Illicit Enrichment

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Stolen Asset Recovery Initiative
The World Bank • UNODC
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<tr>
<th>Acronym</th>
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<td>AML</td>
<td>Anti-Money Laundering</td>
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<tr>
<td>ANI</td>
<td>National Integrity Agency (Romania)</td>
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<td>AUCPCC</td>
<td>African Union Convention on Preventing and Combating Corruption</td>
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<td>DNFBPs</td>
<td>Designated non-financial businesses and professions</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>FIU</td>
<td>Financial Intelligence Unit</td>
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<td>IACAC</td>
<td>Inter-American Convention against Corruption</td>
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<td>IAD</td>
<td>Income and Asset Disclosures</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>INTERPOL</td>
<td>International Criminal Police Organization</td>
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<td>MLA</td>
<td>Mutual Legal Assistance</td>
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<td>NAB</td>
<td>National Accountability Bureau (Pakistan)</td>
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<tr>
<td>NGO</td>
<td>Non Governmental Organization</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>PEP(s)</td>
<td>Politically Exposed Person(s)</td>
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<td>POCA</td>
<td>Proceeds of Crime Act (Australia)</td>
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<td>Suspicious Transaction Report</td>
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Executive Summary

Illicit enrichment is criminalized under Article 20 of the United Nations Convention against Corruption (UNCAC), which defines it as the “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” Illicit enrichment is also prescribed as an offense in the Inter-American Convention against Corruption (IACAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC) under comparable definitions. Despite such broad international recognition of the criminalization of illicit enrichment, it has not been universally accepted as an anti-corruption measure. Instead, such criminalization continues to generate extensive debate and controversy.

Against this background, based on country experience, this study aims at providing an analysis of how the criminalization of illicit enrichment works, with a view to shedding light on any contributions that it has made to the fight against corruption and promoting the recovery of stolen assets. To add value, this study does not delve in detail into the theoretical debates around illicit enrichment, but analyzes practice, case law, and literature to add new perspective to the on-going discussions.

This study does not seek to recommend or oppose the adoption of illicit enrichment provisions. Rather, it aims to assist jurisdictions considering such steps by highlighting key questions that might arise during implementation, including how the offense is defined and enforced domestically by States. Similarly, this study does not endorse nor criticize any practice carried out by States in the implementation of the criminalization of illicit enrichment. Ultimately, it is also hoped that this study provides food for thought to policy makers and practitioners, and fuels upcoming discussions by the Conference of State parties of the UNCAC and its Working Groups.

Forty-four jurisdictions were found in the course of this study to have criminalized illicit enrichment, most of them belonging to developing countries. Several jurisdictions that prosecute illicit enrichment and that were contacted during the course of this study perceive it as a valuable complement to the traditional toolkit to combat corruption. The statistical information collected during the course of this study, however, indicates that only a limited number of these jurisdictions regularly investigate or prosecute the offense. This study reveals several components of the illicit enrichment offense that are common to those jurisdictions that prosecute it. Those components
Illicit Enrichment

are: persons of interest; period of interest; significant increase in assets; intent; and absence of justification.

One critical issue subject to on-going debate relates to the compatibility of illicit enrichment with human rights principles and related concerns regarding the perceived reversal of the burden of proof. Experience in several jurisdictions that have overcome these challenges shows that illicit enrichment offenses can be defined and implemented in a manner that fully respects the rights of the accused.

Considered in a broader context, what is at stake is also whether the public interest in the fight against corruption justifies tools such as the criminalization of illicit enrichment, an offense that contains some form of presumption. In this respect, a number of practices as well as jurisprudence have emerged that reconcile such presumptions with the respect and protection of human rights. For instance, the jurisprudence of the European Court of Human Rights clearly delineates that the principle of the presumption of innocence does not prevent legislatures from creating criminal offenses containing a presumption by law as long as the principles of rationality and proportionality are duly respected. Similarly, many countries that choose not to criminalize illicit enrichment have enacted other offenses that do contain some presumptions that entail some form of reversal of the burden of proof. These related presumptions indicate that measures to shift the burden of proof can be considered as valid and legitimate tools of combating crime when justified by public interest. Therefore parallels may be drawn between these presumptions and the principle of illicit enrichment.

Apart from substantive aspects of the offense, research conducted during the course of this study has revealed that the design and implementation of governmental structures are critical to ensure full respect of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). The status and existence of legislative, administrative, and judicial measures for the implementation of these rights must be considered from the point of view of the elimination of corruption. Of particular relevance is whether institutions involved in the investigation, prosecution, and adjudication of illicit enrichment are properly monitored, accountable, resourced, and trained so that they are in a position to effectively implement the obligations taken under the ICCPR and effectively and fairly pursue the corrupt money. Any illicit enrichment legislation should be tailored to suit the particular needs and concerns of each country, specifically in terms of legislative, administrative and judicial measures—including the role and limits of the prosecution.

Dual criminality remains a hurdle in international cooperation involving illicit enrichment. This is a challenge facing many of the countries prosecuting this offense, particularly when efforts are not made to verify, before seeking assistance, that the conduct underlying the request constitutes an offense in the requested jurisdiction. Several jurisdictions have publicly indicated their willingness to provide mutual legal assistance (MLA), even if they have not criminalized illicit enrichment themselves, provided that the conduct in question could be classified as an offense within their legal systems. Trans-
lating such openness into actual information-sharing requires a very strong capacity to deconstruct the criminal conduct and ensure the quality of the MLA request accordingly.

In all jurisdictions reviewed, the illicit enrichment law addresses the recovery of the assets illicitly acquired. There is however no solid statistical data to establish whether such laws have actually contributed to the recovery of assets. The absence of adequate statistical data points to mixed results. The underlying reasons are difficult to determine. One possibility is that convictions for illicit enrichment lead to penalties other than confiscation. These examples still confirm that illicit enrichment laws can be useful in asset recovery—but demonstrate that there is still a long way to go before they are used systematically.

In sum, the limited experience available demonstrates that illicit enrichment can be a useful anti-corruption and asset recovery tool that is implemented in full respect of human rights. Having identified the issues surrounding illicit enrichment, it is hoped that the experiences documented in this study promote greater understanding of how illicit enrichment works in practice. Further thought may be carried out on institutional issues relating to investigations, prosecutions, and the judiciary as important agencies in the prosecution of illicit enrichment and the protection of the rule of law. Ultimately, as more countries gain experience in this arena and more statistics and information become available, it is expected that this study will provide the foundation for the examination of how illicit enrichment frameworks could help to facilitate the recovery of corruption proceeds.
Introduction

Purpose of the Study

In November 2009, the third session of the UNCAC Conference of States Parties adopted Resolution 3/3, which, in paragraph 13, “urge[d] further study and analysis of, inter alia, the results of asset recovery actions and, where appropriate, how legal presumptions, measures to shift the burden of proof and the examination of illicit enrichment frameworks could facilitate the recovery of corruption proceeds.” The resolution responded to interest expressed by many States Parties in the implementation of illicit enrichment in different jurisdictions.

This study responds to the call for such analysis. Its objectives are: first, to promote a broader understanding of the offense of illicit enrichment, its application, benefits, and the challenges it poses; and second, based on country experience, to identify key issues that jurisdictions may wish to consider when developing an institutional and legal regime for criminalizing illicit enrichment.

In particular, the study looks at whether the criminalization of illicit enrichment has facilitated the recovery of assets by national authorities and examines any issues they have experienced in this respect. The study also addresses key issues identified by these authorities, which include putting in place effective institutional and legislative regimes for criminalizing, identifying, and prosecuting illicit enrichment undertaking mutual legal assistance.

This publication examines how the concept of illicit enrichment is actually applied in those jurisdictions that are implementing and enforcing it, particularly in view of expressed and documented concerns. It describes risks posed to the fairness of the trial process if the accused is required to provide a “reasonable explanation” of his assets. Building on existing legislation and case law, the study identifies the safeguards used by States, and related measures intended to ensure a balanced and fair trial. In order to put the debate on the reversal of the burden of the proof in context, the study also outlines measures used by some jurisdictions to partially reverse the burden of proof in the confiscation of the proceeds of crime and in the prosecution of crimes related to the abuse of positions of trust as alternatives to the concept of illicit enrichment.¹

¹ See also Article 31(8) of the UNCAC, which provides that States Parties may wish to consider shifting the burden of proof to the accused to show that alleged proceeds of crime were actually from legitimate sources.
The objective of the foregoing reviews is not geared towards ranking one approach over another or singling out any jurisdictions. Instead, by providing an overview of different approaches, this study seeks to ultimately identify lessons learned along with the challenges of using the criminalization of illicit enrichment as a framework for anti-corruption and asset recovery efforts, and offer some food for thought to the debate surrounding illicit enrichment.

Methodology

This study builds on published research on illicit enrichment. Most of this literature focuses on constitutional and human rights implications of the offense. The practical issues related to the investigation and prosecution of illicit enrichment have received scant attention, save in a few instances. Given StAR’s focus on operational issues related to asset recovery, as well as the objective of adding value to on-going discussions, the primary focus of the study is on learning from the experiences of States that actually implement an illicit enrichment legal framework.

This study also draws on a review of the records of negotiations for the UNCAC and drafting decisions of the key international conventions, as well as jurisprudence on illicit enrichment. An extensive search was conducted to identify jurisdictions that have legislation criminalizing illicit enrichment. The review drew extensively on the UNODC legal library, a parallel project supported by StAR that is expected to be launched in the second half of 2011.

Additional material was obtained through a survey distributed to jurisdictions that were identified as having illicit enrichment legislation. Its aim was to confirm the current status of legislation and inquire about how these laws are implemented, the frequency of use, and how successful the law has been in bringing prosecutions. Responses were received from 30 out of 45 national authorities contacted. The questionnaire is presented as Annex 3 to this study.

The list presented in Annex 1 encompasses the jurisdictions where, in the view of the team, illicit enrichment has been criminalized. Some other jurisdictions have illicit enrichment provisions in their legal systems, but the related sanctions are not criminal in nature (e.g. the penalty does not include imprisonment). Similarly, other jurisdictions term as “illicit enrichment” provisions amounting to abuse of office or other offenses. Therefore, their implementation of these provisions has not been subjected to an in-depth analysis in the present study.

2 Brazil, Chile, Romania, for instance. Brazil has an illicit enrichment offense since 1992 and is currently considering criminalizing it by adding penal sanctions to the ones already existing. A draft law has been pending in Congress since 2005, and was presented again for adoption in May 2011.
During the course of this study, an experts’ group meeting was convened consisting of practitioners from some civil and common law countries with prior experience prosecuting illicit enrichment cases in their respective jurisdictions. The experts were not only invited to comment on the draft, but to provide substantive contributions based on their own experiences. Representatives of the Office of the High Commissioner for Human Rights (OHCHR) also attended the meeting and provided extremely valuable views on the constitutional and human rights aspects of the illicit enrichment offense.

**How to Use this Study**

Policy makers are the primary audience for this study. This includes senior officials, technical staff, and legislators of governmental agencies and international organizations working in corruption related fields. It is the StAR Initiative's hope that the study will assist in informing the work of these decision makers in designing, implementing, or monitoring the work of agencies responsible for implementing the legal framework around the concept of illicit enrichment so that they are able to contribute to the goal of effective confiscation and recovery of assets. In addressing this audience, the study has sought to cover the relevant key legal concepts and issues with broad brush strokes rather than a minute analysis of the legal arguments.

While this study provides some legal analysis of the issues, the intent is not to delve deeply into the legal intricacies. Instead, it is to raise the pertinent questions that arise when considering the adoption of illicit enrichment legislation, and consider the advantages and disadvantages of illicit enrichment legislation. It is hoped that it will also further provide policy makers with the necessary tools to implement the law. A comprehensive bibliography is provided for those seeking to explore the legal arguments or analysis in greater detail.

While the primary audience of this paper is the policy maker, it may also be useful to prosecutors and other practitioners who implement illicit enrichment laws. A number of references to case law included will be useful in exploring the strategy to be adopted in a particular case, though care should be taken to ensure that cases are analyzed in the context of the particular circumstances of the jurisdictions that rendered them. Similarly, the cases and legislation referred to in this study are illustrative, and should therefore not in any way be relied upon as a comprehensive source, but rather as a starting point.

In spite of several attempts made to generate a quantitative analysis of how illicit enrichment prosecution can facilitate asset recovery, very little information has been obtained from participating countries. The limited quantitative data available is therefore included in the present study as an indication of the experiences of those jurisdictions that are effectively prosecuting illicit enrichment.

The findings documented in this study are based on the experiences of jurisdictions that have enacted illicit enrichment legislation. This study does not aim at taking any
final stance recommending or opposing the adoption of such legislation as a tool to address corruption, or to foster the recovery of stolen assets. The issues surrounding illicit enrichment—and the impact of its criminalization on corruption—are too complex, diverse, and country-specific to allow for a one-size-fits-all recommendation.
1. The Basis of Illicit Enrichment

1.1 The Rationale for the Criminalization of Illicit Enrichment

By preventing corrupt officials from enjoying the benefits of their ill-gotten gains, the State seeks to remove the underlying motivation for corruption. Asset recovery, international cooperation, civil and criminal confiscation regimes, and related mechanisms for securing the return of the proceeds of corruption are therefore increasingly important parts of law enforcement efforts. However, these efforts to prosecute corruption are very difficult, at times requiring evidence that proves to be elusive, calling for costly and technical expertise that few victim countries can master. In terms of detection, the victims of these corrupt acts—the public—may be unaware that the crime is taking place, meaning that the corruption often goes unreported. Those with access to information that would allow the detection of the crime may be complicit. Moreover, those involved in the crime may use positions of power and influence to intimidate witnesses and destroy any evidence of their crimes.

Often, the only tangible evidence that a crime has taken place is the money that exchanges hands between the corrupt official and his partner in crime, thus the enrichment of the corrupt official becomes the most visible manifestation of corruption. An offense such as bribery, which requires the demonstration of an offer or acceptance between the corrupt official and the corruptor, is not easy to prosecute in these circumstances. Similarly, once an offense is established in a court of law, linking the proceeds to an offense for the purposes of recovering assets can often be a complex endeavor. The efforts at fighting corruption are further challenged by the anonymity and fluidity with which assets can be moved, concealed, and transferred prior to effective means being taken to seize, freeze, and return them to their rightful owners.

In response, some States have developed the concept of illicit enrichment as a legal tool that strengthens their overall arsenal to fight corruption and assists in the recovery of assets. Based on the idea that unexplained wealth of a public official may, in fact, be visible proceeds of corruption, illicit enrichment was adopted as a non-mandatory crime in Article 20 of the United Nations Convention Against Corruption (UNCAC) and defined, when committed intentionally, as a “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” For an illustration of a recent case of illicit enrichment, see Box 1.
The criminalization of “illicit enrichment,” “disproportionate wealth,” or “inexplicable wealth” as it is frequently referred, allows States to, among other things, prosecute corrupt officials and confiscate the proceeds of corruption on the basis that the unexplained wealth is the evidence of the corrupt conduct. The need to prove that such wealth is unexplained stands, but in such frameworks, there is therefore no need to prove the source of the illegally acquired wealth by identifying and proving the underlying offenses such as bribery, embezzlement, trading in influence, and abuse of functions. As a result, the effect may extend beyond corruption and allow the confiscation of proceeds of other crimes. To draw a parallel with money laundering, illicit enrich-

### BOX 1 State vs. Mzumara – Malawi

The accused was charged with three counts of possession of unexplained property contrary to Section 32(2)(C) of the Malawian Corrupt Practices Act of 1995 for:

- Having possessed between 1 January 2008 and 21 December 2008 assets to the sum of about US$62,000 disproportionate to his known sources of income amounting to about US$3,000.
- Having deposited US$14,000 which was reasonably suspected to having been corruptly acquired into a bank account.
- The unexplained property of a plot and house worth US$4,000.

At the time in question, the accused was a public officer in the Immigration Department.

In support of the prosecution’s case, one witness testified on the amount of his salary, two witnesses from different banks gave testimony on the number and amounts of deposits he had made into his account, and another testified on the value of the house he had sold to the accused. Lastly, the investigator testified that she had initiated the investigation after receiving information that the accused was involved in smuggling foreigners into the country for a monetary fee. The only evidence in support of this suspicion was that the accused had made phone calls to Somalia, Kenya, and Ethiopia.

In his defense, the accused submitted, inter alia, that the additional sums to his salary were due to an allowance from the government, a loan from his office, and a rice business he was running. In addition to his explanation, he had one witness testify on his behalf.

The Court found that the Prosecution had demonstrated beyond reasonable doubt that:

- the accused was a public officer;
- he had been in possession of pecuniary resources that were disproportionate to his present or past official emoluments or other known sources of income;
- the accused failed to give a reasonable explanation. It also found that the explanations did not meet the balance of probabilities standard required in the circumstances.

As a result, the accused was convicted on all counts and sentenced to a prison term of 12 years.

_Crim. Case number 47 of 2010._

**Note:** At the time of reporting, this case has not yet exhausted the appeals process.
ment is similar in that there is no need to prove an underlying offense—although the criminal origins of funds still need to be proven with money laundering.

In order to attain a conviction of illicit enrichment, the prosecution must demonstrate that the official’s enrichment cannot be justified from legitimate sources of income, raising the presumption that the enrichment is the proceeds of corruption. The public official may rebut this presumption by providing evidence of the legitimate origin of his wealth. Failure to rebut the presumption results in a conviction and imposition of penalties. This is thought by some to result in a partial reversal of the burden of proof and a relaxation of the presumption of innocence that is a fundamental principle of all legal systems. It is also considered by some a potential violation of the right against self-incrimination and other due process rights. Other views consider illicit enrichment a provision that fully complies with human rights principles given the existence of similar presumptions utilized in criminal law, and the general principle that no fundamental right is absolute.

More generally, some hold the view that given the difficulty of proving corruption, it is in the public interest to require public officials to explain how they acquired their wealth. In such logic, the concept of the criminalization of illicit enrichment is essentially rooted in the contractual and fiduciary responsibilities that a public official assumes upon taking up his post. This explains why the public official is the primary subject of this offense. A court in Argentina has held in this respect that the State sets the conditions for admission to the public service, fixes remuneration, and establishes disciplinary law. The candidate who accepts the office or employment as a public official implicitly accepts the regime unilaterally established by the State.³ To the same extent, he also accepts to file an asset disclosure form on a regular basis. This requirement, which sometimes includes disclosure of his bank accounts, is a legal duty only related to his public functions and will help expose cases of illicit enrichment if necessary.

1.2 Origins and Development of the Offense

In 1936, an Argentinean state congressman by the name of Rodolfo Corominas Segura was traveling by train from his home in Mendoza to Buenos Aires. He was irritated to come across a public official displaying the wealth he had made since taking office, wealth that to Corominas Segura’s judgment could not possibly have a legitimate source. Inspired, Corominas Segura introduced a bill which stated that the government would penalize “public officials who acquire wealth without being able to prove its legitimate source.” While Corominas Segura’s bill never became law, similar bills were introduced in successive legislatures until 1964.

In **India**, illicit enrichment was initially enacted as an evidentiary measure, rather than a crime under Section 5(3) of the Prevention of Corruption Act. It laid out an evidentiary rule permitting the prosecution to demonstrate a violation of the enumerated corruption offenses (bribery, trading in influence, misappropriation of public property, criminal conduct in the mischarge of duty, as laid out in sections 5.1.a-d) by demonstrating possession of assets disproportionate to known income, without a satisfactory explanation. It was an entirely new rule which was met with controversy because as interpreted, the prosecution did not need to produce evidence of corrupt acts in order to obtain a conviction using Section 5.3. At the same time, Section 5.3 could not be grounds for a conviction of itself.

In 1964 as a result of amendments to their existing legislation, **Argentina** and **India** became the first countries criminalizing illicit enrichment. In India, the statute defines the obligation of the accused in terms of the possession of resources “for which the public servant cannot satisfactorily account,” while Argentina defines it as the failure “to justify the origin of any appreciable enrichment for himself or a third party.”

In the twenty years following the criminalization of illicit enrichment in **Argentina** and **India**, similar provisions were introduced in **Brunei Darussalam, Colombia, Ecuador, Egypt, Dominican Republic, Pakistan, and Senegal**. By 1990, illicit enrichment had been criminalized in at least ten countries; by 2000 in over twenty countries; and by 2010 in over forty jurisdictions. Like **India**, some of these countries simply criminalized provisions that already existed under their law of evidence. For others, illicit enrichment was a new concept and a radical new tool in their fight against corruption.

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Art. 13, India Prevention of Corruption Act of 1988. “Criminal misconduct by a public servant. (1) A public servant is said to commit the offence of criminal misconduct,—(a) [...] (e) If he or any person on his behalf, is in possession or has, at any time during the Period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. This offense is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.”

Section 268(2), Argentine Criminal Code of 1964, Art. 268(2). “Any person who, when so demanded, fails to justify the origin of any appreciable enrichment for himself or a third party in order to hide it, obtained subsequent to assumption of a public office or employment, and for up to two years after having ceased his duties, shall be punished by imprisonment from 2 to 6 years, a fine of 50% to 100% of the value of the enrichment, and absolute perpetual disqualification. Enrichment will be presumed not only when the person's wealth has been increased with money, things or goods, but also when his debts have been canceled or his obligations extinguished. The person interposed to dissimulate the enrichment shall be punished by the same penalty as the author of the crime.”

Criminal Code, article 268 (3): “Any person who, by reason of his position, is required by law to present a sworn statement of assets and maliciously fails to do so shall be punished by imprisonment from 15 days to 2 years and special perpetual disqualification. The offense is deemed committed when, after due notice of the obligation, the person obligated has not complied with those duties within the time limits established by the applicable law. Any person who maliciously falsifies or omits data required in those sworn statements by the applicable laws and regulations shall be liable to the same penalty.” (Translation as per Argentina, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 18 September 2009. Original available in Annex 1.)
The incorporation of illicit enrichment into three international anti-corruption conventions has undoubtedly led to an accelerated adoption of the offense. Illicit enrichment was first included in the Inter-American Convention against Corruption (IACAC), adopted by the Organization of American States in 1996, then in the African Union Convention on Preventing and Combating Corruption (AUCPCC) approved in 2003, and finally in the United Nations Convention against Corruption (UNCAC) also approved in 2003 and which entered into force in 2005. At regional level, illicit enrichment is also included in the of the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption adopted in December 2001, though not yet in force.5

The IACAC is the only convention where illicit enrichment is a mandatory offense. Both Canada and the United States of America issued reservations regarding the criminalization of illicit enrichment when they ratified the IACAC on grounds that illicit enrichment is, from their perspective, incompatible with constitutional and human rights principles, notably the presumption of innocence.6 There was further controversy during the UNCAC negotiations with some authorities arguing for the illicit enrichment provision to be dropped,7 while others suggested that it be shifted to the chapter on prevention and provide for only administrative sanctions.8 In the end, UNCAC adopted illicit enrichment as a non-mandatory criminal offense and requires States Parties to consider the criminalization of illicit enrichment “subject to the requirements of their constitutions and the fundamental principles” of their legal systems. The African Union Convention has followed a similar approach.

Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe. The reason for such exceptions is that many of these jurisdictions view illicit enrichment as having implications on human rights protections. Amongst countries choosing not to criminalize illicit enrichment, many have nonetheless enacted alternative means for tackling illicit enrichment by public officials which involve measures that make it easier to either prosecute or confiscate illicit proceeds. Such legal dispositions usually rely on organized crime provisions, which can sometimes lower or provide for a partial reversal of the burden of proof for the prosecution.

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5 Article 6(3)(a) of the ECOWAS Protocol reads, “L’enrichissement illicite consistant en une augmentation significative du patrimoine d’un agent public qu’il ne peut raisonnablement justifier par rapport aux revenus perçus légitimement dans l’exercice de ses fonctions sera considéré comme un acte de corruption pour les besoins du présent Protocole par ceux des Etats Parties qui l’ont instauré comme tel.” The English translation of Article 6(3)(a) of the ECOWAS Protocol reads, “A significant increase in the assets of a public official that he cannot reasonably explain in relation to his lawful earnings shall be considered an illicit enrichment and an act of corruption for the purposes of this Protocol among those State Parties for which it is a criminal offense.”

