

Chapter 13: Confiscation

General Commentary

The MCC provides for two types of confiscation: (1) confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense (Article 61) and (2) confiscation of proceeds of crime or of property of corresponding value (Articles 70–73). Reference should be made to the commentaries to Article 60 and Articles 70–73. Confiscation under Article 61 of the MCC is a security measure and an additional penalty aimed at confiscation of items used in or destined for use in a criminal offense; confiscation under Articles 70–73 of the MCC is limited to confiscation of proceeds of crime and can involve property only in the amount corresponding to the proceeds of crime.

Some state legislation aimed at the recovery of assets from an accused or third party includes a reversal of the burden of proof in the assumption that the assets are the proceeds of crime which the owner of the assets must rebut. In other states, there is a reduction in the standard of proof to the balance of probabilities that the property represents the proceeds of crime rather than the usual test of proof beyond reasonable doubt. Many criminal justice systems have introduced such an approach (some even utilize civil forfeiture, where proceeds of crime can be confiscated in civil procedures under a lower standard of proof not requiring conviction). This approach has also been promoted by some international instruments, most notably the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the United Nations Convention against Corruption. Although the reversal of the burden of proof infringes on the presumption of innocence (see the commentary to Article 56 of the MCCP), courts of many jurisdictions (including the European Court of Human Rights) have ruled that the reversal of the burden of proof can be consistent with the right to a fair trial if the standard is regulated and implemented with proper safeguards. Given that this approach is controversial and requires an established criminal justice system and a complex set of procedural rules and safeguards (which are not often found in a post-conflict state), the drafters of the MCCP opted for a more traditional approach to confiscation where burden of proof remains with the prosecution.

Chapter 13 outlines the basic procedure the court must follow to order confiscation, which is the permanent deprivation of property by a court order. Confiscation is a measure that is ordered at the end of criminal proceedings. It is often preceded by preservation and seizure of proceeds of crime and property used in or destined for use in a criminal offense (see Article 133 of the MCCP and the accompanying commentary). In both types of confiscation, the interests of third parties—persons other than the accused who are the legal owners or have a legal interest in the property—must be taken into consideration. As a general rule, any confiscation order by the court must be reasonable and proportionate.

Article 298: Confiscation of Property, Equipment, or Other Instrumentalities Used in or Destined for Use in a Criminal Offense

1. Property, equipment, or other instrumentalities used in or destined for use in the commission of criminal offense may be confiscated by an order of the trial court under Article 61 of the MCC. Confiscation must be reasonable and proportionate.
2. The trial court may order confiscation under Paragraph 1 on the request of the prosecutor or the victim or on its own motion.
3. Confiscation may be ordered following a conviction for a criminal offense.
4. Certain objects, equipment, or other instrumentalities may be confiscated even where the criminal proceedings do not end in a conviction where:
 - (a) the court determines beyond reasonable doubt that the instrumentalities may be used in the commission of a criminal offense;
 - (b) confiscation is required by the interest of general safety of the public and property; or
 - (c) the item or items in question are subject to mandatory seizure and confiscation or they represent prohibited items under the applicable law.
5. A copy of the order on confiscation must be served in accordance with Article 27 on:
 - (a) the prosecutor;
 - (b) the accused; and
 - (c) the person who is the legal owner of or has a legal interest in the property or items subject to confiscation if he or she is a person other than the accused and where that person is known to the court.
6. Where property or items are confiscated from an accused following a judgment in which the accused is found criminally responsible for a criminal offense, the accused may appeal confiscation in the appeal against conviction under Article 274(1)(c) of the MCCP.
7. Where the order is made under Paragraph 4 or where the confiscation order refers to property or items that a person other than the accused is the legal owner of or has a legal interest in the order may be appealed under Article 295.

Article 299: Confiscation of Proceeds of Crime or of Property of Corresponding Value

1. The court may order confiscation of proceeds of crime or of property of corresponding value from the accused or from a third party under Chapter 13 of the MCC. Confiscation must be reasonable and proportionate.
2. The prosecutor must submit to the trial court all relevant information and data required for the determination of the amount of the proceeds of crime.
3. Proceeds of crime or property of corresponding value may be confiscated following a conviction for a criminal offense.
4. Where criminal proceedings do not end in a conviction, proceeds of crime or property of corresponding value may be confiscated when the court establishes beyond a reasonable doubt that:
 - (a) a criminal offense has been committed; and
 - (b) the property subject to confiscation derives from or is obtained directly or indirectly from this criminal offense.
5. A copy of the order for confiscation must be served in accordance with Article 27 on:
 - (a) the prosecutor;
 - (b) the accused; and
 - (c) the person who is the legal owner of or has a legal interest in the property or items subject to confiscation, if that is a person other than the accused and where that person is known to the court.
6. Where confiscation is ordered following a judgment in which the accused is found criminally responsible for a criminal offense, the accused may appeal confiscation in the appeal against conviction under Article 274(1)(c) of the MCCP.
7. Where the order is made under Paragraph 6 or where the confiscation order refers to property that a person other than the accused is the legal owner of or has a legal interest in the order may be appealed under Article 295.

Article 300: Rights of Third Persons

1. Before the court orders confiscation under Article 298 or Article 299 of property or items that a person other than the accused is the legal owner of or has a legal interest in (a “third party”), that person must be given an opportunity to be heard by the court and be questioned as a witness. Where a third party is a legal person, the legal person must be heard and questioned through a representative.
2. Where, during criminal proceedings, the court has reasons to believe that confiscation under Article 298 or Article 299 may be made and where it involves the interest of a third party, the court must promptly notify the third party of the proceedings in accordance with Article 27.
3. The third party must be notified of the following:
 - (a) that criminal proceedings are being conducted before the court that may result in confiscation of the third party’s property as proceeds of crime; and
 - (b) the right of the third party under Paragraph 4.
4. The third party has the right to:
 - (a) be notified by the court in advance of all hearings that take place during the trial;
 - (b) participate in the proceedings;
 - (c) have access to and inspect evidence under similar conditions as the defense;
 - (d) propose evidence in relation to the matter of confiscation; and
 - (e) pose questions to witnesses with the permission of the trial court.
5. If the third party fails to appear at the hearing despite being properly informed of the date of the hearing, the hearing may be conducted in his or her absence.

Article 301: Subsequent Challenge of Confiscation by a Third Party

1. A person other than the accused who is the legal owner of or has a legal interest in property subject to confiscation under Articles 298 and 299 may, after the confiscation order has been executed, appeal the confiscation under Article 295 in the following circumstances:
 - (a) when the order was issued the person was an owner of or had a legal right in the confiscated property or item; and
 - (b) he or she could not exercise the rights under Article 300 through no fault of his or her own.
2. A subsequent challenge of confiscation by a third party under Article 301 may be made within two years of the confiscation order having been issued.
3. A person making a subsequent challenge of confiscation under Article 295 must appeal the confiscation within thirty days of learning about the confiscation order.