



UNODC

United Nations Office on Drugs and Crime

MODEL LAW ON IN REM FORFEITURE

**Legal Assistance Programme for Latin America and the Caribbean
LAPLAC**

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INTRODUCTION

This **Model Law on In Rem Forfeiture** is an initiative of the Legal Assistance Program for Latin America and the Caribbean (LAPLAC) and builds on the long tradition of the United Nations Office on Drug and Crime (UNODC). The design of practical tools to help make the fight against drugs, organized crime, corruption and terrorism easier is one of the main responsibilities of the office. Hopefully, this Model Law will be useful to those countries that plan to include this legal concept in their domestic legislation.

The In Rem Forfeiture is a juridical proceeding aimed at property of illicit origin or destination. As such, it is an instrument of crime policy that seeks to complement the group of legal and institutional measures adopted by the countries. By its nature and scope, in rem forfeiture constitutes a novel mechanism and an effective answer to organized crime, since it focuses exclusively on the pursuit of all types of assets that make up the proceeds of criminal activity.

The starting point of the exercise was the right of every individual to acquire property, a right no one can be denied arbitrarily. To that extent, in rem forfeiture reaffirms the application and recognition of that and other connected rights based on the understanding that property acquired with illegal capital can neither gain legitimacy nor enjoy legal protection.

The Model Law has nine chapters:

- I. General aspects
- II. Procedural guarantees
- III. Procedural aspects
- IV. Proceedings
- V. Evidence
- VI. Nullity
- VII. Management and disposal of property
- VIII. International cooperation
- IX. Final provisions

It is a “*regional*” initiative because it was designed following the civil tradition of those Spanish-speaking countries in Latin America that could incorporate the model in its domestic law. The term “*extinción de dominio*” (in rem forfeiture) was adopted because it was the most commonly used term in the region rather than, for example, “*decomiso sin condena*” (non-conviction based forfeiture), a term used in other international areas.

Employing a different and singular focus in regard to legislative technique, the Model Law incorporates best practices at the international level and domestic experiences in order to achieve the best model possible.

Unlike other model laws, this law dedicates numerous articles to procedural aspects, including a detailed legal proceeding. In fact, this is considered one of the main pillars as it provides a roadmap for legislative and judicial authorities in the countries. This is due to the fact that the concept of *in rem forfeiture* as a “*property-related consequence*” is *sui generis* and that the legal proceeding is “*autonomous*” and “*independent*” of any other trial or legal proceeding. In short, a special legal proceeding is required without which it would take countries much too long to achieve an effective and efficient implementation of the mechanism.

The Model Law was drafted by an informal group of experts which included members from various countries and organizations (see annex). The group – whose members were selected based on technical knowledge and personal experience – met on three occasions between August 2010 and January 2011, in Colombia, with the technical support of OAS/CICAD, and financial support from a number of governments. The idea is to update the law periodically. Likewise, an annotated version of the law is also expected to be made available.

Legal Assistance Program for Latin America and the Caribbean

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MODEL LAW ON IN REM FORFEITURE

Preamble

Legally acquired private property is a fundamental right protected by the Constitution, the law, and international law. Its recognition is subject to the fulfillment of its social function, to public policy, and to the general welfare. Consequently, this right cannot be recognized when property is obtained through illegal activities, nor will property enjoy constitutional or legal protection when it is used for such activities.

Illegal activities, especially manifestations of organized crime, seriously affect fundamental rights and pose a threat to sustainable development and peaceful coexistence. Therefore, there is a critical need to intensify the fight against crime through a legal mechanism that allows the State to take action in regard to property.

The *in rem* forfeiture is an autonomous and independent legal process aimed at eliminating the power and ability to act of criminal entities.

Chapter I General aspects

Article 1. Definitions. For the purposes of this law, the following definitions shall apply:

- a. “Illegal activity”: All activity classified as criminal, even when no judgment has been issued, as well as any other activity that the legislature may deem subject to this Act.
- b. “Property”: Assets of any kind, whether corporal or incorporeal, real or personal, tangible or intangible, and the legal instruments or documents proving ownership or other rights over said assets.
- c. “Proceeds”: Property derived or obtained directly or indirectly from illegal activities.
- d. “Instruments”: Property used or intended to be used, in any manner, in whole or in part, for illegal activities.
- e. “Affected party”: Natural person or legal entity claiming rights *in rem* over property subject to this Act.