6 Also see 1999 annual report of the Inter-American juridical committee to the general OAS, at pp. 92–93.

7 Refer to A/AC 261/4 June 2002, at para. 42.

8 Refer to Ad hoc committee document A/AC.261/3/Rev.1 of June 2002, at p. 33, footnote 188.
2. Defining Illicit Enrichment

2.1 International and Domestic Definitions

Defining illicit enrichment helps to describe and identify the elements of the offense. The elements are a series of essential components that must be present in order for an accused to be found guilty. They are defined in legislation and through the court’s interpretations in jurisprudence. The three examples presented in Box 2 illustrate the variation seen in the definition of illicit enrichment between international conventions.

International conventions seek to harmonize the elements of the crime across States—but Box 2 illustrates that differences still exist between the key relevant conventions. In addition, the debates during the negotiation of the UNCAC further highlighted the differing national perspectives on the appropriate formulation of such elements in the offense of illicit enrichment. This notwithstanding, there are greater similarities than differences among the approaches adopted by States. As a result, trends have developed of common elements of illicit enrichment. These will be discussed further in Section 2.2.

Seeking to harmonize how illicit enrichment is defined ensures that the focus is on the underlying conduct, not the name of the offense. In this respect, while some provisions similar to illicit enrichment are linked to the failure to disclose assets or a misstatement in income and asset disclosures, those provisions are usually based on non-compliance with disclosure laws and, for our purposes, not illicit enrichment. Accordingly, while income and asset disclosures may be used to provide evidence of illicit enrichment and will be discussed in this context in subsequent chapters, offenses arising out of non-compliance with income and asset disclosures will not be included in the present study. Also, other provisions sometimes term as “illicit enrichment” an offense that is actually a classical corruption offense, requiring an unlawful action or misconduct from the public official, while a “pure” illicit enrichment offense is only based on the unexplained increase in the assets of a public official.

Based on the definitions found in the UNCAC, AUCPCC and IACAC, five elements of the offense can be identified: persons of interest; period of interest; conduct of enrichment;
Illicit enrichment, that is, the significant increase in assets; intent including awareness or knowledge; and the absence of justification.

2.2 The Elements of the Offense

2.2.1 Persons of Interest

Illicit enrichment specifically targets public officials. All three of the international conventions and all of the national enrichment laws reviewed in the course of this study identify the persons of interest—the individuals who may be prosecuted for the crime—as public officials at a minimum. Two issues merit further consideration: first, the categories of public officials that are included as persons of interest; and second, whether the persons of interest should include a wider range of individuals beyond public officials.
### BOX 3  Definitions of Illicit Enrichment in National Legislation

<table>
<thead>
<tr>
<th>Sierra Leone</th>
<th>Guyana</th>
<th>The People’s Republic of China (Criminal Law 1997 Article 395)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sierra Leone (The Anti-Corruption Act 2008 Part IV)</strong></td>
<td><strong>Guyana (Integrity Commission Act 1998)</strong></td>
<td>• Any State functionary whose property or expenditure obviously exceeds his lawful income, if the difference is enormous, may be ordered to explain the sources of his property. If he cannot prove that the sources are legitimate, the part that exceeds his lawful income shall be regarded as illegal gains, and he shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, and the part of property that exceeds his lawful income shall be recovered.</td>
</tr>
<tr>
<td>• (1) Any person who, being or been a public officer having unexplained wealth. (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, commits an offence.</td>
<td>• Where a person who is or was a person in public life, or any other person on his behalf, is found to be in possession of property or pecuniary resource disproportionate to the known sources of income of the first mentioned person, and that person fails to produce satisfactory evidence to prove that the possession of the property or pecuniary resource was acquired by lawful means, he shall be guilty of an offence and shall be liable, on summary conviction, to a fine and to imprisonment for a term of not less than six months nor more than three years.</td>
<td></td>
</tr>
</tbody>
</table>

There is a clear preference amongst States for expansive definitions of public officials in both the conventions and national legislation. Article 2 of UNCAC defines “public official” as “(i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a public official in the domestic law of a State Party.”
Where national legislation criminalizing illicit enrichment and supporting jurisprudence defines a public official, the definitions are similarly broad generally encompassing public servants, functionaries, or, in Guyana, “a person in public life.”

Some countries have expanded the persons of interest to include a wider range of individuals who have access to public resources or act in the public interest. India, for instance, uses a definition of “public official” that includes persons serving the public interest, whether or not they carry the ‘public servant’ title, or are “appointed by the Government,” and has never specified outer limits to this definition. Bhutan includes not only public servants, but also “a person having served or serving under a non-governmental organization or such other organization using public resources.” This approach reflects a focus on the abuse of a position of trust in relation to public officials who enrich themselves at public expense.

While most States have enacted illicit enrichment legislation directed towards public officials, some have also extended it to the private sector. In this regard, Colombia has established illicit enrichment committed by private individuals as a stand-alone offense.\(^\text{10}\) Similarly, the Pakistan illicit enrichment provision applies to a “holder of public office, or any other person.” As a consequence of this broader definition adopted by Pakistan, underlying offenses other than corruption may be easily covered. The applicability of illicit enrichment to private persons has been tested before its Courts. In the case of Abdul Aziz Memon vs State,\(^\text{11}\) a question arose as to whether the illicit enrichment provisions were applicable to a private person who is no longer a holder of public office. The accused in that case was a former Member of the National Assembly of Pakistan. He was charged with having assets beyond known sources of income and was arrested and charged together with his wife, in whose name the assets were held. Both were convicted by the Accountability Court to serve a sentence of seven years with confiscation of their assets. However, some of the assets in question were acquired in the period during which the first accused was not a Member of the National Assembly of Pakistan. In their appeal before High Court, one of the contentions was that the accused was not accountable for the years during which he was not a Member of the National Assembly and thereby not a holder of public office. In upholding the conviction, the High Court held in this respect that:

“Consequence to the above discussion, we are persuaded to agree with the contention of Mr S.M. Zafar, that the scope of NAB [National Accountability Bu-

\(^\text{10}\) See Act No. 599 OF 2000 which is issued the new Criminal Code, Title X, Crimes against the Economic Social Order, chapter V, article 327, provides for “the illicit enrichment, for private individuals.” It holds accountable whoever directly or through another person obtains, for his own benefit or for a third party, an unjustified increase in assets, when it is determined to have been derived, in one form or another, from criminal activities.

\(^\text{11}\) Abdul Aziz Memon vs State, 2003 YLR 617, concerning provisions of Section 9 (a)(v) relating to Assets Beyond Known Sources.
rea\] Ordinance is wider in terms and is applicable to all citizens of Pakistan and all persons including the holders of public offices. The result is that, the appellants are accountable for acquiring the assets from the year 1985 till the year 1996, the period for which they were tried.”

Other countries have sought to include individuals that are family members of a public official who may be considered as potential beneficiaries or accomplices involved in hiding the proceeds of corruption under their name. In El Salvador and Egypt, for instance, the offense extends to include the capital or income held by spouses and minor children of the public official. In Paraguay, investigators should consider assets held by first and second-degree bloodline relatives.12 The AUCPCC extends the scope of illicit enrichment further still to “any person.” This may be understood as supporting the prosecution of individuals in the private sector that receive bribes as well as family members and associates of public officials who receive illicit payments.

In practice, some provisions are directed towards the recovery of assets held by those individuals, rather than the targeting of close relatives and associates for prosecution. In Brunei, for example, the illicit enrichment provision extends to property of “any person holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such pecuniary resources or property as a gift, or loan without adequate consideration from the accused” to have been under the control of the accused and liable to seizure.13

Where the intention is to focus on corruption in the public sector, the UNCAC definition of public official14 will generally be sufficient to achieve the objectives of the law. This definition of persons of interest does not exclude action against family members or associates. The financial affairs of these individuals will generally have to be examined in an illicit enrichment investigation of a public official. This approach is consistent

12 Paraguay, Law No. 2.523/04, Article 3.
14 Art. 2 of the UNCAC defines “Public official” as (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party. Financial Action Task Force Recommendation 6, reads, “Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures: a) Have appropriate risk management systems to determine whether the customer is a politically exposed person. b) Obtain senior management approval for establishing business relationships with such customers. c) Take reasonable measures to establish the source of wealth and source of funds. d) Conduct enhanced ongoing monitoring of the business relationship.”
with international agreements, notably UNCAC Article 52 and Financial Action Task Force (FATF) Recommendation 6, which require enhanced monitoring of the family and close associates of prominent public officials in their interaction with financial institutions.\(^{15}\) Where family and associates are found to have been accomplices in hiding the proceeds of corruption, they may be subject to prosecution for collateral offenses such as aiding and abetting or money laundering. It is important that proceeds of corruption held by individuals charged with collateral offenses should be subject to seizure.

### 2.2.2 Period of Interest/Period of Check

The “period of interest” is used to refer to the period during which one can be held liable for having illicitly enriched oneself. The clear delineation of a period of interest is intended to establish a nexus between the significant increase in wealth and the person of interest’s engagement in the public sector (or activities of public interest). The definition or demarcation of a period of interest may also serve a practical purpose in setting a baseline for investigators. National authorities have adopted three different approaches in determining the period of interest: coincidence with the performance of functions; a limited term after leaving their functions; and open-ended. Lessons learned from these various approaches demonstrate that the period of check generally overlaps with a part of the public official’s term in office.

Although UNCAC does not specifically recommend a temporal application of illicit enrichment, the reference to “public official” implies that, at minimum, the period of interest coincides with the public official’s performance of his functions. This is the approach also adopted in the IACAC and in many national laws. Chile, for example, makes illicit enrichment applicable to a public official “who during his term” receives substantial and unjustified enrichment, thus limiting it to investigations of public officials who may have been enriched while in office.\(^{16}\) El Salvador has a similar limitation, specifying that illicit enrichment can only be presumed when the increase in assets occurs “from the date on which the functionary took office to the day he ceased his functions.”\(^{17}\) Following this approach, prosecutors may use entry into functions as a baseline and assess whether increases in assets were significant in relation to the public

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\(^{15}\) Art. 52 of the UNCAC provides, “Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.” For Financial Action Task Force Recommendation 6, see *supra*.

\(^{16}\) Chile, Penal Code Art. 241 *bis*.

\(^{17}\) El Salvador, Ley Sobre el Enriquecimiento Ilícito de Funcionarios y Empleados Públicos, Título III Del Enriquecimiento Ilícito.
official’s official or lawful earnings during the performance of his or her functions or term of office.

The downside of this approach is that a corrupt official simply may defer receiving any benefit derived through corrupt means until after leaving office to avoid prosecution.

Some countries have sought to resolve this problem by extending the period of interest to a number of years after the public official has terminated his or her functions or term of office. Argentina, Colombia and Panama, for instance, have extended the period of interest by two to five years after leaving office.18 Other countries have left the period of interest open-ended so that anyone who has ever been a public official may be liable to prosecution for an illicit enrichment offense for the rest of his or her life. Brunei, for example, makes illicit enrichment applicable to “any person, who, being or having been a public officer…maintains a standard of living above that which is commensurate with his present or past emoluments.” Suggestions along both of these lines were made at the time that the UNCAC was negotiated but did not receive sufficient support to be incorporated in the convention.19

The period of interest should be distinguished from the period forming the basis of an investigation or indictment. In other words, the period identified by the illicit enrichment legislation as that during which a public official can be held liable for enriching himself, may be different from the time frame that he is actually prosecuted for.

18 Section 268(2), Argentine Criminal Code of 1964, Art. 268(2), “Any person who, when so demanded, fails to justify the origin of any appreciable enrichment for himself or a third party in order to hide it, obtained subsequent to assumption of a public office or employment, and for up to two years after having ceased his duties, shall be punished […]” (Translation as per Argentina, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 18 September 2009. Original available in Annex 1 below.)

Article 412 of the Colombian Penal Code provides that, “Any public servant who while in government employment, or anyone who has performed public duties and who, in that time or in a period of two years thereafter, obtains for themselves or for another an unjustified increase in wealth shall, provided that the conduct does not constitute another offense, be liable to between ninety-six (96) and one hundred eighty (180) months of imprisonment, a fine of twice the amount of the enrichment without that exceeding fifty thousand (50,000) times the statutory monthly minimum wage in force, and ineligibility from the exercise of rights and public duties for between ninety-six (96) and one hundred eighty (180) months.” (Translation as per Colombia, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 25 March 2010, Original available in Annex 1 below.)

Art. 345, Penal Code of Panama of 2008, “Any public servant who, either personally or through a third party, unduly increases their wealth in relation to the legitimate income obtained during the occupation of their post and for up to five years after having left the post, whose lawful provenance they are unable to show, shall be punished with three to six years of imprisonment. (Translation as per Republic of Panama, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 16 September 2010. Original available in Annex 1 below).

19 Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption, p. 197. Ultimately, the option of extending illicit enrichment beyond employment was not retained in the final text of Article 20 of the UNCAC.
ter may be determined by the investigator and prosecutor and be equal to or fall within the period of interest.\(^{20}\)

In the context of conducting investigations and cases, two challenges are worth noting—access to records and focus of investigative resources. In most countries, citizens, corporations and financial institutions are not required to retain financial records and documentation indefinitely. Therefore the longer the period subject to potential investigation, the higher the likelihood that any records of suspicious assets will have changed hands or been liquidated and the higher the likelihood that expenses incurred over a given period will be harder to prove. Further, if examining an extended period, prosecutors may have difficulty identifying legitimate sources of wealth and the accused may have difficulty providing rebuttal evidence. Care should also be taken to ensure that long periods of interest do not fall outside any statutes of limitation.

Concerns regarding the period of interest may be addressed through specific guidance provided to prosecutors through administrative instructions. These instructions can, for instance, highlight the difficulties that are likely to be encountered in pursuing investigations once the statutory requirement for citizens, corporations and financial institutions to retain supporting documents for their financial records has expired. This practice is consistent with the administrative guidelines used in many countries to direct prosecutors on the performance of their duties and the handling of specific cases, such as whether to begin, continue, abstain from, or stop prosecution—while fully respecting prosecutorial discretion. It is also consistent with the recommendations for the financial sector’s monitoring of politically exposed persons.

### 2.2.3 Significant Increase in Assets

The UNCAC, IACAC, and the AUCCPCC all require the prosecution to demonstrate enrichment in terms of a “significant increase in assets.” According to the Travaux Préparatoires of the UNCAC, the word “significant” was retained in that particular provision as it reflected existing practice in a number of States and provided further reassurance that the provisions of the article would not be used unreasonably.\(^{21}\) There are two considerations in defining this element: first, how to determine whether the increase in assets or wealth is “significant” and second, which assets or other evidence to take into account.

The international conventions and national legislation define “significant” as a relative rather than an absolute term. For example, the increase in assets is compared with lawful sources of income using terms such as “disproportionate assets,” “assets not commensurate with lawful income” or “above what is commensurate.” Most countries do


not define what is considered “disproportionate” in legislation, thus leaving this to be determined by prosecutors and the courts. India, for instance, has set a specific threshold of 10 percent known sources of income through its jurisprudence.\(^{22}\) A few countries provide some guidance in the form of graduated sanctions, though in these cases the thresholds are generally set in absolute terms.

The specification of a threshold for illicit enrichment in statutes may prevent prosecutions where the amounts concerned are trivial. However, it may also send a signal that they will tolerate a certain level of corrupt conduct unless the threshold sets an extremely low bar. In those countries where the prosecutor has some discretion, public signaling can be avoided by providing policy guidance to prosecutors indicating the threshold levels of illicit enrichment at which they would be expected to prosecute. This has the advantage of providing some flexibility for prosecutors to pursue cases in exceptional circumstances if these fall below the threshold. In Pakistan, the anti-corruption authority adopts an alternative approach. In order to focus time and resources to investigating major cases, as a policy, petty cases involving very small amounts of money are referred to the department concerned. The said department may deal departmentally with the public official, or to other investigative agencies and decide on how to deal with each situation on a case by case basis. In some countries, there may be little need for policy guidance, as smaller thresholds may not be prosecutable under the *de minimis non curat praetor* principle, (the law does not concern itself with trifles) which bars the prosecution of transgressions considered minimal. In addition, smaller thresholds are more difficult for the Prosecution to prove, and may therefore have fewer benefits for the prosecution.

Some countries have defined in their illicit enrichment provisions the type of benefit enjoyed by the public official which is considered as part of this element. Again, where countries have included definitions, they tend to be broad. In Argentina, the provision defines the enrichment in terms of net worth, taking into account debts or other obligations that have been cancelled. Paraguay also makes reference to rights granted, services provided, and the cancellation of debts of not just the accused, but also his or her spouse and first and second-degree bloodline relatives. In Hong Kong, Special Administrative Region of China (Hong Kong) provision also focuses on the “control” of pecuniary resources or disproportionate assets.

Countries that use the terms “standards of living” or “lifestyle” do not intend them as a substitute for assets or wealth. Rather, the “lifestyle” triggers an investigation and the wealth of the individual remains the basis of the evidence of illicit enrichment. Some countries, Lesotho, Malawi, and Zambia for instance, refer in their illicit enrichment laws to a “standard of living” above that which is commensurate with known sources of

income rather than assets or wealth. Nepal uses the term “incompatible or unsuitable lifestyle.”23 In that sense, “lifestyle” or “standard of living” is not strictly speaking an element of the crime. Nonetheless, it is important to call attention to the “standard of living” or “lifestyle” since this is the visible manifestation of illicit enrichment and may lead to the filing of complaints from the civil society.

The precise definition of the particular assets that are subject to illicit enrichment investigations are also an important consideration because they will determine the ease or difficulty with which the Prosecution proves its case. For example, some provisions such as the Jamaican illicit enrichment provision refer to assets disproportionate to “lawful earnings,” while others refer to “official emoluments” as in Antigua and Barbuda and Hong Kong.24 The Malawi provision defines “official emoluments” as including “a pension, gratuity or other terminal benefits.” Therefore, because “lawful earnings” are broader than “official emoluments” it will likely be easier for the prosecution to demonstrate official emoluments through the official or departmental records, than it would be to demonstrate that one’s assets are disproportionate to all of his lawful earnings. In India, the illicit enrichment provision refers to “pecuniary resources or property disproportionate to his known sources of income.” Although seemingly broad, “pecuniary resources or property” has been interpreted broadly by the courts in India to include real property, liquid assets, and income generating investments, while “known” has been interpreted by the Courts to mean “lawfully obtained income that is a revealed by a ‘Thorough Investigation,’ by the prosecution [and] cannot refer to sources of income especially within the knowledge of the accused.”25 In addition, jointly held bank accounts would be assessed as resources of the accused, unless the account was so structured as to prevent its use by the public official.26

The criticism leveled against the element pertaining to the significant increase in assets is that the conventions and legislation are not explicit as regards the criminal conduct (actus reus) that constitutes the basis of the offense. In Argentina, commentators have argued that the provision article 268(2) of the Penal Code, which defines the illicit enrichment offense, fails to satisfy the principle of nulla poena sine lege or no penalty without a law enshrined in article 18 of the Constitution which requires that legislation should clearly define the prohibited conduct or omission.27 It has been argued concerning the illicit enrichment law of Mexico that the failure to define a specific conduct

24 See Annex 1 below.
25 The language employed by the Court is drawn from § 106 of the Indian Evidence Act (1872).
27 This argument is addressed in further detail in Chapter 3, The Principle of Legality.
means that illicit enrichment penalizes the mere possession of wealth by a public servant and the suspicion of misconduct and is therefore clearly unconstitutional. The Hong Kong law has been criticized on similar grounds, as a draconian measure, which does not constitute “a corruption crime as such but rather penalizes a public official for excess wealth per se.”

Another interpretation is that the criminal conduct in the offense relates to the failure to justify: the offense targets an omission rather than a conduct. According to this view, a public official has a statutory duty to provide an explanation on the origin of his wealth, and an omission to do so when required, is an offense. Other views are that international norms are silent on the question as to what conduct should properly be regulated by criminal law. As a result, because international norms do not specify conduct that ought not to be criminalized, it cannot be said on this basis alone that illicit enrichment contravenes general principles of criminal law.

As a result of the foregoing arguments, some proponents argue that the enrichment and the possession of questionable proceeds by public officials are in themselves criminal conducts. The receipt, investment, and use of the proceeds acquired by questionable means require the active participation of the public official. Property has to be purchased and maintained and is used, bank accounts are opened and used for transactions. There are obvious parallels with the offense of money laundering and the criminalization of possession of drugs and arms.

Lessons learned with respect to describing the significant increase in assets in illicit enrichment legislation are that it appears very useful to define the nature of the benefit that is to be considered as part of the increase, including for instance debt cancellation. The precise definition of the assets that are subject to illicit enrichment investigations, such as “official emoluments” or assets disproportionate to “lawful earnings,” are also an important consideration as they will determine the ease or difficulty with which the Prosecution proves its case. Overall, providing details on this element goes a long way in shedding light on the conduct considered as illicit enrichment.

### 2.2.4 Intent

The UNCAC explicitly requires a demonstration of the *mens rea* or intent in the offense of illicit enrichment by incorporating the element “when committed intentionally.” According to the *Travaux Preparatoires* of the UNCAC, during negotiations of the convention, the qualification “when committed intentionally” was added to bring the UNCAC Article 20 in line with other articles in chapter III on criminalization and to provide an additional measure of reassurance that the provisions of the article would not be used

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28 Enrique Diaz-Arranda (SD), pp.98–100.

29 Wilsher, at 31. See also the discussion on the principle of legality in Chapter 3.
unreasonably.\textsuperscript{30} Following the principles laid out in Article 28 of the UNCAC,\textsuperscript{31} the state of mind of the accused official need not be demonstrated but instead can be inferred from the “objective factual circumstances” of the case. In illicit enrichment cases, this inference may be drawn, for instance, from significant transfers of funds from individuals or entities with which the public official has no legitimate business relationship, large cash payments made by the public official, or the continued and deliberate use of luxurious properties inexplicably acquired.

Apart from the UNCAC, none of the international or domestic laws criminalizing illicit enrichment consulted, including IACAC and AUCPCC, expressly identify intent as an element of the crime. This omission should not necessarily be considered as the aim of the legislature in defining the offense. This is because intent is usually considered an overarching element in the definition of criminal offenses within a criminal code, and it does not need to be specifically spelled out in each and every case. In this respect, it is worth noting that both the IACAC and AUCPCC similarly do not specify intent as an element applicable to other corruption offenses. In some common law countries too, there is a presumption that intent should be read into provisions defining the elements of crimes where they are otherwise silent.\textsuperscript{32}

However, some commentators have argued that there may be grounds for specifically omitting intent in the context of illicit enrichment by public officials. The purposeful omission of intent as an element of the crime would transform illicit enrichment into a strict liability offense, allowing for the prosecution of an official even if they were genuinely ignorant of their unexplained income and increase in net worth. Typically, strict liability is used to avoid those accused from escaping liability by pleading ignorance, where society is concerned with the prevention of harm and wishes to maximize the deterrent value of the offense. In the case of illicit enrichment however, it is likely that an accused can escape liability by providing evidence of ignorance, for example where, unknown to him, funds are accidentally deposited into his savings account and are not withdrawn.

At the national level, similar questions have been raised pertaining to the omission of intent in the statutory definition of the offense. Omission of intent in the Hong Kong law, for example, has been interpreted by commentators as establishing strict liability for public officials. Although this approach has been put down to “poor drafting” and been criticized as a draconian measure which does not constitute “a corruption crime as such but rather penalizes a public official for excess wealth per se,”\textsuperscript{33} the Courts im-


\textsuperscript{31}UNCAC Article 28: “Knowledge, intent or purpose required as an element of an offense established in accordance with this Convention may be inferred from objective factual circumstances.”

\textsuperscript{32}Sweet v Parsley [1970] AC 132.

