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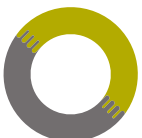
AGAINST TRANSNATIONAL ORGANIZED CRIME

SEARCH AND SEIZURE

The potential of asset forfeiture for countering extortion in Central America

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OCTOBER 2021



COALITIONS FOR RESILIENCE

ACKNOWLEDGEMENTS

This document was made possible thanks to local authorities and stakeholders. Adrián Ancira, Siria Gastélum, Guillermo Vázquez and Ana Castro participated in the editing and design process.

This document was made possible by the government of Canada's financing of the Global Initiative Against Transnational Organized Crime (GI-TOC). The contents are the responsibility of the author and do not necessarily reflect the views of GI-TOC or the government of Canada.

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SUMMARY

Extortion has become an endemic problem in Central America. To provide a comprehensive response to this crime, the countries of the region have begun to make use of asset forfeiture, a tool that reduces the financial assets available to organized crime. This paper describes how this legal

procedure has evolved and been applied in the region, sets out the advantages it offers in the fight against organized crime and proposes strategies for better implementation.

Key points

- Extortion is a pervasive crime in Central America that feeds off the threat of violence from gangs and criminal organizations. If the proceeds of this crime are not seized, it will remain a lucrative business.
- Asset forfeiture can be used to seize assets with an illegal origin or destination, assets comprising a mixture of legal and illegal components, assets with an equivalent or substitute value, and assets that have been abandoned, among others.
- Assets recovered thanks to asset forfeiture can be used to finance the investigation and prosecution of crime, be used in the public interest or be returned to their rightful owners.
- A clear policy on internal coordination must be built between the different organizations that deal with corruption, organized crime, extortion and asset forfeiture.



INTRODUCTION

Generating millions of dollars annually, organized crime has become a profitable business. However, in Latin America, only around 1% of the proceeds of crime are seized. © Getty Images/SOPA Images/IronHeart

According to a 2017 report by the World Economic Forum, organized crime is an immensely profitable business, generating between 1.6 and 2.2 trillion dollars annually.¹

As stated by the Group of Experts for the Control of Money Laundering of the Organization of American States (OAS), 'when the economic benefits that crime can bring are so great [...], the profits to be obtained justify the risk.'² It is therefore necessary to provide states with efficient and effective tools to identify, locate and confiscate the assets of criminal organizations.

The data analyzed by the OAS's Project on Asset Forfeiture in Latin America, an initiative to improve asset forfeiture systems across the continent, is alarming: in some countries in the region, only around 1% of the proceeds of crime are seized.³

Criminal organizations keep their illicit profits almost intact, and this allows them to finance their activities; bribe public officials and institutions; permeate or weaken countries' financial systems through money laundering; finance and promote violence to maintain control; and cause social inequality through unequal access to private property. All this ends up weakening the democratic rule of law and legitimizing the property or assets of criminal organizations.

To deal with assets illegally acquired by criminal organizations, some countries, such as Costa Rica, Uruguay and Paraguay, have modified their internal legal systems to introduce improved, expanded, special or autonomous forms of asset seizure.

Faced with the need to create another legal tool beyond traditional criminal confiscation to deal with new forms of organized crime, asset forfeiture – through which security and justice institutions declare that illegal assets from criminal organizations belong to the state – was born in Colombia as a way for the state to recover the immense illicit fortunes amassed mainly by the large drug cartels of the 1980s. Based on this initiative, the other countries in the region saw the need to improve their asset seizure systems.

Likewise, international organizations such as the OAS's Department against Transnational Organized Crime and the United Nations Office on Drugs and Crime (UNODC), which in 2011 published the Model Law on In Rem Forfeiture,⁴ have provided guidance to states that want to implement this type of legal tool in their fight against organized crime.

This is based on the international commitments assumed by the countries in the three main international conventions of the United Nations: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the UN Convention against Transnational Organized Crime and its protocols (2004), and the UN Convention against Corruption (2004).

Asset forfeiture is a novel tool, destined to weaken and counteract the power and financial capacity of crime. It has been used not only in the fight against drug trafficking, but also against human trafficking and people smuggling, against corruption and any activity that generates wealth from illicit acts, such as extortion.