- f. “Good faith”: Diligent and prudent conduct, free from any negligence, in any act or legal transaction related to the property described in Article 6 of this Act.

Article 2. Concept. The *in rem* forfeiture is a property-related consequence of illegal activity whereby a judicial authority orders the surrender of ownership of the property referred to herein to the State without consideration or compensation of any kind.

The *in rem* forfeiture is a judicial proceeding against property and is ordered through autonomous proceedings, independent of any other trial or legal proceeding.

Article 3. Retroactivity. The *in rem* forfeiture shall be ordered regardless of whether the bases required for its admissibility occurred prior to this law entering into force.

Article 4. Non-applicability of statutory limitations. Statutory limitations do not apply to *in rem* forfeiture.

Article 5. Presumption of good faith. Good faith is presumed in the acquisition and disposal of property.

Article 6. Basis for *in rem* forfeiture. The *in rem* forfeiture shall apply to:

- a. Property that is the proceeds of illegal activities.
- b. Property that is the instrument of illegal activities.
- c. Property that is the physical object of illegal activities.
- d. Property derived from the partial or total transformation or conversion, whether physical or legal, of the proceeds, instruments, or physical object of illegal activities.
- e. Property of legal origin used to conceal property of illegal origin.
- f. Property of legal origin commingled with property of illegal origin.
- g. Property constituting an unjustified enrichment, when there exist elements that allow such property to be reasonably deemed to originate from illegal activities.
- h. Property constituting income, revenue, proceeds, earnings, and other profits derived from the property listed above.

- i. Property of legal origin whose value is equivalent to any of the property described in the preceding points, when it is not possible to locate, identify, confiscate, attach, or physically seize the latter.
- j. Property of legal origin whose value is equivalent to any of the property described in the preceding points, when the right of a third party acting in good faith to the same property is proven.

Article 7. Transfer upon death. The property referred to in the preceding article is not legitimized by the death of the owner. Consequently, such property is subject to *in rem* forfeiture.

Article 8. Legal acts. No legal act performed in regard to the property listed in Article 6 legitimates such property, with the exception of the rights of third parties acting in good faith.

Article 9. Non-invocability of secrecy or confidentiality. Banking, currency exchange, stock exchange, and tax secrecy shall not be invoked, and access to the information contained in databases may not be hindered, in accordance with domestic law.

Chapter II Procedural guarantees

Article 10. Guarantees. In the enforcement of this law, those rights recognized in the Constitution and in relevant international treaties shall be guaranteed and protected.

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

Article 11. Rights of the affected party. During the proceeding, the affected party is entitled to the following rights:

- a. To have access to the proceedings, directly or through the presence and representation of an attorney, from the time notice of the *in rem* forfeiture request is served or preventive measures are implemented.
- b. To be informed in clear, comprehensible terms of the factual and legal grounds upon which the proceedings are based.
- c. To submit and request evidence, and to participate extensively in the defense of his rights.

- d. To dispute the allegations being made as to the property.
- e. To waive the evidentiary phase of the proceedings and opt for a summary judgment of *in rem* forfeiture.

Article 12. *Res judicata*. The affected party may prove that a favorable judgment with the force of *res judicata* has been issued because the parties, object, and cause are identical.

Article 13. Presence at the proceeding. A guardian *ad litem* shall be appointed to represent the interests and ensure the full exercise of the rights of affected parties who are not present and those who are unknown at the time of the proceedings.

Chapter III Procedural aspects

Article 14. Motions. Motions for reconsideration and appeal may be filed against the decisions made during the *in rem* forfeiture proceedings.

Appeals may be filed against the following rulings:

- a. Ruling on assignment of jurisdiction.
- b. Ruling ordering that proceedings be stayed.
- c. Ruling allowing the request to proceed.
- d. Ruling on nullity.
- e. Ruling denying evidence.
- f. Judgment.