\textsuperscript{33}Wilsher, at 31.
plementing the provision have taken a different approach. In one case, notwithstanding the absence of “intention” in the Hong Kong illicit enrichment provision, the Court acknowledged intention as an element of the offense. It considered as mens rea the fact that the accused knew that he would be unable to give a satisfactory explanation as to the source of the funds sufficient to persuade a court at trial.34

It is worth considering that the intent at stake in the illicit enrichment offense is not related to any misconduct, but to the increase of assets. Although most illicit enrichment provisions do not specifically mention intent, from the judgments reviewed, such intent is a necessary factor that must be either expressly or at least implicitly established by the prosecution. Furthermore, practitioners consulted during the course of this study from both civil and common law jurisdictions agreed that convictions for illicit enrichment in their jurisdictions would require a demonstration of this element by the facts.

2.2.5 Absence of Justification

UNCAC, the IACAC, and the AUCPCC all identify the lack of a reasonable justification for the enrichment as an essential element of the illicit enrichment offense. The formulation of this element is considered by many to place a burden of proof on the public official: “a significant increase in the assets of a public official that he or she cannot reasonably explain.” This is the most controversial of the elements, since arguments that the use of the concept of illicit enrichment infringes upon the fundamental principle of the presumption of innocence hinge on the view that the burden of proof in the prosecution of illicit enrichment shifts from the prosecutor to the accused.35 In this context it is important to clarify their respective roles. Because legislation reviewed is generally silent on this issue, the distribution of the burden of proof in illicit enrichment cases has been determined by the courts.

In general, the practice is as follows: the prosecution constructs a case against a person who during the period of interest is a public official. The prosecution demonstrates the enrichment or ownership of assets that are significantly higher in value than the public official’s lawful income. It further demonstrates that the public official had the requisite intent to be enriched. Once these elements are established, a rebuttable presumption that this enrichment is illicit arises. A rebuttable presumption is an assumption made by a court that is taken to be true unless evidence is presented to the contrary. Therefore, once the prosecution has carried out the above steps, the outcome of the case is dictated by the defense. If the accused demonstrates the existence of a reasonable explanation he or she will be acquitted and if he or she fails to do so, he will be convicted. Box 4 demonstrates this sequence of events.

34 The Privy Council in Mok Wei Tak and another v The Queen, [1990] 2 AC 333.

As to the precise nature of the prosecution’s burden, courts in Argentina have repeatedly held that “the prosecution burdens the entire onus of proof.” This includes the presentation of evidence demonstrating that legitimate sources or official emoluments cannot account for the “disproportion” in wealth. In one case, the court said that the lack of justification does not stem from the request to the official, but results from finding that the enrichment is not supported by the declared assets of the agent. In other words, the reasonable explanation must be made only once there is a demonstrated significant and unjustified enrichment. As such, the offense is committed prior to and independent of the legal requirement of justification.


courts have held that the burden of demonstrating assets disproportionate to known income, without a satisfactory explanation, rests on the prosecution.\textsuperscript{38} This manifests in the charge sheet, which in essence must demonstrate the existence of disproportionate assets.\textsuperscript{39} Hong Kong has made similar arguments, stating in Attorney General v. Hui Kin-hong: “before the prosecution can rely on the presumption that pecuniary resources or property were in the accused's control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held (...) on behalf of the accused or were acquired as a gift from him.”\textsuperscript{40}

According to the general rule in many legal systems, the standard of proof in criminal matters is that an accused simply has to raise a reasonable doubt or such that the judge is “intimately convinced” as regards the facts supporting one or more of the elements in the prosecution's case. In most cases, an accused can defend himself through the presentation of a plausible alternative theory of the origin of the funds with some supporting—but not highly convincing—evidence. Similarly, the accused is not required to argue in their own defense, and no adverse inference can be drawn should they chose not to.

The prosecution of illicit enrichment adopts a slightly different approach. There is an expectation that the accused provides a reasonable explanation of a significant increase in his assets. The key consideration is the nature of the burden of proof that falls on the accused. There are two alternatives frequently argued by legal practitioners and academics alike.\textsuperscript{41}

The first places an evidentiary burden of proof on the accused, requiring them to provide evidence that brings into question the truth of the presumed facts as presented by the prosecutor. Parallels have been drawn between the possibility for an accused to


\textsuperscript{39} Swamy v. the State holding that the prosecution must lay out a prima facie case of assets disproportionate to known sources of income; Swapan Adh v. Republic of India—CRMC Nos. 2008 of 1998 [2000] INORHC 179 (23 March 2000), Assuming that the prosecution had met its burden, charge sheet could not be challenged with evidence until the case was brought to trial; State by Central Bureau of Investigation v. Shri S. Bangarappa [2000] INSC 578 (20 November 2000) (presiding judge need not evaluate the quality of the prosecution's evidence, provided that on its face the evidence presented constituted a prima facie case); State of Madhya Pradesh v. Mohanlal Soni [2000] INSC 362 (19 July 2000), prosecution's failure to adequately review and make available relevant documentation that would have discredited the prosecution's alleged prima facie case resulted in quashing of proceeding; Parkash Singh Badal and Anr. V. State of Punjab & ors. [2006] INSC 906 (6 December 2006), allowing for the Charge Sheet to allege a violation of §13.1, without specifying which specific offense was alleged.

\textsuperscript{40} Attorney General v. Hui Kin Hong. Court of Appeal No.52 of 1995.

\textsuperscript{41} Jaywickrama et al (2002) p. 28.
present evidence of the lawful origin of their wealth and the defense of necessity or self-defense in the context of other crimes. The burden of proof remains with the prosecution, since the prosecution must demonstrate their case beyond a reasonable doubt or intimate conviction and refute the evidence provided by the accused. However, when there is an evidentiary burden on the accused, adverse inferences may be drawn from the accused’s failure to provide evidence in their own defense. A clear statutory example is in the **Pakistan** Act which provides,

S. 14(c) In any trial of an offense punishable under this Order, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of property or pecuniary resources disproportionate to his known sources of income, or that such person has, at or about the time of the commission of the offense with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offense of corruption and/or or corrupt practices and his conviction therefore shall not be invalid by reason only that it is based solely on such a presumption.

The second alternative considered in arguments regarding illicit enrichment places a legal burden of proof on the accused. The general rule in criminal cases is that the prosecution bears the legal burden of proving the accused person’s guilt. However, where the legal burden of proof is on the accused, the burden of proving an element must be discharged by the accused. The accused would have to prove their defense on a balance of probabilities. Should the defense merely raise a reasonable doubt as to the accused person’s guilt, but fail to convince the court on a balance of probabilities that the presumed fact was untrue; the accused would be found guilty. According to this view, where there is a legal burden of proof on the accused, the accused person’s failure to provide rebutting evidence would automatically result in their conviction.

Courts have generally moved towards an evidentiary burden of proof on the accused once the prosecution has established its case. In **India**, for instance, courts have held that the justification should present a “satisfactory account” built on “cogent evidence.” A satisfactory account should not only be “plausible” but “convincing.”

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43 Emphasis added. Section 14(c) of the National Accountability Ordinance.

44 See e.g., Swamy v. the State; Saran v. State of M.P; Ramakrishnaiah v. State of A.P.

45 Ramakrishnaiah v. State of A.P.
this testimony is corroborated.\textsuperscript{46} There is a marked preference for documentary evidence of the legitimate source of wealth. A similar approach is seen in \textit{Egypt}, where the official is required to present documentation of legitimate sources of income. In this respect, it is worth noting that public servants are usually paid by bank transfer or check, are administratively attached to a Ministry that manages their career and can provide access to the required documentation necessary to verify their official income. Their tax documentation is also a relevant element and should be consistent with the public officials' wealth; therefore it may help them prove their legitimate sources of income.

In practice, at the time that an accused offers a reasonable explanation in court, he will also tend to provide his defense, which may, depending on the jurisdiction and the Court, also constitute a reasonable explanation. Defenses may also include among other things, a claim that the increased assets are on account of an inheritance; were gifts from relatives and close associates; that they received remittances from abroad from their close relatives; or that they were due to prize money won.

Some defenses are specific to certain countries and take advantage of the weaknesses in a country's financial and legal infrastructure. For example, because in \textit{Pakistan} taxes on agricultural proceeds are not always imposed or enforced, agricultural proceeds tend to be proffered as a defense because it is harder to challenge. Similarly, the winning of prize money on prize bonds is frequently accepted in Pakistan, even though there is often a strong possibility that the accused may have purchased the prize bonds from another person. At the end of the day, the accused person's arguments credibility will be assessed by the judges, as in any penal trial.

\textbf{2.3 Observations}

While there are common elements to the different illicit enrichment provisions, States considering enacting similar legislation will not be well served by adopting "model" legislation or drawing uncritically on the definitions applied in other jurisdictions. Overall, lessons learned from States implementing illicit enrichment provisions demonstrate that an appropriate formulation of the elements will ultimately depend on the legal and procedural systems available in each country and should be determined through the legislative and judicial process.

This process will need to consider illicit enrichment in the broader context of the criminalization of corruption, the oversight regime for public officials, the specific objectives to be achieved with the illicit enrichment offense, and the nature of guidance that can

\textsuperscript{46} Comp. Sajjan Singh \textit{v. the state of Punjab}, 1964 AIR 464; 1964 SCR (4) 630 & Dhanalakshmi \textit{v. State, with Chennai \textit{v. K. Inbasagaran}}. However, in Saran \textit{v. State of M.P.}, the Court held that testimony from multiple persons was sufficient to overcome the prosecution's alleged percentage of income devoted to household expenditures, which was not supported by evidence.
be remitted to supporting regulations and administrative instructions. Therefore, in deciding the ingredients of the illicit enrichment offense in each jurisdiction the language of the relevant statutory provision is crucial. As a general rule, it is helpful for the legislation to be as specific as possible in defining the elements of the case, so as to clarify the objectives of the legislators and the respective roles of the court, prosecution and defense when dealing with an illicit enrichment offense. Accordingly, those jurisdictions that consider the reasonable explanation a defense, may wish to specify this in the provision if it is thought that it would be helpful.
3. Human Rights and Constitutional Aspects

Human rights and constitutional arguments often arise in discussions surrounding illicit enrichment. It should be borne in mind that while human rights are universal and apply to all human beings, constitutional rights are specific to particular jurisdictions.

Under international human rights law, States have the duty to respect, protect, and fulfill their human rights obligations. This also applies to all substantive aspects of an offense, including illicit enrichment. Accordingly, it has been recognized that “effective anti-corruption measures and the protection of human rights are mutually reinforcing and that the promotion and protection of human rights is essential to the fulfillment of all aspects of an anti-corruption strategy.”

A human rights based approach to illicit enrichment requires that all measures addressing this issue are in conformity with the State’s international human rights obligations mentioned above. Of particular relevance is Article 249 of the International Covenant on Civil and Political Rights (ICCPR, 1966) with respect to legislative, administrative, and judicial measures, which implies institutional developments related to investigations, prosecutions and adjudication of corruption related offenses such as illicit enrichment.

47 See http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx.


49 Article 2 of ICCPR: “1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.
Human rights aspects of illicit enrichment legal frameworks should also take a holistic approach including a consideration of the criminal justice system of each jurisdiction.

It is due in large part to constitutional and human rights concerns that the concept of illicit enrichment has not been adopted as an universal standard. Arguments in this context have turned on whether illicit enrichment entails an impermissible shift or partial reversal of the burden of proof, or whether illicit enrichment entails a presumption similar to those recognized in numerous other offenses.

In view of the foregoing concerns, some States parties to the UNCAC, IACAC, and AUCPCC choose not to criminalize the offense in their jurisdictions under the safeguard clauses of these instruments that allow States Parties subject to the constitutions, laws and the fundamental principles of their systems to determine whether or not to implement parts of international conventions. In some countries where the enactment of illicit enrichment has been considered, but not yet implemented, such as Portugal, debates have focused on constitutional and human rights issues. Critics have sometimes gone so far as to argue that the offense of illicit enrichment is so flawed that it is “a remedy that is worse than the ailment” and that the criminalization of illicit enrichment should be discouraged in weak governance environments.50

Rule of law is integral to and indispensable for democracy, good governance, citizens’ security, development, and human rights. A lower level of rule of law suggests that there is a lower probability of a corrupt public agent being caught. Unfortunately, jurisdictions with a pressing need to stamp out corruption are often also those with a pressing need to strengthen their rule of law. Some commentators critical of illicit enrichment also note that prosecutorial discretion, where it is open to abuse, can add to the concerns related to human rights and reversal of the burden of the proof. In this respect, a broader understanding of the criminal justice system, its independence from political pressure, and its institutional and technical capacity, become important features when considering whether and how to enact illicit enrichment statutes.

Apart from rule of law considerations, a close examination of countries in the present study revealed that many developing countries where corruption is perceived as pervasive have been willing to implement the illicit enrichment offense in order to tackle the phenomenon with the entire range of tools available. This is also supported

50 Thomas R. Snider† & Won Kidane (2007) Cornell International Law Journal 40 (691) See page 728. “[I]t is] highly doubtful that compromising the fundamental principle of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, as the AU Corruption Convention suggests, the crime of corruption is directly linked with the rule of law and good governance. In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples’ Rights. The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment.”
by data on the Rule of Law Ranking in the Worldwide Governance Indicators of 2009 of these jurisdictions prepared by the World Bank Institute. A list of jurisdictions with illicit enrichment provisions and their rule of law, control of corruption and GDP per capita rankings. The situation in Hong Kong further illustrates this point: the illicit enrichment provision was introduced in the Hong Kong legal system when corruption was widespread in the public sector, including in the police. Now that the perception of corruption has reduced, it is not used as much. In the final analysis, so long as measures are taken within the context of Article 2 of the ICCPR to ensure the observance of the rule of law in these circumstances, illicit enrichment provisions can still be properly applied.

In many of those countries that have dealt with illicit enrichment, convictions have been challenged on constitutional and human rights grounds. In some countries, these challenges have been successful and illicit enrichment has been held to be unconstitutional. In 1994, Italy’s Constitutional Court overturned illicit enrichment provisions of Law No 356 of 1992 on grounds that a presumption based on the status of the accused violated the presumption of innocence. In 2004, the Egyptian Cassation Court addressed the question of whether the illicit wealth offense is compatible with legal principles and held that the second paragraph of article 2 of the illicit enrichment law which provides that whenever such increase is not consistent with their resources and the public official fails to prove the legitimate source for it—violated the constitution regarding the genesis and presumption of innocence.

In Romania until 2010 the National Integrity Agency (ANI) could directly request a court to confiscate unexplained assets if, following its verification procedures, it found that there was an obvious difference (defined as more than 10,000 EUR) that could not be justified between the wealth acquired while in office and income realized during the same period of time. In April 2010, the Constitutional Court of Romania found several elements of that illicit enrichment law unconstitutional. The Court found that the power of ANI to ask courts to confirm and confiscate significant unjustified differences between the income and acquired assets of public officials breached the constitutional

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51 Cf annex 3: Jurisdictions with illicit enrichment provisions vs Rule of Law, control of corruption and GDP per capita rankings.


53 The law has been amended since and illicit enrichment, as an offense, is still used nowadays, for instance to prosecute top level public officials.

54 Between May 2009 and May 2010 ANI sent six files to court (for confiscation of unjustified wealth). As of May 2010, two findings of unjustified wealth had been confirmed by the Courts in first instance decisions and the confiscation of significant assets ordered, though both decisions were appealed. In the first case the court ordered the confiscation of 458,805EUR, 1580USD and 29,345RON. In the second case the court ordered the confiscation of 9,750 EUR and 913,591 RON (European Commission, Supporting Document Accompanying the Report from the Commission to the European Parliament and the Council, On Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 20.07.2010).
presumption, and prohibition on confiscating, legally acquired property, as well as the presumption of innocence.\textsuperscript{55}

However, Romania has addressed the constitutional issues and enacted a similar provision as a confiscation measure that is no longer a criminal offense.\textsuperscript{56} ANI still evaluates if there is a significant difference of over 10,000 EUR between the wealth and income of a public official accumulated while in office. If the agency finds such a difference it sends a report to different offices depending on the case: to the tax authorities; prosecutor’s office; or the commission for the examination of wealth.\textsuperscript{57} The commission for the examination of wealth starts the control activities as soon as it receives the evaluation report from ANI. At the end of the control procedure the commission can decide with a majority of votes to send the case to an appeal court if it is concluded that the assets or part of them have an unjustified or illicit character. If the appeal court finds that the acquisition of some assets cannot be justified it decides on confiscation of these assets or payment equal to their value.

Specific arguments that illicit enrichment prosecutions violate human rights principles have included: the presumption of innocence, the right against self-incrimination, and the principle of legality.

3.1 The Main Principles at Stake

3.1.1 Presumption of Innocence

The presumption of innocence is a fundamental right in human rights law, protected by all the major international and regional instruments of human rights and fundamental freedoms. Article 11(1) of the Universal Declaration of Human Rights safeguards the presumption of innocence for everyone “charged with a penal offense [...] until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.” Similar principles are laid out in Article 7(1)(b) of the African Charter on Human and Peoples’ Rights, Article 8(2) of the American Convention on Human Rights, and Article 6(2) of the European Convention on Human Rights.

\textsuperscript{55} The objection of constitutionality was raised in one of the agency’s first major confiscation trials, a 3.5 million euro confiscation case concerning a former Member of Parliament. (For more on the Decision of the Constitutional Court see European Commission, Supporting Document Accompanying the Report from the Commission to the European Parliament and the Council, On Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 20.07.2010).

\textsuperscript{56} See Law No. 176 of September 2010, which was adopted in response to the decision of the Romanian Constitutional Court.

\textsuperscript{57} Pursuant to amended Law 115of 1996 the commissions for the examination of wealth are established under the framework of appellate courts. Each commission includes two appellate court judges and one prosecutor. The Superior Council of Magistracy informed ANI in October 2010 that the procedure for appointing the members of these commissions has started.
The presumption of innocence requires the State to prove the guilt of an accused and relieves the accused of any burden to prove his or her innocence. In the view of the United Nations Human Rights Committee, the presumption of innocence entails that "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt [or intimate conviction]."\(^{58}\)

In Argentina, illicit enrichment was challenged in the *Alsogaray* case on grounds that it violates the presumption of innocence.\(^{59}\) In this case, the court held that the crime of illicit enrichment does not require the public official to prove his innocence. Instead, it is the public prosecutor who brings evidence of the unjustified increase in the assets of the public official with the highest specificity and accuracy as possible. It went on to explain that the justification mentioned in the illicit enrichment provision does not violate the privilege against self incrimination as it can only be understood as a notice to the accused to take the formal opportunity to demonstrate the legality of his or her enrichment given the presumption against him.\(^{60}\) It should be noted however, that the Supreme Court in Argentina has not yet pronounced on the constitutionality of the concept of illicit enrichment.

The principle of the presumption of innocence does not exclude legislatures from creating criminal offenses containing a presumption by law as long as the principles of rationality (reasonableness) and proportionality are duly respected.

These principles have been applied to qualify the presumption of innocence with an important precedent set by the European Court of Human Rights in *Salabiaku v. France*.\(^{61}\) Salabiaku was a Zairian national convicted of violating French customs law by receiving a package containing 10kg of cannabis. In its decision, the Court outlined their approach to the permissibility of burden shifting provisions, an approach that can be referred to as the *Salabiaku* Test. The *Salabiaku* Test is based on the recognition that “[p]resumptions of fact or of law operate in every legal system,” but States must confine presumptions

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58 General Comment No. 13 (Article 14), in UN Compilation of General Comments, p. 124, para. 7.


60 *Maria J. Alsogaray, Cámara Nacional de Casación Penal (National Chamber of Criminal Appeals)*, 9 June 2005. The Spanish original reads in part, "El debido requerimiento que menciona la norma debe consistir en un acto de autoridad pública por el cual se le haga saber al funcionario la constatación del enriquecimiento apreciable e injustificado observado, con la mayor especificidad y precisión posibles respeto a todas sus circunstancias. Tal requerimiento tiene por objeto que el requerido pueda brindar las razones o argumentos de que la procedencia obedece a un origen legítimo […] El delito de enriquecimiento ilícito no pone en cabeza del requerido el deber de demostrar su inocencia, sino que al Ministerio Público Fiscal al que le corresponde la prueba del aumento patrimonial injustificado. El requerimiento de justificación del art. 268 (2) CP no viola la prohibición de autoincriminación en tanto aquél sólo puede ser entendido como una notificación para que el acusado pueda hacer uso de la oportunidad formal de probar la licitud de su enriquecimiento."

“within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” Therefore, the Court balanced the State’s interest in the prosecution with maintaining the rights of the accused by keeping presumptions within reasonable limits. In applying the \textit{Salabiaku} test to illicit enrichment, the question becomes whether the public interest in convicting corrupt officials outweighs the infringement on the rights of the accused. In the \textbf{United Kingdom}, the Royal Commission into Standards of Conduct of 1976 argued that “such a burden can only be justified for compelling reasons, but we think that in the sphere of corruption the reasons are indeed compelling ... [t]he burden of proof on the defense is in the public interest and causes no injustice.” The \textbf{Hong Kong} Court of Appeals came to similar conclusions in \textit{Attorney General v. Hui Kin Hong}. While it accepted that requiring the accused to discharge the burden of proof deviates from the presumption of innocence, it held that “there are exceptional situations in which it is possible compatibly with human rights to justify a degree of deviation from the normal principle that the prosecution must prove the accused’s guilt beyond reasonable doubt.”

The effectiveness and correctness of illicit enrichment prosecutions and their compliance with due process should also be considered in the context of the criminal justice system implementing it. This includes considerations consistent with Article 2 of the ICCPR mentioned above, and with Article 14 concerning the right to fair trial. It is only when these measures are fully implemented that an accused can begin to experience a fair trial for illicit enrichment or any other offense.

\textbf{3.1.2 Protection against Self-Incrimination}

Protection against self-incrimination is recognized in Article 8 (2) (g) of the American Convention on Human Rights, which establishes the right of the accused in a criminal case “not to be compelled to be a witness against himself or to plead guilty.” From this right, an accused has a further right to remain silent. Although this right is not

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64 \textit{Attorney General v. Hui Kin Hong}. Court of Appeal No.52 of 1995.

65 \textit{See also: Eur. Court HR, Case of John Murray v. the United Kingdom}, judgment of 8 February 1996, Reports 1996-I, p. 49, para. 45. The right not to be compelled to incriminate oneself and to confess guilt is also contained in article 55(1)(a) of the Law of the International Criminal Court and in articles 20(4)(g) and 21(4)(g) of the respective Laws of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

66 The Law of the International Criminal Court: It is noted in this respect that article 55(2)(b) of the Law of the International Criminal Court provides that a suspect shall be informed prior to questioning that he has a right to “remain silent, without such silence being a consideration in the determination of guilt or conscience.”
specifically mentioned in the European Convention on Human Rights and the African Charter on Human and Peoples’ Rights, the European Court of Human Rights has unequivocally held that “there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure. According to these principles, “[a] suspect must at no time, and in no circumstances, be compelled to incriminate himself or herself or to confess guilt; a suspect has the right to remain silent at all times.”

The explanation provided by the defense in an illicit enrichment case does expose the accused to the risk of self-incrimination. Evidence of income from inheritances, businesses, gambling or gifts may be exculpatory for the purposes of illicit enrichment, but it may still expose the public official to criminal, administrative, or fiscal sanctions for other offenses: where, for instance, income and assets have not been recorded in disclosures, the official has engaged in activities or employment that are incompatible with his public functions, or income has not been declared to the tax authorities (see Box 3). In these circumstances accused persons may be reluctant to establish an appropriate defense or may incriminate themselves by doing so.

However, there is precedent holding that the right against self-incrimination is not absolute. In O’Hallaran and Francis v. the United Kingdom, the accused persons were held liable for refusing to provide records indicating who had been driving a taxi at the time of a criminal violation. The European Court of Human Rights held that, “[a]ll who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like, for example, shotguns...) are recognized to have the potential to cause grave injury.”

Other examples of compulsory self-incrimination include the requirement to submit to a breathalyzer and the mandatory installation of tachographs in trucks.

This reasoning can be extended to public servants, who are subject to a specific regulatory regime. In assuming a position of trust, public officials subject themselves to the legal requirements and the administrative and criminal sanctions that arise from the abuse of that trust. Besides, where countries have an established income and asset disclosure regime, they have also established the principle that public officials may provide personal information that may be self-incriminating. In this context, providing


68 Applications nos. 15809/02 and 25624/02 (2007).

69 O’Hallaran and Francis, 57.

70 Ibid. 31.

evidence regarding the sources of income and assets to the court does not appear as a significant additional burden.

