

# Legal Methods for Recovering Smuggled Funds: A Comparative Study

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## ABSTRACT

In this research, we found that the Iraqi legislation does not have any specific laws or legal texts that are part of an effective law that controls the procedures for asset recovery. Despite the obligations that the United Nations Convention against Corruption imposes on Iraq as a State Party, it involves taking legislative measures on this subject. The only exception to this is the indirect reference made by the Iraqi legislator to the issue of recovering smuggled funds from corruption that are only found within the jurisdiction. owing to the fact that the legislator in the Integrity Commission Law that is currently in effect has indicated in Article (10/seventh) that the Integrity Commission / Recovery Department should be granted the authority to collect monies of corruption that have departed from Iraq, in addition to its other capabilities. Nevertheless, the Commission has not devised any system to track down this money in order to assist in their recovery.

**Keywords:** *Recovering Smuggled; Iraqi law; the United Nations Convention*

## INTRODUCTION

Corruption crimes and the laundering of the proceeds from these activities represent some of the most severe problems and phenomena faced by the modern world, both nationally and internationally. These crimes are linked to cross-border criminal activities, which have grown due to the expansion of organized crime, providing more efficient methods of laundering facilitated by modern technological tools and mechanisms. These advancements have made it more challenging to detect such activities or identify the perpetrators. Recognizing the severe negative impacts of corruption crimes and the laundering of their proceeds, and their threat to the entire international community, combating these crimes and recovering the illicit proceeds have become universally accepted goals that no party dares to undermine. There is a pressing need for international cooperation in recovering these funds, as countries have realized the impossibility of combating corruption and tracking its proceeds in isolation from international collaboration.

The culmination of international efforts to tackle corruption and launder its proceeds resulted in the creation of a new legal instrument under the United Nations, the 2003 United Nations Convention against Corruption. This convention is the first global legal instrument dedicated to combating corruption and recovering its proceeds. The most significant organizational aspect introduced by this convention is the subject of asset recovery, which is addressed comprehensively and systematically in Chapter V. It details the conditions required for legal assistance requests for asset recovery, specifying both procedural and substantive requirements, and outlines the methods for asset recovery and the relevant legal obligations of the state parties.

Iraq, like other transitional states, has recognized the dimensions of corruption that have affected society and its vital institutions, including the laundering of its funds. Besides its existing legal provisions to combat such behaviors, Iraq has ratified the United Nations Convention against Corruption. This move reflects the legislature's desire to develop

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its national legislative system to align with international transformations. However, the subject of asset recovery has not received sufficient attention from the legislative authority, and Iraq's legislative system does not effectively facilitate the procedures for recovering laundered assets abroad.

### **Research Problem**

It is evident that the phenomenon of laundering funds outside the state is criminalized under Iraqi law. However, both developed and developing societies still struggle to recover these funds. Asset recovery is a highly complex issue in terms of legislation and implementation due to the lack of laws governing its procedures. The Iraqi legislation lacks an independent law or legal provisions within existing laws that regulate asset recovery procedures, despite Iraq's accession to the United Nations Convention against Corruption, which obliges state parties to take legislative measures for asset recovery.

### **Research Objective**

The aim of this research is to identify the legislative shortcomings in Iraqi law regarding the recovery of funds laundered as a result of corruption crimes and to advocate for the enactment of a specific law to regulate asset recovery procedures in line with the provisions of the United Nations Convention against Corruption. This research also seeks to propose amendments to various existing legal provisions within current laws, such as the Iraqi Penal Code and the Law on Combating Money Laundering and Financing of Terrorism, which contribute to asset recovery.

### **Research Methodology**

This study will follow an inductive and analytical approach to examine the provisions of the 2003 United Nations Convention against Corruption concerning asset recovery and other related texts. The aim is to comprehensively analyze their content to explain the specific rules on asset recovery, highlight the shortcomings and limitations of these provisions, and then discuss the position of Iraqi legislation on this matter.

