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International cooperation by Bosnia and Herzegovina for criminal assets recovery (lex ferenda)

Summary
This paper identifies gaps in the legal framework for confiscation of crime-related properties in Bosnia and Herzegovina. It contains legislative proposals to make confiscation procedures in the country more efficient. Particular attention is paid to the Republika Srpska Criminal Assets Recovery Act as the earliest and most used legal instrument in Bosnia and Herzegovina.

Keywords: confiscation, assets, crime, law, international cooperation

Bosnia and Herzegovina {BiH} is a complex country in Southeastern Europe located on the Balkan Peninsula. It includes 4 components, each with its own Criminal Code, Criminal Procedure Code and other laws as well. These four components are: the State Level, two entities (Republika Srpska, the Federation of BiH) and Brcko District [1, p. 3].

1. Countries executing foreign requests for confiscation of assets found in their territories (Article 14 of the UN Convention against Transnational organized Crime/UNCATOC or Article 57.1 of the UN Convention against Corruption/ UNCAC) 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 of their redistribution exist. In particular, apart from returning any seized item to its initial possessor if s/he has acted in good faith (Articles 12.8 and 14.2.ii of UNCATOC and Articles 31.9 and 57.1, 3 of UNCAC), the confiscated property may also be shared with the informer of its whereabouts as well.

Legal regulation of such sharing of assets is recommendable. It would be appropriate having a rule in law on asset sharing between the lawful owner (mostly, the confiscating country) and the one who found and reported the assets, incl. the foreign country which by requesting the confiscation of the assets contributed to the successful result. The basic considerations for having such a specific rule in favor of the requesting country are similar to those arguments which support benefiting financially, under any national obligation law, persons who have found and returned a lost item or who have reported its whereabouts, at least. Essentially, the arguments are: to make everyone interested in providing such cooperation. Thus, the person who returns a lost item is awarded with 10% of its value, pursuant to the Republika Srpska {RS} Real Rights Law, or even up to 20% of the lost item's value, pursuant to the Armenian Civil Code, for example. Some similar share might be foreseen in favor of anyone, incl. foreign countries which help BiH to find in its territory and confiscate property which eventually would belong to its budget.

Also, international sharing of assets is widely recommended to stimulate execution of confiscation requests from foreign countries[1]. Pursuant to Point 38 (2) of the Financial Action Task Force 40 Recommendations of October 2003-4, "*there should also be arrangements for coordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets*".

At this point, bilateral agreements are the reliable legal instruments to achieve international asset sharing. It is noteworthy that asset sharing arrangements between countries find support also in multilateral UN instruments – Article 14 (3) (b) of UNCATOC. However, no multilateral convention expressly requires

[1] Asset sharing arrangements between requesting and requested countries find support in multilateral instruments, such as UNCATOC – Article 14 (3)(b).

sharing of confiscated assets. Moreover, one can hardly expect any multilateral legal solution in the near future. According to reliable information, several years ago Iraq carried out consultations for a Protocol on international asset sharing to UNCAC. However, the Iraqi initiative did not yield any positive result[2].

The issue of asset sharing has been solved to some extent in the EU by the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Pursuant to Article 16, when money has been obtained through 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. This Framework Decision is liable to legislative implementation by EU countries but it is also an example worth following by the authorities in BiH as well.

A rule on international asset sharing would be particularly advantageous in regard to foreign countries with which BiH has no international agreement containing a provision on sharing of assets. As BiH is not likely to have such agreements with all foreign countries, it must rely on domestic rules of other countries on international asset sharing to benefit from it. Necessarily, BiH must develop, in turn, its own provisions on such asset sharing to ensure reciprocity.

Lastly, no international asset sharing action excludes any domestic asset sharing, incl. for the benefit of contributing state agencies in the country. On the contrary, international asset sharing might be complementary to such domestic asset sharing in pursuit of the goal to be most efficient.

Either way, domestic rules on international asset sharing are necessary. As competent public officials are in need of a law authorizing confiscation, they needs also specific provisions (international or domestic, at least) authorizing any following international asset sharing as well[3]. Otherwise, without a legal basis, no one can give any part of the confiscated property to requesting/ informing countries in order to financially stimulate them. Obviously, the act of giving in individual situations any part of the confiscated property to them without any legal authorization (international or domestic) would constitute embezzlement in office by the public official in charge unless the justification of extreme necessity or permissive risk is applicable [2, p. 89].