Furthermore, courts have also accepted that they may draw adverse inferences where the accused have chosen to remain silent. In Murray v. United Kingdom, the European Court of Human Rights accepted that the court could draw adverse inferences from the accused's silence when the factual circumstances allowed doing so. This approach further demonstrates that the protection against self-incrimination is not absolute.

### 3.1.3 The Principle of Legality

The principle of legality requires that an act be illegal in the criminal law of a particular jurisdiction before it can be punished. It is included in Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law). Some opponents of illicit enrichment argue that it violates the principle of legality as it does not clearly define a prohibited conduct that constitutes the basis of the offense.

On this basis, in a case in Argentina, the appellant raised the argument that the illicit enrichment provision was susceptible to different interpretations and as such, affects the principle of legality. The Supreme Court of Justice dismissed these arguments, taking the view that the crime of illicit enrichment is a crime of commission as it consists of a significant and unjustified enrichment after taking public office. It also held that the continuous involvement of the accused in the case had not prevented her from knowing the act she was alleged to have committed.

### 3.2 Legal Presumptions Contained in Offenses other than Illicit Enrichment

A number of related presumptions exist in offenses that are applied in various jurisdictions for the purpose of prosecuting and recovering the proceeds of crime. Though similar to illicit enrichment, these offenses are not illicit enrichment and extend to other serious offenses beyond corruption. These related presumptions have mainly been applied in the recovery of the proceeds of organized crime as well as in civil proceedings. They are sometimes targeted towards depriving offenders of their ill-gotten gains, without contributing to a finding of an accused's guilt. They often do not require a link between the assets and a crime for which one was actually convicted. Presumptions

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73 See also Under Article 9(1) of the ICCPR, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”
74 Maria J. Alsogaray, Cámara Nacional de Casación Penal (National Chamber of Criminal Appeals), 9 June 2005. This view was upheld on appeal by the Courte Suprema de Justicia de la Nación (Supreme Court of Justice), 22 December 2008.
75 Maria J. Alsogaray, Courte Suprema de Justicia de la Nación (Supreme Court of Justice), 22 December 2008.
have also been used in a wider context with regard to those that occupy positions of trust. In the United States, for instance, there is a presumption of fraud or undue influence where a guardian or the holder of a power of attorney uses the other person's assets to his or her own benefit.

The United Nations Convention on Trans-national Organized Crime proposes as a means of strengthening the confiscation regimes, that States Parties “may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.”76 This is consistent with the approach of some jurisdictions which are viewed as providing for a discretionary power to reverse the burden of proof, as the offenders have to demonstrate the legal source of the property.

Italy's Legislative Decree 306 of 8 June 1992, aimed at tackling drug trafficking and organized crime, provides that any money, goods or profit whose source or origin cannot be justified and which belongs to someone found guilty of Mafia related crimes can be seized when it can be shown to be the person's property, either directly or through a third person be this an individual or a corporate body, which he has free use of and where the property is disproportionate in value to his own income. It is widely considered to place the burden of proof on the accused if the prosecution establishes that an accused person's assets are not commensurate with his legitimate sources of income and allows for the forfeiture of all the accused person's property.77

In France, the version of Art. 321(6) of the Penal Code adopted in 2006 covers organized crime and other offenses. It can be used in corruption cases as the predicate offenses of generating illicit gains cover a wide range of offenses. These include active and passive corruption, conflict of interest, and misuse of company assets, which are the main offenses used in France to prosecute acts of corruption. The article provides that “the failure to justify resources corresponding to one's lifestyle or to justify the origin of assets owned while in habitual relationship with one or more persons engaged in the commission of offenses punishable by at least five years of imprisonment and providing them a direct or indirect benefit, or while in habitual relationship with victims of these offenses, is punishable by three years of imprisonment and EUR 75,000 fine.” Thus, this article does not intend to sentence the corrupt official himself, but rather his/her associates, family members, or more generally, those persons in habitual relationship with the official. However, similarities exist with the illicit enrichment offense. The onus of proof is on a particular person only because of his/her classification as associate, family

76 Article 12(7), Confiscation and seizure 7.
77 Section 12-sexies (1) and (2) of Law Decree n. 306 of 8 June 1992, supplemented by section 2 of Law Decree n. 399 of 20 June 1994, enacted as Law n. 501 of 8 August 1994.
member, or close relation. It is similar to the burden of proof required of a public official suspected of illicit enrichment due to his status.

The Council of Europe issued Framework Decision 2005/212/HA on Confiscation of Crime-Related Proceeds, Instrumentalities and Properties which aims “to ensure that all Member States have effective rules governing the confiscation of proceeds from crime, inter alia, in relation to the onus of proof regarding the source of assets held by a person convicted of an offense related to organized crime.” Member States are encouraged to enable confiscation “where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.”

Examples of the enabling legislation that shift the burden of proof to the accused if the prosecution establishes a significant increase in the assets of a public official that have not been accounted for include Germany’s Criminal Code, section 73d. The disposition requires forfeiture of assets “where there are grounds to believe that the objects were used for or obtained through unlawful acts.” The Federal Supreme Court has argued that this does not reduce the burden of proof but absolves the prosecution from establishing “the specific details” of the offense.

Similarly, the Netherlands’ Criminal Code, article 36, allows confiscation of the proceeds of the crime for which the offender has been convicted as well as the confiscation of assets “which are probably derived from other criminal activities.” The Supreme Court has argued that this is consistent with the presumption of innocence because “once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption. Once the criminal origin of the proceeds has been made probable, the burden to rebut—not simply to deny—this presumption lies with the defense.”

In Switzerland, if it is established that an individual supports or is part of a criminal organization, the Court is obligated to order confiscation of all the assets owned by that individual. Criminal Code, Article 59(3), creates a presumption that a criminal organization controls the assets of all its members. It is then up to the individual to rebut the presumption by demonstrating the legal origin of the assets. The Supreme Court upheld the position that this respected the presumption of innocence because the accused can rebut it by demonstrating that they are not under the organization’s control or that the assets have legal origin.78

In Thailand, the concept of “unusual wealth” under Section 75 of the National Counter Corruption Commission Act, allows the institution of a case against an individual

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holding a political position or any State official who has become unusually wealthy. Where a request is made that the property be ordered to devolve upon the State, onus of proof to the Court that the said property does not result from the unusual wealth is upon the alleged culprit. The Thai Supreme Court has held that unusual wealth is an independent civil proceeding.

In Australia, the notion of unexplained wealth was first introduced by States of Western Australia and the Northern Territory in their Proceeds of Crime Legislation, but was absent of the Federal Legislation known as POCA (Proceeds of Crime Act). The POCA was enacted in 2002, and its implementation reviewed periodically. In the 2006 review, the author concludes that “however to introduce these provisions would represent a significant step beyond the national and international consensus in this area. The Australian Federal Police Association submission refers to a 1997 resolution of the International Criminal Police Organization (INTERPOL) General Assembly which “recognized that unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country’s domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect of unexplained wealth.” An amendment to the POCA in 2010 finally introduced the unexplained wealth as an offense at the Federal level. It is therefore interesting to observe the change in the Australian attitude toward unexplained wealth offense, in just four years.

In addition to conviction based forfeiture, innovative systems are being developed to facilitate further forfeiture. Recently, Switzerland has approved legislation that provides for the use of administrative forfeiture to recover the proceeds of illicit enrichment held by foreign politically exposed persons in their jurisdiction (see Box 5).

3.3 Protection of the Rights of the Accused in Illicit Enrichment Proceedings

In certain cases, although the elements of illicit enrichment are met, conviction may be set aside on account of a procedural irregularity in order to protect the rights of the accused. One of the major arguments against criminalizing illicit enrichment is that it is a crime that easily lends itself to abuse, through complainants who make allegations for political gain. Therefore, courts have established certain exceptions as safeguards for the trial process.

In this respect, Courts will accept a plea of mala fides, according to which a challenge of bad faith is lodged before the courts. In the case of Badal v. State of Punjab79 the Indian Appellate Court stressed however, that mere allegation and suspicions are not sufficient, but should be supported by cogent evidence. It added that simply because the

79 Parkash Singh Badal And Anr vs State Of Punjab And Ors, 6 December, 2006.
complainant was also a political opponent does not per se lead to an inference that the complaint has to be thrown out or that no notice should be taken thereof.

Prejudice to an accused to such a degree that it occasions a miscarriage of justice is another basis on which Courts have vitiated illicit enrichment proceedings. In one case the Court held that there had been a miscarriage of justice where the prosecution had withheld documents, failed to conduct a thorough investigation, and failed to file the proper order authorizing the investigation. Furthermore, none of these shortcomings were adequately explained at trial.80


BOX 5 Administrative Forfeiture in Switzerland

On October 1, 2010, the Swiss Parliament passed the Return of Illicit Assets Act, which seeks to facilitate the recovery of the proceeds of corruption in situations where the state of origin of the assets is unable to conduct a criminal procedure that meets the requirements of Swiss law on international mutual assistance. This provides for the freezing, forfeiture, and restitution of assets held by foreign politically exposed persons and their associates in Switzerland on the basis of decisions by the Federal Administrative Court. Following Article 6, the court may presume the unlawful origin of these assets where: “the wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person; and the level of corruption in the country of origin or surrounding the politically exposed person in question during their term of office is or was acknowledged as high.” The court may reject the presumption, “if it can be demonstrated that in all probability the assets were acquired by lawful means.” Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court.

Justification for this law which is also considered by many to entail a partial reversal of the burden of proof is found in the presumption of ownership on the grounds of possession, which is laid down in Art. 930 of the Swiss Civil Code. The Supreme Court has claimed that this presumption of ownership cannot be claimed if possession is “ambiguous,” where the circumstances of acquisition or the exercise of authority over the property are unclear, or if there are doubts about the legal validity of the identity documents used to gain possession. In such cases, the possessor must prove that they have acquired the thing in a lawful manner.

In certain cases as in India, prior sanction is required to begin investigations. The case can be prosecuted only if the accused/public servant has been previously sanctioned by his administrative authority. This is meant as a filter to ensure that only those cases warranting investigations are pursued. On the other hand, as reported by India for the purpose of this study, this filter sometimes prevents prosecution against high level officials, who are likely to benefit from protection and leniency from their own administration, especially in public sectors where corruption is widespread.

3.4 Observations

Few would contest the assertion that it would be counterproductive to put in place a criminal offense intended to reinforce the rule of law that undermines the very principles on which that law is built. While some commentators have argued that illicit enrichment raises concerns regarding fundamental principles of law and human rights, notably regarding the burden of proof, the presumption of innocence, and the privilege against self-incrimination, experience and jurisprudence have also shown that not all rights are absolute. These fundamental principles are often qualified in the application of the law to serve the public interest and the interest of justice. As a result, the criminalization of illicit enrichment squarely can be seen as an example of the tension between public interest in eradicating corruption and the rights of the individual—which each jurisdiction will have its own way to address.

The claim that the use of a rebuttable presumption of illicit enrichment shifts the burden of proof to the accused is most often a more narrow reading of the elements of the offense of illicit enrichment. Besides, the European Court of Human Rights has accepted in principle (though not in jurisprudence related to illicit enrichment per se) that it may be appropriate to use rebuttable presumptions that shift some of the evidentiary burden of proof to the accused where the legislature has decided that this would be in the public interest, as determined by the court taking into account the facts of the case and done within reasonable limits that respect the rights of the defense. Similarly, the same court has accepted that those accused may be required to provide evidence overriding their right against self-incrimination where this is in the public interest.

In sum, the lessons learned from the above-mentioned jurisprudence show that what should be considered in terms of human rights protection when addressing any shift in the burden of proof in an illicit enrichment offense are the rationality of the offense and the proportionality of the sanction. These are the principles that have been taken into account by the Courts when the offense was challenged. Domestic Courts and the European Court of Human Rights both recognized that any breaches in human rights principles such as presumption of innocence and protection against self-incrimination can be acceptable if rationality and proportionality criteria are met.

While rigorous adherence to the law and legal procedure are essential for the defense of the Constitution, the rule of law, and human rights, these objectives cannot be ensured
through legislation alone: effective, transparent, and independent institutions for the administration of justice are equally important. States have also recognized that transparent, responsible, accountable, and participatory government, which is responsive to the needs and aspirations of the people, is the foundation on which good governance rests. They have further noted that such a foundation is an indispensable condition for the full realization of human rights, including the right to development.81

Lessons learned by States prosecuting illicit enrichment in this respect are that with proper legal and institutional safeguards in place, illicit enrichment provisions can be an effective tool that is used fairly. The challenge for national authorities is to develop the institutional capacity to assert independence and to be vigilant against potential abuse. In many developing countries, this may require investments in building the capacity of prosecutors, the judiciary, and law enforcement while ensuring their independence and impartiality.

81 HRC resolution 7/11 of 27 March 2008.
4. Operational Aspects

4.1 Triggering Investigations on Illicit Enrichment

Countries criminalizing illicit enrichment should give some consideration to the sources of potential cases and the sources of information for investigations. Four broad categories of sources are presented in detail in this chapter: income and asset disclosures by public officials; lifestyle checks and complaints; suspicious transaction reports from the financial sector and related businesses; and leads in other investigations. They can generate leads for investigation and can be helpful sources of information during the course of investigations.

4.1.1 Income and Assets Disclosures

Income and asset disclosures (IAD) identify a public official’s principal assets and liabilities. In some countries, where public officials are required to disclose the value of assets and liabilities, disclosures present the official’s net worth at the time of filing. Many countries extend disclosure requirements to spouses and immediate family members and, in many systems, officials are expected to disclose at least twice during their time in office. If verified, discrepancies between an official’s disclosed wealth and the wealth identified through the control of the disclosure may be sufficient basis for further investigation for illicit enrichment.

Respondents to questionnaires and in the course of case studies stressed that public officials’ income and asset disclosures are one of the most important tools available to investigators and prosecutors in illicit enrichment cases. It is worth noting that in some countries, the legal provisions for illicit enrichment are embedded in the IAD legislation.

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82 An upcoming study by the StAR Initiative will examine Income and Asset Disclosures in detail.

83 For instance, in Honduras, the Superior Court of Accounts, an independent government institution, has a duty to investigate, corroborate, and determine the existence of unlawful enrichment. And in Jamaica: the Corruption Prevention Act criminalizes passive and active corruption by public servants, embezzlement, and illicit enrichment. The CPA also requires public servants, including police officers, customs officers, revenue officials, and procurement officers, to submit a declaration of assets and liabilities.
For the purpose of prosecuting illicit enrichment, income and asset disclosures can be used at two different levels: (i) to identify illicit enrichment cases and (ii) to generate evidence of illicit enrichment.

The role of IAD systems in initiating and supporting investigations on illicit enrichment is confirmed by the fact that 34 of the 43 jurisdictions (approximately 77 percent) that have criminalized illicit enrichment under this study have some form of asset disclosure regime.

However, IAD disclosures can only be used to initiate an investigation if the disclosure has been filed. Compliance tends to be patchy where there are no criminal or administrative sanctions for public officials’ failure to file disclosure forms, as reported by Paraguay for instance.

Public officials should be required to provide complete and accurate information. Verification of disclosures at the time of filing may provide some assurance that public officials are meeting this requirement. However, verification systems are likely to be selective given the numbers of public officials subject to IAD disclosure requirements in most jurisdictions. Public officials will have an incentive to provide complete and accurate information where there are administrative or criminal sanctions for failure to disclose, incomplete filing, and the filing of false information. In countries where there are sanctions for submitting false information, the public official’s failure to do so can be used as evidence at trial and the incomplete or inaccurate disclosures can be used as evidence in court.

The agency responsible for managing the IAD system should be empowered to conduct preliminary verification. If disclosures are not reviewed they will not serve as a source of potential cases. In some countries, Jordan for instance, the responsible agency cannot initiate an investigation until a complaint is filed against a specific public official. That said, a cursory verification of large numbers of disclosures is unlikely to generate useful leads. A more targeted, risk based approach is likely to be needed, concentrating attention on a few high-risk red flags.

Prosecutors and investigators should have access to IAD disclosures at the early stages of their investigations. In some countries, Argentina for instance, financial information is presented in annexes, but asset declarations are deemed public records. Parties interested in viewing or obtaining a copy of the declaration may submit a written request before the anti-corruption office for access to some information, depending on the sensitivity. This information however remains fully accessible by judicial authorities, the National Commission of Public Ethics, or the Fiscal de Control Administrativo (in the latter case, only upon decision by the Ministry of Justice and Human Rights with notice given to the investigated individual). In terms of initiating investigations, Argentine law authorizes the commencement of an investigation by the National Commission of Public Ethics (and by extension the anti-corruption office) for both illicit enrichment
and violations of the asset disclosure and conflict of interest regime. It is worth noting however that less than four percent of illicit enrichment cases in Argentina are initiated through the analysis of income and asset disclosure forms.84

In Honduras, the Superior Court of Accounts (Tribunal Supremo de Cuentas) is given complete access to financial statements and bank accounts of civil servants and their relatives during its investigations of illicit enrichment.

4.1.2 Lifestyle Checks and Complaints

Lifestyle checks may be understood as inquiries into whether the lifestyle of a public official is manifestly out of proportion to his/her known income. They are undertaken by examining the assets, activities, and expenditures of a public official. These may include a valuation of immovable property and vehicles, verification of income, stocks, nature of schools attended by children, loan and tax payments, travel, extravagant parties, and other expenditures. Lifestyle checks may also include reputational and family background checks which are useful as a starting point and subject to corroboration. To avoid abuse, standard operation procedures may be developed on how to run lifestyle checks.

Prior to investigations, a useful source of lifestyle checks, and an aid to detecting illicit enrichment are complaints or allegations from members of the civil society, NGOs specializing in anti-corruption, media coverage, and whistleblowers. UNCAC under Article 33 directs States Parties to consider “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this Convention.” The intention is to create an environment in which individuals can provide information that generates or supports investigations.

Most countries have complaint mechanisms in place. However, few have mechanisms in place to protect the anonymity of a whistle-blower and protection in case their identity is revealed. In some countries, generally no action is taken on anonymous and pseudonymous complaints unless they contain specific allegations and disclose some vital information which can help in the investigation of the act in question. An environment conducive to NGO and media participation also includes one that allows free participation of the press and flow of information.

Some countries have adopted a cautious approach seeking to protect officials from potentially frivolous accusations. The latter are discouraged in some systems by means of the threat of sanctions. In Romania, untrue statements or “deceitful evidence” in complaints are subject to sanctions. Some countries require a financial surety to lodge a complaint.

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84 According to research during the course of the study, the majority of illicit enrichment cases in Argentina are initiated through a combination of leads in other cases, media coverage, internal audits, and complaints lodged by whistleblowers and NGOs.
This approach may protect the privacy of public officials but it may also discourage many legitimate complaints that could serve as the basis for successful prosecutions. Lebanon is currently reviewing the requirement for individuals filing a complaint to deposit a substantial bank guarantee (eq. US$18,000) for precisely these reasons. While these are issues that are more appropriately left to whistle-blower protection laws, and will not be dealt with in greater detail in the present study, they should be considered in implementing illicit enrichment laws as they may have an impact on the detection of illicit enrichment.

4.1.3 Suspicious Transaction Reports

First, it is important to note that although illicit enrichment is not explicitly considered a predicate offense for money-laundering by FATF, it constitutes a non-mandatory corruption offense under the UNCAC. As corruption is one of the predicate offenses of an effective anti-money laundering (AML) regime, it may be argued on this basis that illicit enrichment is implicitly a predicate offense. The AML tools aim at preventing and detecting the proceeds of crime.

Although it is not in every case that illicit enrichment may be detected through banking assets, the financial sector can play an important role in detecting cases of illicit enrichment since financial institutions and a list of designated non-financial businesses and professions (DNFBPs) are required by FATF standards to implement “customer due diligence” as a basic anti-money laundering requirement.

Where the activity of the customer account differs from the expected, the financial institutions are required to file a suspicious transaction report (STR) with the country’s Financial Intelligence Unit (FIU) in respect of predicate offenses recognized by that jurisdiction. The FIU will analyze the STR and may refer the case to the Prosecutor or law enforcement agencies if sufficient grounds for prosecuting money-laundering or related offenses are demonstrated. In cases where the information before a Prosecutor fails to establish all the elements of a corruption or economic crime, it may be useful for the purposes of an illicit enrichment prosecution. Suspicious transactions reports may also be helpful in supporting investigations involving financial transactions held by Politically Exposed Persons (PEPs), or individuals who are or have been entrusted with prominent public functions in a foreign country, as defined by the FATF.

4.1.4 Other Investigations

Frequently, during an inquiry or in the process of investigating other cases, investigators might come across information tending to suggest that illicit enrichment has taken place. While this is the case with most forms of financial investigation, this is particularly notable in the case of illicit enrichment which is in some countries prosecuted.

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85 Lebanon questionnaire.
86 FATF, the international standard-setter for AML policies.
87 It is expected that this FATF definition will be amended to include domestic PEPs.
where other crimes are not able to be prosecuted. For example, in Venezuela, the illicit enrichment provision states that the offense may be prosecuted “provided that it does not constitute another crime.” These investigations are also initiated by anti-corruption and other officers, and may also be based on information received through sources that do not want to come forward.

Box 6 shows the origins of illicit enrichment investigations in India.

4.2 Strengthening Investigations on Illicit Enrichment

4.2.1 Domestic Coordination

Broadly speaking, there are two models for the institutional arrangements for the identification, investigation and prosecution of illicit enrichment (and corruption offenses more generally). In the first, illicit enrichment is subject to the same criminal procedure as any other offense. There is an institutional separation between the investigation and prosecution functions. There may be some specialization in corruption

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88 See Venezuela, Anti-corruption Law, Art. 73. "Any public servant who in the performance of his duties obtains an increase in his net worth that is disproportionate in comparison to his income and that he cannot justify, upon being requested so to do and provided that it does not constitute another crime, shall be punished by a prison term of between three (3) and ten (10) years. The same penalty shall apply to third parties who intervene to cover up such unjustified increases in net worth."
among investigators and prosecutors but the institutional arrangements are basically the same as for any other crime, meaning that special arrangements are not put in place for illicit enrichment. This model is found in both civil and common law jurisdictions. In the second, anti-corruption legislation designates an ad-hoc institution or individual to carry out the investigative or prosecutorial mandate for illicit enrichment. This approach is found mainly in common law jurisdictions.89

Both models present the challenge of coordination as the investigation and prosecution of illicit enrichment require a large number of institutions to exchange information and coordinate beyond investigators and prosecutors. Indeed, successful prosecution of illicit enrichment may require coordination between institutions responsible for managing income and asset disclosures (sometimes placed in an anti-corruption agency), the financial intelligence unit, tax authorities, property and other registries, and the entity responsible for international cooperation.

4.2.2 Building a Financial Profile

Building a solid case demonstrating a disproportion in assets requires investigators to construct a financial profile of the public official from a starting point in time up to the point where the illicit enrichment is identified. The financial profile will demonstrate what the official owns, owes, earns from legitimate sources of income, and spends over a period of time. Forensic accountants have developed a number of techniques for constructing and presenting financial profiles, the net worth analysis90 being one of the most commonly used and long recognized by courts.91 Other techniques focus on elements of the financial profile: expenditures relative to known income or bank deposits to identify unknown sources of funds.

Selection of the appropriate starting point or baseline for the financial profile is critical. This starting point may be the official’s entry in office or employment. If the official has been employed for a long time, a more recent date may be chosen. In either case, the profile requires documentation and other evidence regarding the official’s assets and liabilities. Without a robust baseline it will be impossible to determine whether subsequent receipts and payments are legitimate or not. Caution should also be exercised to

89 The Malawi Anti Corruption Bureau is charged with the sole responsibility of investigating illicit enrichment which has to be carried out by “the Director, the Deputy Director or any officer of the Bureau authorized in writing by the Director.” Similarly, in India, illicit enrichment “shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police” (Prevention of Corruption Act of 1988, S. 17(c)).


