

FOREIGN NATIONALS AND CRIMINAL JUSTICE (The Case of Iraq)

*Yabancı Uyruklular ve Ceza Yargılaması
(Irak Olay İncelemesi)*

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ABSTRACT

The procedural status of foreign nationals accused or sentenced of crimes in Iraq constitutes the subject of the present article. Their rights in criminal and related proceedings, as well as the possibilities of assistance through international judicial cooperation from the countries of their nationalities are dealt with. The judicial mechanisms for protection of their rights are revealed. Special attention is paid to three forms of international judicial cooperation which Iraq may obtain from the foreigners' countries in respect of their alleged or proven crimes, namely: execution of a request to the country of the foreigner's nationality to launch criminal proceedings against him/her, relinquishing the criminal case to the country of the foreigner's nationality and international transfer of the imprisoned foreigner to the country of his/her nationality. Obtaining confiscation by Iraqi authorities in another country is also a major topic of this article.

Key Words: Foreign national, detention, request, transfer, crime proceeds.

ÖZ

Bu makalenin konusunu Irak'ta işlenen suçlardan mahkum olan veya suçlanan yabancı uyruklu kişilerin prosedürel durumu oluşturmaktadır. Bu kişilerin cezai ve buna ilişkin hakları, uluslararası yargı işbirliği ve uyruğu olduğu ülkelerin yardım olanakları ele alınmaktadır. Haklarının

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korunması için gerekli olan yargısal mekanizmalar açıklanmıştır. Uluslararası yargısal işbirliğinde, iddia edilen ve ispatlanan suçlarda Irak üç konuda dikkatli davranmak zorundadır. Şöyle ki: Yabancı uyruklu kişi hakkında ceza yargılaması talebinin iletilmiş olması, ceza davasından feragat edilmesi ve tutuklu yabancının kendi ülkesine uluslararası transferi. Irak otoritesinin başka ülkelerde müsadere etme durumu da makalenin diğer önemli bir konusunu oluşturmaktadır.

Anahtar Kelimeler: Yabancı uyruklu, gözetli/alıkoyma, talep, transfer, suç gelirleri.

As a general rule, foreign nationals participating in legal proceedings enjoy the rights granted to the nationals of the country where the proceedings are conducted. Iraq is no exception. That is why foreign nationals participating in Iraqi criminal proceedings have all the rights that are provided to the corresponding participants of Iraqi nationality, such as: civil plaintiffs, witnesses, experts, etc. This is particularly valid for those foreign nationals who are defendants (accused, indictees). Such persons enjoy the same rights as Iraqis under the Iraqi Criminal Procedure Code and also under Article 14 (3) ('f') of the International Covenant on Civil and Political Rights. This letter provides for the right of free translation to all accused and indictees where necessary². The rights of foreign nationals are guaranteed by the Constitution of Iraq. According to its Article 19 (6), every person, regardless of his/her nationality "*shall have the right to be treated with justice in judicial and administrative proceedings*".

At the same time, unlike Iraqis, foreign nationals, once accused, are deemed to be "vulnerable accused". They are "vulnerable accused" by virtue of their nationality, linguistic disadvantage, insufficient information on local conditions, and limited contacts with relatives and friends. Such persons are entitled to special attention by law. They are additionally granted some specific rights as well given also the possibility to request their countries for judicial cooperation in respect of the alleged or proven crimes committed by them. Their specific rights are materialized in the following legal institutions: (i) the consular assistance institution, (ii) the institution of requesting the country of the foreigner's nationality to launch criminal proceedings against him/her (iii) the institution of relinquishing (transferring) the criminal case to the country of the foreigner's nationality and (iv) the institution of international transfer of the imprisoned foreigner to the country of his/her nationality.

² See also *Kavitha R. Giridhar*. Justice for All: Protecting the Translation Rights of Defendants..., in "Case Western Reserve University's J. of Int'l Law", Cleveland-USA, 2011, Vol. 43, No. 3, p. 799.

CONSULAR ASSISTANCE

I. The first set of additional rights granted to foreign nationals derives from the legal framework for their consular protection when detained. Most often, a foreign national may be detained for some criminal proceedings or extradition proceedings. In any case, once in detention, s/he enjoys the right to access to his/her consul. Under Article 36 of the **Vienna Convention on Consular Relations, 1963** (Iraq has been a Party to it since 14 January 1970), local authorities must notify “without delay” all detained foreigners of the right to have their consulate informed of their detention and also of the right to regular consultation with consular officials during detention. At the request of the detained foreign national, the detaining authorities must then notify the consulate without delay, facilitate unfettered consular communication and grant consular access to the detainee. The rights in question of any detained foreign national invoke correlative obligations on the local state bodies. These bodies are legally obliged, first of all, to inform the foreign national of his/her right to access to his/her consulate. Hence, the Iraqi judges (investigating judges, trial judges) in charge of the respective legal proceedings have the duty to ensure that the state bodies of Iraq fulfil their obligation to advise the detained foreign national of his/her right to have his/her consulate notified.

The notification of the consulate though is a matter of the detainee’s right only. This is not a duty of the detaining authorities. It follows that if the detained foreign national does not exercise his/her right under Article 36 of the aforementioned Vienna Convention, the detaining authorities have no obligation to provide any information to consul of the detainee. Moreover, the detaining authorities are generally prohibited from giving such information to the consul. According Article 36, Paragraph 1 (c) of the Convention, “*consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action*”. The Iraqi judicial authorities are expected to be aware that the common interpretation of this provision is that the detaining authorities shall disclose information to the consul about the detainee only if the detainee has granted them permission to do so. Otherwise, if the detainee does not want his/her consul to be informed on the detention, the detaining authorities must respect his/her right to privacy (or anonymity) under Article 36 of the Vienna Convention on Consular Relations. For example, in UK there is a Prison Service Order No. 4630/11 Jan 2008. Its Point 3 reads: “*In the absence of a request from a prisoner to have his embassy informed, prisons must not pass on the prisoner’s details to his embassy. Where some foreign*



embassy requests information on a prisoner, the prisoners' permission for details to be released must be secured by prison staff before information is disclosed. If the prisoner refuses, then the prison must inform the embassy of the prisoners' right of anonymity under Article 36(1)(c) of the Convention". This applies to any other detained foreign national as well.

