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Review Article

International Legal Assistance for Crime-Related Confiscation (Some Ideas for Somalia)

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Abstract: This research paper explores the confiscation under the Somali Penal Code, its compatibility with confiscations in foreign countries as well as the possibilities of cooperation between Somalia and other countries with different confiscation systems for the purposes of depriving serious criminal offenders of their financial powers. The problem of such mutual legal assistance occurs when the confiscation has been ordered in one country while the target property is located, in whole or in part, in the territory of another country. Even in such cases, the confiscation should be achieved so that "crime does not pay". The successful solution to this complex problem requires serious legislative work and operational efforts by competent authorities. The aim of this paper is to prompt some ideas to Somalia as to how progress in this area might be made.

Keywords: crime, link, property, assets, law, international agreement, sharing.

INTRODUCTION

Somalia still adheres to the traditional criminal confiscation which is regulated by the Somali Penal Code [PC] as a security measure. The confiscation under the PC of Somalia concerns material objects related to crime, namely: instrumentalities and benefits: proceeds and/ or profits. It takes place only if their owner is convicted. The objects which the convict owns are liable to confiscation only if they are connected to his/her crime, intended or committed (attempted or accomplished), and this connection is proven in compliance with the same high evidentiary standards as the crime itself. Courts in Somalia and other countries with this traditional type of confiscation do not confiscate any assets if their link with the crime is not proven like the crime itself.

However, there are also foreign countries where the volume of criminal confiscation as a security measure is larger. These are the countries, which have introduced new types of confiscation: either the Extended Confiscation or the Unexplained Wealth Confiscation. Such confiscations deprive to a larger extent the convicted owner of the financial power to commit new crimes. In view thereof, when the owner is convicted in Somalia but his/her assets are in another country, which has adopted any of these new types of confiscation, the Somali authorities have the chance to more significantly neutralize the convict. Additionally, if the foreign country shares the confiscated assets with the country, which has requested their confiscation, this could bring positive consequences also to Somalia when it is the requesting country. This is why the Somali authorities should be aware of the two new types of confiscation to be able to efficiently make use of any of them.

Prior to requesting any foreign country for confiscation, Somalia must find satisfactory proof that the target property is its territory. This is a necessary result with also requires efficient international legal assistance. Mistakes may only benefit offenders as Somali authorities would not be able to successfully collect sufficient evidence about their assets and present it to the country where they are located.

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Evidence for Financial Proceedings for Achieving Confiscation Abroad - the two Methods of Its Obtaining

In an increasing number of cases the property liable to confiscation is, in whole or in part, somewhere abroad. In such cases, the magistrate in charge of the case must know how to find the property and also what to do if s/he succeeded in finding it.

When trying to find the location, the nature and the amount of such property abroad, the interested magistrate and the country s/he works for can make use of two means. They can resort either to international legal assistance between judicial authorities or resort to international cooperation between administrative bodies, such as Financial Investigation Units [1].

The first of the two means is international legal assistance. It consists of the execution of letters rogatory, mostly. Their execution is designed to result in the collection and provision of evidence about the proceeds from the investigated crime. This evidence is useable to substantiate their confiscation as well [2, 3].

The second means, that one can make use of, is the international cooperation between national administrative bodies. This is non-judicial cooperation, in general. It is a procedure mentioned in a number of domestic laws. Such laws are UK Criminal Finances Act [4], and the Republika Srpska Criminal Assets Recovery Act [5]. However, this administrative procedure is comparatively new and not very well-known. This is why many countries are hesitant and even reluctant to respond to requests under this procedure.

Administrative requests are less reliable for another important reason as well. Despite being faster, they do not guarantee that the requested information can always be obtained. For example, administrative requests do not guarantee that the requested information is obtainable if it constitutes some bank secrecy. This weakness does not characterize letters rogatory. On the contrary, they are the appropriate device to open foreign bank secrecy for evidentiary purposes. According to Article 7 (5) of the UN Drug Convention of 1988 and Article 18 (8) of the UN Convention against Transnational Organized Crime, *"Parties shall not decline to render mutual legal assistance...on the ground of bank secrecy".* Furthermore, the two UN Conventions prescribe that interested judicial authorities can use letters rogatory to request the provision of originals or certified copies of documents, bank, financial, corporate or business records. Also, according to the two UN Conventions, letters rogatory can be used for identifying or tracing proceeds and instrumentalities of crime. Nothing of this sort is globally provided for administrative requests. This is another serious argument to prefer letters rogatory to administrative requests in search of evidence relating to criminal assets and their confiscation.

A significant peculiarity of the evidence produced through the execution of letters rogatory should be highlighted. Sometimes, the focus of the requesting magistrate is on the predicate crime only. S/he does not take into consideration the connected money laundering crime, although a suspicion that it has been committed exists, usually. As a result, the requesting magistrate forgets to expressly request evidence in respect of the connected money laundering crime as well. When this magistrate receives, unexpectedly, pieces of evidence of the money laundering crime also, s/he faces the problem as to whether the evidence concerning the money laundering crime is it admissible in court.