Article 15. Procedures for the motion for appeal. The motion for appeal shall be filed in accordance with the requirements, procedures, and time periods established in domestic law.

Article 16. Preventive measures. The following preventive measures may be ordered in regard to property subject to *in rem* forfeiture:

- a. Suspension of the power of disposition.
- b. Attachment or Confiscation.

c. Physical seizure.

Preventive measures shall be enforced regardless of who holds title to the property.

No guarantee shall be required of the competent authority in order to request or order preventive measures.

Article 17. Notices. Personal notice of the decisions allowing the request to proceed and of all rulings issued regarding the request shall be served on the affected parties, directly or through their legal representative. When such notice cannot be served, summons shall be ordered.

All other notices shall be served pursuant to law.

Article 18. Summons. Any affected parties on whom notice has not been served, and the possible unknown right holders of the property, shall be given public notice.

The summons shall be posted for five (5) days at the courthouse, on an official website, or by any other suitable means.

Three (3) days after the expiration of the summons period, the judge shall appoint a guardian *ad litem*, who, after having been served notice, shall ensure compliance with the rules of due process and other rights of any persons not present.

Article 19. Terms. The terms for filing motions and serving notice shall apply equally to all parties and shall be counted as of the most recent notice.

Chapter IV Proceedings

Article 20. Phases. The proceedings consist of two phases: an initial or preliminary phase, which shall be the responsibility of the competent authority to whom investigative functions are assigned by law, and a procedural phase, which is the responsibility of the judge, and which shall commence as of the filing of the request for *in rem* forfeiture.

Article 21. Initial or preliminary phase. The competent authority handling the *in rem* forfeiture case shall, on its own motion, open and conduct an investigation in order to:

- a. Identify, trace and locate property that might be subject to *in rem* forfeiture.
- b. Verify that the basis for *in rem* forfeiture have been met.

- c. Identify potential owner or interest holder of property that may be subject to *in rem* forfeiture and determine where notice may be served upon them.
- d. Verify the connection between the potential affected parties and the basis for *in rem* forfeiture.
- e. Rebut the presumption of good faith.

The proceedings shall be kept under reserve until notice of the *in rem* forfeiture action is served or preventive measures are implemented.

Article 22. Powers of the competent authority in the initial or preliminary phase. In this phase, the competent authority may use any evidentiary means and all investigative techniques that it may deem necessary, such as controlled deliveries, undercover operations, interception and recording of private communications of all kinds, and electronic or other types of surveillance, as long as respect for fundamental rights is ensured.

When it is urgently necessary to secure the property and sufficient cause is shown for doing so, preventive measures may be taken or requested in connection with property under investigation, in accordance with the provisions of this Act.

The competent authority has four (4) months as of the implementation of preventive measures to determine whether to close the case or proceed to file a request for *in rem* forfeiture. This period may be extended for sufficient cause.

Article 23. Termination of the initial or preliminary phase. The initial or preliminary phase concludes when the competent authority makes a duly reasoned decision to file the request for *in rem* forfeiture before the respective court or orders that the case be closed on a provisional basis.

The decision to close the case does not have the effect of *res judicata* and may be challenged according to law.

When evidence comes to light that reasonably disproves the grounds for the decision to close the case provisionally, the competent authority may reopen the investigation.

Article 24. Filing of the request. The competent authority shall file a written request for *in rem* forfeiture with the court, which shall include the following:

- a. Factual and legal grounds for *in rem* forfeiture.
- b. Identification, tracing and location of the property.
- c. Direct and circumstantial evidence supporting the claim.

- d. Request for any proceedings deemed necessary.
- e. Information about preventive measures taken.
- f. Request for preventive measures.
- g. Information available as to the identity and location of potential affected parties and their connection to the property.
- h. Description of the actions taken during the initial phase, which must be kept secret or confidential in accordance with the law.

Article 25. Admissibility of the request. Upon receipt of the written notice of *in rem* forfeiture action, the court shall rule, within fifteen (15) days, on whether the request is admissible or must be returned to the competent authority to remedy any procedural defects, indicating the reasons supporting that decision.