Hence, if the competent authorities in Iraq receive some request for information about a foreign national in custody from a consulate of his/her country which is a Party to the Vienna Convention only, they should ask the detainee for his/her consent. If the authorities do not obtain it, they shall not pass on any detainee's details to his/her consulate. Instead, they are likely to inform the embassy that the detainee has exercised his/her right of anonymity under Article 36 of the Convention.

Therefore, there is no general obligation to inform the foreigner's consul. On the contrary, there is a legal prohibition from doing this in the case, set forth in Article 36, Paragraph 1 (c)(iii) of the Vienna Convention on Consular Relations, namely: whenever the detained person expressly opposes such action. Hence, the Convention actually provides for a general prohibition from informing the embassy of the detained person³.

At the same time, if the detained foreign national desires to get in contact with his/her consul, his/her right to communication is undeniable. This right exists even in terrorism cases. With regard to such cases the so-called "*incommunicado* detention" has been under discussion.

II. The "*incommunicado* detention" is understood as a situation in which a detained individual is denied access to family members, an attorney, or an independent physician. There is no general prohibition under international law of *incommunicado* detention. That is why some countries resort to this detention. The United Kingdom, for example, allows for forty-eight hours *incommunicado* detention under the Terrorism Act 2000; in June 2003, Australia adopted a Terrorism Act empowering the Australian Security Intelligence Organization to detain and hold suspects *incommunicado* for up to seven days, a period that can be extended by order of the Attorney General for successive periods of seven days⁴.

³ Where a detained foreign national does not wish to have assistance from the consular authorities of his/her home country, the assistance of a recognized international humanitarian organization is offered as an alternative. The International Committee of the Red Cross, whose official functions include visits to detainees, is the most suitable international humanitarian organization to offer assistance as such an alternative. See additionally George Haynal, Michael Welsh, Louis Century & Sean Tyler. *The Consular Function in the 21-st Century*, Munch School-University of Toronto, 2013, p. 2-19.

⁴ Besides, Article 520 bis of the Spanish Criminal Procedure Code postulates that in cases involving terrorist suspects the maximum three-day limit in police custody may be extended by 48 hours. The extension must be requested within the first 48 hours of detention and

Therefore, it is acceptable, as irrelevant to international law and standards for the time being, to restrict the right of access to family. The problem is that some countries, such as Bosnia and Herzegovina for example, consider the expansion of the *incommunicado* detention. They think also of restricting the access of detained foreign nationals to their consular officials as well. Bosnia and Herzegovina think of postponing the notification of respective foreign consuls for a period of 72 hours. Such a domestic rule would violate international law and standards. The Vienna Convention on Consular Relations prescribes the contrary: notification without any delay. Its Article 36 (1) reads: *“Any communication addressed to the consular post by the person... shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph”*.

Furthermore, even international law and standards for the fight against terrorism do not provide for any exception to the right of the foreign national to communicate with his/her consul. On the contrary, they confirm this right. Thus, both Article 9 of the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999, and Article 10 of the International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005, read:

“3. Any person ... shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) To be visited by a representative of that State;

(c) To be informed of that person’s rights under subparagraphs (a) and (b).

Given these texts, no justification exists for any delayed communication of the detained foreigner with his/her consul.

B. However, the Vienna Convention provides not only for the general prohibition from informing the consulate of its detained national. The Convention also contains some exceptions to this general legal prohibition.

The basic exception to the general rule of detainee’s anonymity is

authorized by the competent judge within the following 24 hours. This judge may authorize that these individuals be held *incommunicado* in police detention. Terrorism suspects may therefore be held for a total of five days in *incommunicado* police detention.



provided for in Article 36 of the Vienna Convention is in the detention of a consular official as set out in Article 42 of the Convention. This Article reads: *“In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel”*.

In this connection it is worth mentioning that consular officers and consular employees do not enjoy full immunity in criminal proceedings, but just the functional one. This means that they have immunity in respect of acts performed in the exercise of consular functions, but not for other acts. For instance, if such a person is involved in a traffic accident, most countries do not recognize driving of a car as exercising of official functions. Hence, the immunity in the event of traffic accidents involving such person is not recognized.

There are also other situations where it is also mandatory to inform embassies of their detained nationals. These obligations to notify though are neither from the Convention, nor have anything do with the defense of the foreigner’s rights. The obligations are solely in favor of criminal justice; they are prescribed in extradition law.

Thus, the state authorities shall inform any foreign country (the country of the detainee’s nationality or third country), if it has circulated via Interpol or other acceptable means of communication a petition for the international search and provisional detention of the person in order to secure his/her presence for future extradition proceedings on its formal extradition request. If the embassy of the other country is active, it would be sufficient to inform its staff; otherwise, the detaining authorities can inform the other country via the Interpol channel.

Secondly, there is another situation where detaining authorities shall notify an interested foreign country: the country of the detainee’s nationality or a third country interested in obtaining the extradition of the detainee. This is done in case of such a bilateral treaty with the foreign country which provides for an obligation to provisionally detain the person without any petition to secure his/her presence for future extradition proceedings, and there is some information that the person has actually committed a crime in respect of which s/he might be extradited to the other country.

C. A lot of Parties to the Vienna Convention have also signed Bilateral Consular Conventions. It is noteworthy that Bilateral Conventions

take precedence over the Vienna Convention. Hence, where a foreign country has signed both the Vienna Convention on Consular Relations and a bilateral Consular Convention with Iraq, the parties must follow the requirements of the bilateral Consular Convention with regard to disclosure of information to foreign consulates.

Basically, countries sign Bilateral Consular Conventions in order to overcome the restrictions of the right of anonymity. It follows that if Iraq has signed a Bilateral Consular Convention with another country, this Convention contains, most likely, a provision for the obligation to notify the consulate of the other country about the personal details of its detained national within specific time limits. This provision is often called a “mandatory notification provision”. Its text might be based on two approaches to fix the problem of the timely informing of the other country’s consulate.

The first approach is to define the time limits in a relative way, by requiring that the delivery should be done “immediately” or “without delay” as provided for in the Convention with Hungary. The second approach is to define the time limits absolutely, in specified days, e. g. the Convention with Bulgaria setting up a deadline of 7 days.