The answer should be positive: this evidence is also admissible. The argument is that no restrictive rule exists for any evidence received from abroad for the criminal proceedings in support of which the evidence was requested. A restrictive rule exists when the extradition of a wanted person is obtained. This is the Speciality Rule. According to it, the magistrate in charge of the criminal proceedings cannot even collect evidence against the person, including through a letter rogatory. Per argumentum a contrario, when it comes to evidence produced through the execution of some letter rogatory, the magistrate in charge is allowed to make use of all pieces of evidence obtained for the respective criminal proceedings without any restriction at all.

The Letter Rogatory for the Purposes of Future Confiscation

The preparation of letters rogatory is an important and difficult job. When it comes to Europe, two conventions are to be taken into consideration: the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The former convention is called the Strasburg Convention [6] while the latter is called the Warsaw Convention [7]. Both conventions contain legal frameworks for international judicial cooperation. These legal frameworks coincide to a very large extent.

The two Conventions have a common peculiarity. None of them supports requests for the so-called "fishing expeditions"[1]. Requests for such investigations lie outside the scope of application of both Conventions. These "fishing expeditions" are such general inquiries which are carried out sometimes even without the existence of any suspicion that an offence has been committed [8, 9]. These “expeditions” target persons, actually; they do not constitute any reaction to alleged/probable violations of law at all.

The official Explanatory Report to the Warsaw Convention clearly states that the Council of Europe does not support any "fishing expeditions". This does not mean, though, that "fishing expeditions" are prohibited. Actually, the non-support to "fishing expeditions" solely means that, initially, the interested country needs to prepare and provide in its letters rogatory the necessary threshold information about the bank account(s) that it is looking for. This necessary information is received through international police, customs, or other non-judicial (operational) cooperation. Then the information is given in the letter rogatory to increase the probability of success.

The lack of support to these "fishing expeditions”, when requested by a letter rogatory, expresses a significant general idea of international legal assistance. This is the idea that the requesting country should always retain its investigative responsibilities for making the necessary evaluations and conclusions. The requesting country cannot transfer its responsibilities to the requested country. No foreign country is to be assigned with any fact-finding tasks, such as finding as to whether a given suspect has any property in the territory of that country.

The interested magistrate can request investigative actions only. The interpretation of their results is solely his/her duty. The magistrate has to study the results received from the requested country and decide whether the circumstances that s/he is looking for have actually occurred or not. This peculiarity of international legal assistance is worth highlighting because even some countries believe that they can task us with fact-finding missions. Armenia is such an example. According to Article 475 of the Armenian CPC, outgoing letters rogatory shall contain, among other things, “*a list of circumstances which must be found out*” by the authorities of requested countries. Yet, no country is obliged to do anything like this for Armenia. The sole obligation of any requested country is to undertake the investigative actions which Armenia has requested and to send to the Armenian authorities the pieces of evidence that were collected. Thereafter, it is their job to draw conclusions about the existence or non-existence of circumstances, which might be relevant to their case.

If the requesting Party has no clue where the property sought for confiscation might be found, the requested Party is not obliged to search all banks in a country. According to Article 37 (1), ‘e’, ‘f’ of the Warsaw Convention, the request is expected to contain: description of the property in relation to which cooperation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property. Therefore, the request should include information relating to the banks it is thought may hold relevant accounts, if such information is available. Hence, the requesting Party should try to limit the subject of its request to certain types of bank accounts only and/or accounts kept by certain banks only. This will enable the requested Party to restrict the execution of the request accordingly. Otherwise, the requested Party may prefer to say, in one way or another, that it is too difficult to execute the request.

In Europe, one can make use of three conventions to acquire evidence from abroad for future confiscation. These are the two specialized conventions, the Strasbourg and the Warsaw convention, and also the European Convention on Mutual Assistance in Criminal Matters. In such cases, when the judicial authorities of a given country have more instruments, they need to find the applicable one. Usually, it is not a matter of our free choice; it is a matter of law, actually [10, 11]. Thus, Article 26.1 of the European Convention on Mutual Assistance in Criminal Matters stipulates that “*this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties*”. So, to be on the safe side, the requester must always mention this Convention in our letters rogatory. Moreover, it is appropriate to begin with a reference to this Convention. In this way, s/he recognizes the subsidiarity of other competing international instruments, including the two specialized conventions, namely: the Strasburg Convention and the Warsaw Convention. As a result, no one can blame the magistrate for lack of precision. S/he reduces the risk of failure in the efforts to obtain evidence from abroad.

[1]See Point 125 of the Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 2005, p. 21.

It is worth mentioning that similar hierarchy exists by virtue of Article 68 [Provisions of the Agreement are binding to the Parties**]**, letter "a", of the multilateral 1983 Riyadh Arab Agreement for Judicial Cooperation {also Riyadh Convention} reads the same: "*The provisions of this Agreement shall be binding to all its contracting parties, and no two or more contracting parties may agree on whatsoever is in contravention of its provisions*". Obviously, if the Parties (Somalia is one of them as it ratified the Agreement on the 21st of October 1985) deviate from the provisions of the Riyadh Convention, the new agreement would violate them and be, therefore, inapplicable. However, this principle applies to future agreements only. Regarding prior agreements, the Riyadh Convention addresses only those, which govern extradition issues. According to letter "b" of the aforementioned article, "*If the provisions of the present Agreement conflict with those of any previous special agreement, the text most effectual in extraditing persons facing charges or convicted shall apply*". Most likely, this matter of priority would be settled on a case-by-case basis when it comes to conflicting provisions on letters rogatory.