2. Exceptionally, *ad hoc* agreements on international asset sharing might be reached as well. In general, they are based on the principle reciprocity between

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[2] This information was received from the Iraqi authorities by the author of the current paper who worked in Baghdad (2012–2013) as the Head of the Judiciary Team of the EUJUSTLEX for Iraq.

[3] It might be appropriate to borrow the general idea of Article 20.6 of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds: „ *... the funds or other property confiscated on the territory of the Republic of Azerbaijan may be fully or partially delivered to*" the requesting country.

requesting and requested countries. However, the country which approaches other countries with requests for confiscation may rely on reciprocity with them if its domestic legal framework for international cooperation is of good quality and does not unreasonably prevent their incoming requests from being executed.

To avoid any such unreasonable prevention, the RS Criminal Assets Recovery Act {CARA} should be improved. This Act provides for confiscation of any crime--conditioned property found in the territory of RS if some serious crime (specified in Article 2 of the Act) was committed and it has been ascertained by a local judgment – Article 28 in conjunction with Article 48 (2) of the Act[4]. The problem is that the CARA does not prescribe any confiscation if no such judgment is issuable because local criminal law is not applicable to the conditioning crime[5] at all. For this reason the CARA is not well synchronized with the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime {ECLSSC} (ratified by BiH on 01 July 2004). The Convention virtually requires some domestic law "extension" for its actual implementation in all cases where confiscation is appropriate.

According to Article 13 of this Convention, "*a Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall: (a) enforce a confiscation order made by a court of a requesting Party…; or (b) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it*". Further on, pursuant to Article 14 "*the procedures for obtaining and enforcing the confiscation shall be governed by the law of the requested Party*"; under Article 15, "*Property confiscated by a Party …, shall be disposed of by that Party in accordance with its domestic law*".

Obviously, the Convention makes no exception for cases when the requested country's criminal law is not applicable to the crime conditioning confiscation. Therefore, the Convention does not free on the grounds that national criminal law is inapplicable any requested country, incl. BiH/RS, from the obligation to confiscate at incoming international requests. The importance of such confiscation, even though conditioned by a crime the requested country's law cannot be applied to, is beyond doubt, nowadays [3, p. 563].

It is true that if the assets wanted for confiscation are located in RS as a requested country, this usually is a clear indication of a money laundering crime commit-

[4] This Paragraph 2 reads: "*Provided that there is no internationally reached agreement or that some of the issues had not been defined by international agreement, international cooperation is to be reached in accordance with the provisions presented by this Act*".

[5] It is called "conditioning" as it opens the way to confiscation because the assets subject to confiscation are related to the crime (most often the link is causal: they originate from it) or because the owner is sentenced for the crime and is in possession of assets which are also confiscable on the grounds (Article 3.1 CARA) that are not explainable with his/her lawful income and are likely to originate from some other criminal activity.

ted in part, at least, in its territory. In theory, this place of commission makes the applicability of local criminal law inevitable. Hence, it seems that once RS authorities receive an international request for confiscation, they can institute own criminal proceedings for money laundering to obtain a local judgment ascertaining the commission of this crime and then proceed with the requested confiscation.

In practice though, such money laundering is hard 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 RS criminal law is not applicable, its authorities would, inevitably, break the quoted Article 13 of the Convention. To avoid such systematic violations, counterproductive to local budget as well (see the quoted Article 15 of the Convention), the CARA should provide for an additional confiscation procedure: triggered solely on the grounds of incoming international requests for confiscation when the conditioning crime does not fall within RS jurisdiction but has been ascertained, for example, by a judgment in the requesting country. Otherwise, foreign countries may always reciprocate by refusing to grant requests from BiH (RS) for confiscation, when their national criminal law is not applicable to the conditioning crime, even if – in contrast to BiH (RS) – such confiscation is allowed under their law.

Probably, some prosecutors and judges may try to construe expansively, even apply by analogy, the CARA provisions which allow confiscation (Article 2 and 28, specifically) for the purpose of including in the confiscation grounds also the conditioning crimes committed abroad to which local criminal law is not applicable. This is hardly feasible though, especially given the general idea of the *in dubio pro reo* argument. Therefore, the positive result is likely to occur in few cases. A serious risk of a negative result would always exist.

Obviously, the lack of a clear provision allowing confiscation when local criminal law is not applicable to the conditioning crime substantiates a risk of failure. This risk created by legislative inaction cannot be justified since one simple legal text is sufficient to remove the risk and guarantee success of confiscations conditioned by crimes beyond the scope of national criminal law[6].