If the request is admitted, then within the same length of time the judge shall rule on any preventive measures and their implementation, as well as the confidentiality of the proceedings, and shall order that notice of the request be served following implementation of the preventive measures.

Article 26. Service of notice. Following service of the final notice of the admissibility of the request, the written request and entire case file shall be placed at the disposal of the parties for a period of twenty (20) days. Thereafter, a date and time shall be set for the preliminary hearing.

Article 27. Preliminary hearing. The preliminary hearing shall begin with the competent authority's confirmation, amendment, or petition to withdraw the request.

This shall be followed by:

- a. Findings regarding jurisdiction, nullity, estoppels, and challenges.
- b. Verification of the standing and interests of the parties involved, and a determination on the parties to the proceedings.
- c. Rulings on motions filed as to the admissibility of the request, and any observations and other procedural matters that may have been raised.

Only a motion for appeal having suspensive effect may be filed against a decision resolving any of the preceding points.

During the hearing, the parties shall have the authority to:

- a. Present evidence in support of their position.
- b. Amend evidentiary requests.
- c. Propose or submit evidentiary stipulations or agreements.
- d. Suggest the execution of agreements in accordance with the Constitution and the law.

The judge shall decide the admissibility of the evidence offered and shall order the admission of those he deems pertinent, relevant, and useful.

In addition, the judge shall set the date and time of the hearing for presentation of evidence and arguments, which must be held within the following 30 days.

Article 28. Withdrawal of the request. After the request has been admitted, the competent authority may ask the court that it be withdrawn when evidence comes to light that invalidates the basis for that request. If the court finds good cause for the withdrawal, it shall lift all preventive measures imposed and order that the proceedings be permanently filed with the effect of *res judicata*.

Article 29. Hearing for the presentation of evidence and arguments. During the hearing, following the same order of participation as in the preliminary hearing:

- a. Evidence shall be submitted and examined.
- b. The parties shall present the factual and legal arguments supporting their positions.

Thereafter, the court shall order the hearing adjourned and shall set the date and time for reading of the judgment, within a term of not more than thirty (30) days.

Article 30. Content of the judgment. The judgment shall contain:

- a. Identification of the property and affected parties.
- b. Summary of the request for *in rem* forfeiture and the opposing position.
- c. Analysis of the factual and legal basis.
- d. Evaluation of the evidence.
- e. Reasoned statement on the admissibility or inadmissibility of *in rem* forfeiture.
- f. Determination, if applicable, of the amount of compensation for the cooperation of a private individual.

Only a motion for appeal may be filed against this judgment.

Article 31. Summary judgment. The affected party may accept the request for *in rem* forfeiture. In that case, the court will evaluate the request and issue a ruling.

Any agreements between the affected party and competent authority shall be submitted to the court for findings as to their admissibility.

Chapter V Evidence

Article 32. Evidence required for *in rem* forfeiture. The judgment declaring *in rem* forfeiture shall be based on the legal, timely submitted evidence.

The court shall order *in rem* forfeiture based on what has been alleged and proven by a preponderance of the evidence.

Article 33. Evidentiary material. All direct and circumstantial evidentiary material that is relevant, pertinent and useful to the purposes of the proceedings, such as statements by the parties, the testimony of third parties, expert reports, judicial inspections, documents, and indicia shall be admitted.

The court shall examine any evidence not provided for in this law pursuant to the provisions governing evidentiary material. The court may rule *sua sponte* on the evidence.

Article 34. Evaluation of the evidence. The evidence shall be considered as a whole and according to the rules of reasoned judgment.

Article 35. Burden of proof. Each party is responsible for proving the grounds supporting its position.

Common knowledge and indefinite claims or denials do not require proof.

Article 36. Exclusion of illegal evidence. The court shall exclude all evidence obtained in a manner that violates basic rights, without prejudice to the application of relevant guidelines on exceptions to the rules on excluded evidence.

Chapter VI Nullity

Article 37. Grounds for nullity. The following are grounds for nullity, without prejudice to any validation allowed by law:

- a. Lack of jurisdiction.
- b. Failure to serve notice or irregularities therein.
- c. Substantial violation of due process.

Article 38. Timeliness and procedure. Nullity may be invoked during the preliminary hearing and during the hearing for presenting evidence and arguments.