Not all issues relating to international legal assistance are regulated by the overriding international instrument. This is valid for the European Convention on Mutual Assistance in Criminal Matters also. In some cases, interested European countries should make use of the two specialized conventions: the Strasburg Convention and the Warsaw Convention. Precision also requires knowing how to find the applicable one in a given situation.

It is well known that the Warsaw Convention updates and expands the scope of the Strasbourg Convention. Nevertheless, the Strasbourg Convention is still in force and shall not be underestimated, let alone ignored. On the contrary, if a country can achieve what it wants by resorting to the Strasbourg Convention its authorities should prefer this Convention to the Warsaw Convention. The Strasbourg Convention must be preferred for pragmatic reasons. This Convention has been applied for a much longer time and it is much better known than the Warsaw Convention. Hence, if one resorts to the Strasbourg Convention, differences in interpretation with the requested Party are less likely.

Certainly, there is a room for making use of the Warsaw Convention as well. The interested country must refer to this Convention in cases where the Strasbourg Convention does not allow it to reach the goals that this country is in pursuit of. These are cases where the Warsaw Convention is the only appropriate instrument enabling us to obtain evidence from abroad. A good example is Article 17 of the Warsaw Convention. This Article is titled 'Requests for information on bank accounts'. Paragraph 6 of this Article reads: "*Parties may extend this provision to accounts held in non-bank financial institutions. Such an extension may be made subject to the principle of reciprocity*". This provision is useful because, since the adoption of the 1990 Convention, money laundering techniques have significantly evolved. They increasingly target the non-bank sector and use professional intermediaries to invest criminal proceeds in thelegitimate economy. So, if Parties are willing to cooperate for the purpose of detecting and confiscating such proceeds also, they may make use of Article 17 (6) of the Warsaw Convention.

Also, one can make use of another significant innovation of the Warsaw Convention. This is the innovation that the requested Party may apply the requesting Party's rules governing provisional measures for future confiscation. Article 15 (3) of the Convention provides, in particular, that the requested Party must respect the formalities and the procedures contained in the request of the requesting Party, even if the formalities or procedures are unfamiliar to the requested Party. This obligation rests with the requested Party if these formalities or procedures are not contrary to its fundamental principles. The idea of this innovation is to reduce the number of rejected requests on procedural grounds by requested countries and also to reduce the number of inadmissible pieces of received evidence in the courts of requesting countries.

Possible Incompatibilities between the Two Countries' Laws to be Taken into Consideration.

If the requesting country, including Somalia, collects the necessary evidence and, eventually, succeeds in establishing the location, nature and amount of the property liable to confiscation, this country would be interested in achieving its confiscation. The property may be located (in part or even in whole) in the territory of a foreign country. In this situation, Somalia as the seeking country is interested in preparing and dispatching further requests to the foreign country in question. Their objective would be to achieve the confiscation of any property in the territory of that country.

In any such case, the applicable law for the desired confiscation is always the law of the requested country. If that country is requested for something incompatible with the fundamental principles of its law, the request will not be granted. Because such incompatibility varies from country to country, it is appropriate to clarify in advance the rules on confiscation in the foreign country that

interested magistrates plan to approach. Sometimes, European magistrates will need to study the Sharia law to come closer to success. For example, should such a magistrate approach Libya with a request for confiscation it would be good if s/he knows well in advance the text of Article 14 [Criminal Law and Sharia Law] of the Libyan Penal Code: „*This Code shall in no manner affect the individual rights provided for by Sharia law*." Therefore, if a property has been acquired on the basis of the Sharia law in Libya the provisions of the Code governing confiscation would not be applicable to this property.

There might be also some other incompatibilities of a more general character between the laws of the requesting country and the laws of the requested one. The first such incompatibility is between the types of confiscations provided in the two countries.

In many countries, confiscation is only a security measure ('forfeiture'). Somalia is one of them – Articles 182-183 of the Somali Penal Code. At the same time, in some other countries, such as Bulgaria (Art. 37. 1.3 of its Criminal Code), China (Art. 59 of its Criminal Code), Greece (Art. 76. 1 of its Criminal Code) and Ukraine (Art. 51.7 of its Criminal Code), confiscation may be a punishment as well. As a result, there might be a situation where the property liable to confiscation under Somali law (possible solely in the form of a security measure) is in the territory of such a foreign country, where the crime committed and punished in Somalia constitutes in the other country a ground for confiscation solely as a punishment there. In such cases, if a Somali court issues a confiscation order for assets found in such a country, the authorities of Somalia would need to clarify with the other country's authorities how to approach them to make them confiscate the target property at their disposal if this is feasible at all.