INTERNATIONAL JUDICIAL COOPERATION CONCERNING FOREIGN NATIONALS

III. Not all criminal proceedings against foreign nationals are necessarily completed in Iraq. They are not completed even where this is possible as the person is available: s/he is still present in the Iraqi territory, s/he does not enjoy any immunity and there are no other legal impediments to criminal proceedings against him/her. In some cases Iraqi judicial authorities are authorized to forward the materials they have gathered against a given foreign national to the country of his/her nationality in order to involve its judicial authorities in his/her prosecution, trial and punishment.

The other country is involved through two different forms (methods) of international judicial cooperation. The first one is to request the other country to institute criminal proceedings against him/her as their national. Because most countries recognize the principle of personality to substantiate extraterritorial application of its criminal law, they would consider materials against its nationals, including materials from abroad. This option is very good, especially in cases where Iraq and the other country have an agreement providing for the obligation to consider requests to the other country for institution of criminal proceedings against its nationals. Such obligation is provided for in Article 21 of the Treaty on



Legal Assistance between Iraq and Hungary, and Article 24 of the Treaty on rendering mutual legal assistance between Iraq and the former Soviet Union (still in force for Russia and some other former SU countries). Even if this method of cooperation is not provided for in any international agreement with the other country, it is still the lesser evil compared to the other two possible options: to patiently wait for the wanted foreigner to come back to the territory of Iraq or to try to extradite him/her from a third country when s/he leaves the territory of his/her present residence on his/her own.

In any case, regardless of the reaction of the foreign country, the criminal case against the foreigner stays with Iraqi judicial authorities. They do not transfer your competence over the case to the other country. Iraqi authorities retain their judicial powers over the case. If the foreigner comes back, they can detain, interrogate and prosecute him/her; if s/he is in a third country they may try to obtain his/her extradition from that country. The foreigner is granted with no right to oppose.

In addition to the request for institution of criminal proceedings against the foreign national, his/her deportation or expulsion is likely to be organized if s/he is still in the territory of Iraq and does not want to leave it voluntarily – Article 1 (10, 11) of the **1978 Iraqi Law on Foreigner's Residence No. 118**. In this situation Iraqi authorities face a serious problem. This is the problem of resisting the temptation of resorting to the expulsion of the wanted person to the country that seeks his/her extradition. Such expulsion is easier but prohibited as it constitutes the so-called Disguised Extradition. Such an act is illegal because he deprives him/her of the rights which s/he should have as a wanted person and extraditee.

First of all, any extradition law always grants more rights and opportunities to defense in comparison to the administrative law which governs expulsion. The wanted person is in the position to defend himself/herself during the extradition proceedings by arguing that there is no dual criminality, no dual punishability, that the requesting country cannot guarantee any fair trial, that the person is likely to be tortured there, etc. But if the authorities of the country, where the foreign national is, open expulsion procedures against him/her, s/he can't practically rely on anything similar.

Besides, if the person is extradited, s/he enjoys the immunity of an extraditee in the country which requested his/her extradition. This immunity comes from the so-called Speciality Rule provided for in favor of any extraditee. In accordance with this binding rule, the extraditee shall

not be prosecuted and/or punished for any crime which is different from the one in respect of which s/he was extradited⁵. Nothing of that kind is being foreseen in favor of expelled persons. The foreign country which receives them in its territory is not restricted by any Speciality Rule. It follows that if a person sought for extradition is expelled to the country which requested his/her extradition, then two types of his/her rights are being violated: the right to defense within extradition proceedings in the requested country and the right after the extradition proceedings to be immune from prosecution and/or punishment in the requesting country for any crime which is different from the one in respect of which s/he was extradited⁶.

Obviously, the first way for Iraq to obtain cooperation from the country of the alleged offender's nationality in respect of his/her crime is to send to that country a request for institution of criminal proceedings against him/her. There is a second way though. It is to transfer, if feasible, the Iraqi criminal proceedings against the alleged offender to the country of his/her nationality. This form of international judicial cooperation transfers the judicial competence over the case. It involves two consecutive acts of the prosecuting country. They are the following: initially, Iraqi judicial authorities launch own criminal proceedings against the foreign national; thereafter, they send to the country of his/her nationality a request for taking charge of the criminal proceedings. The basic idea of this transfer is to ensure more successful investigation and prosecution of the alleged crime. That is why it is used to result in conducting the criminal proceedings over it in the country where most evidence might be collected. Usually, this is the country where the alleged crime was committed. In view of this, Iraq is very likely to resort to this option where the foreign national has committed the crime in the territory of his/her country and the victim of that crime has been an Iraqi national.

5 According to Article 52 of the Riyadh Arab Agreement for Judicial Cooperation (1983), "No charge, trial in presence, or imprisonment in execution of a penalty for a crime prior to the date of extradition or other than such crime as he had been extradited for and crimes related to it or crimes committed after extradition, may be made, conducted, or effected in respect of the said person except in the following cases:

(a) If the person had the freedom and the means to leave the territory of the contracting party to whom he was extradited and didn't do so within 30 days of his final release, or had departed and voluntarily returned to it.

(b) If the contracting party which had extradited him agrees to such procedures, provided that a new request, accompanied by the documents listed in Article 42 of this Agreement and a judicial record containing the statements of the extradited person concerning the extension of extradition indicating that he has been given a chance to present his defense to the competent authorities of the contracting party requested to extradite, is made".

6 See also Note on the relationship between extradition and deportation/expulsion (disguised extradition), Council of Europe, European Committee on Crime Problems, 62-nd meeting of the PC-OC, Strasbourg, 15/11/2012.



This form of international judicial cooperation has two distinctive peculiarities. First, this kind of transfer involves preservation of the validity of the evidence collected in the requesting country. It transfers the validity of this evidence as well. Thus, if the competent investigating judge or judicial investigator has interviewed a witness in Iraq and this witness dies later, the court in the other country can, nevertheless, read out his/her witness testimony.

Second, the completed transfer results also in transferring the competence over the case to the other country. Hence, this transfer, as a general rule, prevents Iraq as the requesting country from further prosecuting the alleged offender. In Europe, for example, there is a Convention that regulates transfer of criminal proceedings to another European country. In accordance with this Convention, the requesting country can no longer prosecute the foreigner for the offence in respect of which the proceedings have been transferred on the decision of the requested country. The accomplished transfer constitutes a legal impediment to criminal proceedings against the person for the same offence. At the same time, the finalization of the transfer should not prevent any transferring country from confiscating criminal assets of the person, especially those assets that are found in its territory. In view of this, the laws of some countries expressly prescribe that financial proceedings shall be carried out against the person even where the criminal case against him/her has been transferred abroad, e. g. Article 22 (2) (5) of the 2012 Bulgarian Criminal Assets Forfeiture Act.