91 The US Supreme Court recognized net worth analysis as a providing prima facie evidence of a crime in 1954 in Holland v. United States, 348 US 121, 75 S.St 127.
avoid unduly narrow investigations which might disregard key assets. Overly lengthy periods of check may similarly present challenges. For example, countries where stability of currency is a concern may face issues in assessing the value of properties acquired over a lengthy period.

As demonstrated by the approach in some States, it may be helpful for an illicit enrichment provision to extend for a reasonable period beyond a public official's term of office, so that any corrupt benefits received during this period can be included in the prosecution (See Chapter 2). Such a provision can be supplemented by administrative instructions that give guidance to the prosecution as to how to exercise their discretion in prosecuting illicit enrichment.

An income and asset declaration, a loan application, or tax information will usually provide basic information for a baseline financial profile. This information will have to be verified. Assets may include accounts in various banks, securities or options in public and private corporations, insurance policies and other financial instruments, movable property (boat, plane) and real estate, and high value items such as antiques, art, and jewelry. Assets have to be valued at the cost at the time they were acquired, disposal of assets at the sale price. Liabilities may include loans and mortgages, some of which may not be through formal financial institutions. The investigator will also have to identify all legitimate sources of income and track expenditures.

Because illicit enrichment criminalizes the significant increase in a public official's assets that cannot be explained in relation to his legitimate income, there is no need for the Prosecution to demonstrate or link the assets to any underlying criminal act. This is the major advantage of the criminalization of illicit enrichment from a prosecutorial perspective.

4.2.3 Tools and Skills to Facilitate Investigations

Most of these requirements are not specific to investigations related to illicit enrichment. They are obviously a prerequisite for any effective investigation on financial crimes. However, they are of a special interest when investigating and/or prosecuting illicit enrichment due to the complexity of the investigations. Showing an increase of assets during a period of time is not such an easy task and many challenges will occur during the course of the investigations.

In order to compile all relevant information, investigators will need to have access to a wide range of data sources and registries. These will particularly include public property and vehicle registries, bank account records, and records of other financial institutions. Additional information may have to be collected through interviews with third parties familiar with the official's financial affairs, including accountants and lawyers. Onsite inspections may be needed to identify assets that are not documented.

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92 See also section D.
Since it is rarely possible to track all income and expenditures, the investigator will have to make some assumptions and draw inferences. There are particular challenges in determining the amount of cash on hand—money not deposited with financial institutions—and expenditures. The amount of cash on hand may have to be inferred from other financial records and expenditures will often have to be estimated on the basis of assumptions regarding reasonable cost of living. Where businesses are involved, a forensic accountant may have to construct a profile and compare key characteristics of the business activities with comparable enterprises. The courts will subsequently have to determine whether these inferences and assumptions are convincing.

Beyond the financial profile and the evidence of disproportion between legitimate income and growth in net worth, expenditures or bank deposits, the prosecutor/investigative magistrate may be able to draw other inferences from the circumstances of the case. For instance, the prosecution may be able to point to the measures taken by the official to conceal the funds. The prosecution or magistrate may also be able to point to leads and theories regarding the corrupt conducts that generated the alleged illicit enrichment, even if these cannot be proven to the requisite standard.

It is also important to discreetly investigate and verify the suspect’s personal and familial particulars. It may be useful in this respect, to draw up a list of close family and associates in whose names key assets may be held, or who may be in a position to lend assistance in the concealment of assets.

Provisions will need to be put in place for the preservation of assets pending disposal of the illicit enrichment case. This may include powers to obtain orders at any time to freeze and seize property in possession of an accused, any relative, associate, or any person on his behalf. Another alternative is to statutorily prohibit the transfer of property subject to prosecution once an investigation has been initiated, as in Pakistan.93

In order to strengthen the efficiency and effectiveness of investigations, the investigating team may include the use of services of document experts and notaries to prove forgeries or the anti dating of documentation false inheritance. Cyber forensics experts may

93 Section 23 of the National Accountability Bureau Ordinance in Pakistan, which reads, “Transfer of property void
(a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated investigation into the offenses under this Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf, shall not transfer by any means whatsoever, create a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court; and any transfer of any right, title or interest or creation of a charge on such property shall be void.
(b) Any person who transfers, or creates a charge on property in contravention of subsection (a) shall be punishable with rigorous imprisonment for a term, which may extend to three years and shall also be liable to fine not exceeding the value of the property involved.”
also be useful in a variety of ways including in conducting hard disk analysis, cracking of passwords for unearthing proof of beneficial ownership, tracking foreign remittances and dematerialized accounts. In addition, forensic accountants on the team may help to disprove false claims of incomes by the associates as well as detect use of corporate vehicles. Form an early stage, it will also be helpful to have valuators on hand who can immediately assist with the valuation of any assets subject to illicit enrichment investigations.

4.3 Process and Interaction with the Public Official during the Investigation

4.3.1 The Different Stages of the Procedure

An illicit enrichment case commences with the investigation phase and is followed by prosecution through the different stages outlined in Chapter II and Box 4.

Once sufficient evidence is gathered through investigation, there are different approaches found in the various jurisdictions consulted. On the one hand, evidence may be presented to the public official to allow him an opportunity to provide a reasonable explanation; on the other hand, a case may immediately be instituted with the Courts to allow the official an opportunity to provide an explanation in Court.

In terms of sequence of events, once the investigation reveals the existence of disproportionate assets, the offense becomes complete on the failure of the public servant to account or explain such excess. This does not mean that a charge cannot be framed until the public servant fails to explain the excess or surplus pointed out to be the wealth or assets of the public servant concerned, as this exercise can be completed only in the trial. In other words, a public servant may be charged with illicit enrichment before failing to provide a reasonable explanation at trial.

In India, after collection of all evidence, the investigating officer is not legally bound to call upon a suspect to account for the excess of the assets over the known sources of income as to do so would be elevating him to the position of an enquiry officer or a judge. The investigating officer is only required to collect material to find out whether the alleged offense appears to have been committed, and may in the course of the investigation, examine the accused. Indeed, fair investigation requires that the accused should not be kept in darkness, especially if he is willing to cooperate.

In Pakistan through a Standard Operation Procedure established in 2006 it was decided that on receipt of a complaint, before initiating an inquiry the accused will be given

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96 Ibid.
an opportunity to explain his assets to save him from embarrassment due to initiation of a formal inquiry or investigation if he is able to justify his assets.

In rebutting the prosecution’s case, the accused may demonstrate that the increase in net worth, expenditures or bank deposits originated from legitimate sources. Substantiated explanations may include inheritance of assets, lottery or gambling winnings, employment outside the public sector, as well as proceeds from investments, business interests, or income generating activities. Occasionally, an illicit enrichment case has turned on the legitimacy of the source of income. In the Alsogaray case in Argentina, for example, the accused intended to justify a portion of the increase in her fortune by demonstrating that she regularly received informal allowances coming from the Argentine Intelligence Agency that were paid to her as “salary bonus.” While the Court accepted the fact that the allowances were regularly paid and ordered the opening of a formal criminal investigation over such facts, it ultimately held that these payments were not legitimate.

In many cases, even if the public official's enrichment is legally explained, he/she may still remain reliable for other offenses (Box 7).

### 4.4 Enforcing Illicit Enrichment: The Challenges

The most significant challenge in investigating and prosecuting illicit enrichment cases is the collection of evidence. Below are few examples of challenges that the investigators and prosecutors will face when charging a public official for illicit enrichment. Many of these are not specific to illicit enrichment but are encountered in most financial investigations.

<table>
<thead>
<tr>
<th>BOX 7</th>
<th>Related Offenses</th>
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<tr>
<td><strong>False Declarations in Financial Disclosures.</strong> In most countries that have this system in place, officials that omit or provide false information in their financial disclosures are subject to prosecution.</td>
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<tr>
<td><strong>Unauthorized Employment and Gifts.</strong> Public administrations often prohibit public officials from taking paid employment or receiving gifts.</td>
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<td><strong>Tax offenses.</strong> As with any other taxpayer, public officials that have not declared income to the tax authorities may be liable to prosecution for tax evasion. Again, in the USA the authorities may prosecute a 26 U.S.C. 2601 section 7201 offense by proving three elements: the existence of a tax deficiency; an affirmative act constituting an evasion or attempted evasion of the tax; and willfulness. The techniques employed in investigating illicit enrichment are directly applicable to the presentation of evidence in tax evasion cases.</td>
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<tr>
<td><strong>Foreign Accounts Holding.</strong> Some countries—notably Nigeria and more recently Kenya—prohibit public officials from holding foreign bank accounts. Others, such as China, require these accounts to be authorized. Failure to comply with these requirements can lead to prosecution. Foreign exchange control also applies to public official in other countries (Tunisia).</td>
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4.4.1 Access to Registries and Relevant Databases

In many countries, there are no up-to-date, searchable databases that can be used to identify assets. For example, Paraguay cited the lack of actualized databases for land titles as a major obstacle to investigations. In other countries, data is dispersed between numerous, independent registries. Some countries have invested heavily in information systems to help consolidate information. In Pakistan, for instance, there is a central database, tied to citizens’ National Identification Card, which stores information including property and other registries. Chile also has a similar facility, with online access to property registries, licensing information, and tax records.

The same impediment arises for the identification of bank accounts. The lack of centralized database or efficient tools to trace assets in many countries may hinder the ability to have a comprehensive view of the assets held domestically by a public official.

Investigators will generally have to undertake legal proceedings to gain access to evidence. This may entail court authorization for the release of tax records, income and asset disclosures, financial records, as well as searches and seizure of documents. In some cases, tax returns are filed on fictitious returns as an advance way of preparing a legitimate explanation for the illicit funds. Verifying gift tax returns and bank foreign returns are useful means of disproving potential false claims of gifts. In this respect, it is also useful to closely scrutinize tax returns of the suspect and any close family or associates in order to detect any belated returns made as an afterthought to cover the illicit enrichment.

4.4.2 Cash Economies and Valuation of Properties

Financial investigations are particularly difficult in countries where there is a substantial cash economy. In these countries it is not unusual for individuals to hold substantial amounts of cash on hand and for large payments to be made outside of the banking system. For example, in many Middle Eastern and South Asian jurisdictions a number of transactions, including international transfers for trade and migrants’ remittances, are channeled through informal hawala networks and simply go unrecorded for official purposes. Where transactions take place in cash, they may be difficult, if not impossible, to trace.

In certain cases, the actual value of real estate properties may be manipulated by the overvaluing or undervaluing of a property followed by a succession of sales and purchases. This practice consists of buying or selling a property at a price above or below its market value, often by people who are related. In other cases, the immovable properties which are purchased by the corrupt officers are highly undervalued and cannot be challenged because while calculating disproportion it is usually the registered value that is considered.

97 Paraguay questionnaire.
To address the problem of valuation, and in case it is challenged by the suspect, it may be beneficial for investigators and prosecutors to take a conservative valuation of properties, which is often the registration value at the time of acquisition. Where it is allowed by a particular jurisdiction, the use of special investigative techniques may prove to be highly valuable. For example, the use of visual technology may add value to the evidence as it is not in every case that the Judge will be able to physically see the assets. It may also be very helpful to take evidence from multiple sources to rebut evidence that does not leave a paper trail such as agriculture income.

### 4.4.3 The Use of Third Parties

Preparation of an accurate financial profile is further complicated by the use of third parties, front entities, and straw men to disguise the ownership of assets. Several countries cite the use of third parties as one of the principle obstacles to illicit enrichment prosecutions. Identifying assets held in the name of associates and third parties can be extremely difficult for investigators, especially where evidence is layered through a series of corporate vehicles in multiple jurisdictions.98

Other challenges encountered by investigators may be culturally specific. For example, in some cultures such as in India, it is not uncommon for married adult children to continue living in the same household as their parents and pool all resources and salaries in a common account. In such a situation, segregating incomes in a family of multiple earning members can prove to be extremely difficult. Family trusts are also often created which make it more difficult to detect the enrichment. In addition, it may be difficult to disprove explanations offered by a suspect who may justify the enrichment in terms of a loan, false inheritance, or gift, particularly where prosecution takes place a substantial period after the initial enrichment.

There are also legal challenges. Family members, straw men, and front entities may be able to demonstrate legal ownership of assets and claim that these assets are not a legitimate target of investigation. Legislation has sought to address this problem by including assets held by family members and, in some countries, possible associates of the public officials in the calculation of net worth (see Box 8 and the benami’s jurisprudence in India).

Some illicit enrichment provisions seek to punish and deter accomplices that help public officials conceal the proceeds of corruption by including them within the scope of the illicit enrichment law. However, most countries deal with the issue of third parties through specific legislation concerning accomplice or accessory liability, or money laundering. This is the same approach as that under the UNCAC, according to which Art. 27(1) requires States Parties to take legislative and other measures as may be neces-

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98 A forthcoming StAR publication highlights the difficulties faced by investigators in tracing corrupt funds where the beneficial ownership of assets is obscured by the abuse of corporate vehicles (to be published during the Second Half of 2011).
sary to establish as a criminal offense, participation in any capacity such as an accomplice, assistant, or instigator in an offense established under the convention.

4.4.4 Original Solutions to Overcome Challenges

In order to address practical challenges in investigating and prosecuting illicit enrichment, plea bargaining may be considered by States as a means of ensuring recovery of the illicit wealth. In Pakistan, an accused facing investigations or prosecution for illicit enrichment is allowed to voluntarily return the illicit wealth and any gains derived from it. If his offer is accepted by the National Accountability Bureau, the suspect is discharged from liability and is not deemed to be convicted. After authorization of investigation, during the pendency of trial or appeal the suspect or accused may apply for plea bargain by making an offer for his liability which if accepted by NAB, is referred to Court for approval. This approach may facilitate expeditious disposal of a case, recovery of proceeds of corruption, disqualification from office and avoids practical challenges in enforcing illicit enrichment.99

Where investigations suggest an international element to the case, experience has shown that it is useful to check immigration and customs records for ascertaining and proving foreign travels. The use of relevant networks such as the Egmont Group of Financial Intelligence Units, the StAR-INTERPOL Focal Point Initiative Database and money laundering agencies can be helpful in providing informal assistance to the investigation. In terms of formal assistance, it is beneficial for countries to strive to enter into more bilateral treaties on mutual legal assistance and extradition, which are less restrictive in terms of use to which assistance can be directed.

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99 Section 25(a) [Sec 25(b)] of the Pakistan National Accountability Ordinance.
4.5 Assessing the Effectiveness of an Illicit Enrichment Regime

4.5.1 Penalties and Forfeiture

As it is the case with most crimes, there are a variety of penalties imposed by States upon conviction for illicit enrichment. Penalties resulting from a conviction for illicit enrichment should be aligned with objectives of legislation. Four broad objectives have been identified: (i) to restore losses that have occurred through corruption to the State; (ii) to punish officials that engage in illicit enrichment; (iii) to prevent them from benefiting from ill-gotten gains, signaling through prosecution that crime does not pay, thereby providing an effective deterrence; and (iv) to incapacitate them through dismissal or prison sentences.

These objectives are achieved through a combination of fines, incarceration, and the forfeiture of the proceeds of the crime. Lastly, in addition to incarceration, public officials may also be subject to administrative and civil sanctions, which include termination of employment, prohibition from elected office, and restrictions on the right to stand for office and to vote. These provide a level of incapacitation as the official is prevented from committing further wrongdoing.

In practice, there are two approaches adopted by States in stipulating the applicable penalty for illicit enrichment: it is either laid out in the illicit enrichment provision or in the penalties common to the anti-corruption crimes comprised in an act. In the latter case, an act containing anti-corruption provisions would not distinguish the illicit enrichment penalties from those applicable to other corruption offenses.

Most countries rely on a combination of economic sanctions and incarceration, with some requiring incarceration only where the official does not pay the economic penalty. Some countries provide for the recovery of assets accumulated within the period of that illicit enrichment. As said earlier when defining the scope of the study, some jurisdictions do not provide for incarceration as a penalty for the offense, relying entirely on economic penalties. Other countries do not include economic penalties in their illicit enrichment law, providing only for periods of incarceration. However, some of these countries have criminal forfeiture regimes that theoretically may be applied following conviction.

Across the jurisdictions that provide for incarceration, prison terms are set within a range from a minimum of a fourteen days and a maximum of twelve years, with most countries falling in the range of between two to five years. For example, in India, imprisonment may be for a term which shall be not less than one year, but which may extend to seven years and the convict shall also be liable to fine. Most countries leave

100 See for example Philippines, Chile, or Romania.
the sentencing at the full discretion of the court. However, some countries have set the graduated penalties based on the absolute amount found to be the product of illicit enrichment. Panama, for instance, has two applicable ranges: three to six years upon conviction and five to twelve years if the illicit wealth is found to exceed US$100,000.

Fines tend to be structured differently depending on the circumstances of each case and jurisdiction. At times, they are equivalent in value to confiscating the illicit enrichment proceeds, with an additional amount as a punitive measure. In Ecuador, the fine is double the amount of illicit enrichment. Some set graduated fines in absolute amounts: in Madagascar, the amount is approximately US$5,000 to US$20,000; in Colombia, the fine is up to approximately US$1,000 complemented by one to eight years of jail. When imposing a fine in India on the other hand, the Court is directed to take into consideration the pecuniary resources or property for which the accused person is unable to account satisfactorily.

Forfeiture of the proceeds of illicit enrichment is conviction based. In cases reviewed, there have been two approaches. In the first, assets subjected to confiscation have been those which have a direct link to the offense: i.e. those that cannot be reasonably explained. This was the approach adopted in the Mzumara case in Malawi. Another approach involves confiscating property amounting to the difference between the legitimate income and the overall assets. This approach is adopted by Argentina. The ill-gotten proceeds are targeted based on the assessment of the illicit enrichment. The amounts recovered can be substantial. In India, about US$10 million has been recovered through illicit enrichment investigations, according to the authorities. Argentina has recovered assets in only one case, totaling US$650,000 and applied fines in other cases. In Hong Kong, assets were recovered in 24 instances, worth HK$47,467,912 (US$6,085,630).

Trends have not yet emerged demonstrating whether confiscation and fines are taken into account by the Courts in mitigation of sentence. In fact, in some cases such as in Argentina, persons convicted of illicit enrichment routinely incur more than one type of penalty. This is also demonstrated by the Alsogaray case in Box 9.

The appropriate balance between the penalties for illicit enrichment will depend on legislators’ objectives. Where the primary objective is to address the underlying economic—the acquisitive—motivation for the corrupt conduct, it would be appropriate to give greater weight to restitution, forfeiture and fines, requiring these sanctions in all instances of the crime.

However, legislators may consider that the forfeiture of the proceeds of corruption and additional economic sanctions may not offer adequate or sufficient deterrence and may not satisfy public expectations regarding the punishment of corrupt officials. Provisions for incarceration in high profile cases, where there is significant damage to the public interest owing to the scale and nature of the corruption, may be used to ensure that the punishment is proportionate to the crime.
Illicit Enrichment

4.5.2 Performance

Experience in the prosecution of illicit enrichment can be broken into three broad categories of jurisdictions: first, those jurisdictions that have not yet prosecuted cases or have experience in a few cases; second, countries that have prosecuted illicit enrichment over an extended period of time but use the illicit enrichment offense sparingly; and third, countries that have prosecuted illicit enrichment over an extended period of time and use the illicit enrichment offense frequently.

Countries that have not yet prosecuted cases include countries that have only recently criminalized illicit enrichment and countries that criminalized illicit enrichment some time ago but have only recently begun to actively pursue cases. Malawi falls into the latter group. Illicit enrichment was criminalized in 1994 but prosecutions have only been brought in the last three years. Prosecutors have recently secured three convictions for modest cases in the lower courts. One of these has been tested in appeals courts and the sentence reduced. The limited track record in successful prosecutions and limited case law is a source of uncertainty and may discourage prosecutors from initiating further cases. In this context, further development of illicit enrichment cases will require sup-

**BOX 9 The Alsogaray Case in Argentina**

The accused, María Julia Alsogaray, had been in the public service from 1985 until 1999 when she was the Minister of Natural Resources and Human Environment in Argentina. The proceedings against her were triggered by a complaint filed by an individual who based his complaint on the “explosive economic glitz” in which she was living and her “sudden change of image” since assuming her functions working for the government.

In laying out its case, the prosecution collected all documents, reports, and relevant testimony, and made a comparative chart demonstrating the accumulation of her assets for the years 1988 to 1996. According to the Court, the significant increase in the assets of the accused was demonstrated by a comparison of her assets at the time of assumption of public office (consisting of one real estate property, two automobiles, assets worth about US$8,000, and stocks in companies), with those added during the course of her public functions (which in addition consisted of five real estate properties, a garage, a canopy, two real estate properties in New York, four automobiles, and an increase in her stocks). In conclusion, the Court found that it was proven that Alsogaray had illegally enriched herself in the sum of US$ 500,000 or $ 622,000 (Argentinean currency).

The accused was then required to provide a detailed justification of it. In her defense, Alsogaray declared that some of her unexplained income was on account of fees for her professional activity in various companies, that some were given to her by her former husband and that others were donations received from her father. The Court was not convinced by her explanation, and accordingly found no justification for her enrichment. Consequently, she was convicted of illicit enrichment, sentenced to three years imprisonment, barred from public office for a period of six years and ordered to pay compensation in the amount of US$ 500,000 and $ 622,000 (Argentinean currency).

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port from prosecution authorities to address potential risks, investments in capacity, and favorable judgments from the courts.

A number of countries have prosecuted illicit enrichment over an extended period but still use the offense sparingly. **Argentina** falls into this category. Illicit enrichment was criminalized in 1964 but the offense was not used until 1994, when a constitutional amendment provided support for the underlying concept and encouraged the authorities to initiate prosecutions. Over the decade 2000 to 2009, 39 cases of illicit enrichment were prosecuted and there have been 29 convictions.

Illicit enrichment in Argentina represents around one in eight of the complaints relating to corruption crimes, trailing behind embezzlement and bribery. The proportion of illicit enrichment offenses that go to trial after complaints are lodged or investigations opened is also significantly lower than complaints and investigations opened for bribery and embezzlement individually.

In the case of Argentina, out of every 100 complaints, only 14 are illicit enrichment cases. Further, only 6.3 trials are illicit enrichment cases. However, the conviction rate is significantly higher for illicit enrichment at 14 percent of corruption cases brought to trial. This is largely because prosecutors are able to identify cases that are likely to be successful in court during the course of investigations. Interviews with those suspected of illicit enrichment are often able to identify a legitimate source of increases in wealth. The Percentage Distribution of Investigation, Prosecution and Conviction of Illicit Enrichment and other Corruption Offenses between 2000–2009 in Argentina is illustrated in Table 1.

**El Salvador** and **Panama** are reported to have only brought one case each, neither of which has yet resulted in conviction.\(^{101}\)

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**TABLE 1**

<table>
<thead>
<tr>
<th></th>
<th>Complaint</th>
<th>Trial</th>
<th>Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bribery</td>
<td>29.0</td>
<td>24.6</td>
<td>26.2</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>52.6</td>
<td>65.8</td>
<td>56.3</td>
</tr>
<tr>
<td>Conflict of interests</td>
<td>4.0</td>
<td>3.4</td>
<td>3.4</td>
</tr>
<tr>
<td>Illicit enrichment</td>
<td>14.4</td>
<td>6.3</td>
<td>14.1</td>
</tr>
<tr>
<td><strong>Total Crimes</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

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\(^{101}\) Source: countries’ questionnaires.
The third category of jurisdictions includes those that have prosecuted illicit enrichment over an extended period of time and still use the illicit enrichment offense frequently. In these jurisdictions, illicit enrichment is presented as a key tool in combating corruption, for instance in Bangladesh, India, and Pakistan. In Pakistan, since the National Accountability Bureau Ordinance was enacted in 1999, 280 cases of illicit enrichment have been filed before the Courts. Of these, 127 have ended in convictions, and 52 ended in acquittals, while 25 were withdrawn. This adds up to a 62.25 percent conviction rate of completed illicit enrichment cases. Table 2 illustrates illicit enrichment cases in Pakistan between 1999–2011.

