

# Section 13: Confiscation of the Proceeds of Crime and Property

## General Commentary

Section 13 deals with confiscation, or forfeiture as it is also commonly known. Confiscation means the permanent deprivation of the proceeds of crime or of property of corresponding value. Confiscation is based upon the principle that proceeds of crime should be forfeited, as a convicted person should not benefit from his or her criminal activity. Confiscation is consequently not termed a penalty and has been placed apart from the penalties section in the MCC. According to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, “[C]riminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use and for maintaining the operations of their criminal enterprises. Despite some sanctions, the perception would still remain that crime pays. . . . Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes” (pages 140–141).

Many states have recently introduced legislation to allow for the confiscation of proceeds of crime, while many others are in the process of amending their domestic criminal laws to do so. A number of international conventions place a positive duty on states parties to introduce legislation on confiscation of the proceeds of crime. The first such convention was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 5. More recently the United Nations Convention against Transnational Organized Crime, Article 12; the United Nations Convention against Corruption, Article 31 and Chapter 5; and the International Convention for the Suppression of the Financing of Terrorism, Article 8, have included similar duties. Domestic measures on the confiscation of the proceeds of crime are particularly important when it comes to serious criminal offenses such as drug offenses, organized crime, corruption, and the financing of terrorism, as

referenced in the relevant conventions. The international conventions just mentioned apply to only a short list of criminal offenses. Rather than apply confiscation to those offenses only, the MCC provisions apply to all criminal offenses contained in the Special Part of the MCC, as is urged by the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 145).

It is important to point out that confiscation of assets is extraordinarily complicated and requires a lot of time, money, and specialized personnel to investigate and determine the value of proceeds of crime and what property of equivalent value may be seized. Many states struggle to implement domestic confiscation regimes. The Council of Europe's *Combating Organized Crime: Best Practice Surveys of the Council of Europe* highlights the fact that "proceeds of crime only rarely fall into the lap of the courts or government like ripe fruit from the tree or vine. What is not investigated by financial intelligence or other personnel may never be learned about at all, for it is very difficult to reconstruct financial flows from crimes long after they have occurred, and harder still to get the money back. . . . Merely to pass laws . . . will not *ipso facto* lead to a substantial increase in recoveries from offenders or third parties. This extra recovery can happen only if unspent assets can be found, and can be attributed to the possession or control of someone against whom an order can be made" (page 46). In addition to resources, intensive training programs will be required for those involved in the investigation of proceeds of crime. It may be necessary to establish special units or teams to undertake the investigations. The teams may be composed of actors from different sectors of the justice system and beyond, including prosecutors, police, and experts in forensic accounting. This process is discussed in more detail in *Combating Serious Crimes in Post-conflict Societies* (pages 74–79), edited by Colette Rausch and published by the United States Institute of Peace. It may also be necessary to establish a financial intelligence unit. Article 58 of the United Nations Convention against Corruption urges states parties to consider the establishment of a financial intelligence unit "to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions."

Implementation of a confiscation regime will likely require yet more measures to be taken. First, criminal procedure laws will have to be amended to allow police and prosecutors to gain information on the banking transactions of a convicted person and any money held in accounts with a bank. Article 12(6) of the United Nations Convention against Transnational Organized Crime requires a state party to "empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act . . . on the ground of bank secrecy." Article 31(7) of the United Nations Convention against Corruption imposes an identical obligation upon states parties. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 123) states that "financial records" include those of other financial service companies and that "commercial records" include real estate transactions and records of shipping lines, freight forwarders, and insurers. Second, other changes to domestic banking laws may be required. The most elaborate and extensive provisions on the sorts of amendments required are contained in Article 52 of the United Nations Convention against Corruption and include a requirement that financial institutions verify the identity of customers, take reasonable steps to determine the identity of

beneficial owners of funds deposited in high-value accounts, conduct enhanced scrutiny of certain accounts, and maintain adequate records of transactions.