Also, when confiscation is a punishment, it is not always required that the target property shall be connected to the crime for which its owner was found guilty. Often, it is sufficient that the property belongs to him/her[2]. However, this is not the case with confiscation as a security measure, including under Somali law. According to Article 183 of the Somali PC,

"*On a conviction, the Judge may order the confiscation of the material objects which were used or intended to be used in the commission of the offence [15 P.C.], or of those which are the proceeds or the profits thereof.*

Confiscation shall be ordered:

- *of material objects which constitute the rewards for the offence [15 P.C.];*
- *of material objects whose manufacture, use, possession, custody or alienation constitutes an offence [15 P.C.], even where no conviction was pronounced...*".

Hence, the confiscatable assets of the offender shall be related to his/her proven crime (being its object, instrumentality or/and gain), regardless of whether or not a conviction was pronounced. Obviously, a country, where confiscation is a punishment, may turn to Somalia. This is why Somalia should be prepared to react. Its legislative authorities must decide, as well as produce respective legal rules, whether to grant incoming requests for such confiscation, even if the target property is not related to any proven crime of its owner. In case of a positive legislative decision, Somalia, would, in turn, benefit itself. It would open the way to its judicial authorities to reciprocally request these countries for the confiscation of assets, found in their territories, even when these assets are not related to the crime and therefore, the Somali own standards for their confiscation have not been met.

Another problem to be addressed by the Somali legislation is the so-called Civil Forfeiture [12]. It is a confiscation without any criminal judgment at all. Following the recommendation of Article 54.1, letter "c" of the UN Convention against Coruption[3], some foreign countries do not require any longer criminal conviction as a prerequisite to obtaining an order of confiscation, especially in cases when the perpetrator enjoys immunity or s/he has died or fled and cannot be trialed *in absentia* [13]. Somalia is not among those countries yet. Because of this difference the Somali legislation needs to decide whether incoming requests from such foreign

[2] For example, Article 57 [Confiscation of Property] of the Tajik PC reads as follows:
"*(1) Confiscation of property means final, uncompensated taking by the State of all or part of the belongings which are the property of the offender.*
(2) Confiscation of property is prescribed for felonies or especially grievous crimes committed with mercenary motives, and it may be imposed by a Court only in cases provided for by corresponding articles of the Special Part of the Code.
(3) Belongings being necessary for the convict and his dependents are not subject to confiscation according to the list specified by the criminal executive Code of the Republic Tajikistan".

[3] This provision expressly requires from the State Parties to "*consider taking such measures as may be necessary to allow confiscation of ... property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases*".

countries for civil forfeiture (non-conviction based confiscation) may be granted and when, despite its present inapplicability in Somalia.

It would be particularly important to clarify in all cases whether Somali authorities would render not-treaty based cooperation to foreign countries for confiscation**.** Since Somalia is a Party to very few international agreements and is not expected to have much more agreements with other countries, not-treaty based cooperation would also be recommendable**.**

The next incompatibility concerns the criminal (conviction based) confiscations which are security measures only. This incompatibility occurs in cases the laws on this confiscation of the two cooperating countries are conceptually different. Most often, the difference is in the volume of the confiscated property.

Thus, Article 183 of the Somali PC requires not only that the confiscatable assets of the offender shall be related to his/her proven crime (being its object, instrumentality or/and gain). Also, it is always required that the existence of such property and its link to the crime has been proven with the same high evidentiary standard ["beyond reasonable doubt"] as the crime itself. This is why courts in Somalia and other countries with this traditional form of confiscation do not confiscate from the owner any of his/her assets if their link with the crime is not proven like the crime itself or his/her assets originate from other criminal activities (his/her or another person's), even if a proven link between them and the activities exists.

However, there are foreign countries, which follow other models of criminal confiscation, which have looser requirements. The confiscatable property under these models is larger in volume. They are applicable in respect of serious crimes, exhaustively enlisted in law, e.g. terrorism, organized crime, corruption, etc [14-16].

A. The first such model is the extended confiscation [17-19]. It has been introduced in Bosnia and Herzegovina (see below), Romania (Article 112-1 of its Criminal Code), Serbia (Article 3.2 and 28.2 of its Law on Seizure and Confiscation of Proceeds from Crime) and some other countries as well. Such countries confiscate not only the assets, which derive from the crime for which the owner has been convicted. These countries also confiscate assets originating from any other criminal activities, if some evidence of a link between them exists. In any case, a lower evidentiary standard of proving the link is sufficient. Thus, according to Article 110a (1) of the Bosnian Criminal Code, there must be "*sufficient evidence to reasonably believe that the property gain is of criminal origin*". Article 114a of the Criminal Code of the Federation of Bosnia and Herzegovina (one of its entities) is similar. It reads that „*the court can also ... order confiscation of material gain for which the prosecutor provides sufficient evidence that there is reasonable suspicion that it was acquired through … criminal offences*...".