### **Research Structure**

This research is divided as follows:

- Chapter One: Concept of Asset Recovery
  - Section One: Definition and Nature of Asset Recovery
  - Section Two: Conditions for Asset Recovery
- Chapter Two: Methods of Asset Recovery
  - Section One: Criminal Pathways for Asset Recovery
  - Section Two: Alternative or Complementary Pathways for Asset Recovery

### **CONCEPT OF ASSET RECOVERY**

Asset recovery is a form of mutual legal assistance aimed at tracking and confiscating assets obtained from crimes and transferred outside the state to return them to their country of origin. This is one of the most effective legal mechanisms for combating corruption since seizing the proceeds of corruption from offenders and recovering them is a highly effective deterrent against corruption crimes. It also contributes to combating another serious crime: money laundering, as perpetrators of corruption often launder the money obtained from their crimes to remove it from the state's control and protect it from confiscation. The evolution of criminal tactics parallels the development of anti-corruption measures.

International legal instruments, notably the United Nations Convention against Corruption, have organized mechanisms to address these issues by establishing detailed rules and conditions for asset recovery.

## Definition and Nature of Asset Recovery

Defining asset recovery requires examining the definitions provided by scholars and then exploring its distinct characteristics. Asset recovery might be confused with several legal terms, but it differs in terms of concept and rules. For a comprehensive understanding of asset recovery, this section is divided into two parts: the first part defines asset recovery, and the second part discusses its distinct characteristics.

### Definition of Asset Recovery

Legal scholars have not provided a comprehensive definition of asset recovery. However, one definition describes it as "a set of procedural rules aimed at returning assets obtained from corruption crimes to the countries from which these assets were embezzled, through mechanisms of cooperation between state parties to the United Nations Convention against Corruption." This definition is not entirely accurate, as it refers to asset recovery as procedural texts, which is incorrect. Procedural texts refer to those found in criminal procedure laws or specific procedural laws and do not include judicial rulings that result from these procedures, nor does it mention administrative procedures that play a significant role in recovery.

Another definition refers to asset recovery as "a set of judicial and non-judicial measures and efforts by states to recover assets embezzled from their wealth and resources due to corruption and transferred to foreign countries or retained within the same country." Given the insufficiency of existing definitions, asset recovery can be defined as "a set of measures resulting from a judicial ruling to confiscate laundered assets obtained from corruption crimes, taken by the requesting state through international cooperation and mutual legal assistance to return its assets from abroad."

### Distinct Characteristics of Asset Recovery

After defining asset recovery, it is essential to distinguish it from similar legal concepts such as restitution and confiscation.

#### 1. Restitution:

- Restitution aims to restore the situation to what it was before the crime was committed. It involves returning stolen or misappropriated assets to their rightful owner. Restitution is considered a complementary punishment, obligatory alongside the primary penalty for embezzlement and other related crimes.

- Similarities:

- Both restitution and asset recovery aim to return assets to their rightful owner or the state.
- The death of the accused does not negate the obligation for restitution or asset recovery.
- General amnesty does not affect the right of the state to restitution or asset recovery.

- Differences:

- Restitution is narrower in scope, focusing on specific crimes such as embezzlement, while asset recovery includes all financial crimes related to corruption.

- Restitution is governed by national laws, while asset recovery involves international legal cooperation.

- Restitution is implemented within the national jurisdiction, whereas asset recovery often requires cross-border actions and international collaboration.

#### 2. Confiscation:

- Confiscation involves the compulsory seizure of assets by the state without compensation. It can be general, involving all assets of the convicted person, or specific, targeting assets obtained from or used in the commission of a crime.

- Similarities:

- Both asset recovery and specific confiscation focus on assets obtained from criminal activities.

- Both have a financial nature, impacting the offender's wealth.
- Differences:
  - Confiscation is a broader concept and can include all assets of the convicted person, while asset recovery targets specific proceeds of corruption.
  - Confiscation is often a complementary punishment, while asset recovery is a procedural measure following judicial rulings.
  - Asset recovery involves international cooperation and is regulated by specific laws and conventions, whereas confiscation is typically governed by national criminal laws.