In Hong Kong, between 1971 and 1994, the case-based conviction rate for illicit enrichment was 64.7 percent. Notwithstanding the impressive conviction rate for illicit enrichment, some national authorities report that prosecutors still tend to consider illicit enrichment as an offense of last resort and where they do investigate and prosecute they will often do so alongside other corruption offenses. This is partly because illicit enrichment is considered difficult to investigate, requiring the compilation of a substantial amount of data and requiring accounting expertise.

The authorities in Hong Kong reported that they have preferred other measures to illicit enrichment prosecutions since 1994. This is because where civil servants have acted alone in abusing their office for personal gain, Hong Kong now employs the offense of misconduct in public office to prosecute such persons in addition to the public sector corruption offenses under the Prevention of Bribery Ordinance. The Hong-Kong experience is symptomatic of the use of illicit enrichment to tackle rampant corruption in identified public sectors such as the police or other exposed administrations. The offense has been extensively used in the past to restrain the phenomenon and now the deterrence effect of the offense is more prevalent, according to the authorities.

In jurisdictions frequently prosecuting the offense, illicit enrichment is seen as a preferred offense for prosecuting corruption. There are a number of factors that explain this approach. The first relates to the legal context. Illicit enrichment has a successful prosecution track record in India and the support of courts. As the courts are familiar with the offense, they are generally willing to provide search warrants for investigators to collect physical and documentary evidence at an early stage of investigations and have settled potential constitutional issues, meaning that convictions and sentences are less likely to be overturned on these grounds on appeal. Consequently, illicit enrichment prosecution is seen as a low risk case for prosecutors. The institutional framework is also favorable. In both India and Pakistan, public servants are required to file income

<table>
<thead>
<tr>
<th>TABLE 2</th>
<th>Illicit Enrichment Cases in Pakistan between 1999–2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filed in the Courts</td>
<td>280</td>
</tr>
<tr>
<td>Convictions</td>
<td>127</td>
</tr>
<tr>
<td>Acquittals</td>
<td>52</td>
</tr>
<tr>
<td>Withdraw</td>
<td>25</td>
</tr>
<tr>
<td>Under Progress</td>
<td>76</td>
</tr>
</tbody>
</table>
and asset declarations and report on the acquisition of assets above a certain threshold. Courts have generally viewed failure to report as undermining claims from the defense regarding the legitimate origin of assets. Furthermore, the majority of public servants tend to remain in the public service for the whole of their careers and it is unusual to find mid-career entrants, other than at the political level. This makes it considerably easier to track public servants’ accumulation of assets and signal significant changes that may warrant further investigation.

4.6 Observations

Lessons learned indicate that the use of illicit enrichment as an offense will be most effective when it is implemented as part of a broader anti-corruption strategy, and where there are systems in place to facilitate the identification of potential cases and generate the information needed to support investigations. Therefore, resources would need to be put in place at all levels to allow the detection, tracing, and preservation of evidence and proceeds of the illicit enrichment. For instance, an effective income and asset disclosure system is a valuable support for the investigation and prosecution of illicit enrichment. In countries that have decided to criminalize this offense, consideration should be given to the design of the IAD system and the means by which the IAD agency interacts with agencies responsible for investigation and prosecution.102

An effective income and asset disclosure system should be complemented by mechanisms for lifestyle checks, internal audits, whistle-blower protection laws and the reporting of suspicious transactions to the Financial Intelligence Unit.

Effective communication between investigators and prosecutors is critical. This is as true of illicit enrichment as it is of any criminal procedure. Equally important is the existence of and access to financial records and property registries. Without such information it is difficult for investigators to prepare a financial profile of suspects or generate evidence of illicit enrichment. Access to income and asset disclosures of public officials in particular, but also tax returns and loan applications, can greatly facilitate the development of an appropriate baseline for investigating illicit enrichment. Law enforcement agencies will need to have financial analysts who are able to analyze this information and generate evidence that can be interpreted by non-specialists in court. From the outset, it is therefore important to consider the institution that is best placed to investigate and prosecute illicit enrichment, and accord it the necessary powers to do so.

In their fight against corruption, prosecutors will tend to pursue trials and the criminal offenses that are most likely to be successful in court and least likely to be overturned on appeal. Risks of an adverse outcome will be minimized where courts are

102 Further information on the design and management of IAD systems is presented in the StAR publication, “Income and Asset Disclosure: Tools and Trade-Offs.” See also on PEPs, another StAR publication: Politically Exposed Persons, Preventive Measures for the Banking Sector. Available on StAR website.
familiar with illicit enrichment cases, and are prepared to support investigations, by, for instance, facilitating search warrants and access to restricted information, and where there is extensive jurisprudence to guide the courts on potential challenges from the defense or on appeal.

These factors suggest that there is a powerful feedback loop, where successful prosecutions will tend to encourage and facilitate further use of illicit enrichment as a prosecutable offense. In a positive feedback loop, successful prosecutions will help develop the experience of investigators, prosecutors, and the courts, and successful prosecutions will develop case law on illicit enrichment and resolve legal challenges for appeal.
5. International Cooperation

Corrupt officials, like many other criminals, may at times transfer the proceeds of their crime abroad and hold accounts in foreign jurisdictions so as to evade detection and more easily enjoy their loot. This makes international legal cooperation crucial in illicit enrichment prosecutions, particularly in high profile cases. Although all major international corruption conventions promote enhanced international cooperation in the fight against corruption,\(^{103}\) the prosecution of illicit enrichment presents specific challenges.

International cooperation includes both non-judicial cooperation (between specialized bodies such as FIUs, anti-corruption agencies, or banking supervisors, Police Units working upon initiative) and mutual legal assistance (MLA), which can be described as “the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country.”\(^{104}\) MLA can be requested at any point in the investigation, during trial or for the execution of a judgment by a court in another jurisdiction. While MLA may be provided spontaneously, legal frameworks such as bilateral treaties, conventions and memoranda of understanding are usually necessary for countries to formally obtain or reply to mutual legal assistance and extradition requests.\(^{105}\)

Article 46 of the UNCAC requires States Parties to afford each other the widest measure of assistance in relation to the corruption offenses covered by the treaty.\(^ {106}\) The convention lays out the conditions and procedures that can be used for requesting and ren-

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\(^{104}\) British Home Office, Basic guidelines for getting assistance from within the UK and from abroad. Available at http://www.homeoffice.gov.uk/police/mutual-legal-assistance/.

\(^{105}\) *Denying Safe Haven to the Corrupt and the Proceeds of Corruption, Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and Return of the Proceeds of Corruption*, Asia Development Bank and the Organization for Economic Cooperation and Development, 1 (2006). The UNCAC (Art. 46 (4)) has broken new ground on explicitly calling for spontaneous MLA in combating corruption.

\(^{106}\) UNCAC Article 46[1].
Notwithstanding the expectation that UNCAC States Parties will provide legal assistance, they are not obligated to do so and the convention enumerates various grounds for refusal or postponement of assistance.\textsuperscript{108}

Grounds for refusal specifically related to illicit enrichment include dual criminality, due process, and evidentiary concerns. More often than not, the real challenge is lack of understanding and miscommunication.

5.1 Addressing Dual Criminality

Dual criminality is the requirement to demonstrate that the crime underlying the request for assistance is criminalized in both the requested and the requesting jurisdictions. A strict interpretation of dual criminality by the requested jurisdiction would require the requesting jurisdiction to demonstrate that the name and elements of the offense were the same in both jurisdictions. However, the UNCAC requires under Article 43(2) that dual criminality be based on the conduct underlying the offense in issue.

The absence of dual criminality is a discretionary ground for refusing MLA under the United Nations Convention on Transnational Organized Crime, which states that parties can provide assistance in an MLA in the absence of dual criminality when they deem it appropriate to do so. Under UNCAC, however, a State Party may deny assistance only after taking into account the purposes of the convention. In addition, following Article 46(9)(b), if the request is not for coercive action, such as searches and seizures or extradition, a State Party must render the assistance in the absence of dual criminality if it is consistent with their legal system to do so.

In practice, most jurisdictions do not consider dual criminality a prerequisite for the exchange of information during an investigation. However, many do require dual criminality for coercive measures such as search and seizure, and most require it for extradition. Notwithstanding the UNCAC, some countries may in practice still consider the absence of dual criminality a discretionary ground for refusing any or all assistance.\textsuperscript{109}

Regarding illicit enrichment, the type of assistance that may be requested from a foreign State in order to demonstrate the offense would focus on bank account information, real estate possession, or companies’ ownership. The latter actions may not be considered to be coercive in many countries.

Where both the requesting and requested jurisdictions have criminalized illicit enrichment dual criminality requirements can be satisfied fairly easily. Officials contacted during the course of this study in Paraguay and Argentina both point to successes in

\textsuperscript{107}UNCAC Article 46[7].
\textsuperscript{108}UNCAC Article 46[21–26].
\textsuperscript{109}Ibid.
obtaining mutual legal assistance from some neighboring countries in Latin America, which have similar formulations for illicit enrichment. However, the large majority of States Parties to the UNCAC have not criminalized illicit enrichment, among them all of Western Europe and North America and many of the world’s financial centers. Several jurisdictions reported that requests for legal assistance in illicit enrichment cases are often delayed and or refused on grounds of the absence of dual criminality when dealing with jurisdictions that do not recognize the offense.

Objections to illicit enrichment can at times be overcome by adopting a conduct-based approach to dual criminality. A conduct-based approach requires the requested and requesting State to “transpose the facts (but not the offense) under investigation in the requesting country to the legal system of the requested country, and ask whether such facts would be considered illicit if committed there.”\textsuperscript{110} \textbf{Argentina} reported a successful use of a conduct-based approach in MLA in an illicit enrichment case from a country not criminalizing illicit enrichment (Spain), which was able to provide assistance in an illicit enrichment case because the facts could be interpreted as embezzlement.\textsuperscript{111}

Some countries, such as \textbf{Uruguay}, which have not criminalized illicit enrichment have reported that they would nevertheless, provide international assistance in these cases, citing, as examples, mutual assistance treaties that the country has signed and Uruguayan case law.\textsuperscript{112}

Other jurisdictions contacted in the course of this study indicated that they would usually apply a conduct-based approach if presented with an MLA request for an illicit enrichment case. Box 9 describes the reservation made by the United States to the illicit enrichment provision in the IACAC.

Cooperation requires flexibility and effective communication on the part of both the requesting and requested States. Requesting States will have to provide extensive information on the facts of the case when drafting mutual legal assistance requests, bearing in mind that illicit enrichment may be associated with a wide range of offenses in almost all countries, including corruption and economic offenses.\textsuperscript{113}

Informal cooperation and contacts between the authorities prior to the preparation of an MLA request can help identify possible basis for assistance and help the requesting country focus on the relevant facts before drafting.\textsuperscript{114} The issue of dual criminality can

\textsuperscript{110}Schmid at 45; Karmel & Kelly at 913.

\textsuperscript{111}Argentina questionnaire.

\textsuperscript{112}The Oriental Republic of Uruguay, the Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 18 September 2009.


\textsuperscript{114}See Asset Recovery Handbook, StAR Initiative.
be avoided altogether where the authorities investigate and prosecute public officials for illicit enrichment alongside other corruption offenses.

5.2 Meeting Evidentiary and Due Process Standards

MLA requests usually have to be backed with sufficient admissible evidence to enable the requested jurisdiction to meet the evidentiary threshold required by their legal system. Generally, the more intrusive the measure, the higher the evidentiary standard required. Evidentiary requirements—standards of proof, evidentiary tests, and admissibility requirements—vary among jurisdictions. Failure to meet the evidentiary requirements in the requested jurisdiction may result in the request being returned or rejected.
Evidentiary requirements can be a challenge where investigations focus only on illicit enrichment without consideration to the criminal conduct that generates the illicit wealth. Evidence of this criminal conduct may have to be presented to provide a basis for MLA on grounds of corruption offenses, embezzlement, money laundering, and economic crimes such as fraud, depending on the case. This underlines the importance of undertaking a broad investigation of the suspects’ criminal activities. Even if the evidence of criminal conduct may not be sufficient to support a conviction for that particular offense, the suspicion during the investigations may be sufficient to support MLA requests with other jurisdictions.

In this respect, any contextual information on the suspect should be usefully detailed in the MLA request: public function, duration, type of duties (i.e., awarding public contracts, managing public funds, supervising private entities, etc.), and amount of assets already calculated domestically. Procedural aspects may also be relevant: initiator of the prosecution (e.g., whistleblower, NGO, FIU, ACA), and related offenses.

Requested States may seek explanations regarding the manner in which evidence is collected or legal proceedings are undertaken. This may be necessary to meet the due process requirements of their legal system. Particular attention is likely to be given to evidence collected by coercive means and confessions. It is important to stress that requested authorities should determine whether due process requirements have been met on a case-by-case basis, rather than looking at the entire legal system. In order to address these concerns, MLA requests will generally have to provide information on domestic proceedings; the rights afforded the parties and any procedural decisions taken by the courts regarding the case in question.

Informal cooperation and communication between the requesting and requested jurisdiction can help clarify the evidentiary requirements and how evidence should be presented before drafting of MLA requests. Communications between parties can also help identify evidentiary requirements for MLA requests related to specific offenses. Indonesia, for instance, allows for MLA in illicit enrichment cases only when there is evidence that the enrichment arose from criminal activities and that the criminal activity harmed the public or society.

Some conditions specified by requested States may also have the effect of restricting the way in which the information they provide may be used by the requesting State. Follow-

115 Ndiva Kofele-Kale, Presumed Guilty, Balancing Competing Rights and Interests in Combatting Economic Crimes, 40 Int’l Law. 909, note 145 (2006); Schmid in Denying Safe Haven to the Corrupt and the Proceeds of Corruption, 47.

ing the principle of specialty, information provided by the requested States should only be used for the purpose requested. This principle seeks to “ensure against a requesting State’s breach of trust to a requested State and to avoid prosecutorial abuse against the relator after the requested State obtained in personam jurisdiction over the relator.” This may present a problem where the requesting State is pursuing an investigation for one offense, such as embezzlement, and decides to drop this charge and proceed with a prosecution for illicit enrichment at a later date. Information provided by the requested state to support the embezzlement charge may not be admissible in illicit enrichment proceedings. Again, a possible solution lies in communication, ensuring that the requested and requesting authorities are aware of the potential uses of the information shared and explore specific restrictions that may apply.

5.3 Legal Cooperation Regime

Bilateral MLA treaties and Memoranda of Understanding provide a framework for cooperation between jurisdictions, complementing and superseding the requirements under UNCAC. These agreements can be used to clarify how authorities will deal with requests related to specific offenses and thereby reduce uncertainty. For example, Switzerland has long handled the United States Securities and Exchange Commission investigations by signing Memoranda of Understanding that address specific requests. Such agreements can address illicit enrichment if the authorities anticipate that such cases will constitute an important part of their bilateral cooperation.

Familiarity with the procedures and legal requirements of partner countries is probably the most effective way of facilitating mutual legal assistance in general and in illicit enrichment cases in particular. This familiarity can be gained by contacting partner institutions, undertaking joint training activities, and most importantly, by initiating requests. The vast majority of countries consulted in the course of this study admitted that they had never filed or received a mutual legal assistance request in an illicit enrichment case. Familiarity can help avoid miscommunication over the prosecutorial objectives and legal procedures. It can also help partners identify strategies for presentation of evidence.

5.4 Observations

Lessons learned indicate that jurisdictions requesting international cooperation, particularly mutual legal assistance requests, continue to encounter challenges in obtaining assistance from requested States. However in many instances these challenges are surmountable. Because many States will render assistance based on the underlying conduct, efforts may be made to ensure that that the conduct underlying the offense constitutes an offense in the requested jurisdiction. Therefore it may be helpful for States

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117 Karmel & Kelly, at 913.
to look beyond the enrichment and focus on the criminal conduct that generates the wealth prior to making the request. States may also wish to address cooperation regarding illicit enrichment in their bilateral MLA treaties, or Memoranda of Understanding, if they anticipate that these will constitute an important part of their bilateral cooperation.
## Illicit Enrichment Provisions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Extract of Law</th>
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<tbody>
<tr>
<td><strong>1 Algeria</strong></td>
<td>Article 37 Any public official who cannot reasonably explain the increase of his/her funds in comparison to his/her remuneration shall be sentenced to 2–10 years of imprisonment and a fine of DZD 200,000–1,000,000 ... The illicit offense is considered a continuous offense and results from either acquiring or exploiting illicit assets, whether directly or indirectly.</td>
</tr>
<tr>
<td><strong>2 Angola</strong></td>
<td>Seção I Dos Atos de Improbidade Administrativa que Importam Enriquecimento Ilícito VII. adquirir, para si ou para outrem, no exercício de mandato, cargo, emprego ou função pública, bens de qualquer natureza cujo valor seja desproporcional à evolução do patrimônio ou à renda do agente público; The Law on Public Probity (article 25 g) defines illegal enrichment as “acquiring for oneself or for another, in the exercise of one's duties, responsibilities, employment or public function, goods of any nature whose value is disproportionate to the capital gains or income of the public servant.”</td>
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Annex 1

Illicit Enrichment Provisions (continued)

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<thead>
<tr>
<th>Jurisdiction</th>
<th>Extract of Law</th>
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| 3 Antigua and Barbuda 2004 The Prevention of Corruption Act, Art. 7, Possession of unexplained property | (1) A person who, being or having been a public official—                                                                     
(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or  
(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, unless he gives a satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, commits an offence.  
(2) Where a court is satisfied in proceedings for an offence under subsection (1) (b) that having regard to the closeness of his relationship with the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property the resources or property shall, until the contrary is proved, be presumed to have been in the control of the accused.  
(1) A person who commits an offence under sections 3, 4, 5, 6, or 7 is liable upon conviction on indictment to a fine not exceeding one hundred thousand dollars and to imprisonment for a term not exceeding five years or, in addition to the penalty specified above, the court may do any or all of the following:  
(i) order the person convicted to pay the public body and in such manner as the Court directs, the amount or value of any property, benefit or advantage received by him;  
(ii) forfeit his right to claim any non-contributory gratuity or pension to which he would otherwise have been entitled;  
(iii) declare any right under any non-contributory pension scheme to which he is entitled to be forfeited.  
(iv) declare him to be disqualified from holding any public office for a period not exceeding seven years from the date of conviction for the offence;  

(Continued on next page)
Illicit Enrichment Provisions (continued)

<table>
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<th>Jurisdiction</th>
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<tr>
<td>Argentina</td>
<td>Será reprimido con reclusión o prisión de dos a seis años, multa del cincuenta por ciento al ciento por ciento del valor del enriquecimiento e inhabilitación absoluta perpetua, el que al ser debidamente requerido, no justificar la procedencia de un enriquecimiento patrimonial apreciable suyo o de persona interpuesta para disimularlo, ocurrido con posterioridad a la asunción de un cargo o empleo público y hasta dos años después de haber cesado en su desempeño. Se entenderá que hubo enriquecimiento no sólo cuando el patrimonio se hubiese incrementado con dinero, cosas o bienes, sino también cuando se hubiesen cancelado deudas o extinguido obligaciones que lo afectaban. La persona interpuesta para disimular el enriquecimiento será reprimida con la misma pena que el autor del hecho.</td>
</tr>
<tr>
<td>1964</td>
<td>[85] Criminal Code, article 268 (2): “Any person who, when so demanded, fails to justify the origin of any appreciable enrichment for himself or a third party in order to hide it, obtained subsequent to assumption of a public office or employment, and for up to two years after having ceased his duties, shall be punished by imprisonment from 2 to 6 years, a fine of 50% to 100% of the value of the enrichment, and absolute perpetual disqualification. Enrichment will be presumed not only when the person’s wealth has been increased with money, things or goods, but also when his debts have been canceled or his obligations extinguished. The person interposed to dissimulate the enrichment shall be punished by the same penalty as the author of the crime.”</td>
</tr>
<tr>
<td>Argentine Criminal Code Art. Section 268(2)</td>
<td>[86] Criminal Code, article 268 (3): “Any person who, by reason of his position, is required by law to present a sworn statement of assets and maliciously fails to do so shall be punished by imprisonment from 15 days to 2 years and special perpetual disqualification. The offense is deemed committed when, after due notice of the obligation, the person obligated has not complied with those duties within the time limits established by the applicable law. Any person who maliciously falsifies or omits data required in those sworn statements by the applicable laws and regulations shall be liable to the same penalty.”</td>
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### Illicit Enrichment Provisions

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| Bangladesh   | 27. (1) If there are sufficient and reasonable grounds to believe that a person in his/her own name or any other person on his/her behalf is in possession and has obtained ownership of moveable or immovable property through dishonest means and the property is not consistent with the known sources of his/her income and if he/she fails to submit to the court during trial a satisfactory explanation for possessing that property, then that person shall be sentenced to a prison terms ranging from a minimum of three (3) years to a maximum of ten years imprisonment, and these properties shall be confiscated.  
(2) If it is proved during the trial of charges under sub/section (1) that the accused person in his own name or any other person on his/her behalf has obtained ownership or is in possession of moveable or immovable property not consistent with the known sources of his/her income then the court shall presume that the accused person is guilty of the charges and unless the person rebuts that presumption in court the punishment meted out on the basis of this presumption shall not be unlawful.  
5-C. Possession of Property disproportionate to known sources of income:  
(1) Any public servant who has in his possession any property, movable or immovable either in his own name or in the name of any other person, which there is reason to believe to have been acquired by improper means and which is proved to be disproportionate to the known sources of income of such public servant shall, if he fails to account for such possession to the satisfaction of the Court trying him, be punishable with imprisonment for a term which may extend to seven years and with fine, and on such conviction the property found to be disproportionate to the known sources of income of the accused by the Court shall be forfeited to the Provincial Government.  
(2) The reference in sub-section (1) to property acquired by improper means shall be construed as reference to property acquired by means which are contrary to law or to any rule or instrument having the force of law or by coercion, undue influence, fraud or misrepresentation within the meaning of the Contract Act, 1872. |

(Continued on next page)
## Illicit Enrichment Provisions (continued)

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<th>Jurisdiction</th>
<th>Extract of Law</th>
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<tr>
<td>Bhutan</td>
<td>Any person who, being or having been a public servant or a person having served or serving under a non-governmental organization or such other organization using public resources: (a) Maintains a standard of living that is not in commensurate with his lawful source of income; or (b) Is in control of pecuniary resource or asset disproportionate to his lawful source of income; shall unless he gives a satisfactory explanation to the Commission or the Court, be guilty of an offence and shall be liable for value-based sentencing in accordance with the Penal Code of Bhutan.</td>
</tr>
<tr>
<td>Bolivia</td>
<td>La servidora pública o servidor público, que no hubiere incrementado desproporcionadamente su patrimonio respecto de sus ingresos legítimos y que no pueda ser justificado, será sancionado con privación de libertad de cinco a diez años, inhabilitación para el ejercicio de la función pública y/o cargos electos, multa de doscientos hasta quinientos días y el decomiso de los bienes obtenidos ilegalmente.</td>
</tr>
<tr>
<td>Botswana</td>
<td>(1) The Director or any officer of the Directorate authorized in writing by the Director may investigate any person where there are reasonable grounds to suspect that that person- (a) maintains a standard of living above that which is commensurate with his present or past known sources of income or assets; or (b) is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets. (2) A person is guilty of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under subsection (1) as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.</td>
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<td>Jurisdiction</td>
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<tr>
<td>Brunei Darussalam</td>
<td>(1) Any person who, being or having been a public officer—(a) maintains a standard of living above that which is commensurate with his present or past emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence: Penalty, a fine of $30,000 and imprisonment for 7 years.</td>
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<td>(2) In addition to any penalty imposed under subsection (1) the court may order a person convicted of an offence under subsection (1) to pay to the Government—(a) a sum not exceeding the amount of the pecuniary resources; or (b) a sum not exceeding the value of the property, the acquisition of which by him was not explained to the satisfaction of the court and any such sum ordered to be paid shall be recoverable as a fine.</td>
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<td></td>
<td>(3) Where a court is satisfied in proceedings for an offence under subsection (1) that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such pecuniary resources or property as a gift, or loan without adequate consideration from the accused, such pecuniary resources or property shall until the contrary is proved, be deemed to have been under the control or in the possession of the accused.</td>
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### Illicit Enrichment Provisions (continued)

<table>
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<tr>
<th>Jurisdiction</th>
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<tr>
<td>10 China</td>
<td>Any State functionary whose property or expenditure obviously exceeds his lawful income, if the difference is enormous, may be ordered to explain the sources of his property. If he cannot prove that the sources are legitimate, the part that exceeds his lawful income shall be regarded as illegal gains, and he shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention, and the part of property that exceeds his lawful income shall be recovered. Any State functionary shall, in accordance with State regulations, declare to the State his bank savings outside the territory of China. Whoever has a relatively large amount of such savings and does not declare them to the State shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention; if the circumstances are relatively minor, he shall be given administrative sanctions at the discretion of his work unit or the competent authorities at a higher level.</td>
</tr>
<tr>
<td>11 Hong Kong (SAR)</td>
<td>1) Any person who, being or having been the Chief Executive or a prescribed officer—(Amended 14 of 2003 s. 17; 22 of 2008 s. 4): (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence. (1) Any person guilty of an offence under this Part, other than an offence under section 3, shall be liable—(a) on conviction on indictment— (i) for an offence under section 10, to a fine of $1000000 and to imprisonment for 10 years; (ii) for an offence under section 5 or 6, to a fine of $500000 and to imprisonment for 10 years; and (iii) for any other offence under this Part, to a fine of $500000 and to imprisonment for 7 years; and (Replaced 50 of 1987 s. 3)</td>
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### Illicit Enrichment Provisions (continued)

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<td>(b) on summary conviction:</td>
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<td>(i) for an offence under section 10, to a fine of $500000 and to imprisonment for 3 years; and (ii) for any other offence under this Part, to a fine of $100000 and to imprisonment for 3 years, and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify.</td>
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<td>3) In addition to any penalty imposed under subsection (1), the court may order a person convicted of an offence under section 10(1)(b) to pay to the Government—(Amended 1 of 2003 s. 3)</td>
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<tr>
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<td>(a) a sum not exceeding the amount of the pecuniary resources; or</td>
</tr>
<tr>
<td></td>
<td>(b) a sum not exceeding the value of the property, the acquisition of which by him was not explained to the satisfaction of the court.</td>
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#### Macao (SAR) 2003

Law 11/2003 Declaração de Rendimentos e Interesses Patrimoniais Statement of Incomes and Properties

1. The statement required pursuant to Article 1. Which shall by himself or through intermediaries, are in possession of assets or income abnormally higher than indicated in previous statements and provided no warrant, specifically, how and when they came into his possession or not satisfactorily demonstrate their lawful origin, shall be punished with imprisonment up to three years and a fine of up to 360 days.