At the same time, the Iraqi authorities are aware that the transfer of criminal cases against the foreign nationals (with or without diplomatic immunity) to the countries of their nationality is neither mandatory, nor always appropriate. Prior to requesting the other country for institution of criminal proceedings against its national, two important issues shall be taken into consideration.

First, the authorities of the requesting country must be sure that the Penal Code of the requested country is applicable to the offence of their national. This is particularly important where his/her offence has been committed in the territory of the potential requesting country and the country of the agent is among the so-called Anglo-Saxon (Common Law) countries as they rarely resort to extraterritorial applicability of their national criminal laws.

Second, the authorities of the requesting country must be sure that the offence constitutes a crime under the Penal Code of the potential

requested country as well. To reach such a conclusion, one should take into account not also the legal descriptions of criminal offences but also the defenses to crime (justifications, excuses) provided for in the Penal Code of the other country. The existence of any such a defense excludes the criminality of the conduct even if this conduct fully corresponds to the legal description of some criminal offence there. Hence, defenses to crime are no less important. On the contrary, it is worth highlighting that the difference between Iraqi and foreign legal descriptions of corresponding defenses to crime is usually bigger than the difference between Iraqi and foreign legal descriptions of corresponding crimes. This is particularly valid for justifications, such as: performance of a duty, exercising of a legal right, legal defense.

Thus, the legal framework for a specific justification in the foreign country might be larger in scope and, therefore, exclude the criminality of the foreign national's conduct (act or omission) under the law of his/her country even though the same conduct is criminal under Iraqi law. For example, legal defense in the other country may be larger in scope because subsidiarity of defense is not required... The other country may, unlike Iraq, recognize legal defense in all cases where the defending person could have avoided the conflict with the assailant. Thus, on the one hand, Iraqi authorities have to prosecute anybody who has defended him/herself in situations where it was possible for him/her to avoid the conflict with the assailant as required in Article 42 of the Iraqi Penal Code. It reads: *"This right exists if the following conditions apply: (1) If a person defends himself and his property against the threat of a criminal act or reasonably believes that such threat exists; (2) If he is unable to take refuge with the public authorities in order to protect himself from such threat at the appropriate time; (3) If he has no other means with which to ward off such threat"*. On the other hand though, the laws of many other countries do not contain such restrictions to legal defense. They permit legal defense even in situations where it was possible to avoid the described conflicts with the assailant: by turning to public authorities or by running away. Moreover, the law of some of these countries contains a provision reading: *"Every person shall have the right to necessary defense notwithstanding any possibility to avoid a socially dangerous trespass or request assistance of other persons or authorities"* (e. g. Article 36.2 of the Ukrainian Penal Code). That is why if such a country receives a request for institution of criminal proceedings against its national who has defended him/herself in a situation where it was possible for him/her to avoid the conflict with the assailant, then the judicial authorities would justify the act of the person with the argument that legal defense is



permissible in such situations as well.

The other country's legal framework for justifications there might also be larger in scope because its law provides for some justifications that do not exist in Iraqi law at all. Thus, all countries to the north of Iraq have a specific justification that one cannot see in the Iraqi Penal Code. This is the justification of reasonable (or permissible) risk⁷. Countries that do not have it in their laws often resort to the legal framework for necessity. However, reasonable risk is very different. Actions (rescue operations) in necessity shall be successful; otherwise, the harm caused entails responsibility. On the contrary, actions constituting reasonable risk in criminal law are by definition unsuccessful. Nevertheless, they are justified if they are a necessary experiment, regardless of whether they are in implementation of some specific law, performance of some duty, exercise of some right or not. Hence, if such a country recognizing reasonable risk in its law receives a request for institution of criminal proceedings against its national who has acted in a situation of such a risk, then the judicial authorities of the foreign country would justify the act of the person with the argument that s/he has not violated law.

IV. Lastly, a national of a foreign country may be found guilty and get an imprisonment sentence in Iraq. Nevertheless, s/he shall not necessarily bear in Iraqi territory all consequences of his/her crime and the judgment against him/her. The sentenced foreign national may return to the country of his/her nationality prior to the completion of the procedure to serve there the punishment imposed on him/her.

In particular, this foreign national may be repatriated in implementation of a bilateral or multilateral treaty on the international transfer of sentenced persons. Besides, in contrast to extradition, it is not necessary that the sentenced person is not a national of the sentencing country; it is sufficient that the person is a national of the other country when it comes to his/her transfer⁸. Even if s/he is a person of dual nationality, it is better to transfer him/her to the other country of his/her nationality in case that

7 See Article 46 of the Armenian Penal Code, Article 39 of the Penal Code of Azerbaijan, Article 13a of the Bulgarian Penal Code, Article 31 of the Georgian Penal Code, Article 35 of the Penal Code of Kazakhstan, Article 44 of the Tajik Penal Code, Article 41 of the Penal Code of Uzbekistan, etc.

8 According to Point 20 (2) of the Explanatory Report to the Convention on the Transfer of Sentenced Persons [Council of Europe, 1983], "It is not necessary for the person concerned to be a national of only the administering State. Contracting States may decide to apply the convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals".



the execution of his/her punishment there would produce better results with his/her re-socialization.

A. In contrast to extradition, the transfer of an imprisoned foreign national to the country of their nationality is not a matter of obligation. It is only a matter of prisoner's desire and a discretionary decision of the authorities of both countries: Iraq whose court has rendered the judgment and the country of the prisoner's nationality⁹. It is up to each country to decide what legal obligations it should have to its own nationals but it is difficult to find any country which has entrusted its authorities with the obligation (in the Constitution or another law) to ensure the repatriation of its nationals who are imprisoned in another country. It goes without saying that all countries in the world are obliged to protect their nationals abroad. Nevertheless, this obligation is never interpreted as to include an obligation to request for or to accept the transfer of their imprisoned nationals from sentencing foreign countries. Therefore, sentenced persons in another country do not have any legal right to repatriation.