Extortion has become a pervasive criminal phenomenon in Central America. Through threats of violence, gangs and criminal groups force small, medium and transnational businesses to pay regular fees in order to continue operating. In Guatemala, El Salvador and Honduras in particular, millions of dollars are extorted from businesses, increasing the price of final products for consumers and spreading fear and violence, in many cases causing forced displacement.⁵

Asset forfeiture has become a tool for social justice that enforces ethical and social constitutional rights through the obligations to use property for lawful ends and to acquire property and wealth in legitimate ways. Although there is little application of asset forfeiture as a response to extortion-based crime in the region, it has the potential to become a reliable mechanism to target the revenue generated by perpetrators.

This document explains the development and practical application of this process in Central America, and highlights its advantages in the fight against, not only extortion, but other organized crime manifestations.



WHAT IS ASSET FORFEITURE?

Assets may be put under investigation when the legality of their origin or destination is questionable. © Getty Images/NurPhoto/Krisanapong detraphiphat

A Asset forfeiture is a court action *in rem*, that is, relating to property. It identifies and locates goods (such as property, vehicles and other assets) that could have been acquired through the proceeds of crime or that could be destined for illegal use. In this, it differs from criminal investigation, the main objective of which is to investigate and identify personal conduct constituting a crime, as defined in the criminal legal systems of each country.

The two processes are self-contained and independent, but can be coordinated to become the cornerstone of the fight against any of the manifestations of organized crime.

Assets may be subject to investigation for several reasons:

- **Because of their origin:** Asset forfeiture finds its legitimacy in the political constitution of each country and reaffirms and safeguards the rights of citizens. For property rights or assets to enjoy constitutional protection, they must comply with the formalities indicated by internal regulations, including the requirement for the assets to have a legal origin. If they are of illicit origin, they may be subject to investigation and, ultimately, a forfeiture order.
- **Because of their use or destination:** In this case, the enforcement of constitutional rights comes through the obligation that all citizens of a country have to use their assets to fulfil a 'social function'.⁶ The 'social function of property' is a legal concept that limits property rights and

obliges the owner or right holder not to make use of their assets in a manner that is contrary to public policy or morality.

Therefore, an asset that is destined for illegal use would cease to have constitutional protection and could give rise to a sanction, in the form of asset forfeiture, for not fulfilling its required social function. Examples of this are the properties used by criminal organizations to sell drugs or those used by gangs to carry out criminal activities, especially in Guatemala, Honduras and El Salvador.

- **Because they comprise a mixture of legal and illegal assets:** Especially in money laundering, criminals often use the method of commingling illegal resources with legal ones, to give an impression of legality and legitimize these assets – for example, a legal company that allows the injection of illegal capital, or a legal property acquired, donated or inherited legally, but whose improvement works are paid for with illegal capital. In these cases, the asset forfeiture is performed against all the commingled assets.
- **Because they are assets of an equivalent value:** In this case, the state is empowered to seize a legal asset of equivalent value to, or as a substitute for, the illegal asset under investigation, in order to avoid impunity regarding the illegal assets. This approach applies when the state cannot physically seize the assets under investigation and subject them to the asset forfeiture process, either because they have disappeared or because it is impossible to locate them.
- **Because they are abandoned assets:** Often, the holder or owner of some assets cannot be identified. In these cases, the legislation requires its publication for a certain time, so that any person who has a legitimate interest in the investigated asset can make their respective claims to submit to the process. If this period expires without anyone coming forward, the judge is empowered to declare the forfeiture of the asset to the state.

In Central American countries, for this reason, large amounts of cash found in hidden places and some aircraft and boats connected with international drug trafficking have been declared subject to asset forfeiture.⁷

- **Because of an unexplained increase in wealth:** Starting from a presumption of good faith in the acquisition of assets, a financial/asset investigation of a person's sources of legal income is carried out and compared with the acquired assets, to determine if there are indications of an unexplained increase in wealth.

This forfeiture procedure is applied in some cases to counter the strategies used by organized crime to place assets in the name of third parties (or so-called 'front men'), to prevent their identification and seizure by the authorities.