### **Conditions for Asset Recovery**

Asset recovery requires compliance with procedural and substantive conditions outlined in the United Nations Convention against Corruption and relevant national laws. These conditions are divided into procedural conditions, which relate to the formal requirements of the recovery request, and substantive conditions, which pertain to the content of the request.

#### **Procedural Conditions:**

- The recovery request must comply with the formal requirements specified by the United Nations Convention against Corruption and relevant national legislation. These requirements ensure that the request is processed efficiently and effectively.

#### **Substantive Conditions:**

- The request must include detailed information about the assets to be recovered, the connection between the assets and the crime, and evidence supporting the claim. These conditions ensure that the recovery process is justified and legally sound.

### **ISSUANCE OF A FINAL IRREVOCABLE CONFISCATION JUDGMENT**

A final confiscation judgment issued by the courts of the requesting state is the basis for requesting the return of assets through criminal procedures. The United Nations Convention against Corruption requires a final judgment for the confiscation of assets derived from corruption crimes. This means a final judgment must be issued by the courts of the requesting state, including a conviction for one of the acts of corruption and the imposition of the supplementary penalty of confiscation of the assets in question, after the original penalty has been imposed and the judgment has become irrevocable. This is necessary for presenting it to the receiving state to support the return of the assets. This condition is inferred from several provisions of the Convention that regulate the procedures for criminal asset recovery, whether explicitly or implicitly. For example, paragraph (a) of Article 54 states: "1 - Each State Party shall, for the purpose of mutual legal assistance pursuant to Article 55 of this Convention in relation to property acquired through the commission of an offense established in accordance with this Convention or property connected to such an offense, take such measures as may be necessary to permit its competent authorities to enforce an order of confiscation issued by a court of another State Party."

The condition is also explicitly stated in Article 57, which regulates the mechanisms for returning confiscated assets by the receiving state based on the submission of a final confiscation judgment issued by the requesting state. The mandatory nature of this condition is emphasized by the fact that the Convention requires a judgment to be relied upon in the final and decisive stage of asset recovery, which is the return of assets, as stipulated in the article above. Although other provisions refer only to an "order," such as Article 55 concerning international cooperation for the purpose of confiscation, the term "judgment" implies issuance by a judicial body, whereas an order can be issued by an administrative authority. This distinction indicates that the Convention conditions the return of assets to the requesting state on a confiscation judgment and requires that the judgment be final, meaning it is not subject to appeal. It should be noted that there might be variations in the concept of a final judgment among the laws of different states, which depends on the state that issued the judgment.

As for the Iraqi law's stance on the requirement of a final judgment, the legislator stipulated this condition in the current Anti-Money Laundering Law, requiring the competent Iraqi authorities to enforce final foreign criminal judgments issued by the competent foreign judicial authorities for the confiscation of assets derived from money laundering crimes. This condition is inferred from the requirement that the enforcement of foreign judgments be final.

### **THE CONDITION OF DUAL CRIMINALITY**

Dual criminality means that the act subject to international cooperation must be criminalized under the laws of both the requesting state and the receiving state. Dual criminality can be achieved through one of two methods: the exclusive list method or the minimum penalty method. The exclusive list method involves enumerating the crimes for which international cooperation or legal assistance is permissible and excluding others. The minimum penalty method permits international cooperation for crimes whose penalties exceed a certain minimum threshold. If the penalty for the crime in question is below this threshold, cooperation or assistance is prohibited.

The United Nations Convention against Corruption exemplifies conventions that generally adopt the exclusive list system, as it provides for international cooperation and mutual legal assistance for all purposes related to the enumerated acts of corruption. Notably, in subparagraph (b) of paragraph (9) of Article 46, the international legislator implicitly included the minimum penalty method by allowing the refusal of legal assistance for trivial matters without specifying what constitutes trivial matters.