At the same time, sentenced nationals of foreign countries have, often, the right to know that they may be transferred, if the two countries so decide. Thus, Article 2 (3) of the Bilateral Treaty between Russia and Turkmenistan on Transfer of Sentenced Persons prescribes that "*the Sentencing Country informs of the contents of this treaty each and every sentenced person to whom this treaty could apply*". Such a right is also provided for in Article 6 (2) of the Bilateral Treaty between Belarus and Turkmenistan on Transfer of Sentenced Persons. Finally, Point 6 of the UN Model Agreement on the Transfer of Foreign Prisoners (1985) proposes the following text: "*The prisoner shall be fully informed of the possibility and of the legal consequences of a transfer, in particular whether or not he might be prosecuted because of other offences committed before his/her transfer. The prisoner shall be fully informed of the possibility and of the legal consequences of a transfer*". Obviously, foreign prisoners usually have the right to be informed about the possibility of their transfer and also the right to apply for such a transfer to the country of their nationality. But they have no further rights in this direction and, in particular, the right to actually obtain the transfer.

B. Furthermore, unlike extradition, the transfer of anyone cannot take place without his/her prior consent. However, if the person agrees and the transfer to his/her country takes place, then s/he, again in contrast

⁹ Such decisions are not arbitrary though. They are taken "to further the ends of justice and the social rehabilitation of sentenced persons" – European Court for Human Rights (fourth section), Partial Decision of 2 Dec. 2003 on Application No. 9764/03 by Siim Altsaar against FINLAND.



to extraditees, would not enjoy any immunity from prosecution and/or punishment in his/her country.

It is also noteworthy that the consent of the person and the decision of the sentencing country are always unconditional. This person cannot agree to be transferred under the condition that s/he will not be proceeded against for another crime in the other country. Besides, the sentencing country has usually no grounds either to impose on the other country the condition that the transferee shall not be proceeded against for another crime in the other country. Such consents and decisions are not valid. Again in contrast to extradition, conditions are not inherent in international transfer of sentenced persons.

Extradition –vs- International Transfer of Persons

<i>COMMON FEATURES</i>	A detained person is being surrendered from one to another country in respect of a crime that s/he has committed	
	Dual criminality required	
	Generally, the person is a foreigner in the surrendering country	
	The accepting country is able to enforce the legal consequences of the crime	
<i>DIFFERENCES</i>	Extradition	Transfer
	The surrendered person is not necessarily a convict	The surrendered person is always a convict
	Where the person is a convict, s/he has not yet become a prisoner	The person has already become a prisoner as well
	The person is not necessarily surrendered to the country of his/her nationality	The person is surrendered to the country of his/her nationality (repatriated)
	Most often, the law of the surrendering country is not applicable to crime committed by the person	The law of the surrendering country is always applicable to crime committed by the person

	The law of the accepting country must be applicable to the crime committed by the person	The law of the accepting country is not necessarily applicable to the crime committed by the person
	No transfer of competence together with the surrendered person	Transfer of competence (over the punishment execution) together with the surrendered person
	The consent of the person is not needed	The consent of the person is needed
	The accepting country is bound by the Speciality Rule	The accepting country is not bound by any Speciality Rule
	Justice may not be done without it, as it brings the guilty person to the trial and/ or punishment on him/her	Justice may be done without it, as the guilty person has been available for both trial and punishment

At the same time treaties on international transfer of sentenced persons do not necessarily provide for the opportunity to rule out the possibility of their pardoning (granting special amnesty) in the other country. The execution of the sentence there is governed by the domestic law of that country. Its law never excludes pardoning of transferred persons. So once the decision on transfer is taken, the sentencing country can't validly require that the transferred prisoner shall not be pardoned (granted any special amnesty) unless its treaty with the other country contains a provision, such as Article 61 (2) of the 1983 Riyadh Arab Agreement for Judicial Cooperation, that prohibits the other country from pardoning the transferee. As soon as the judgment of the sentencing country is recognized there, the President of the other country may pardon the person. It will be their tactical problem to consider to what extent, by doing this, they decrease the chance of obtaining in the future transfers of their other



imprisoned nationals from abroad.

Possible pardoning though may come only after the legalization [recognition] of the foreign criminal judgment in the country of the sentenced person. Otherwise, the foreign judgment produces no legal effect there: the punishment imposed is not enforceable and therefore, not subject to any pardon. The legislation of the foreign criminal judgment is a legal procedure called recognition of the foreign judgment. Thereafter, the punishment imposed is enforceable in the country of the sentenced person and no longer enforceable in the sentencing country. It follows, by the argument from the opposite, that if the recognition procedure has not been finalized (e. g. because the person has been pardoned prior to any recognition of the foreign judgment), the punishment would be still enforceable in the sentencing country and its authorities must take the necessary steps to execute this punishment.

Int'l Transfer of Prisoners –

Transferee's Status

(comparative law)

I/ Possibility of transferee's pardoning in the accepting country (his/her own)

Europe – YES,

Commonwealth of Independent States – YES,

(Former Soviet Union Countries)

America – NO,

Arab World – NO.

II/ Possibility of transferee's amnesty in the accepting country (his/her own)

Europe – YES,

Commonwealth of Independent States – YES,

(Former Soviet Union Countries)

America – NO unconditionally,

Arab World – NO unless the sentencing country agrees (does not oppose).

C. Neither the Iraqi Criminal Procedure Code, nor the Riyadh Arab Agreement for Judicial Cooperation contains any rule on transfer proceedings and their finalization, in particular. Moreover, none of these instruments provide even for any regulations on the finalization of the proceedings for recognition and enforcement of foreign criminal judgments either. Iraqi judicial authorities do not have any reliable rule that might be applied by analogy, at least, to ascertain the end of transfer proceedings. This is end after which the authorities of the sentencing country have no longer competence over the execution of the punishment but prior to this end the authorities of the sentencing country must always do their best to ensure the execution of the punishment. Usually, this end comes at the moment when the court of the transferee's country recognizes the foreign judgment sent to be enforced.

As a result, the sentencing country shall no longer enforce its judgment sent for this purpose to the transferee's country. However, if the sent foreign judgment is not considered by the judicial authorities of the country of the transferee, as s/he was just pardoned on arrival and the authorities there simply disregard the judgment, or though considered, has not been recognized by them for any reason (e.g. the judgment is not compatible with the fundamental principles of their legal system), then the sentencing country retains its competence to enforce the judgment, regardless of location of the sentenced person. Certainly, if by that time the person is no longer in the territory of the sentencing country, its authorities should consider resorting to other forms of international judicial cooperation: for example, the extradition of the person (most likely, from a third country) or even the transfer of the case against him/her to his/her own country¹⁰.