In Central America, large amounts of cash related to drug trafficking have been declared subject to asset forfeiture.



For property rights or assets to enjoy constitutional protection, they must have a legal origin. © Getty Images/Peter Power

Despite the great impact and diversification that has come from the establishment of the concept of asset forfeiture, there are still problems in terms of international legal cooperation, related to the legal formalities of mutual legal assistance for requisitioning evidence about assets and money found outside the borders of the countries or on the enforcement of judgments.

This is mainly due to the limited experience that countries have in recovering assets abroad through the asset forfeiture procedure and the difficulty of finding their own space within the framework of international legal cooperation, given that asset forfeiture is an *in rem* action, i.e. against property, whereas international mutual legal assistance has been developed in criminal matters, that is, against people.



ASSET FORFEITURE IN CENTRAL AMERICA

In Central America, asset forfeiture has been implemented in the last decade in the context of several kinds of criminal activities in order to neutralize the economic power of criminal organizations, especially those involved in drug trafficking, money laundering, human trafficking and people smuggling, as well as in cases related to crimes of public corruption.

In Guatemala, this tool was approved against the background of an alarming increase in the number of crimes against the assets of the state and individuals, as well as crimes that cause serious damage to the life, integrity, liberty and health of its inhabitants.

Unlike laws in El Salvador and Honduras, in Guatemala the asset forfeiture procedure is applied to assets obtained through a restricted list of illicit or criminal activities,⁸ but, in practice, it focuses mainly on drug trafficking⁹ and on smuggling of goods.¹⁰ This means the application of asset forfeiture for criminal or illegal markets that are not mentioned in the law is limited.

In El Salvador, although the asset forfeiture regulation begins with a restricted list of illegal activities, it ends up stipulating that it is applicable to all punishable acts that generate economic or other material benefit, obtained individually, collectively or through organized or structured criminal groups.¹¹ In this way, Salvadoran law allows this legal process to be applied to a much broader spectrum than in Guatemala.

In addition, Salvadoran legislation expressly states that, in the case of terrorist organizations, gangs and organized criminal groups, an unjustified increase in

In Central America, asset forfeiture has been implemented against various kinds of criminal activities.

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All countries in the region are taking the first steps towards asset forfeiture.

wealth is presumed for the purposes of asset forfeiture. In addition, deeper financial/asset investigations have been carried out in the country regarding assets related to these criminal structures, assets from major corruption cases,¹² the wealth generated by criminal organizations such as gangs,¹³ and human trafficking and people smuggling.¹⁴

In Honduras, asset forfeiture was introduced through the law on the deprivation of assets of illicit origin (*Ley de Privación de Bienes de Origen Ilícito*), through Decree 26-2010, and has undergone several reforms, the most notable being that of 2014, which introduced recognition of the property rights of victims in cases such as kidnapping and extortion.¹⁵ The concepts of restitution of rights and asset recovery were also incorporated, when the assets come from crimes related to public corruption, such as the case of the Instituto Hondureño del Seguro Social, Honduras's social security institute, which in 2014 was investigated for allocating public money to shell companies.¹⁶ In this case, it was even possible to recover assets located in Chile.¹⁷

These regional efforts have been joined by bills on asset forfeiture in Costa Rica and Panama. The Costa Rican bill has been widely discussed in various legislative sessions since 2012, but has yet to be approved. However, it is important to note that, since 2009, Costa Rican legislation has developed the concept of 'emerging capital', which provides the authorities with legal tools to investigate all capital increases without an apparent lawful cause dating back up to 10 years, through administrative proceedings.

These are the first steps towards asset forfeiture, although the focus is limited only to unexplained increases in wealth. Following the application of this legislation, by 2019 the Costa Rican authorities had obtained 11 favourable judgments, representing approximately US\$1 million in assets.¹⁸

In Panama, implementation of asset forfeiture legislation has been widely discussed since 2013 and, in April 2021, the executive presented an asset forfeiture bill to the legislative assembly.¹⁹ The country's criminal procedure code already includes some concepts and characteristics of asset forfeiture proceedings, especially with regard to the burden of proof,²⁰ noting that those accused of the crimes of money laundering, corruption of public servants, unexplained wealth, terrorism and drug trafficking must demonstrate the lawful origin of the seized assets in order to request the lifting of interim measures.