Regarding the condition of dual criminality in the Convention, the international legislator made its imposition optional, leaving it to the receiving state. If the receiving state requires dual criminality, this condition becomes mandatory for the requesting state. If not, it is not binding. The optional nature of this condition is inferred from several provisions in the Convention, such as Article 43, which addresses international cooperation, stating, "In matters of international cooperation, whenever dual criminality is required, that condition shall be deemed fulfilled."

The above text indicates that the optional nature is suggested by the phrase "whenever dual criminality is required," meaning the imposition of this condition is left to the receiving states and does not imply mandatory compliance. This optional nature is also inferred from Article 46, which deals with mutual legal assistance, where the Convention invites states to consider the purposes of the Convention if the condition of dual criminality is not met in the subject matter of the request.

As for the Iraqi law's stance on this condition, the legislator in the current Iraqi Code of Criminal Procedure requires dual criminality for mutual legal assistance in extradition matters, and similarly in the current Iraqi Anti-Money Laundering and Counter-Terrorism Financing Law.

### **Methods of Asset Recovery**

The United Nations Convention against Corruption provides several methods for asset recovery, should the states parties wish to recover their smuggled assets according to its provisions. Each method has its specific rules, some of which depend on national and international criminal procedures that must be followed to achieve the desired goal. The criminal method, the subject of our discussion, is the most detailed and mandatory in terms of organization. The Convention also provides alternative methods for asset recovery: civil and exceptional, but these are not as regulated or mandatory as the criminal method.

### **The Criminal Method for Asset Recovery**

The criminal method for asset recovery involves international cooperation and mutual legal assistance in the area of confiscation, as addressed by the United Nations Convention against Corruption. The Convention pays particular attention to the criminal method for asset recovery through confiscation, dedicating several key and specific articles to it, including Article 31 from the chapter on criminalization and punishment and Articles 54 and 55 from the fifth chapter on asset recovery. The Convention leaves the decision-making and procedural actions regarding the confiscation of assets derived from corruption crimes to the internal systems of the states parties or bilateral agreements. Therefore, this requirement will be divided into two sections: the first covers the new confiscation rules, and the second addresses the procedures for submitting and executing asset recovery requests.

## New Confiscation Rules

Confiscation in asset recovery is no longer limited to traditional rules, which sometimes involve issuing confiscation orders exclusively by the judiciary or seizing assets for the purpose of confiscation. New rules have been introduced through modern anti-corruption agreements, particularly the United Nations Convention against Corruption, aimed at recovering criminal proceeds smuggled abroad. This section will cover the most important of these new rules.

### Authority to Issue Confiscation Orders

Confiscation is considered a penalty and cannot be imposed without a judicial ruling. This principle derives its legitimacy from the supreme law, the constitution, as some states explicitly stipulate in their constitutions that confiscation can only be ordered by a judicial ruling. However, the United Nations Convention against Corruption deviates from this principle by allowing confiscation orders to be issued by a non-judicial authority, as per paragraph (g) of Article 2 of the Convention. The Convention permits the issuance of confiscation orders either by a court or by another competent authority, without specifying whether this authority is a public prosecutor or an administrative body, leaving it to the internal laws of the states parties.

### Options for Confiscation Orders

Most perpetrators of corruption crimes dispose of the proceeds to prevent confiscation by dissipating or converting the assets into another form. To prevent offenders from benefiting from the proceeds of their crimes, the United Nations Convention against Corruption and Iraqi law provide an alternative to objective confiscation when it is impossible to impose or enforce it. This results in two options for confiscation orders:

#### 1. Property-Based Confiscation (Objective Confiscation):

This type of confiscation is directed against assets directly obtained from the crime or tools used in committing the crime. It requires proving the connection between these assets or tools and the crime (a specific asset). This type of confiscation is more beneficial for enforcement, especially at the national level when the identified assets can be linked to the crime, such as confiscation orders in bribery cases where the bribed item is seized or embezzled funds are found in the possession of the embezzler. However, it can also be applied internationally, such as confiscating smuggled assets if the state to which the assets were smuggled is identified.