So, some vague causal link with criminal activities is required; a suspicion that the property of the convict (his/her non-reported/ unlawful property) is of criminal origin. In practice, any evidence is sufficient. Thus, in contrast to criminal proceedings, where the crime of the accused must be proven beyond a reasonable doubt (say: 95+), in the extended conviction procedure the level of proof should be as lower one as in any other civil proceedings, namely: the plaintiff/claimant must prove his/her case by a preponderance of the evidence (50%+). As a result, the defendant, who is the target property owner as well, is interested in seeking and presenting own pieces of proof to oppose/ neutralize the existing evidence against him/her.

B. The other new model of confiscation is the so-called unexplained wealth confiscation [20, 21]. It implies a larger volume of confiscation; its volume is larger even compared to the previous group.

The unexplained wealth confiscation also needs a conviction but does not require any link with criminal activities at all. Therefore, the prosecutor shall not prove that the property claimed for confiscation derives from any criminal activity. This confiscation has been introduced in Bulgaria (see below), Italy (Article 240-bis of its Penal Code), Ukraine (Article 100.9.6-1 of its CPC), the UK (Articles 362a-362t of the UK Proceeds of Crime Act) and some other countries.

Thus, the Bulgarian 2018 Law on Combating Corruption and Forfeiture of Illegally Acquired Property, Chapters X – XIII, requires a final judgment, in general. However, in some cases, confiscation is achievable even if criminal proceedings against the suspected owner have not been instituted at all or after their initiation, have been terminated or suspended – Article 108 of the Law. Lastly, as the focus on this confiscation is the property of the person, his/her assets may be confiscated, in some cases, even when s/he is acquitted if no evidence of their legal origin has been presented by him/her.

The Albanian Antimafia Law (No. 9284 of 2004 "*On Preventing and Striking at Organized Crime*") is similar. Pursuant to its Article 24 (1), confiscation shall be imposed when there are reasonable doubts that the person participated in organized criminal activities and it has not been proven that his/her assets have a legal origin or the s/he did not manage to justify the possession of assets, disproportionate with his/her incomes or profits gained through legal resources declared by him/her [6].

No doubt, a country, using any modern form of confiscation, may turn to Somalia. This is why the Somali legislation must decide whether to grant incoming requests for recognition and enforcement of such confiscation orders, which do not meet the strict standards of traditional confiscation under Article 183 of the PC. In case of a positive legislative decision, whereby such orders are also recognizable and enforceable in Somalia, it, in turn, would open the way to Somali authorities to reciprocally request these countries for recognition and enforcement of orders for confiscation of assets, found in their territories, even when the Somali own standards have not been met.

Somalia is interested in finding a way to obtain confiscation from such countries. Their new forms of confiscation deprive to a larger extent the convicted owner of the financial power to commit new crimes. In view thereof when the owner is convicted in Somalia but his/her assets are in another country, which has adopted any of the new forms of confiscation; the Somali authorities have the chance to more significantly neutralize the convict. Additionally, if the foreign country shares the confiscated assets with the country, which has requested their confiscation, this would also bring positive consequences to Somalia.

Again, it is essential that the Somali legislation must decide whether incoming requests for confiscation may be granted without any international treaty. Since Somalia is a Party to very few international agreements and is not expected to have much more agreements with other countries soon, not-treaty based cooperation would also be recommendable**.**

The Difference between the Two New Forms of Confiscation

Somali authorities seeking assistance from other countries, which have introduced new forms for confiscation, should be aware of the differences between them. Otherwise, they cannot correctly identify the applicable form in the country where the target property is located, in whole or in part.

The criterion to distinguish between the extended confiscation and the unexplained wealth confiscation lies in the necessity to separately find any proof of a link between the owner's crime and the target property. The former requires finding some whereas the latter does not. Therefore, if the law does not assign the interested state authorities with finding and presenting in court any evidence about the link between the owner's crime and the target property because this link, though mentioned in the legal text, is proven in full by the existence of another ascertained circumstance, the confiscation is an unexplained wealth one, actually.

Such typical circumstance, which shall inevitably lead to the conclusion that the link in question exists, is the manifest (or obvious) disproportionality of the convict's property to his/her lawful income. Once this disproportionality has been ascertained, the existence of the link is accepted *ex lege*. Article 8 of the Montenegrin Law on the Seizure and Confiscation and Article 4.2 of the Republika Srpska (the other entity of Bosnia and Herzegovina) Criminal Assets Recovery Act are a good illustration of this situation where the link between the owner's crime and the target property is mentioned in the text of the law but it does not need to be proven at all because its existence is accepted *ex lege*.

The two Articles contain not only the requirement of manifest (or obvious) disproportionality of the convict's property to his/her lawful income. Both Articles mention also the causal link of the unlawful income with suspected criminal activities. Nevertheless, this link does not constitute any separate requirement for confiscation. Actually, it solely clarifies why the convict's property has become manifestly disproportional to his/her lawful income. The two Articles explain that the property of the convict has become manifestly disproportional because it originated from criminal activities. Ths, according to both Article 8 (2) of the Montenegrin Law and Article 4.2 of the Republika Srpska Law, "*Well-founded suspicion that material benefit was derived from criminal activities exists if the property of the perpetrator… is manifestly disproportionate to his lawful income*." Per argumentum a contrario, if the property is not manifestly disproportional to the lawful income, it is not linkable to any criminal activities at all. Therefore, the causal link of the property with criminal activities is just an inevitable derivative and impressive explanation of its manifest disproportionality. If the property is disproportional, its exceeding part always comes from criminal activities. No other piece of evidence is necessary for its causal link with criminal activities. This is why the link cannot be regarded as another legal requirement for the confiscation of the property, namely: as a link which is needed separately from the requirement of the manifest disproportionality of the property.