ASSET FORFEITURE AND EXTORTION

Since the 1980s, gangs in Guatemala, Honduras and El Salvador have grown and their activities have evolved from occasional extortion to constant and systematic extortion, primarily targeting small businesses and the public transport industry.²¹ For these criminal organizations, extortion represents the main source of the resources they need to maintain control and acquire weapons, and the financing that allows them to develop and carry out other criminal activities and consolidate their assets.

Extortion has become an endemic problem in Central America, and, according to some studies, it generates about US\$61 million annually in Guatemala and US\$27 million in the transport sector alone in Honduras. In El Salvador, it affects 70% of small businesses, at least two of which close each week, showing its impact on families and businesses in the region.²²

The crime not only spreads fear and violence in the region but is also connected to other crimes, such as drug and human trafficking, corruption and money laundering. To avoid the identification, location and seizure of a large number of illegitimate resources, criminal organizations have adopted money laundering mechanisms: they conceal the illicit origin of the resources through small companies that act as fronts and through legal entities connected with companies that facilitate the laundering of assets obtained through extortion and the sale of drugs.²³

In addition, they acquire real estate and vehicles through front men and hide cash in properties (called *caletas*, caches/stashes) and other financial resources, to give the appearance of legality.²⁴

In Central America, extortion is the main tool used by gangs to accrue wealth and maintain territorial control. © Getty Images/Mario Tama/Catherine Falls Commercial

Asset forfeiture is being strengthened to achieve a more efficient dismantling of criminal structures.

To provide a comprehensive response in the fight against this criminal phenomenon, countries within the region have created anti-extortion police divisions and task forces, such as Guatemala's División Nacional contra el Desarrollo de Pandillas (national anti-gangs division) and Honduras's Fuerza Nacional Anti Maras y Pandillas (national anti-gangs force). Additionally, countries such as El Salvador and Honduras have targeted the financial assets of criminal organizations, undertaking asset forfeiture proceedings against the assets of gangs.

Asset forfeiture provides the ideal mechanism to carry out an objective financial asset investigation, which, supported by the appropriate application of special investigation techniques, allows the assets to be subjected to a forfeiture procedure with a favourable outcome.

A practical example was the execution, by the Honduran authorities, of the three phases of *Operación Avalancha*, one of the largest operations in history against the Mara Salvatrucha gang.²⁵ In one of the phases of this operation, law enforcement authorities managed to seize 1 559 assets, including vehicles, commercial businesses, properties (houses and land) and financial resources.²⁶

This procedure entailed a large investigation to bring criminal charges against people and a financial assets investigation to identify and locate assets that were in the hands of front men and money launderers, in order to deprive them of ownership of these assets.

Likewise, in El Salvador, multiple asset forfeiture proceedings have already been brought against criminal structures, and the country has secured favourable rulings, such as the case of the forfeiture of US\$210 000 in cash assets obtained through extortion, drug trafficking and smuggling, hidden in properties.²⁷ Meanwhile, there have been other lawsuits targeting real estate, cash and vehicles, valued at more than US\$700 000, in the so-called Metalío²⁸ case and in Operation Tsunami,²⁹ two operations that targeted established gangs in the country.

Extortion is a pervasive crime, and security and justice institutions in the region are still a long way from using asset forfeiture as a tool to combat exclusively extortion-based crimes. Against this background, asset forfeiture is being strengthened to achieve a more efficient dismantling of these complex criminal structures, in coordination with the criminal justice system. Increasing institutional capacity to investigate and research illicit financial flows and generate sound evidence will be paramount.



ASSET RECOVERY

Asset forfeiture has been used to combat wealth accumulation through domestic and international drug trafficking and money laundering, and, at the end of the forfeiture process, these resources have been used to financially support investigation and prosecution agencies, such as security forces, public prosecutors and the judiciary.