In the end, it is appropriate to note that e.g. Article 2.2 of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds tried to offer an alternative solution to the problem with confiscation of assets when the criminal law of the requested country is not applicable to the conditioning crime and therefore, the crime is beyond the country's jurisdiction. This Paragraph reads**:**

[6] As far as it can be judged from BiH, Macedonia, for example, faces the same problem. Article 27 (1) of its 2010 Law on Judicial Cooperation in Criminal Matters postulates that confiscation requested by other countries shall be executed in conformity with the Criminal Code, the Criminal Procedure Code and international agreements. Obviously, national legal framework for such requested confiscation is necessary as international agreements refer to local laws regarding mechanisms of confiscation but none of the laws of Macedonia envisage the situations when the conditioning crime is beyond the reach of its local criminal law.

„*This Law shall apply to the activities related to legalization of the criminally obtained funds or other property and the financing of terrtorism outside the jurisdiction of the Republic of Azerbaijan in accordance with the international instruments to which the Republic of Azerbaijan is a Party*".

However, while focusing on conditioning crimes beyond own jurisdiction, the quoted legal text – similarly to Article 48 (1) CARA – relies only on international law. Such a legislative solution is hardly sufficient to yield a positive result since international law (Article 15 of ECLSSC) postulates that the property subject to confiscation is disposed of by the requested country "*in accordance with its domestic law*". Hence, if the domestic law returns the issue to international law, the respective country creates a vicious circle (Lat.: circulus vitiosus) only. To get out of this circle the domestic law of the requested country should expressly regulate this issue by providing that even if the conditioning crime is beyond the criminal jurisdiction of the country, the property shall, nevertheless, be confiscated if all other legal requirements are met.

3. When it comes to the Federation of BiH, the other BiH entity, one can argue that applicability of own criminal law to the conditioning crime is not always necessary for confiscation on foreign requests. This is true in part since applicability of own criminal law to the conditioning crime is not necessary in cases when requested confiscation results from recognition and enforcement of foreign judgments, incl. those which contain also some confiscation order. Therefore, this confiscation is feasible as even the recognition of such foreign judgments does not require applicability of own (the requested country's) criminal law to the conditioning crime. Once recognized, the foreign judgment is enforced together with confiscation order which it contains. As per Article 37 (2, 3) of the Federation of BiH Law on Forfeiture of Criminal Proceeds:

"(2) The decisions of the competent authorities in Bosnia and Herzegovina on the basis of the Mutual Legal Assistance in Criminal Matters Law, which require temporary forfeiture … shall be submitted to the Agency for execution.

(3) The provisions of paragraph 2 of this article are applicable to 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".

It follows that the confiscation order within the judgment is executable in the requested country's territory even when its criminal law is not applicable to the offence. *Per argumentum a contrario*, though, in all other situations, where a foreign judgment is not enforced, no such a confiscation is possible even under the quoted Law, if own criminal law is not applicable to the conditioning offence. Two are these other typical situations where no foreign judgment is enforced but, nevertheless, confiscation should be carried out: when an executable foreign request for the enforcement of a separate confiscation order issued in the requesting

country has been received, and when an executable foreign request for confiscation has been received without any confiscation order issued in the requesting country – see both situations in Article 13 of UNCATOC. All this means that, like RS, the Federation of BiH has to produce a general rule allowing confiscation even when the conditioning crime is beyond own criminal jurisdiction.

4. BiH is neither a Party to the European Convention on the International Validity of Criminal Judgments, nor a Party to any other similar European instrument. This should not be a long-lasting situation as the general tendency in Europe is to comply with and implement the underlying principle of MUTUAL RECOGNITION OF JUDICIAL DECISIONS [4].

This principle cannot be avoided by BiH given its EU orientation. The said principle is reflected in Article 82 (1) (i) of the 2012 Treaty of the Functioning of EU. This provision encourages the mutual recognition of sanctions (punishments and security measures) in EU, incl. freezing and confiscation orders, and financial penalties – see Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the Framework Decision No. 2003/577/JHA on the execution in EU of orders freezing property or evidence, the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders and the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

In view of all this, it is recommendable that the BiH authorities consider becoming a Party to the European Convention on the International Validity of Criminal Judgments (CETS 070). This is particularly necessary given Article 62 (1) (i) of the BiH Law on Mutual Legal Assistance in Criminal Matters. It postulates that foreign criminal judgments are executed in BiH "*only where so provided by international treaty*".

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