Hence, the manifest disproportionality of unexplainable wealth is sufficient for its confiscation. This makes confiscation under the Montenegrin Law and the Republika Srpska Law based, actually, on the Unexplained Wealth theory. Certainly, a proven crime is needed for the confiscation under this theory. However, the crime does not necessarily engender the confiscatable property. The crime is solely a condition for the confiscation of the property. No evidence is needed that this crime or any other crime has anything to do with the confiscatable property.

It follows at the end that if a country, such as Somalia tries to obtain confiscation of property from such countries, which have introduced the Unexplained Wealth Confiscation, it would not need to separately present to them any evidence. If the owner was convicted for a crime which triggers this confiscation in those countries, it would be sufficient to prove the manifest disproportionality of the convict's property to his/her lawful income.

The Ability to Confiscate at a Foreign Request

The problems with confiscation abroad are not limited to the volume of the confiscated property only. Many countries requested for the confiscation of property in their territories need, to execute the request, a conviction for the conditioning crime. As a result, if their national criminal laws are not applicable to the crime, such countries do not have any legal mechanism to carry out the requested confiscation despite any international obligations.

This is the situation with Serbia, for example. Its Law provides for confiscation of property found in Serbian territory if some serious crime was committed and ascertained by an indictment of the prosecutor, at least. Pursuant to Article 28 (1) of this Law on Seizure and Confiscation of Proceeds from Crime, "*After the legal entry into force of indictment and not later than one year following the final conclusion of criminal proceedings the public prosecutor shall file a motion for the permanent seizure of the proceeds from crime*".

However, to have an indictment and later, institute confiscation proceedings in Serbia, its national criminal law shall be applicable. If it is not, the judicial authorities there cannot issue any indictment, let alone conduct confiscation proceedings. So, to hit the road to confiscation, the country in question must apply its criminal law to the conditioning crime. Otherwise, no confiscation under the Serbian Law is possible. This Law does not allow any confiscation, if the local criminal law is not applicable to the crime. There is no exception even in cases when a foreign country requests the confiscation.

Indeed, if the assets wanted for confiscation are located in the requested country, this usually indicates a money laundering crime committed in part, at least, in its territory. In theory, this place of commission makes the applicability of local criminal law inevitable[4]. Hence, it seems that once the Serbian authorities receive an international request for confiscation, they can institute own criminal proceedings for money laundering in order to obtain a local judgment ascertaining the commission of this crime and then proceed with the requested confiscation. In practice, however, such money laundering is difficult to prove, let alone be ascertained by a local judgment. As a result, in almost all cases of incoming requests for confiscation conditioned by crimes, committed abroad to which the Serbian criminal law is not applicable, its authorities would not be able to react positively.

Probably, some magistrates (prosecutors, judicial investigators and/or judges) may try to construe expansively the provisions, which allow confiscation. Such lawyers may try to include in the confiscation grounds also conditioning crimes committed abroad to which the local criminal law is not applicable. This is hardly feasible, though. At least, this is not the better option. To be on the safe side, any country needs a clear provision allowing requested confiscation when its national criminal law is not applicable to the conditioning crime.

In this regard Article 2 (2) of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds is an interesting example. This Paragraph tries to offer a legislative solution to this problem when the criminal law of the requested country is not applicable to the conditioning crime and therefore, the crime is beyond that country's jurisdiction. The Paragraph in question reads**:** „*This Law shall apply to activities…outside the jurisdiction of Azerbaijan in accordance with the international instruments to which Azerbaijan is a Party*".

[4] See the texts of Article 6 (3) of the Chinese Criminal Code, Article 113-2 (2) of the French Criminal Code, Article 8 (1) (ii) of the Turkish Criminal Code, Article 16 (2) (ii) of the UAE Criminal Code, etc.

The problem is that this Azeri legal text relies only on international law. It refers to international law. However, the applicable international law, in turn, prescribes that the property subject to confiscation is disposed of by the requested country "*in accordance with its domestic law*". This is Article 15 of the Strasbourg Convention and also Article 25 of the Warsaw Convention. So, the issue goes back to domestic law. The same weakness is visible also in Article 27 (1) of the North Macedonian Law on Judicial Cooperation in Criminal Matters. It reads: „*The confiscation of property and the property benefits in a procedure of international legal assistance shall be made in accordance with the provisions of the Criminal Code, Law on Criminal Proceedings and international agreements*".

As a result, a "vicious circle" occurs. To get out of it, the domestic law of the requested country should expressly regulate this issue. There must be an explicit domestic provision that the confiscation procedure shall be carried out also in cases of incoming foreign requests for confiscation even when the conditioning crime is beyond the criminal jurisdiction of the country. Otherwise, the problem is only seen but not solved, actually.

