be better used as the first line of financial control and evaluation (preventive and parallel investigation). It could play an extremely important role in this type of case in the future.

There should also be a primary focus on asset recovery at a **national level**, before moving on to asset recovery at an international level. This has to do with the need to improve domestic mechanisms. If a state is not able to recover assets in its own territory, it will be difficult for it to make the next step of recovering assets held abroad.

**“NBCF is a journey undertaken by multiple institutions. Reaching the destination requires a shared vision and excellent coordination.”**



## 3) Speed and autonomy

States urgently need legislation that allows them to recover assets faster. For **greater speed** in asset recovery, states can take advantage of the inherent brevity of NBCF proceedings, which require only a civil standard of proof. It is abundantly clear that the criminal process has not been fast or effective enough in this matter.

The **freezing of assets** should be carried out as early as possible in the process so that when the judgment is obtained, it will not be too late to recover them.

**“We should invest more in training and guidance for magistrates, as currently more importance is given to obtaining criminal convictions and depriving defendants of their liberty than to recovering the illicit assets.”**

Paulo Munguambe, Deputy Director,  
Financial Intelligence Unit, Mozambique

It is also essential to make the process of asset recovery even more **autonomous**. Legislators and practitioners need to detach themselves from criminal reasoning and understand that the NCBF has a clear civil character. The limitations of the criminal process should not be uncritically transferred to NCBF/civil confiscation.

The filing of a criminal investigation should therefore not prevent an investigation being started with a view to launching NCBF proceedings.

#### 4) International judicial cooperation

**International judicial cooperation** (both formal and informal) between states is vital in the fight against organised crime. Fuelled by the accelerated globalisation we are undergoing, almost all such crime is transnational. For this very reason, it is impossible for any state alone to pursue and fight crime effectively without the help of other countries and without recourse to international judicial cooperation.

Law enforcement institutions must therefore maximise their use of the various channels of international cooperation in order to exchange information that can help identify, investigate and prosecute those responsible for this type of crime.

Speeding up the exchange of information and the sending, receiving and processing of mutual legal assistance requests should be a priority, as stolen assets and funds need to be frozen before being dissipated by perpetrators. New investigative techniques, innovative practices and strategies that are developed should be widely shared to avoid duplication of work and ensure a consistent and harmonised response. **Standards for cooperation** also need to be developed to improve asset recovery outcomes.

International cooperation is only possible if there is trust between the institutions of each country. Otherwise, requests for cooperation will remain unanswered, and assets circulating between countries will remain unrecovered.

For cooperation to be successful, it is also necessary to **avoid skipping stages in the process** (especially the initial stages of identifying and locating assets), as this undermines the chances of success of mutual legal assistance requests.

**“In the process of asset recovery, the money is almost all abroad. This is a big problem and also our biggest challenge. There is an urgent need to create legislation to recover illicitly obtained assets as quickly as possible.”**

Eduarda Rodrigues Neto, Director of the National  
Asset Recovery Service (SENRA), Angola

**“The support of ICAR and the sharing of experiences of colleagues who are participating in this initiative will be very useful in arriving at future solutions regarding NCBF mechanisms.”**

Franklin Afonso Furtado, Advisor to the  
Prosecutor General of Timor-Leste

It is also important that cooperation takes place early on in the process so as to increase the chances of success and so that the process does not become unexpectedly complex in the middle.

**Informal cooperation** is another essential element of more effective collaboration between states. Before starting the process of formal cooperation with a state, consideration should be given to informal cooperation,

which often helps to speed up and improve formal requests. The sharing of positive and negative ideas and experiences between the various countries can be extremely useful for those who are beginning to develop or apply NCBF laws.

Conferences, webinars, workshops and other **knowledge-sharing sessions** are central to improving trust between institutions and relationships among the various states. Advantage should be taken of the existence and support provided by organisations such as the Basel Institute on Governance and its International Centre for Asset Recovery (ICAR). These can serve as an important aid to improve cooperation between the various states, particularly in promoting training and meetings such as the Lisbon Conference.



## 5) Multidisciplinary approach

A **multidisciplinary approach**, based on innovation and creativity, are important to deepen the understanding and development of new, advanced legal mechanisms that are effective in asset recovery.

One of the most talked-about examples concerns the **sixth-generation mechanism** suggested by Judge Cura Mariano. The sixth-generation mechanism is a proposal aimed



at facilitating the application of NCBF by removing the need to prove that the property to be confiscated stems from a specific illegal act. It would only have to be demonstrated that a person has assets that are not compatible with their lawful income.

## 6) Investment in training

It is essential to invest in the **training of highly specialised officers** to work in asset recovery, since this is the best tool we have to fight organised and transnational crime.

This means investing in the training of technical staff from various areas (prosecutors, judges, criminal police agencies and officials) and also individuals specialised in international cooperation.

Among some practitioners there is still aversion towards confiscation. This is caused by a legacy of indifference that is quite entrenched in some countries, but slowly dissipating.

Several experts even suggest the creation of a **specific specialisation** for magistrates in all legal systems.

In addition to **investing in training and specialisation**, advantage should be taken of the new technological tools available, which allow assets to be traced more quickly and at a lower cost. Investing in digitalisation is, therefore, indispensable for the effective recovery of assets.

**Proactivity**, in turn, requires mechanisms capable of monitoring in real time what is happening with each illicitly acquired asset, so that criminal proceeds can always be located and are never lost sight of.

**“It is necessary to reinforce the importance of training, to overcome unwillingness to engage in asset forfeiture. This is a fundamental problem that needs to be resolved.”**

Elisa Gomes, Chief Public Prosecutor,  
Cape Verde