#### 2. Value-Based Confiscation (Alternative Confiscation):

This is a newly introduced judgment in the United Nations Convention against Corruption and Iraqi law, which serves as an effective alternative when objective confiscation is not possible due to the disposal, mixing, or destruction of the assets in question. It focuses on:

- Equivalent and alternative value for direct criminal proceeds when they cannot be seized due to hiding, destroying, converting, or mixing with legitimate funds.
- Equivalent value for non-material benefits derived from criminal behavior or benefits resulting from using direct criminal proceeds, whether they cannot be seized directly.

Iraqi law's stance on confiscation options includes traditional objective confiscation as stipulated in the current Penal Code. However, alternative confiscation is addressed in the current Iraqi Anti-Money Laundering and Counter-Terrorism Financing Law.

### Third: Nullification of Bad Faith Transactions

Confiscation faces the issue of offenders transferring ownership of criminal proceeds to knowledgeable individuals (relatives, friends) to avoid confiscation. Some agreements and national laws allow courts to nullify such transactions if made with knowledge of the crime. The burden of proof lies on the new owner to demonstrate good faith and fair market value payment.

Iraqi law addresses this for the first time in the current Iraqi Anti-Money Laundering and Counter-Terrorism Financing Law by allowing courts to nullify transactions made in bad faith to evade confiscation.

## PROCEDURES FOR SUBMITTING AND EXECUTING ASSET RECOVERY REQUESTS

The United Nations Convention against Corruption outlines the procedures for submitting and executing asset recovery requests. This involves international cooperation and mutual legal assistance in the area of confiscation. The procedures vary depending on whether the request is for the purpose of identifying and tracing assets, freezing or seizing assets, or ultimately confiscating and returning the assets.

### Identifying and Tracing Assets

States parties are required to assist each other in identifying and tracing assets derived from corruption crimes. This may involve the exchange of information, the use of special investigative techniques, and cooperation with financial institutions and other relevant entities.

### Freezing or Seizing Assets

Upon request, states parties are required to take measures to freeze or seize assets suspected of being proceeds of corruption crimes. This may involve issuing provisional measures to prevent the transfer, conversion, or disposal of the assets.

### Confiscating and Returning Assets

States parties are required to enforce foreign confiscation orders issued by the requesting state. This involves recognizing and enforcing the confiscation judgment, taking appropriate measures to return the assets to the requesting state, and ensuring that the process complies with due process and the rights of affected parties.

In conclusion, the United Nations Convention against Corruption provides a comprehensive framework for the recovery of assets derived from corruption crimes. It outlines the conditions and procedures for international cooperation and mutual legal assistance, ensuring that states parties can effectively pursue and recover stolen assets. The Convention emphasizes the importance of final confiscation judgments, the condition of dual criminality, and the new rules for confiscation to achieve the goal of asset recovery.

In accordance with the international legislator in the United Nations Convention against Corruption to provide effective options that lead to curbing perpetrators of corruption crimes through legal prosecution and preventing them from enjoying those illegal proceeds, steps were taken to provide open options for the States Parties in the Convention in case of failure to recover funds through criminal means. These methods include direct asset recovery (civil route) and the exceptional route for asset recovery.

#### Civil Route (Direct Asset Recovery)

The civil route for asset recovery allows any State Party to the Convention to file a civil suit before civil courts in the state where the proceeds obtained from corruption crimes were smuggled to, aiming to trace and confirm their ownership or their monetary value, or to obtain a compensation judgment according to the internal laws of the state where the civil suit is filed before its civil judiciary. The Convention has encouraged the adoption of civil suits as a tool for direct asset recovery, which is commendable and could complement criminal suits. The civil route for asset recovery grants the claiming state direct control over the stages of litigation through its representative or attorney, compared to the criminal procedures in foreign judicial jurisdictions where its role is often limited. However, this route is not without its accompanying drawbacks, including the burdens and costs of tracing assets, fees such as attorney fees, accountants, experts, and other expenses borne by the claiming state until a compensation decision is issued, in addition to civil suits requiring a long period of time that can extend to several years due to multiple stages of litigation resulting from objection and appeal procedures in the issued decision.