When improving its legal provisions on international judicial cooperation in criminal matters Somalia is also advised to produce such a rule that the confiscation procedure shall be carried out also in cases of incoming foreign requests for confiscation even when the conditioning crime is beyond the criminal jurisdiction of the country. Without such a rule Somalia will not be able to execute such requests. In turn, it will be more difficult for the Somali authorities to obtain in similar conditions confiscation from other countries.

Unlike Serbia, some countries can, at least, execute some of the incoming confiscation requests, even when their Criminal Codes are not applicable to the conditioning crime. The Federation of Bosnia and Herzegovina, for example, is allowed do this when the order for confiscation is a part of a foreign criminal judgment sent for recognition and enforcement in full. According to Article 37 (3) of the Federation Law on Forfeiture of Criminal Proceeds, this Bosnian entity is bound by *"decisions of the competent authorities in Bosnia and Herzegovina, which recognize and enforce foreign judgments, if these decisions contain a measure of forfeiture of property and proceeds of crime"*. Actually, the foreign judgment shall contain such measure.

The quoted article is a step forward compared to the Serbian Law. The recognition and enforcement of foreign criminal judgments do not require that the requested country's Criminal Code is applicable to the crime for which they were issued. The applicability of the Code is not necessary even when this crime conditions the requested confiscation. Therefore, a foreign criminal judgment containing a confiscation measure may be recognized and enforced, together with this measure, even if the Criminal Code of the requested country is not applicable to the conditioning crime of the convict. It follows that if the Somali authorities want to confiscate something in the territory of a country with a law like the one in the Federation of Bosnia and Herzegovina, they need an own criminal judgment of their court containing a confiscation measure and a request for the recognition and enforcement of the judgment in full.

Regretfully, in all other situations, no confiscation is possible, even in the Federation of Bosnia and Herzegovina, if the own criminal law of the requested country is not applicable to the conditioning offence. It is worth noting that there are two other typical situations, where no foreign judgment is recognized and enforced, but, nevertheless, confiscation should be carried out in the execution of a foreign request.

- The first situation occurs when a given country receives an executable foreign request for enforcement of a separate confiscation order issued in the requesting country. Article 20 (1) (i) of the West African Convention on Mutual Assistance in Criminal Matters, for example, the envisages this situation and prescribes that "*the requested Member State shall, to the extent permitted by its laws, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting Member State*".
- The second situation occurs when some country receives solely an executable foreign request for confiscation without any confiscation order issued in the requesting country. In this situation, as there is no foreign confiscation order to enforce, the requested country is expected to produce its own one for the property outlined by the requesting country.

Both situations can be found in Article 13 of the UN Convention against Transnational Organized Crime. This Article demands from the Parties of the Convention that incoming confiscation requests shall be executed even when they are not related to any foreign judgment that must be recognized and enforced. Besides, Article 13 is not limited only to the cases when requested country's criminal law is applicable to the crime conditioning confiscation. This means that each country is in need of some general rule, which to allow confiscation when the conditioning crime is beyond its own criminal jurisdiction. This recommendable rule is

general; it shall not refer only to confiscation within the recognition and enforcement of foreign judgments. The rule shall cover the other situations of executable incoming requests for confiscation as well.

If a given country has not produced such a rule to implement in full Article 13 of the aforementioned Convention, the cooperation with this country would be more difficult. When it comes to the interested judicial authorities, their duty is to identify such countries and decide what to do with them before approaching them with our requests for confiscation.

Finally, it is worth explaining - in relation to the aforementioned Article 37 (3) of the Federation of Bosnia and Herzegovina Law - that in some countries, there are also situations when a non-conviction based confiscation has been ordered. In such situations, the owner of the target property may not be convicted at all. Therefore, the issuing country cannot send to the Federation of Bosnia and Herzegovina, or other country with a similar law, any own criminal judgment at all, let alone a judgment containing a confiscation measure.

Moreover, even if the owner has been convicted in the requesting country the problem is not any different. That country is not obliged to prefer to achieve the confiscation through recognition and enforcement of its judgment. It may want to achieve the confiscation in some of the other two alternative ways under the quoted Article 13 of the UN Convention against Transnational Organized Crime. The problem is that requested country (the said Federation or any other similar approached country) cannot render any cooperation, as it has no corresponding national mechanism to execute the request. Also, such requested country is not in the position to make the requested one take into consideration what may be done for it either. In particular, the requesting country cannot require from the requesting one to withdraw its confiscation request and present request for the recognition and enforcement of its judgment (containing a confiscation measure), instead, especially if the execution of the punishment imposed is underway in that requesting country.

The Asset Sharing Issue

Finally, there is another confiscation related-problem. It is, however, associated only with the efficiency of the confiscation rather than its feasibility. This is the problem of asset sharing [22].