Third, it will also be necessary to regulate procedures for the handling of confiscated proceeds and property. Regulations should specify who is responsible for taking the confiscated property and holding it, where it should be held, and what will be done with the property. The United Nations Convention against Corruption, Article 31(3), and the United Nations Convention against Transnational Organized Crime, Article 14, actually specify that states parties should make provisions to regulate the administration and disposal of confiscated property. Inherent in this provision is the question of what use will be made of the confiscated proceeds or property. In some states, proceeds and property go to a victims' fund, or directly to the victim of the criminal offense in question when the victim lost property or money as a result of it. Article 14(2) of the United Nations Convention against Transnational Organized Crime urges states parties to consider doing this. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* states that "for most confiscation systems, a key objective is to restore to victims property taken from them by criminals and it is extremely useful to provide for a procedure under domestic law to enable sharing of confiscated assets with domestic and foreign victims" (page 152). Article 57 of the United Nations Convention against Corruption provides that confiscated property be returned to its prior legitimate owner.

According to the Council of Europe report, *Combating Organized Crime: Best Practice Surveys of the Council of Europe*, in some states the proceeds of confiscation do not go to the state but instead go to activities such as law enforcement police training or prevention activities (page 71). The Council of Europe report stresses the importance of transparency of expenditure, so the public knows where the funds end up. In the case of transborder criminal offenses, as set out in Article 14 of the United Nations Convention against Transnational Organized Crime, the state that has confiscated the proceeds or property may consider sharing it with the other state or using it to cover costs of mutual legal assistance provided by the other state.

Confiscation can be distinguished from seizure or freezing, wherein a person is temporarily prohibited from transferring, converting, disposing of, or moving his or her property or other "economic advantages" as set out in Article 70(b), below. A person whose assets have been confiscated has probably already had his or her assets seized. Seizure usually occurs during the investigation of a criminal offense and after an application to the court by a prosecutor. The MCCP contains provisions on seizure. Reference should be made to Chapter 8, Part 3, Section 3, of the MCCP and the accompanying commentaries, which discuss the issue in greater detail.

## Article 70: Definitions

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For the purpose of Section 13:

- (a) *confiscation* means a measure ordered by a court following proceedings in relation to a criminal offense or criminal offenses resulting in the final deprivation of property;
- (b) *proceeds of crime* means any economic advantage derived from or obtained directly or indirectly from a criminal offense or criminal offenses. It may consist of any property as defined in Article 1(8); and
- (c) *property* has the same meaning as in Article 1(8).

### Commentary

**Paragraph (a):** The definition of *confiscation* has been taken from Article 1(c) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005). It is similar to the definition contained in Article 2(g) of the United Nations Convention against Transnational Organized Crime, except that the former is more illustrative. The explanatory report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism states that the definition of *confiscation* implicitly includes forfeiture, a fact that is made explicit in the United Nations conventions.

**Paragraph (b):** This definition was taken from Article 1(a) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The United Nations Convention against Transnational Organized Crime, Article 1(e), and the United Nations Convention against Corruption, Article 2(e), also define proceeds of crime, although more narrowly. The definition in both United Nations conventions refers only to property derived from crime, rather than to any economic advantage derived from crime, which is contained in the Council of Europe convention. The Council of Europe definition and the MCC definition both include property but go much further. The explanatory report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism states, at paragraph 21, that “the definition of ‘proceeds’ was intended to be as broad as possible.”

**Paragraph (c):** For the definition of *property*, reference should be made to Article 1(8).

## Article 71: Prohibition on Retention of Proceeds of Crime

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1. No person may retain the proceeds of crime.
2. Proceeds of crime must be confiscated by the court after a person has been convicted of a criminal offense.

### Commentary

**Paragraph 2:** In some states, given problems related to organized crime, legislation has been introduced to allow for the confiscation of the proceeds of crime through civil actions in the civil courts (as opposed to the criminal courts), irrespective of a criminal conviction. This model of confiscation was not considered for inclusion in the MCC as it focuses only on criminal law and not civil law remedies.