CONFISCATION ABROAD CONCERNING FOREIGN NATIONALS

V. In Iraq confiscation is a supplementary punishment. According to Article 101 (1) (i) of the Iraqi Penal Code, *"In circumstances other than those in which the law requires a confiscation order, the court may, on the conviction of a person for a felony or misdemeanor, order the confiscation of particular items that*

¹⁰ The Ramil Safarov case might be a good illustration – see also the European Parliament resolution of 13 September 2012 on Azerbaijan [2012/2785(RSP)]. Ramil Sahib oglu Safarov is an officer of the Azerbaijani Army who was convicted in Hungary of the 2004 murder of an Armenian Army Lieutenant during a training seminar in Budapest: Safarov broke into Margaryan's dormitory room at night and axed him to death while Margaryan was asleep. In 2006, Safarov was sentenced to life imprisonment in Hungary with a minimum incarceration period of 30 years. After his request under the European Convention on the Transfer of Sentenced Persons, he was on August 31, 2012 surrendered to Azerbaijan where he was pardoned by the President in compliance with Article 12 of the Convention but prior to any recognition of the Hungarian judgment. It is noteworthy that if the foreign judgment has not been recognized, it produces no legal consequences; therefore, there is nothing for pardoning.



were acquired as a result of the offence and that were subsequently seized or that were intended to be used in the commission of the offence". Foreign nationals constitute no exception: the confiscation punishment might be imposed of them too.

The problem is that the assets of a convicted foreign national subject to confiscation are not necessarily in the territory of Iraq. In whole or in part, they are likely to be in another country. In this case, it would be necessary, first of all, to identify and detect the criminal assets. For this purpose, laws on international cooperation provide for two types of cooperation: judicial cooperation for criminal cases and administrative procedure for non-criminal cases designed to ensure the confiscation of criminal assets. The judicial assistance consists of execution of rogatory commissions (letters rogatory). There is no obstacle to collect evidence through their execution about the proceeds from the investigated crime and to use this evidence to substantiate their confiscation as well.

The international administrative procedure is comparatively new. It is between administrative agencies rather than judiciaries. Most often, the cooperating agencies are called Financial Investigation Units. This international procedure is mentioned in a number of domestic laws governing criminal assets recovery though non-criminal legal proceedings, such as: the Serbian Law on Seizure and Confiscation of Proceeds from Crime (2008), the UK Proceeds of Crime Act (2002), etc. These laws regulate the administrative requests relating to criminal assets. The requests may be used to eventually obtain information about the assets for the purpose of their confiscation. However, it should be borne in mind that these requests are new and many countries are hesitant even reluctant to respond to them.

Moreover, some domestic laws on criminal assets recovery expressly postulate that such international cooperation is rendered solely on the basis of international agreements (e. g. Article 92 of the Bulgarian Law on the Forfeiture of Criminal Assets to the Exchequer). This makes the administrative requests even less reliable. That is why if same information is acquirable through both requests, namely: for rogatory commissions and administrative requests, the requests for rogatory commissions should be preferred to administrative requests.

Administrative requests are less reliable for another important reason as well. It is good to know that they do not guarantee obtaining of information hidden behind bank secrecy. This is not applicable to rogatory commissions. On the contrary, they are the truly appropriate means to

obtain such information. According to the latest UN Drug Convention [ratified by Iraq on 22 July 1998], the UN Convention against Transnational Organized Crime [ratif. by Iraq on 17 May 2008], and the UN Convention against Corruption [ratif. by Iraq on 17 May 2008] “*States Parties shall not decline to render mutual legal assistance ... on the ground of bank secrecy*”. Furthermore, all these conventions prescribe that mutual legal assistance ... may be requested for any of the following purposes: ...Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes. Nothing of this sort has been provided for any administrative request relating to criminal assets.

Finally, there is also another important advantage of requests for rogatory commissions to administrative requests. The advantage is that the requests for rogatory commissions are more often grantable without meeting any dual criminality requirement. To express and confirm this policy Articles 46 of the UN Convention against Corruption calls on State Parties to consider providing such international cooperation in the absence of dual criminality.

VI. There are four possible solutions to the problem with criminal assets abroad. The first solution is to make the foreign country, where the criminal assets are located, institute criminal proceedings against the owner for the purpose of obtaining a judgment with a confiscation order for them. The second solution is to make that foreign country recognize and enforce an Iraqi criminal judgment containing a confiscation order. The third solution to the aforementioned problem is to make the foreign country institute separate financial proceedings against this owner for the production of a separate confiscation order against him/her there if this is possible there at all. Lastly, the fourth solution is to make the foreign country recognize and enforce separately a confiscation order issued by Iraq against the owner – the order is separate in the sense that it is not a part of any criminal judgment.

Ideally, the confiscation of criminal assets found somewhere abroad is achievable through recognition and enforcement of criminal judgment containing a confiscation order or a separate Iraqi confiscation order in the foreign country where the assets are located. This is the shortest way to their confiscation. The problem is that such international judicial cooperation in criminal matters is possible only on the basis of an international agreement and Iraq has no such agreement.



This is why the realistic options for Iraq are to trigger some proceedings in the foreign country designed to result in confiscation of the target property found there. The proceedings shall be either criminal or financial.

A/ Thus, the first way to achieve the desired result is to make the foreign country institute some criminal proceedings against the owner the property found there, if his/her conviction would entail the confiscation of his/her property. This result may be achieved in 3 forms of international judicial cooperation in criminal matters: (i) through sending information, (ii) through forwarding a request for institution of criminal proceedings or (iii) through transfer of criminal proceedings to the respective foreign country.

(i) First, the other country may be approached in the form of the so-called spontaneous information delivery – see, for example, Article 46 (4) of the UN Convention against Corruption. This form of cooperation does not legally transfer any judicial competence over the case. The requesting country does not relinquish any sort of competence at all. Even if its request is granted, this does not prevent its authorities from working on the case. Hence, if the judicial authorities of the other country are not sufficiently proactive, the authorities of the country that has sent the information may do any investigation and prosecution of the alleged crime.