2. O património ou rendimentos cuja posse ou origem não haja sido justificada nos termos do número anterior, pode, em decisão judicial condenatória, ser apreendido e declarado perdido a favor da Região Administrativa Especial de Macau. The assets or income or from whose possession there was justified under the preceding paragraph may, in court conviction, be declared forfeit in favor of the Macao Special Administrative Region.
### Illicit Enrichment Provisions (continued)

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<th>Jurisdiction</th>
<th>Extract of Law</th>
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<tr>
<td><strong>13 Colombia</strong>&lt;br&gt;Código Penal, Art. 412: Enriquecimiento Ilícito (Penalties increased by Article 14 of Law 890 of 2004, as of January 1, 2005)</td>
<td>El servidor público que durante su vinculación con la administración, o quien haya desempeñado funciones públicas y en los dos años siguientes a su desvinculación, obtenga, para sí o para otro, incremento patrimonial injustificado, siempre que la conducta no constituya otro delito, incurrirá en prisión de noventa y seis (96) a ciento ochenta (180) meses, multa equivalente al doble del valor del enriquecimiento sin que supere el equivalente a cincuenta mil (50,000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de noventa y seis (96) a ciento ochenta (180) meses.  &lt;br&gt;Any public servant who while in government employment, or anyone who has performed public duties and who, in that time or in a period of two years thereafter, obtains for themselves or for another an unjustified increase in wealth shall, provided that the conduct does not constitute another offense, be liable to between ninety-six (96) and one hundred eighty (180) months of imprisonment, a fine of twice the amount of the enrichment without that exceeding fifty thousand (50,000) times the statutory monthly minimum wage in force, and ineligibility from the exercise of rights and public duties for between ninety-six (96) and one hundred eighty (180) months.<strong>2</strong></td>
</tr>
<tr>
<td><strong>14 Costa Rica</strong>&lt;br&gt;2004&lt;br&gt;Law 8422: Law Against Corruption and Illicit Enrichment in Public Office. Article 45</td>
<td>Será sancionado con prisión de tres a seis años quien, aprovechando ilegítimamente el ejercicio de la función pública o la custodia, la explotación, el uso o la administración de fondos, servicios o bienes públicos, bajo cualquier título o modalidad de gestión, por sí o por interpósita persona física o jurídica, acreciente su patrimonio, adquiera bienes, goce derechos, cancele deudas o extinga obligaciones que afecten su patrimonio o el de personas jurídicas, en cuyo capital social tenga participación ya sea directamente o por medio de otras personas jurídicas.  &lt;br&gt;(Continued on next page)</td>
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| **Cuba** 15          | 1. La autoridad, funcionario o empleado que, directamente o por persona intermedia, realiza gastos o aumenta su patrimonio o el de un tercero en cuantía no proporcional a sus ingresos legales, sin justificar la licitud de los medios empleados para realizar los gastos o obtener tal aumento patrimonial, incurre en sanción de privación de libertad de dos a cinco años o multa de trescientas a mil cuotas o ambas.  
2. A los declarados responsables del delito previsto en este artículo se les impone, además, la sanción accesoria de confiscación de bienes.  
3. Las sanciones previstas en este artículo se imponen siempre que el hecho no constituya un delito de mayor entidad. |
| **Ecuador** 16        | Art. 296-1 – Constituye enriquecimiento ilícito el incremento injustificado del patrimonio de una persona, producido con ocasión o como consecuencia del desempeño de un cargo o función pública, que no sea el resultado de sus ingresos legalmente percibidos.  
Art. 296-2. – El enriquecimiento ilícito se sancionará con la pena de dos a cinco años de prisión y la restitución del doble del monto del enriquecimiento ilícito, siempre que no constituya otro delito. Article 296.1 of the Criminal Code, which provides that “Illicit enrichment is the unexplained increase in the wealth of a person produced in the course of, or as a consequence, of the performance of a public duty or function that is not the result of legally received income.”  
Article 296.2 of the Criminal Code, which provides that “Illicit enrichment shall be punished with a sentence of two to five years of imprisonment and the repayment of twice the amount of the illicit enrichment, provided that it does not constitute another offence.” |
| **Egypt** 17          | Those responsible for public authority and all employees in the state administrative body except for those of the third level.  
All money gained by any of those subjected to the rules of this law for him or for others as a result of exploiting the service or qualification or as a result of a behavior contrary to the penal law or public behavior is considered illegitimate gain. |

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Illicit Enrichment Provisions *(continued)*

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<td><strong>It is considered to be the result of the exploitation of the service or qualification or the illegal conduct an increase in the wealth that occurs after assuming the service or establishing the qualification for those who are subjected to the law, his spouse or minor children whenever it is not proportionate with their income and in the case of failing to prove legitimate source for it.</strong></td>
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<tr>
<td><strong>(18) A person who has collected for himself or for others illegitimate gains shall be punished by imprisonment and a fine equivalent to the illegitimate gain in addition to a rule to return that gain.</strong></td>
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<tr>
<td><strong>The criminal case which ends by death does not prevent the return of the illegitimate gains according to a ruling from the relevant criminal court at the request of one of the authorities stipulated in article 5 within three years of the date of the death.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>The court has to order the spouse and minor children who have benefitted from the illegitimate gain to execute the ruling to return the money each according to the extent of his or her benefit. The court may also order those who have seriously benefitted other than those mentioned in the previous paragraph to be included, so that the judgment to return would be enforceable and taken from his or her money in the same amount of the benefits acquired.</strong></td>
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**18 El Salvador**

Article 240 of the Constitution; Criminal Code, Article 333 (illicit enrichment)

"Those public officials and employees that unlawfully enrich themselves at the expense of the government or Municipal Treasury shall be required to make restitution to the State or Municipality for what they improperly acquired without prejudice to their liability under the law.

Illicit enrichment is presumed when the increase in the capital of public official or employee, counted from the date on which they took up their position until the date of their termination, is significantly higher than it normally would be based on their lawful pay and emoluments and the increases in their capital or income by any other lawful cause. In determining that increase, the capital and income of the public official or employee, their spouse, and their children shall be jointly considered."

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### Illicit Enrichment Provisions (continued)

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<tr>
<td>Ethiopia</td>
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<td>2004</td>
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<tr>
<td>The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No.414/2004</td>
<td>(1) Any public servant, being or having been in a public office, who:</td>
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<td>a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or</td>
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<td></td>
<td>b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, shall, unless he gives a satisfactory explanation to the Court is to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.</td>
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Judicial proceedings for unlawful enrichment may only be instituted within 10 years after the date on which the public official or employee ceased to hold the office in whose exercise said enrichment may have occurred.”

The Criminal Code, Article 333

“Any government official, public authority, or public employee who in the course of their duties or functions obtains an unjustified increase in wealth shall be punished with three to 10 years of imprisonment.

Third parties who disguise an unjustified increase in wealth shall be liable to the same penalty.

Whatever the case, they shall be disqualified from that position or employment for the same period of time.”
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<td>Gabon</td>
<td>Au sens de la présente loi, est considéré comme enrichissement illicite, le fait, pour tout dépositaire de l’autorité de l’Etat, de réaliser ou de tenter de réaliser des profits personnels ou d’obtenir tout autre avantage de tout nature:—au moyen d’actes de corruption active ou passive, de concussion, de fraude, de détournement ou de soustraction frauduleuse de deniers ou de biens publics, d’abus de pouvoir, de trafic d’influence, de prise illégale d’intérêts ou de tout autre procédé illicite;—au moyen d’une pratique illicite en matière d’expropriation, d’obtention de marché, de concession ou de permis d’exportation ou d’importation;—par l’utilisation due, à son profit ou à celui d’un tiers, de tout type d’information confidentielle ou privilégiée dont il a eu connaissance en raison ou à l’occasion de ses fonctions. Est également considéré comme enrichissement illicite, l’augmentation significative du patrimoine de tout dépositaire de l’autorité de l’Etat que celui-ci ne peut raisonnablement justifier par rapport aux revenus qu’il a légitimement perçus.</td>
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Article 24: Tout fonctionnaire, tout agent ou préposé d’une Administration publique, chargé, à raison même de sa fonction, de la surveillance ou du contrôle direct d’une entreprise privée et qui, soit en position de congé ou de disponibilité, soit après admission à la retraite, soit après démission, destitution ou révocation, et pendant un délai de cinq ans à compter de la cessation de la fonction, prendra ou recevra une participation par travail, conseils ou capitaux, sauf par dévolution héréditaire en ce qui concerne les capitaux dans la concession, entreprise ou région qui était directement soumise à sa surveillance ou à son contrôle, et ce en connaissance de cause, sera puni des peines prévues à l’article 21 ci-dessus.

Les dirigeants des concessions, entreprises ou régies publiques sont considérés comme complices.effectués ou des biens livrés;
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<tr>
<td>Honduras</td>
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<td>1993</td>
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<tr>
<td>Ley Contra el Enriquecimiento Ilicito de los Servidores Publico Decreto # 301</td>
<td>Se presume enriquecimiento ilícito cuando el aumento del capital del funcionario o empleado, desde la fecha en que haya tomado posesión de su cargo hasta aquella en que haya cesado en sus funciones, fuere notablemente superior al que normalmente hubiere podido tener en virtud de los sueldos y emolumentos que haya percibido legalmente y de los incrementos de su capital o de sus ingresos por cualquier otra causa. (…)</td>
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</table>

Para determinar dicho aumento, el capital y los ingresos del servidor público, con los de sus cónyuge, compañero o compañera de hogar, hijos sujetos a patria potestad y pupilos se considerarán en conjunto.

Para justificar la presunción de enriquecimiento ilícito del servidor público, se tomará en cuenta:

**Sus condiciones económicas personales previas al ejercicio del cargo o empleo.**

(Continued on next page)
### Illicit Enrichment Provisions (continued)

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<td>La cuantía en que ha aumentado su capital en relación al monto de sus ingresos y de sus gastos ordinarios; y, La ejecución de otros actos o la existencia de otras circunstancias que permitan presumir que la persona ha incurrido en alguno de los casos de enriquecimiento ilícito a que se refiere el Artículo 7 de esta Ley.</td>
</tr>
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<td></td>
<td>Artículo 9. La carga de la prueba sobre las circunstancias indicadas en los artículos anteriores, la relativa al importe de ingresos y de gastos ordinarios y la que tienda a comprobar la licitud del aumento de capital, pesa sobre el servidor público.</td>
</tr>
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<td>Artículo 32. El delito de enriquecimiento ilícito será castigado, según el monto del enriquecimiento, así:</td>
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<td>a) Si dicho enriquecimiento no excediere de CINCO MIL LEMPIRAS, con presidio menor en su grado máximo.</td>
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<td></td>
<td>b) Si dicho enriquecimiento excediere de CINCO MIL LEMPIRAS y no pasare de DIEZ MIL LEMPIRAS, con presidio mayor en su grado mínimo.</td>
</tr>
<tr>
<td></td>
<td>c) Si excediere de DIEZ MIL LEMPIRAS y no pasare de CIEN MIL LEMPIRAS, con presidio mayor en su grado medio; y</td>
</tr>
<tr>
<td></td>
<td>d) Si excediere de CIEN MIL LEMPIRAS, con presidio mayor en su grado máximo.</td>
</tr>
<tr>
<td>22 India</td>
<td>(1) A public servant is said to commit the offence of criminal misconduct,—(a)[...] (e) If he or any person on his behalf, is in possession or has, at any time during the Period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.</td>
</tr>
<tr>
<td>1988</td>
<td>This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.</td>
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### Illicit Enrichment Provisions (continued)

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<th>Jurisdiction</th>
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<tbody>
<tr>
<td><strong>Jamaica</strong></td>
<td>14. (1) A public servant commits an act of corruption if he –</td>
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<tr>
<td>2005</td>
<td>(5) (a) owns assets disproportionate to his lawful earnings; and (b) upon being requested by the Commission or any person duly authorized to investigate an allegation of corruption against him, to provide an explanation as to how he came by such assets, he (i) fails to do so; or (ii) gives an explanation which is not considered to be satisfactory, he shall be liable to prosecution for the offence of illicit enrichment, and on conviction thereof, to the penalties specified in section 15 (1). (5A) It shall be a defense to a person charged with an offence of illicit enrichment to show the court that he came by the assets by lawful means.</td>
</tr>
<tr>
<td>The Corruption (Prevention) Act, Section 14</td>
<td>15. (1) Any person who commits an act of corruption commits an offence as is liable –</td>
</tr>
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<td></td>
<td>(a) on summary conviction in a Resident Magistrate’s Court –</td>
</tr>
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<td></td>
<td>(i) in the case of a first offense, to a fine not exceeding one million dollars or to imprisonment for term not exceeding two years, or to both such fine and imprisonment; and</td>
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<td>(ii) in the case of a second or subsequent offence to a fine not exceeding three million dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment</td>
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<td>(2) on conviction in a Circuit Court –</td>
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<td>(i) in the case of a first offense to a fine not exceeding five million dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment; and</td>
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<tr>
<td></td>
<td>(ii) in the case of a second or subsequent offence to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding ten year or to both such fine and imprisonment.</td>
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### Illicit Enrichment Provisions (continued)

<table>
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<tr>
<th>Jurisdiction</th>
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<tbody>
<tr>
<td>24 Lebanon</td>
<td>Article 1. Illicit wealth is considered as: 1) wealth earned by the employee or person performing public service and the judge or their accomplice, by bribery or influence peddling or misuse of position, or work assigned to them (articles 351 to 366 of the Penal Code), or by any illegal means even if it does not constitute a criminal offense; 2) enrichment of an employee or person performing public service, the judge and other natural or legal persons, either through acquisition or through the attainment of export and import licenses or other benefits of different types, if done contrary to the law; 3) obtaining or poor implementation of contracts, concessions and licenses granted by any person of public law to bring in benefit, if done contrary to the law.</td>
</tr>
<tr>
<td>1999 Illicit Wealth Law No.154</td>
<td>Article 9: The provisions of the criminal procedures law apply to the investigation in illicit wealth cases, and the provisions of the criminal code apply in cases of illicit wealth as a result of a criminal offense.</td>
</tr>
<tr>
<td>25 Lesotho</td>
<td>Possession of unexplained property</td>
</tr>
<tr>
<td>1999 Prevention Of Corruption and Economic Offences Act, Act No. 5</td>
<td>31. (1) The Director or any officer of the Directorate authorized in writing by the Director may investigate any public officer where there are reasonable grounds to suspect that person:</td>
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<td>(a) maintains a standard of living above that which is commensurate with his present or past known source of income or assets reasonably suspected to have been acquired illegally; or</td>
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<td></td>
<td>(b) is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets reasonably suspected to have been acquired illegally.</td>
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<td></td>
<td>(2) A public officer is presumed to have committed the offence of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under subsection (1) as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.</td>
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### Illicit Enrichment Provisions (continued)

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<td><strong>(3)</strong> Where a court is satisfied in any proceedings for an offence under subsection (2) that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property as a gift, or loan without adequate consideration from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.</td>
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<tr>
<td>34. Any person who commits the offence of corruption or cheating the revenue under this Part shall, upon conviction, be liable to a fine not less than M5,000.00 and not more than M10,000.00 or to imprisonment for a term not less than 5 years and not more than 10 years or both and in the case of juristic persons, the fine shall not be less than M10,000.00.</td>
<td></td>
</tr>
<tr>
<td><strong>26 Madagascar</strong>&lt;br&gt;2004&lt;br&gt;Law n° 2004–030 On the fight against corruption</td>
<td>Will be punished with an imprisonment of 6 months to 5 years and a fine of 50 million FMG or 10 million Ariary to 200 million FMG or 40 million Ariary, any person invested with public authority or in charge of a public service mission, any person invested with a public electoral mandate, any leader, proxy or employee of a public company that cannot reasonably justify a substantial increase in such person's personal wealth relative to his or her lawful revenues. Will be punished with the same penalties any person that will have knowingly held the goods or resources of the persons cited above. Illicit enrichment is a continuous offence characterized by the holding of personal wealth and the use of illicit resources. Evidences of the licit origin of the enrichment or the resources can be brought forth by any means. However, will be exempted from prosecution pursuant to this article the person who, before the opening of an inquiry or direct citation, will have revealed facts to the administrative or legal authorities and permitted the identification and condemnation of the principal author. The decision of condemnation may also pronounce the confiscation for the benefit of the State, government organization, public and para-public organisms, of all or part of the condemned party up to the amount of the prejudice sustained.</td>
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<tr>
<td>27 Malawi</td>
<td>(1) The Director, the Deputy Director or any officer of the Bureau authorized in writing by the Director may investigate any public officer where there are reasonable grounds to believe that such public officer— (a) maintains a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income; (b) is in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or (c) is directly or indirectly in receipt of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act. (2) Any public officer who, after due investigation carried out under the provisions of subsection (1), is found to— (a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income; (b) be in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or (c) be in receipt directly or indirectly of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act, shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and, unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he shall be guilty of an offence.</td>
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Illicit Enrichment Provisions (continued)

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<td>(3) In this section</td>
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<td>(i) “official emoluments” includes a pension, gratuity or other terminal benefits;</td>
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<tr>
<td>(ii) “public officer” includes any person who has held office as a public officer on or after 6th July, 1964. […]</td>
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<tr>
<td>34. Any person who is guilty of an offence under this Part shall be liable to imprisonment for a term of twelve years.</td>
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<tr>
<td>35. Any person who attempts to commit, or who aids, abets or counsels, or conspires with any person to commit an offence under this Part shall be guilty of committing that offence.</td>
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<tr>
<td>28 Malaysia</td>
<td>Where the Public Prosecutor has reasonable grounds to believe that any officer of a public body who has been served with the written notice referred to in subsection (1) owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, the Public Prosecutor may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess and if he fails to explain satisfactorily such excess, he shall be guilty of an offence and shall on conviction be liable to; (a) imprisonment for a term of not less than fourteen days and not more than twenty years; and (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.</td>
</tr>
<tr>
<td>29 Mexico</td>
<td>Se sancionará a quien con motivo de su empleo, cargo o comisión en el servicio público, haya incurrido en enriquecimiento ilícito. Existe enriquecimiento ilícito cuando el servidor público no pudiere acreditar el legítimo aumento de su patrimonio o la legítima procedencia de los bienes a su nombre o de aquellos respecto de los cuales se conduzca como dueño, en los términos de la Ley Federal de Responsabilidades de los Servidores Públicos.</td>
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<td>Incurre en responsabilidad penal, asimismo, quien haga figurar como suyos bienes que el servidor público adquiera o haya adquirido en contravención de lo dispuesto en la misma Ley, a sabiendas de esta circunstancia.</td>
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<td>Al que cometa el delito de enriquecimiento ilícito se le impondrán las siguientes sanciones:</td>
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**Illicit Enrichment Provisions (continued)**

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<td>Decomiso en beneficio del Estado de aquellos bienes cuya procedencia no se logre acreditar de acuerdo con la Ley Federal de Responsabilidades de los Servidores Públicos.</td>
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<tr>
<td></td>
<td>Cuando el monto a que ascienda el enriquecimiento ilícito no exceda del equivalente de cinco mil veces el salario mínimo diario vigente en el Distrito Federal, se impondrán de tres meses a dos años de prisión, multa de treinta a trescientas veces el salario mínimo diario vigente en el Distrito Federal al momento de cometerse el delito y destitución e inhabilitación de tres meses a dos años para desempeñar otro empleo, cargo o comisión públicos.</td>
</tr>
<tr>
<td></td>
<td>Cuando el monto a que ascienda el enriquecimiento ilícito exceda del equivalente de cinco mil veces el salario mínimo diario vigente en el Distrito Federal, se impondrán de dos años a catorce años de prisión, multa de trescientas a tres mil veces el salario mínimo diario vigente en el Distrito Federal al momento de cometerse el delito y destitución e inhabilitación de dos años a catorce años para desempeñar otro empleo, cargo o comisión públicos.</td>
</tr>
<tr>
<td></td>
<td>“Sanctions shall apply to anyone who commits illicit enrichment by reason of his post, position, or commission. Illicit enrichment exists when a public servant is unable to prove the legitimacy of an increase in his net worth or the legal origin of assets held in his name or with respect to which he acts as the owner, pursuant to the Federal Law on the Responsibilities of Public Servants.</td>
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<td>“Criminal responsibility is also incurred by a person who knowingly passes off, as his own, assets acquired by a public servant in contravention of the provisions of this law.</td>
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<td>“The following sanctions shall apply to those who commit the crime of illicit enrichment:</td>
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<td>“Forfeiture, to the benefit of the State, of those assets that cannot be accredited in accordance with the Federal Law on the Responsibilities of Public Servants.</td>
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**Illicit Enrichment Provisions (continued)**

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<tr>
<th>Jurisdiction</th>
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| Nepal        | "When the amount of the illicit enrichment does not exceed the equivalent of five thousand times the minimum daily wage in force in the Federal District, the sanction shall be a prison term of between three months and two years, a fine of between thirty and three hundred times the minimum daily wage in force in the Federal District at the time the crime was committed, dismissal, and disqualification from holding another public post, position, or commission for between three months and two years."

"When the amount of the illicit enrichment exceeds the equivalent of five thousand times the minimum daily wage in force in the Federal District, the sanction shall be a prison term of between two and fourteen years, a fine of between three hundred and five hundred times the minimum daily wage in force in the Federal District at the time the crime was committed, dismissal, and disqualification from holding another public post, position, or commission for between two and fourteen years."\(^4\)

30 Nepal

2009

The Prevention of Corruption Act, Art. 20, Property Deemed to be Acquired Illegally

(1) In case the statement of property submitted in accordance with prevailing laws by a public servant deemed to have held a public office in accordance with prevailing laws seems to be incompatible or unnatural or in case he maintains an incompatible or unsuitable lifestyle or it is proved that he has given someone a donation, gift, grant, present or has lent money beyond his capacity, he shall prove the sources from which he has acquired such property and if he fails to do so, such property shall be deemed to have been acquired in an illegal manner.