In most states, and in the MCC, confiscation occurs after the final decision in a criminal case and where a person is convicted of a criminal offense or offenses. Confiscation after a conviction can be undertaken in two ways. One method is to decide upon confiscation at the end of the criminal proceedings, upon conviction, at the same time that penalties are being imposed. Another method is to decide upon confiscation after a trial is done, in proceedings in a civil court, separate and apart from criminal proceedings (but always after they have concluded). In such cases, it is common for the procedure to use the civil burden of proof relating to the source of assets. This means that instead of the prosecutor having to prove “beyond a reasonable doubt” (in legal systems using that burden of proof in criminal cases) that certain property, including any economic advantages, derived from crime, he or she would have to prove “on the balance of probabilities” or “the preponderance of the evidence” that the economic advantage was derived from crime. In the MCC, confiscation occurs at the end of the criminal trial, when the court is deciding on other penalties.

## Article 72: Confiscation of Proceeds of Crime or Property of Corresponding Value from the Convicted Person

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1. Proceeds of crime, or property that corresponds in value to such proceeds, must be confiscated from the convicted person.

2. Confiscation encompasses the proceeds of crime, or property that corresponds in value to such proceeds, such as:
  - (a) property into which the proceeds of crime have been transformed or converted;
  - (b) property acquired from legitimate sources, if proceeds of crime have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; and
  - (c) income or other benefits derived from proceeds of crime, property into which proceeds of crime have been transformed or converted, or property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as the proceeds.
3. Where the confiscation of proceeds of crime or property of corresponding value is not feasible, the court may oblige the convicted person to pay an amount of money that corresponds to the proceeds of crime.

## Commentary

**Paragraph 1:** There are many models for confiscation in different states, as mentioned above. There are also many different approaches to what should be confiscated by the courts. As stated in the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 289), some states opt for a property-based system of confiscation, others opt for a value-based system, while others combine both approaches. Under the first model, property that represents the proceeds of crime is confiscated. Under the second model, the value of the proceeds of crime is assessed and money of equivalent value is confiscated. This approach is often called a value confiscation order. The model adopted in the MCC combines both approaches. It targets the proceeds of crime first and then property of corresponding value. It also allows, at the court's discretion, the payment of money instead of the confiscation of property.

**Paragraph 2(a):** This paragraph is inspired by Article 12(3) of the United Nations Convention against Transnational Organized Crime and Article 31(4) of the United Nations Convention against Corruption, both of which provide that “if proceeds of crime [have] been transformed or converted, in part or in full, into other property, such property” will be liable to confiscation.

**Paragraph 2(b):** This paragraph is inspired by Article 12(4) of the United Nations Convention against Transnational Organized Crime and Article 31(5) of the United Nations Convention against Corruption.

**Paragraph 2(c):** This paragraph is inspired by Article 12(5) of the United Nations Convention against Transnational Organized Crime and Article 31(6) of the United Nations Convention against Corruption. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 308) states that “an interpretive note [to the convention] indicates that the words ‘other benefits’ are intended to encompass material benefits as well as legal rights and interests of an enforceable nature that are subject to confiscation.”

**Paragraph 3:** Under this paragraph, where it is not feasible for a convicted person, for whatever reason, to hand over property, such as when it has been damaged or no longer exists, the court may, at its discretion, allow the convicted person to pay the equivalent amount to the court. This matter will be negotiated between the court and the convicted person, usually at the request of the convicted person.

## Article 73: Confiscation of Proceeds of Crime or Property of Corresponding Value from a Third Party

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1. Proceeds of crime or property of corresponding value must be confiscated from a third party where:
  - (a) the proceeds of crime or the property was transferred to the third party by the convicted person or another person without compensation, or the proceeds of crime or the property was transferred to the third party by the convicted person or another person for compensation that did not correspond to the real value of the proceeds or the property; and
  - (b) the third party knew or should have known that the property was acquired through the perpetration of a criminal offense.
2. Where a legal person acquires the proceeds of crime or property of corresponding value, the proceeds or the property must be confiscated where:
  - (a) the proceeds of crime or the property was transferred to the legal person by the convicted person or another person without compensation; or
  - (b) the proceeds of crime or the property was transferred to the legal person by the convicted person or another person for compensation that did not correspond to the real value of the proceeds or the property.
3. Where a close relative of the convicted person acquires the proceeds of crime or property of corresponding value, the proceeds or the property must be confiscated, unless the person can prove that he or she gave the convicted

person compensation that corresponds to the real value of the proceeds or the property.