(ii) There is also another possibility to make the foreign country prosecute the owner as perpetrator of the crime that conditions the confiscation of his/her property. This is the possibility to send that country a request for institution of criminal proceedings against this owner. On the one hand, this possibility is similar to the previous that has been called spontaneous information delivery. The possibility is similar because it does not result in the transfer any judicial competence over the case. The requesting country does not relinquish any sort of competence at all; it retains its responsibility over the criminal proceedings. On the other hand, this form of international judicial cooperation is not usable against nationals of the requesting country or any third countries' nationals. It can be used only against nationals of the requested country. Besides, this form of international judicial cooperation is treaty based: Iraq is in need of a bilateral treaty to request the foreign country and eventually oblige it to consider your request. Examples of bilateral treaties that provide for such requests are: Article 21 of the Treaty on Legal Assistance between the People's Republic of Hungary and the Republic of Iraq and Article 24 of the Treaty on rendering mutual legal assistance between the [former] Union of the Soviet Socialist Republics [still in force for Russia and some other

former USSR countries] and the Republic of Iraq. Like the previous one, this form of cooperation does not transfer any judicial competence over the case. The requesting country does not relinquish any sort of competence at all. That is why, even if its request is granted, this does not prevent that country's authorities from working on the case. It follows that if the judicial authorities of the other country are not sufficiently proactive, the authorities of the country that has sent the request may always prosecute of the alleged offender.

(iii) The third possibility is the transfer of criminal proceedings to the foreign country, where given criminal assets are found, to prosecute their owner as a probable perpetrator of (or another, accessory participator in) the crime that conditions the confiscation of the assets. This specific possibility transfers the judicial competence over the case. It involves two consecutive acts. They are as follows: Initially, Iraq should launch own criminal proceedings against the owner; thereafter, Iraq should send to that country a request for taking charge (transfer) of the criminal proceedings. In contrast to the previous two forms, this form of international judicial cooperation has two distinctive peculiarities.

First, this transfer involves preservation of the validity of the evidence collected in the requesting country. It transfers the validity of this evidence as well. Thus, the evidence obtained in this way would be admissible in the court of the requested country once it accepts the foreign criminal proceedings.

Second, this transfer results also in transferring the competence over the case to the other country. As a general rule, the effected transfer prevents the requesting country from further prosecuting the alleged offender. In Europe, for example, there is a Convention that regulates transfer of criminal proceedings to another European country. It is called European Convention on the Transfer of Proceedings in Criminal Matters [Strasbourg, 1972]. In accordance with Article 21 (1) of this Convention, the requesting country can no longer prosecute the suspected person for the offence in respect of which the proceedings have been transferred on the decision of the requested country¹¹.

11 The exceptions are as follows, according to Paragraph 2 of the same Article: *The right of prosecution and of enforcement shall revert to the requesting State:*

- a. if the requested State informs it of a decision in accordance with Article 10 not to take action on the request;*
- b. if the requested State informs it of a decision in accordance with Article 11 to refuse acceptance of the request;*
- c. if the requested State informs it of a decision in accordance with Article 12 to withdraw acceptance of the request;*
- d. if the requested State informs it of a decision not to institute proceedings or discontinue them;*



The basic idea of this transfer is to ensure more successful investigation and prosecution of the alleged crime. That is why it is used to result in conducting the criminal proceedings over it in the country where most evidence might be collected. Usually, this is the country where the alleged crime was committed.

Additionally, the transfer is used to put together all criminal proceedings launched initially in different countries. Again, the idea is to ensure more successful investigation and prosecution of the alleged crime and also imposition of appropriate punishments on all participants in it. In view of this, both Article 21 of the UN Convention against Transnational Organized Crime, and Article 47 of the UN Convention against Corruption prescribe that States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular, in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

B/ The other principle solution to the problem with criminal assets abroad is the following. Iraqi judiciary retains the criminal case and relies on requests for institution of financial proceedings in the foreign country where the criminal assets are located. Such financial proceedings are designed to produce an order for confiscation of the target property. This property may include money or some physical items. It is important to know that if the physical items that are not found in the other country must be requested to oblige the convict pay a sum of money equal to the value of that missing property.

VII. Regardless of the nature of the confiscation order, criminal assets can only be confiscated once they are identified and detected. Because it takes time to obtain the confiscation order, there must be mechanisms to preserve assets in the interim. The typical mechanisms are freezing (for bank accounts and real property) and seizure (for other moveable assets). Where it is necessary and appropriate, petitions for such provisional measures shall be forwarded to the other country without delay. Thus, pursuant to Article 32 [Seizure and confiscation of the objects and delivery receipts resulting from crime] (1) of the Arab Convention for the Fight against Organized Crime across National Borders (Cairo, 2010), *“each State Party after receiving a request from another State Party having jurisdiction over an offense covered by this Convention shall take the necessary measures to*

e. if it withdraws its request before the requested State has informed it of a decision to take action on the request.



uncover the proceeds of crime, property, instrumentalities or any other things related to the crime, trace and freeze or seize the purpose of confiscation”.

Most often, laws of countries, requested to confiscate criminal assets in their territories, foresee that the assets shall become their state property unless claimed by third privileged persons. However, once the confiscation procedure is completed, there are also some options regarding the possible redistribution of the confiscated property by recovering it to the initial possessor or/and sharing it with the informer.

It goes without saying that, prior or after the completion of the investigation, any seized item shall be returned to its possessor, if s/he has acted in good faith. Paragraph 101 (1) (ii) of the Iraqi Penal Code, in particular, expressly postulates this return. This rule is in line with Articles 12 (8) and 14 (2) (ii) of the 2003 UN Convention against Transnational Organized Crime and Articles 31 (9) and 57 (1, 3) of the UN Convention against Corruption.

Besides, it would also be good to have a specific rule on assets sharing between the lawful owner and the one who has found the assets, incl. the requesting country as well. The basic considerations for having such a specific rule are similar to those for the sharing of found items on their return (incl. information of their present whereabouts) regulated in any national obligation law, namely that others are to be 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 Real Rights Law, or even up to 20% of the lost item's value, pursuant to the Armenian Civil Code. Some similar share might be foreseen in favour of anyone that has helped Iraq to find in Iraqi territory and confiscate property which eventually belongs to its budget.

Moreover, such sharing has been widely recommended at the international level for execution of confiscation requests from foreign countries. Thus, 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”*. Such a rule on international assets sharing is necessary in regard to foreign countries with which Iraq has no international agreement to specifically provide for it. It is noteworthy that as Iraq will never be able to have sufficient number of such agreements with other countries, it must rely on domestic rules of other countries on assets sharing and necessarily, develop its own in Iraqi national law to be able to reciprocate.