(2) In case it has been proved that a public servant has acquired property in an illegal manner as referred to in subsection (1), he shall be liable to a punishment of imprisonment for a term not exceeding two years as per the amount of the property acquired in such a manner, and a fine according to the amount of property and the illegal property acquired in such a manner shall also be confiscated.

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### Illicit Enrichment Provisions (continued)

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| **31 Nicaragua** | Article 448  
Law No. 641 of 2008 (the Criminal Code), Article 448, Enriquecimiento ilícito  
La autoridad, funcionario o empleado público, que sin incurrir en un delito más severamente penado, obtenga un incremento de su patrimonio con significativo exceso, respecto de sus ingresos legítimos, durante el ejercicio de sus funciones y que no pueda justificar razonablemente su procedencia, al ser requerido por el órgano competente señalado en la ley, será sancionado de tres a seis años de prisión e inhabilitación por el mismo período para ejercer cargos o empleos públicos.  
A public authority, official, or employee who, without committing a more severely punished crime, obtains an increase in his net worth that is significantly excessive compared to his legitimate income during the performance of his functions and the origin of which he cannot reasonably justify, when so required to do by the competent body indicated by law, shall be punished by a prison term of between three and six years and disqualified from holding public positions or post for the same duration. |
| **32 Niger** | Article 1er: “le délit d’enrichissement illicite est constitué lorsqu’il est établi qu’une personne possède un patrimoine et/ou mène un train de vie que ses revenus licites ne lui permettent pas de justifier”  
Article 4 “dès lors qu’est ouverte une information pour enrichissement illicite, le ministère public adresse une réquisition à la personne visée par ladite information afin qu’elle lui communique l’état de son patrimoine et les modalités de sa constitution ; la nature et le montant de ses revenus” |

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### Illicit Enrichment Provisions (continued)

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<th>Jurisdiction</th>
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<tr>
<td>Pakistan</td>
<td>National Accountability Bureau Ordinance</td>
</tr>
<tr>
<td>1999</td>
<td>A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:- if..</td>
</tr>
<tr>
<td></td>
<td>v. If he or any of his dependents or benamidars owns, possesses, or has any right or title in any movable or immovable property or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for;</td>
</tr>
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(1) Any public servant who has in his possession any property, moveable or immoveable either in his own name or in the name of any other person, which there is reason to believe to have been acquired by improper means and which is proved to be disproportionate to the known sources of income of such public servant shall, if he fails to account for such possession to the satisfaction of the Court trying him, be punishable with imprisonment for a term which may extend to seven years and with fine, and on such conviction the property found to be disproportionate to the known sources of income of the accused by the Court shall be forfeited to the Provincial Government.

The reference in subsection (1) to property acquired by improper means shall be construed as a reference to property acquired by means which are contrary to law or to any rule or instrument having the force of law or by coercion, undue influence, fraud or misrepresentation within the meaning of the Contract Act, 1872.

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### Illicit Enrichment Provisions (continued)

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<tr>
<td>Panama</td>
<td>El servidor público que, personalmente o por interpuesta persona, incremente indebidamente su patrimonio respecto a los ingresos legítimos obtenidos durante el ejercicio de su cargo y hasta cinco años después de haber cesado en el cargo, y cuya procedencia lícita no pueda justificar será sancionado con prisión de tres a seis años. La pena será de seis a doce años de prisión si lo injustificadamente obtenido supera la suma de cien mil balboas. La misma sanción se aplicará a la persona interpuesta para disimular el incremento patrimonial no justificado. Para efectos de esta disposición, se entenderá que hay enriquecimiento injustificado, no solo cuando el patrimonio se hubiera aumentado con dinero, cosas o bienes, respecto a sus ingresos legítimos, sino también cuando se hubieran cancelado deudas o extinguido obligaciones que lo afectaban. “Any public servant who, either personally or through a third party, unduly increases their wealth in relation to the legitimate income obtained during the occupation of their post and for up to five years after having left the post, whose lawful provenance they are unable to show, shall be punished with three to six years of imprisonment. “The penalty shall be six to twelve years of imprisonment if the unjustified amount obtained exceeds the sum of one hundred thousand balboas (B/.100,000.00). “The same penalty shall apply to the third party used to conceal the unjustified increase in wealth. “For the purposes of this provision, unjustified enrichment shall be deemed to exist not only when there has been an increase in wealth in terms of money, objects, or property in relation to their lawful income, but also when debts have been repaid or obligations extinguished.”</td>
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Illicit Enrichment Provisions (continued)

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<td>Paraguay</td>
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Article 3 provides that the offense of illicit enrichment is committed by any public servant covered by any of the situations described in Article 234 who, following commencement of his or her functions, incurs any of the following situations:

(a) has obtained the ownership, possession, use and enjoyment of goods, rights, or services that represent a price for purchase, possession, or use and enjoyment that is in excess of his or her legitimate economic possibilities and those of his or her spouse or companion;

(b) following his or her admission to public service, has paid off debts or canceled obligations that affected his or her net worth, or those of his or her spouse or companion, in conditions in excess of his or her legitimate economic possibilities.
Illicit Enrichment Provisions (continued)

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<td>Peru 1991</td>
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| Law 28355 of 2004 (Law amending various articles in the Criminal Code and the law against money laundering), which modifies Article 401 (on illicit enrichment) of the Pervuan Criminal Code | Law 28355 of 2004 Enriquecimiento Ilícito
El Funcionario o servidor public que ilícitamente incrementas su patrimonion, respect de sus ingresos legítomos durante el ejercicio de sus funciones y que no pueda justificar razonablemente, sera reprimido con pena privative de libertad no menor de cinco ni mayor de diez años e inhabilitación conforme a los incisos 1 y 2 del artículo 36º del Código Penal.
Si el agente es un funcionario public que haya ocupado do cargos de alta dirección en las entidades uorganismos de la administración pública o empresas estatales, o esté sometido a la prerrogativa del antejuicio y la accusación constitucional, la pena sera no menor de ocho ni mayor de dieciocho años e inhabilitación conforme a los incisos 1 y 2 del artículo 36º del Código Penal.

Se considera que existe indicio de enriquecimiento ilícito cuando el aumento del patrimonio y/o del gasto economic personal del funcionario o servidor public, en consideración a su declaración jurada de bienes y rentas, es notoriamente superior al que normalmente haya podido tener en virtud de sus sueldos o emolumentos percibidos, o de los incrementos de su capital, o de sus ingresos por cualquier otra causa lícita.

Any government official or public servant who unlawfully increases their assets above their lawful earnings during the performance of their functions and cannot reasonably justify said increase, shall be punished with not less than five nor more than 10 years of imprisonment and ineligibility pursuant to Article 36 (1) and (2) of the Criminal Code.

If the agent is a government official who has held senior management positions in entities or agencies of the public administration or state-owned enterprises, or is subject to impeachment proceedings, the penalty shall be not less than eight, nor more than 18, years of imprisonment and ineligibility pursuant to Article 36 (1) and (2) of the Criminal Code.

Indicia of illicit enrichment are deemed to exist when the increase in the assets and/or personal spending of the government official or public servant, bearing in mind their sworn declaration of assets and income, is clearly higher than it normally could have been based on their pay or emoluments received, or on any increases in their equity or income for any other lawful reason.”

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Illicit Enrichment Provisions *(continued)*

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<tr>
<td><strong>Philippines</strong></td>
<td>If in accordance with the provisions of Republic Act Numbered One thousand three hundred seventy-nine, a public official has been found to have acquired during his incumbency, whether in his name or in the name of other persons, an amount of property and/or money manifestly out of proportion to his salary and to his other lawful income, that fact shall be a ground for dismissal or removal. Properties in the name of the spouse and unmarried children of such public official may be taken into consideration, when their acquisition through legitimate means cannot be satisfactorily shown. Bank deposits shall be taken into consideration in the enforcement of this section, notwithstanding any provision of law to the contrary.</td>
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<td><strong>Rwanda</strong></td>
<td>Article 24</td>
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<tr>
<td></td>
<td>Se sera rendu coupable d’enrichissement illicite, tout agent de l’État et toute autre personne qui se sera enrichi sans pouvoir prouver que cet enrichissement est juste et légal. Sera puni d’une peine d’emprisonnement de 2 à 5 ans et d’une amende portée au double jusqu’à 10 fois la valeur du bien dont il n’est pas à mesure de justifier l’origine licite.</td>
</tr>
<tr>
<td></td>
<td>La juridiction ordonne d’office la confiscation des biens ou des revenus faisant l’objet de l’infraction.</td>
</tr>
<tr>
<td><strong>Senegal</strong></td>
<td>L’enrichissement illicite de tout titulaire d’un mandat public électif ou d’une fonction gouvernementale, de tout magistrat, agent civil ou militaire de l’État, ou d’une collectivité publique, d’une personne revêtue d’un mandat public, d’un dépositaire public ou d’un officier public ou ministériel, d’un dirigeant ou d’un agent de toute nature des établissements publics, des sociétés nationales, des sociétés d’économie mixte soumises de plein droit au contrôle de l’État, des personnes morales de droit privé bénéficiant du concours financier de la puissance publique, des ordres professionnels, des organismes privés chargés de l’exécution d’un service public, des associations ou fondations reconnues d’utilité publique, est puni d’un emprisonnement de cinq à dix ans et d’une amende au moins égale au montant de l’enrichissement et pouvant être portée au double de ce montant.</td>
</tr>
<tr>
<td></td>
<td>Le délit d’enrichissement illicite est constitué lorsque, sur simple mise en demeure, une des personnes désignées ci-dessus, se trouve dans l’impossibilité de justifier de l’origine licite des ressources qui lui permettent d’être en possession d’un patrimoine ou de mener un train de vie sans rapport avec ses revenus légaux.</td>
</tr>
</tbody>
</table>

*(Continued on next page)*
## Illicit Enrichment Provisions (continued)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Extract of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>L’origine licite des éléments du patrimoine peut être prouvée par tout moyen. Toutefois la seule preuve d’une libéralité ne suffit pas à justifier de cette origine licite.</td>
<td></td>
</tr>
<tr>
<td>Dans le cas où l’enrichissement illicite est réalisé par l’intermédiaire d’un tiers ou d’une personne physique dirigeant la personne morale seront poursuivis comme complices de l’auteur principal.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sierra Leone</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Anti-Corruption Act, Art. 27</td>
<td></td>
</tr>
<tr>
<td>27. (1) Any person who, being or been a public officer having unexplained wealth.</td>
<td></td>
</tr>
<tr>
<td>(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or</td>
<td></td>
</tr>
<tr>
<td>(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, commits an offence.</td>
<td></td>
</tr>
<tr>
<td>(2) Where the court is satisfied in proceedings for an offence under paragraph (b) of subsection (1) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.</td>
<td></td>
</tr>
<tr>
<td>(3) A person guilty of an offence under subsection (1) shall on conviction be liable to a fine not less than thirty million leones or to imprisonment for a term not less than 3 years or to both such fine and imprisonment.</td>
<td></td>
</tr>
<tr>
<td>(4) In addition to any penalty imposed under subsection (1), the court may order a person convicted of an offence under paragraph (b) of subsection (1) to pay into the Consolidated Fund:</td>
<td></td>
</tr>
<tr>
<td>(a) a sum not exceeding the amount of the pecuniary resources; or</td>
<td></td>
</tr>
<tr>
<td>(b) a sum not exceeding the value of the property, the acquisition by him of which was not explained to the satisfaction of the Court.</td>
<td></td>
</tr>
</tbody>
</table>

(Continued on next page)
### Illicit Enrichment Provisions (continued)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Extract of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Uganda</strong></td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td></td>
</tr>
<tr>
<td>The Anti-Corruption Act 2009, Section. 31</td>
<td>31. Illicit enrichment.</td>
</tr>
</tbody>
</table>

(1) The Inspector General of Government or the Director of Public Prosecutions or an authorized officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—

(a) maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets; or

(b) is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.

(2) A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.

(3) Where a court is satisfied in any proceedings for an offence under subsection(2) that having regard to the closeness of his or her relationship to the accused and to the relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as gift or loan without adequate consideration, from the accused, those resources or property shall, until the contrary is proved, be deemed to have been under the control or in possession of the accused.

(4) In any prosecution for corruption or proceedings under this Act, a certificate of a Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as the value of the asset or benefit or source of income or benefit is admissible and is proof of the value, unless the contrary is proved.

(Continued on next page)
### Illicit Enrichment Provisions (continued)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Extract of Law</th>
</tr>
</thead>
</table>
| 42 Venezuela          | Any public servant who in the performance of his duties obtains an increase in his net worth that is disproportionate in comparison to his income and that he cannot justify, upon being requested so to do and provided that it does not constitute another crime, shall be punished by a prison term of between three (3) and ten (10) years. The same penalty shall apply to third parties who intervene to cover up such unjustified increases in net worth.  
Anti-corruption Law, Art. 73 |
| 43 West Bank and Gaza | Article 1: (…) An illegal gain shall also be any increase in wealth which occurs after the availment of a service or the rendering of a capacity upon a person subject to the provisions of this law or to his spouse or minor descendants, if this is not compatible with their income and the person fails to submit evidence of a legitimate source thereof.  
Law n.1 of 2005 concerning Illegal gains (amended in 2010, now named Anti-corruption n.1 of 2005) |
|                       | Article 25: Any person who obtains an illegal gains for himself or others, or enables others to do so, shall be punished by the following: (i) temporary imprisonment (ii) restitution of the value of the illegal gain and of everything that is proven to be in his financial assets and to have been obtained by means of the illegal gains (iii) payment of a fine that is equal to the value of the illegal gain. |

*Disclaimer:* while endeavoring to reflect existing illicit enrichment provisions within the United Nations, the present list does not purport to be comprehensive. It rather provides an overview of the implementation provisions of illicit enrichment legislation as identified by the team, by relevant jurisdictions in response to questionnaires and by other contributions provided during the course of this study. Similarly, the table includes the applicable penalties where provided in the enacting legislation. Provisions not materially consistent with the UNCAC definition of illicit enrichment, as well as those not criminal in nature are not included in this list. Translations have been included where available.

1 Translation as per Argentina, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 18 September 2009.
2 Translation as per Colombia, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 25 March 2010.
3 Translation as per Ecuador, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 25 March 2010.
4 Translation as per Mexico, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 25 March 2010.
5 Translation as per Nicaragua, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 16 September 2010.
6 Translation as per Republic of Panama, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 16 September 2010.
7 Translation as per Republic of Paraguay, Final Report, Mechanism for Follow up on the Implementation of the Inter-American Convention against Corruption, 18 September 2009.
### Annex 2

#### Jurisdictions With Illicit Enrichment Provisions and Rule of Law, Control of Corruption and GDP per Capita Rankings

<table>
<thead>
<tr>
<th>2009 JURISDICTIONS</th>
<th>2009 WDI Rank Rule of Law (out of 214)</th>
<th>2009 WDI Rank Control Corruption (out of 211)</th>
<th>World Data Bank Rank GDP per Capita (out of 174)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Algeria</td>
<td>156</td>
<td>132</td>
<td>85</td>
</tr>
<tr>
<td>2 Angola</td>
<td>187</td>
<td>200</td>
<td>94</td>
</tr>
<tr>
<td>3 Antigua and Barbuda</td>
<td>39</td>
<td>26</td>
<td>49</td>
</tr>
<tr>
<td>4 Argentina</td>
<td>150</td>
<td>131</td>
<td>49</td>
</tr>
<tr>
<td>5 Bangladesh</td>
<td>154</td>
<td>176</td>
<td>148</td>
</tr>
<tr>
<td>6 Bhutan</td>
<td>87</td>
<td>53</td>
<td>128</td>
</tr>
<tr>
<td>7 Bolivia</td>
<td>192</td>
<td>143</td>
<td>110</td>
</tr>
<tr>
<td>8 Botswana</td>
<td>71</td>
<td>52</td>
<td>45</td>
</tr>
<tr>
<td>9 Brunei</td>
<td>60</td>
<td>45</td>
<td>39</td>
</tr>
<tr>
<td>10 China</td>
<td>117</td>
<td>135</td>
<td>89</td>
</tr>
<tr>
<td>11 China – Hong Kong SAR</td>
<td>21</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>12 China – Macao SAR</td>
<td>68</td>
<td>68</td>
<td>3</td>
</tr>
<tr>
<td>13 Colombia</td>
<td>129</td>
<td>110</td>
<td>76</td>
</tr>
<tr>
<td>14 Costa Rica</td>
<td>74</td>
<td>58</td>
<td>70</td>
</tr>
<tr>
<td>15 Cuba</td>
<td>147</td>
<td>75</td>
<td>64</td>
</tr>
<tr>
<td>16 Ecuador</td>
<td>197</td>
<td>174</td>
<td>84</td>
</tr>
<tr>
<td>17 Egypt</td>
<td>97</td>
<td>125</td>
<td>95</td>
</tr>
<tr>
<td>18 El Salvador</td>
<td>165</td>
<td>99</td>
<td>90</td>
</tr>
<tr>
<td>19 Ethiopia</td>
<td>164</td>
<td>155</td>
<td>163</td>
</tr>
<tr>
<td>20 Gabon</td>
<td>131</td>
<td>173</td>
<td>51</td>
</tr>
<tr>
<td>21 Guyana</td>
<td>143</td>
<td>137</td>
<td>120</td>
</tr>
<tr>
<td>22 Honduras</td>
<td>169</td>
<td>168</td>
<td>114</td>
</tr>
</tbody>
</table>

(Continued on next page)
### Jurisdictions With Illicit Enrichment Provisions and Rule of Law, Control of Corruption and GDP per Capita Rankings (continued)

<table>
<thead>
<tr>
<th>2009 JURISDICTIONS</th>
<th>WDI Rank Rule of Law (out of 214)</th>
<th>WDI Rank Control Corruption (out of 211)</th>
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</tr>
</thead>
<tbody>
<tr>
<td>23 India</td>
<td>95</td>
<td>113</td>
<td>119</td>
</tr>
<tr>
<td>24 Jamaica</td>
<td>135</td>
<td>127</td>
<td>87</td>
</tr>
<tr>
<td>25 Lebanon</td>
<td>145</td>
<td>163</td>
<td>61</td>
</tr>
<tr>
<td>26 Lesotho</td>
<td>113</td>
<td>80</td>
<td>146</td>
</tr>
<tr>
<td>27 Madagascar</td>
<td>158</td>
<td>105</td>
<td>162</td>
</tr>
<tr>
<td>28 Malawi</td>
<td>110</td>
<td>130</td>
<td>168</td>
</tr>
<tr>
<td>29 Malaysia</td>
<td>75</td>
<td>89</td>
<td>55</td>
</tr>
<tr>
<td>30 Mexico</td>
<td>141</td>
<td>108</td>
<td>54</td>
</tr>
<tr>
<td>31 Nepal</td>
<td>175</td>
<td>158</td>
<td>157</td>
</tr>
<tr>
<td>32 Nicaragua</td>
<td>167</td>
<td>160</td>
<td>147</td>
</tr>
<tr>
<td>33 Niger</td>
<td>146</td>
<td>146</td>
<td>170</td>
</tr>
<tr>
<td>34 Pakistan</td>
<td>172</td>
<td>183</td>
<td>126</td>
</tr>
<tr>
<td>35 Panama</td>
<td>102</td>
<td>107</td>
<td>62</td>
</tr>
<tr>
<td>36 Paraguay</td>
<td>178</td>
<td>167</td>
<td>106</td>
</tr>
<tr>
<td>37 Peru</td>
<td>149</td>
<td>116</td>
<td>79</td>
</tr>
<tr>
<td>38 Philippines</td>
<td>138</td>
<td>154</td>
<td>117</td>
</tr>
<tr>
<td>39 Rwanda</td>
<td>136</td>
<td>81</td>
<td>164</td>
</tr>
<tr>
<td>40 Senegal</td>
<td>115</td>
<td>136</td>
<td>141</td>
</tr>
<tr>
<td>41 Sierra Leone</td>
<td>176</td>
<td>177</td>
<td>166</td>
</tr>
<tr>
<td>42 Uganda</td>
<td>127</td>
<td>166</td>
<td>153</td>
</tr>
<tr>
<td>43 Venezuela</td>
<td>194</td>
<td>207</td>
<td>65</td>
</tr>
<tr>
<td>44 West Bank and Gaza</td>
<td>118</td>
<td>129</td>
<td></td>
</tr>
</tbody>
</table>

*Source: World Bank Institute, Worldwide Governance Indicators and World dataBank, 2009. Although the illicit enrichment offense requires a strong rule of law to be implemented properly, it has also been enacted in some jurisdictions where because of corruption, the rule of law is perceived as weak. Furthermore, a close examination of jurisdictions in the present study revealed that many developing countries where corruption is perceived as pervasive have implemented the illicit enrichment offense in order to tackle the phenomenon with a wide range of tools available.*
Annex 3:
The Illicit Enrichment Questionnaire

Background Information

Country name: __________________________________________________________

Contact Information: ____________________________________________________

Legal Framework

1. Is ILLICIT ENRICHMENT a crime in your country? (For purposes of this study, illicit enrichment is the criminalization of a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.)

   Yes ☐       No ☐

If yes, please include the relevant law below.

____________________________________________________________________
____________________________________________________________________

If no, is “illicit enrichment” incorporated in other legal instruments (tax code, administrative laws, forfeiture laws, ethics codes, etc.)? If so, please specify.

____________________________________________________________________
____________________________________________________________________
2. What evidence is needed to prove an illicit enrichment offense? What types of evidence is presented in court? (documents, testimony)

____________________________________________________________________

____________________________________________________________________

3. How does the burden of proof shift during an illicit enrichment prosecution?

____________________________________________________________________

____________________________________________________________________

4. What according to your country’s jurisprudence is considered a defense to the illicit enrichment offense, that is, what is considered a “reasonable explanation” of the source of assets?

____________________________________________________________________

____________________________________________________________________

Application Data

For this section, if statistics are available and public, please provide us with the relevant data requested below. If not, please provide approximate numbers.

5. How many cases of illicit enrichment have been brought in your country since the law was enacted? How many, in average, are brought each year?

____________________________________________________________________

____________________________________________________________________

6. Of the illicit enrichment prosecutions sought, what percentage resulted in convictions?

____________________________________________________________________

____________________________________________________________________
International Cooperation

7. Have you filed requests for international mutual legal assistance in relation to illicit enrichment investigations/prosecutions?

Yes ☐ No ☐

If yes, have you encountered problems in obtaining said assistance? Please describe.

____________________________________________________________________

____________________________________________________________________

Asset Recovery

8. What assets are subject to recovery in relation to illicit enrichment proceedings?

9. Have you recovered any assets in relation to an illicit enrichment prosecution?

Yes ☐ No ☐

If yes, in how many instances and what quantities were recovered?

____________________________________________________________________

____________________________________________________________________

Challenges

10. What are the main challenges in investigating and prosecuting illicit enrichment cases in your country?

____________________________________________________________________

____________________________________________________________________
Bibliography


McWalters, I. 2003. Bribery and Corruption Law in Hong Kong. LexisNexis Butterworths, A Division of Reed Elsevier (Singapore) Pte Ltd.


**Cases**


John Murray v. the United Kingdom. judgment of 8 February 1996, Reports 1996-I, p. 49, para. 45

J.B. v. Switzerland, Application no. 31827/96 (2001)

Minelli v. Switzerland (A62 (1983) para 38)

Hong Kong (SAR):
Attorney General v. Hui Kin Hong. Court of Appeal No.52 of 1995

India:


Krishnananand Agnahatri v. State of M.P. [(1977) 1 SCC 816]


Sajjan Singh v. the State of Punjab, 1964 AIR 464; 1964 SCR (4) 630


U.S.A.:
Coffin v. United States, 156 U.S. 432 (1895) at 453.


United States v. Saccoccia, 18 F.3d 795, 800 n.6 (9th Cir. 1994).
Treaties and Conventions