## Commentary

**Paragraph 1:** Often, a convicted person will have transferred the proceeds of crime or property to a third party prior to his or her trial in order to conceal it from domestic authorities and in an attempt to exempt it from the confiscation regime. Where a transfer has been made for no consideration, or for consideration that did not amount to its real value, and where the recipient either knew, or should have known, that the proceeds or property derived from a criminal offense, the property or proceeds will also be subject to confiscation.

**Paragraph 2:** It is common that in an effort to conceal the proceeds of crime, a convicted person may transfer the proceeds of crime to a legal person for no consideration or for consideration that does not equate to the real value of the property or proceeds. When this sort of transaction has occurred, the court must confiscate the property. Unlike in Paragraph 1, there is no need to prove any knowledge that the proceeds or property derived from a criminal offense.

**Paragraph 3:** The transfer of property or proceeds of crime to a close relative is often more common than the transfer to a third-party nonfamily member or legal person. The court will not accept the excuse that the property was a gift, nor will its transfer for nominal consideration be accepted by the court as a reason for allowing the family member to retain the property. Where a close relative has received property or the proceeds of crime, the MCC requires that the close family member gave the convicted person consideration that was equivalent to real value of the property or proceeds. In contrast to Paragraph 1 which relates to third-party recipients of property or proceeds of crime, Paragraph 3 allows confiscation even absent proof that the close relative knew or ought to have known that the proceeds or property derived from a criminal offense.

# Section 14: Dispositions Applicable to Juveniles and Adults on Trial for Criminal Offenses Committed as Juveniles

## General Commentary

Section 14 of the General Part of the MCC should be read in light of Chapter 15 of the MCCP on juvenile justice, which contains additional provisions on procedural aspects of the determination of a juvenile disposition. The Model Detention Act also contains provisions on the detention and imprisonment of juveniles.

Preferably, a state should create a wholly separate juvenile justice system, because juveniles who commit criminal offenses should be treated differently than adults by the criminal justice system. While they benefit from the same rights and protections applicable to adults under international human rights law, they are also entitled to additional rights contained in international human rights norms and standards, and these rights should be reflected in domestic criminal law. In a post-conflict state, the creation of a separate juvenile justice system may not always be a viable option for a variety of reasons, mostly relating to resources. Many of the experts consulted during the vetting process for the Model Codes were strongly in favor of a separate juvenile justice system. However, they were willing to concede the potential impossibility of establishing this system in some post-conflict situations, where resources are already overstretched. That said, everyone agreed that a post-conflict state should work toward the creation of a separate juvenile justice system. For the interim period, the Model Codes address the issue of juveniles within the regular criminal justice system, an option that a post-conflict state could initially follow. It would be inappropriate to treat adults and juveniles in the same way. Therefore, the MCC sets out separate provisions on penalties. Separate provisions on procedural protections for juveniles are contained in the MCCP, and separate provisions on the detention and imprisonment of juveniles are integrated into the Model Detention Act.

The purpose of Section 14 of the MCC is to incorporate the international standards relating to dispositions for juveniles contained in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). Reference should be made to these instruments, in particular the commentary that accompanies the Beijing Rules, which may be instructive for drafters of legal provisions on juvenile dispositions. The International Covenant on Civil and Political Rights, Article 14(4), emphasizes the desirability of promoting the rehabilitation of juveniles in conflict with the law. Article 37(b) of the Convention on the Rights of the Child states that imprisonment of a child shall be used as a measure of last resort and for the shortest appropriate period of time. Part 3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice sets out relevant standards on the disposition of criminal cases involving juveniles. The focus of juvenile dispositions is more on rehabilitation and less on retribution. The rationale for dealing with juveniles under a separate section relates not only to the differences in the purposes of penalties for adults and for juveniles but also to the suitability, or unsuitability, for children of penalties applicable to adults.

The term *disposition* instead of *penalty* has been used throughout Section 14 to underscore the predominantly nonpunitive nature of measures applied to juvenile convicted persons.