Pursuant to Article 14 of the UN Convention against Transnational Organized Crime, Article 57 of the UN Convention against Corruption and Article 25 of the Warsaw Convention as well, countries executing foreign requests for the confiscation of assets found in their territories dispose of the assets in accordance with their national laws. Most often, requested countries make laws to benefit themselves. Their laws postulate that, in general, confiscated assets shall become their property. However, requested countries do not necessarily retain all assets. Options for their redistribution exist. Apart from returning any seized item to its initial possessor if s/he has acted in good faith, the confiscated property may also be shared with the informant of its whereabouts. This asset sharing would stimulate such informants to cooperate. At the international level, the informant is actually, the country, which requests the confiscation. Therefore, this country may be put in the position to benefit from asset sharing if the requested confiscation takes place at all.

Bilateral agreements are the typical legal instruments on international asset sharing. Therefore, if one requests confiscation from a foreign country, s/he must find whether a bilateral agreement on asset sharing with that country exists. If such an agreement exists, the share of the requesting country is outlined in its text, unless the determination of this share has been left to the requested country's law.

If no such agreement exists, the interested country may try to negotiate the so-called *ad hoc* agreement with the foreign country where the target property is located. Such an agreement would be applicable to the individual case only. Before negotiating, the interested country should find whether the other country has any domestic rule on asset sharing. If it has, the probability of reaching agreement increases.

The other country's domestic rule may contemplate some percentage for transfer to the requesting country. Such a rule should exist in each European Union [EU] country for the benefit of the other EU countries. The rule is a result of the legislative implementation by EU countries of the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders[5]. Pursuant to Article 16 of this Framework Decision, when money has been obtained through

[5] The legal basis for them was Article 34 of the Treaty on European Union, amended by the Treaty of Nice and before being repealed by the Lisbon Treaty. The continued basis for framework decisions is set out in transitional provisions of

the execution of a confiscation order, it remains in full with the executing (requested) country, if the amount is 10,000 euros or less. Otherwise, 50 per cent of the amount obtained is transferred to the issuing (requesting) country.

The other domestic solution to the problem is in mentioning the possibility of asset sharing in domestic law. Article 20 (6) of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds provides such an example. It reads: „ *the funds or other property confiscated on the territory of Azerbaijan may be fully or partially delivered to*"the requesting country. No percentage is being contemplated but, in any case, this provision opens the door to negotiations.

Such a provision is recommendable to Somalia as well. Given the limited number of bilateral treaties that it can conclude, this country should be open to cooperation on the reciprocity basis. Such cooperation should involve asset sharing on reciprocity basis, which would be possible if the interested countries provide a legal basis for it like Article 20 (6) of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds.

CONCLUSION

Somalia is interested in finding a way to obtaining confiscation from foreign countries which have introduced new forms of criminal (conviction based) confiscation. These new forms deprive to a larger extent the convicted owner of the financial power to commit new crimes. In view thereof when the owner is convicted in Somalia but his/her assets are in another country, which has adopted any of the new forms of confiscation; the Somali authorities have the chance to more significantly neutralize the convict. Additionally, if the foreign country shares the confiscated assets with the country, which has requested their confiscation, this could bring positive consequences also to Somalia when it is the requesting country.

The new forms of criminal confiscation, the extended and the unexplained wealth one, have four peculiarities. First, both forms of confiscation are contemplated for serious crimes, exhaustively enlisted in law, such as: terrorism, organized crime, corruption, etc. Second, the property liable to confiscation does not necessarily derive from the crime for which its owner was convicted. Thus, the crime, for which the owner was convicted, is not necessarily the source of the confiscatable assets. It is solely a pretext for their confiscation, only a conditioning crime for the confiscation. Third, these confiscations never require that the link between criminal activities (incl. the owner's crime) and the target property has been proven in compliance with the same high evidentiary standards as the crime itself. The evidentiary standards are not the same as that required in criminal proceedings for proving the guilt of the suspect. The evidentiary standards for proving the causal link with some criminal activity are either lower [expanded confiscation] or non-existent at all [unexplainable wealth confiscation]. Lastly, both forms of confiscation need obvious discrepancy of the convict's property with his reported (lawful) incomes.

In any case, Somali authorities are recommended to resort to letters rogatory when they want to prove that the target property is its territory. Purely administrative procedures for seeking international assistance between executive authorities are less efficient. It is noteworthy that mistakes and omissions may only benefit offenders, as Somali authorities would not be able to successfully collect sufficient evidence about their assets and present it to the country where they are located.

Finally, it is to be remembered that national confiscation mechanisms are usually triggered when the respective crime is within the criminal jurisdiction of the country as its penal law is applicable to this crime. However, foreign countries may request confiscation of proceeds found in Somalia that derive from crimes, which are beyond the reach of the Somali penal law. Such a legislative gap shall not be allowed. It can be excluded by an explicit rule that confiscation mechanism of Somalia shall be also applicable when the incoming request for confiscation concerns proceeds, deriving from crimes, which are beyond the reach of the Somali penal law.

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the Lisbon Treaty. Article 9 of the Protocol on Transitional Provisions provides that: "*The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union*".

A framework decision was a kind of legislative act of the European Union used exclusively within the EU's competences in police and judicial cooperation in criminal justice matters. However, the framework decisions were not capable of direct effect. They only required from EU countries to achieve particular results without dictating the specific means (legislative, operational) of achieving any of them.

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