VIII. The quoted Article 101 (1) of the Iraqi Penal Code requires connection between the crime and the property subject to confiscation. This means that Iraq sticks to the **crime proceeds confiscation theory** *per se*. Iraqi authorities though must be aware that another confiscation theory becomes more and more popular with foreign countries they can turn to. This is the so-called **unexplained wealth confiscation theory**. Its aim is to overcome the difficulties arising from the **crime proceeds confiscation theory**.

The problem with this classical theory is that sometimes state authorities find themselves in a too difficult situation. They find with convicts assets which are too difficult to legally process. Many assets found with convicts are unlikely to be obtained in any legal way. Nevertheless, it is often impossible for the state authorities to prove that these assets are proceeds from crime. Hence, state authorities face the following situation: some criminal assets have been found with a given person but they cannot be linked to a visible crime committed by the same person. Therefore, the authorities cannot find any originating crime, let alone link the suspicious property to it.

Should such a link stay as a legal requirement for confiscation of this property, the solution might be the criminalization of the possession of such property by the convict¹². This makes the link between the crime and property subject to confiscation much easier to ascertain.

Not many countries resort to this artificial solution though. More countries find unnecessary to require any link between the crime and property subject to confiscation. They solve the problem with confiscation of suspicious property of the convict by resorting to the so-called **unexplained wealth theory** in their law making process. Such countries expand the object of confiscation by including into it all property found with the convict whose legal origin s/he cannot support with acceptable

¹² A good example of such criminalization unexplainable wealth possession may be found in Article 268 (2) of the Penal Code of Argentina. The provision reads: *"Whoever duly required, does not justify the origin of a personal appreciable patrimonial enrichment or that from a third party in order to conceal it, occurred after the appointment in a public post or a public employment, and up to two years after leaving public office, will be punished with reclusion or a prison term from two to six years, and a fine between 50% and 100% of the value of the enrichment and absolute disqualification for life to occupy public office. It would be understood that enrichment existed, not only when the patrimony was increased with money, things or assets, but also when debts or obligations affecting it were cancelled. The person cooperating to conceal the enrichment will be punished with the same sanction as the author of the crime"*.

This criminalization, actually, implements Article 20 of the UN Convention against Corruption. This Article, titled ILLICIT ENRICHMENT, reads: *"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, 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"*.

evidence. As a result of the expansion of the confiscation object, all assets found with the convict that significantly exceed his/her legal income constitute unexplained wealth and become confiscable items. The convict can reduce the size of confiscation by reasonably explaining the lawful origin of some of the items. The lack of such explanation is promoted to a legal requirement for confiscation of the wealth: the pieces of wealth are confiscated on the grounds that the convict who owns them does not reasonably explain that they have any lawful origin.

Basically, it is only the convict who can give the explanation and thereby, exclude the satisfaction of the mentioned requirement for confiscation. It follows that, in fact, the burden of proof on this specific issue is being reversed to the convict. Now, he is the party interested in proving the lawful origin of assets in order to avoid their confiscation. The state authorities are no longer the party that has to prove the criminal origin of the assets in order to obtain their confiscation. Thus, the inability to prove the lawful origin of assets virtually brings sanction to their convicted owner.

In general, unexplained wealth includes more property that proceeds from crime. This makes another difference between confiscation of crime proceeds and confiscation of unexplained wealth. Usually, the confiscation of crime proceeds is ordered within the criminal proceedings over the originating crime while confiscation of unexplained wealth, being much larger, needs specific legal proceedings. They are separate from the criminal proceedings over the crime. These separate legal proceedings are called financial proceedings. They begin with financial investigations conducted by specialized financial investigators. Their investigation activities are overseen either by the body that manages the criminal investigation (in Serbia it is the competent Public Prosecutor) or by an administrative body (in Bulgaria it is the competent Confiscation Commission). In any case, this body applies to court for confiscation order.

Thus, the chief necessary result of the introduction of the unexplained wealth confiscation is the financial investigation focused solely on asset searches. Any such investigation tries to determine where money comes from, how it moves, and how it is used. Also known as forensic accounting, this specific type of investigation is most supportive to ordinary criminal investigations into fraud, embezzlement, bribe, money laundering, tax evasion, terrorist financing and many other crimes conditioning confiscation. In turn, successful criminal investigations and prosecutions of criminal offenses conditioning confiscation open the way to confiscating



assets of offenders.

Lastly, given the larger amount of secured and confiscated property through the unexplained wealth confiscation, agency that manages them is set up. All these peculiarities of the unexplained wealth confiscation significantly increase its efficiency.

Criteria for Comparison	Crime Proceeds Theory	Unexplained Wealth Theory
Shall the object of confiscation be the whole property (except for non-confiscable items) rather than only property originating from crime?	NO	YES
Do the state authorities carry all burden of proof (?); do they need to establish a link between the property to be confiscated and the committed crime?	YES	NO
Is it appropriate to install a separate confiscation procedure, apart from the corresponding criminal proceedings?	NO	YES

CONCLUSION

The right of detained foreign nationals to consular protection is a matter of right rather than duty. It is noteworthy that some governments have allegedly used their consular officers to harass their political opponents. This is why, if a given foreign national is fleeing persecution in his/her home country, contacting the consul may not be a good idea for him/her. On the other hand, the detaining authorities shall respect his/her right to anonymity unless obliged by a bilateral treaty (consular convention) with the country of the detainee's nationality.

In some cases Iraqi judicial authorities are authorized to forward the materials they have gathered against a given foreign national to the country of his/her nationality in order to involve its judicial authorities in his/her prosecution, trial and punishment. The other country may be involved through two different forms of international judicial cooperation. The first one is to request the other country to institute criminal proceedings against him/her as their national. The second form of cooperation is to request the other country to take charge of the proceedings against their national initiated in Iraq. In case of expulsion, any Iraqi act that is likely to be considered a disguised extradition shall be avoided. Finally, the foreign



national who has been sentenced to imprisonment in Iraq may request to be transferred to the country of his/her nationality. In such a case though, the person will not be protected there by the Specialty Rule applicable to extraditees.

The conviction of a foreigner in Iraq opens the way to the confiscation of some of his/her property. If the property is in the territory of another country, Iraqi authorities may obtain its confiscation if they know both the forms of international cooperation that may lead to this result and the peculiarities of that country's law on confiscation as well.



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