Chapter VII Management and disposal of property

Article 39. Purposes. The primary purpose of the management of property is to preserve and maintain the productivity or value of the property.

Article 40. General rules of management. Property on which preventive measures are imposed shall be placed immediately under the management of the specialized body created or designated for such purpose, which shall ensure that all property is managed properly, in accordance with the principles of efficiency and transparency of civil service.

The management of property shall be governed by the following rules:

- a. The designated authority shall be authorized to outsource services in cases in which it is necessary for the proper management of said property.
- b. Preferably, management trusts under State supervision or oversight shall be established at fiduciary or similar specialized entities, based on the nature of the property.
- c. Leases or other agreements will be executed with natural persons or legal entities based on market conditions.
- d. Costs of property management shall be paid with the proceeds and yields from the property.

The Government must ensure the existence of strict supervisory oversight in regard to the management of confiscated and seized assets.

Article 41. Advance sale of property. When a property subject to preventive measures is at risk of perishing, deteriorating, or becoming devalued, or if its preservation entails losses or expenses disproportionate to its value or management, the designated authority under domestic law shall order the advance sale of said property.

Proceeds of the sale shall be deposited in a fund or account within the financial system, established for such purpose.

Article 42. Disposal of property. Property declared forfeited under the provisions of this Law may be used to:

- a. Finance programs that provide care and compensation to victims of illegal activities.
- b. Finance crime prevention programs.
- c. Help strengthen the institutions charged with fighting organized crime, particularly the specialized agencies involved in the *in rem* forfeiture process.
- d. Invest in the property management system.
- e. Finance the procedural costs required for *in rem* forfeiture.
- f. To be shared with other States that may have cooperated in the *in rem* forfeiture.

In all cases, an established collegial organ shall decide how to dispose of the property.

Chapter VIII International cooperation

Article 43. Duty of international cooperation. The Government shall cooperate with other States in regard to investigations and proceedings whose objective is *in rem* forfeiture, regardless of how it is designated.

Article 44. Handling of the request. Responses shall be given to requests for *in rem* forfeiture and for assistance in investigations and preventive measures having the same objective. Assistance shall be provided in accordance with the provisions of this law.

When a request has been received from another State with jurisdiction to order *in rem* forfeiture, measures shall be taken to identify, locate, and attach or confiscate the property, as well as to enforce the *in rem* forfeiture judgment.

The respective request for assistance shall be acted on even when procedures and actions not provided for in the legislation of the requested State are specified, as

long as the request is not inconsistent with basic principles of said State's domestic law.

Requests from other States for purposes of enforcing *in rem* forfeiture judgments or identifying, locating, attaching, confiscating or physically seizing property subject to forfeiture must be given the same priority as those made in the context of domestic proceedings.

Article 45. Application of international agreements. International agreements that have been signed, adopted and ratified by the Government that involve mutual legal assistance and cooperation or that govern international cooperation to seize, locate, identify, recover, repatriate or forfeit property, are fully enforceable in the cases provided for in this law.

Article 46. International cooperation for the management of property. The Government may enter into bilateral and multilateral cooperation agreements to facilitate the management of property. Such agreements shall include provisions related to management costs and the manner in which property is shared.

Chapter IX Final provisions

Article 47. Public servant's duty to report. Any public servant who knows of the existence of property that may be subject to *in rem* forfeiture shall be obligated to report it to the competent authority immediately.

Failure to comply with this obligation shall result in any applicable administrative and criminal penalties in accordance with the law.

Article 48. Collaboration by a private individual. Any private individual who provides information that effectively contributes to the procurement of evidence or proof for the declaration of *in rem* forfeiture may receive compensation equivalent to a percentage of the amount obtained by the Government for the liquidation of the property, or of its commercial value, depending on the cooperation provided. The court shall determine the percentage in its ruling, on its own motion, or at the request of the competent authority.

Article 49. Consistent interpretation. The provisions of this Act shall be interpreted in a manner consistent with domestic law, whenever compatible with the nature hereof. In all matters not provided for in this law, penal procedure or civil procedure shall apply.

ANNEX I

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