In some countries, in accordance with international best practice, a portion of these resources has been devoted to financing programmes and/or projects to prevent crime and the consumption of illicit substances and to treat people dependent on illicit substances, while another portion has been used to strengthen financial resources for the administration of the seized assets.

However, if asset forfeiture proceedings are opened up to other illicit activities, such as public-sector corruption, kidnappings, extortion, human trafficking and people smuggling, the goal of the asset seizures may vary in focus and scope, depending on the illicit activity that generated them. For example, in corruption offences, the goal of the seizure is the recovery of assets under the terms of Chapter V of the United Nations Convention against Corruption.³⁰

In cases of the restitution of rights, there is also a restorative purpose focused on returning property or assets to the victim in the event of a crime of extortion, theft, fraud, kidnapping for ransom or forced eviction.

Most of the laws on asset forfeiture do not expressly contemplate the rights of the victim in asset forfeiture proceedings, but the state cannot ignore these rights, as the victims would be revictimized. One example would be a property that a kidnapper has bought using ransom money. While it is true that it is of illicit origin, the state would be wrong to seize it and keep it, because there is a victim who paid the ransom. In this case, the procedure applied would not be asset forfeiture, but rather the restitution of the money obtained by extortion.

Recovered resources have been used to financially support investigation and prosecution agencies.
© Getty Images/Mario Tama



The implementation of asset forfeiture has made it possible to weaken the financial arm of organized crime. © Getty Images/Mario Tama/Ncognet0

CONCLUSION

A sset forfeiture is here to stay and will continue to evolve and expand to more and more Latin American countries. Therefore, it is essential to understand its legal nature, its scope, its benefits and the methodology for its application, and to follow the recommendations of international organizations and experts in order to be more efficient in the fight against organized crime in the region.

The best results have been obtained when all the participating institutions have worked in a coordinated and integrated manner in the investigation, processing and administration of the assets.

The implementation and development of this legal tool have made it possible to weaken and neutralize the financial arm of organized crime and, when applied appropriately and in accordance with the legal system of each country, it strengthens the institutions that fight against organized crime, in addition to recovering assets obtained through corruption, restoring the rights of the victims of extortion and generating financial resources to assist them.

Recommendations

Although the use of asset forfeiture to counter extortion in Central America is a promising tool, countries in the region need to strengthen their legislative and law enforcement strategies in order to implement the instrument more widely and effectively. Below are a list of recommendations intended for a better implementation of asset forfeiture processes in the region.

- **International cooperation:** Strengthen international cooperation mechanisms and mutual legal assistance on asset forfeiture in order to recover assets abroad.
- **Policies and laws:** Adapt this instrument to the legislation of countries such as Costa Rica, Panama and the Dominican Republic, where the bills on asset forfeiture are currently in the legislative phase, as well as taking into account the documents and studies of good practices issued by international organizations and institutions, and the advice of experts in the field.
- **Criminal justice:** Strengthen the prosecution units and the national police with people specialized in accounting and surveying, as well as professionals from the legal sciences and with research backgrounds. In addition, training is essential, not only in criminal matters and in the use of special investigative techniques, but also in civil, commercial, financial and economic law.
- **Witness and victim protection:** Identify the victims in the course of the financial assets investigation and decide whether to opt for asset recovery or the restitution of rights, depending on the case. This requires reforms in the legal systems of the countries in which asset forfeiture exists. Honduras, for example, recognizes the rights of victims through the Ley de Privación del Dominio de Bienes de Origen Ilícito (law on deprivation of ownership of assets of illicit origin).³¹ In addition, create a special fund to provide care and compensation for victims, financed by the resources seized in extortion cases, as recommended by the UNODC's Model Law on In Rem Forfeiture.³²
- **Distribution of assets:** Focus on asset recovery, be it restorative or in the form of restitution of victims' rights, and on the percentage distributed to law enforcement agencies. In addition, legislation should include the restitution of whole communities affected by extortion, redistributing the wealth of forfeited assets in the form of public infrastructure to improve community resilience to organized crime. This could include investing in public parks, public schools, community centres and local entrepreneurship projects, among other initiatives.

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