#### Exceptional Route: Confiscation Without a Conviction

The exceptional route based on confiscation without the requirement of a conviction plays a significant and highly effective role in asset recovery when convicting the perpetrator is impossible. It is a legal mechanism aimed at tracking and restricting assets, followed by their confiscation without the need for a conviction judgment. This represents a notable development in the confiscation system, as it separates the judgment from criminal procedures against the crime perpetrator and violates traditional legal rules, reflecting legislative developments in anti-corruption and asset recovery procedures.

The term "confiscation without conviction" refers to a legal procedure targeting assets based on legal evidence, considering these assets as proceeds from illegal activities, rather than targeting the criminal directly. The term is used interchangeably with physical confiscation, objective confiscation, civil confiscation, all of which are included in the definition of confiscation without conviction. This means that the claiming state must provide all evidence and documents supporting that the funds intended for confiscation were obtained by committing one of the crimes of corruption stipulated in the Convention, and its inability or failure to obtain a conviction and specify the reason for the failure to obtain it, submitting to the court determined by the state receiving the request, considering that the competent authority for its consideration is the judiciary.

The United Nations Convention against Corruption is the sole legal instrument at the international level containing a specific and explicit provision regarding confiscation without conviction. This provision has introduced innovative and pioneering provisions, urging States Parties to cooperate internationally in criminal matters and provide technical assistance among them, as paragraph (c) of paragraph 1 of Article 55 of the Convention states: "considering what may be necessary to allow for confiscation of such property without criminal conviction in cases where the perpetrator cannot be prosecuted due to death, flight, absence, or in other appropriate cases."

As for the Iraqi legislative stance, the Iraqi law does not have explicit regulation similar to what is stated in the United Nations Convention against Corruption. However, it has been indirectly referenced in the Iraqi Anti-Money Laundering and Counter-Terrorism Financing Law in effect, when addressing the penalties for the crime of money laundering and terrorism financing, stating in paragraph (2) of Article 38: "the expiry of the criminal suit does not prevent the confiscation of funds obtained from money laundering and terrorism financing."

It is clear from the above article that the Iraqi legislator has obliged Iraqi courts to confiscate funds obtained from money laundering and terrorism financing crimes, even if the criminal suit has expired, which means that the courts must order confiscation, even in the absence of conviction, due to the expiration of the criminal suit by one of the methods specified in the Iraqi Criminal Procedure Code, whether by death, amnesty, or any other method stipulated in the law as a method of expiry of the criminal suit, which corresponds to what is regulated in the Convention, giving the judiciary broad prospects for dealing with smuggled or laundered corruption funds abroad, to rule on such a type of confiscation.

## **CONCLUSIONS**

1. The Iraqi legislation lacks a special law or legal texts within an effective law that regulates asset recovery procedures, despite the obligations imposed by the United Nations Convention against Corruption on Iraq as a State Party, which involve taking legislative measures on this subject, except for the indirect reference by the Iraqi legislator to the issue of recovering smuggled corruption funds from the jurisdiction only, as the legislator in the Integrity Commission Law in effect in Article (10/seventh) has mentioned granting the Integrity Commission / Recovery Department, in addition to its other competencies, the competence to recover funds of corruption that escaped outside Iraq. However, no mechanism has been developed by the Commission to trace these funds for recovery.

2. The United Nations Convention against Corruption has provided an exceptional route for asset recovery under paragraph (c) of paragraph (1) of Article 55, which can be resorted to in case the criminal route based on conviction is exhausted. This route consists of confiscation without relying on a conviction judgment in cases where the perpetrator cannot be convicted for reasons such as death, flight, immunity, and other necessary cases. This is a direct procedure targeting assets, separate from the proceedings against the accused, when it is proven that these assets are returns obtained from one of the corruption crimes. Despite the necessity for such a system, the Iraqi legislator has not regulated it.

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