

Confiscation of proceeds and property related to crimes: international standards and the ECHR practice

Professor Natalya ORLOVSKA¹
Julia STEPANOVA²

Abstract

Organized crime and corruption in the context of globalization pose a huge threat to the security of all countries without exception. Therefore, the common European and national crime prevention systems pay great attention to criminal activity economic sense deprivation. This is achieved through the application of confiscation of property and proceeds related to crime. For transitive legal systems development the reference points are the international standards and ECHR practice which are studied using dialectical, formal legal and comparative legal methods. The study showed that the international standards and ECHR practice make it possible to find a balance between public and private interests, ensure maximum seizure of proceeds and property related to crimes, and guarantee the protection of property rights as an essential human right. On the example of Ukraine the peculiarity of the confiscation regulation in countries with a transitive legal system is shown and the perspectives for domestic law improving in this aspect are outlined.

Keywords: *confiscation, proceeds and property related to crime, international standards, ECHR practice, punishment and criminal law measure, human rights protect*

JEL Classification: K14, K38, K42

1. Introduction

An analysis of the criminal activity characteristics in the global world indicates about organized crime and corruption increasing. These phenomena are in a systemic interrelationship and have a strong impact on the political and economic systems of states. A vivid evidence of this is the significant amount of dirty money which is by-product or a symptom of political corruption in the jurisdictions in which it originates. This typically involves multiple jurisdictions³. In this regard the issues of proceeds and property related to crimes confiscation are being actualized. Such confiscation is seen as a necessary and effective tool for preventing crime and its economic sense depriving. However, the question of human rights observance inevitably arises.

¹ Natalya Orlovska – National Academy of the state Border Guard of Ukraine named after Bogdan Khmelnitsky, Ukraine, natalyaorlovska@ukr.net.

² Julia Stepanova - National Academy of the state Border Guard of Ukraine named after Bogdan Khmelnitsky, Ukraine.

³ Demetriades, Panicos and Vassileva, Radosveta. “Money Laundering and Central Bank Governance in the European Union”. *Journal of International Economic Law*, Vol. 23 (2) (June 2020): 509-533.

In the criminal context we are talking not only about proceeds of crime, but also about the instruments of crime. In addition, mechanisms for laundering dirty money (especially in transnational financial transactions) are quite effective in legalizing such financial resources. Also, offenders often hide the proceeds of crime by transferring them to third parties. Therefore, by providing for and applying confiscation the legislators and courts interference with the property rights of not only concrete offenders, but also third parties.

To determine the limits of government compulsion and interference with property rights the international community has formulated standards for proceeds and property related to crime confiscation. For several decades a number of global and European documents have been adopted to protect human rights and improve the effectiveness of the organized crime and corruption prevention.

A huge role plays the ECHR practice which is based on the principles of lawfulness and proportionality of interference with human rights. The ECHR legal positions cover the most important aspects: concept, goals, types, admissibility of confiscation, and procedural guarantees for the protection of property rights.

With this in mind, our study purpose is to analyze international standards and the ECHR practice as guidelines for assessing the current state and development of transitive legal systems, in particular, Ukraine, on the basis of the social conditionality for proceeds and property related to crimes confiscation.

The study of the content and significance of international standards and ECHR practice for improving the legal regulation of proceeds and property related to crimes confiscation in countries with a transitive legal system has been carried out by dialectical, formal legal and comparative legal methods.

The dialectical method made it possible to consider the relationship between crime and the directions of its prevention. In such cases, states have a wide margin of appreciation in implementing policies to fight organized crime, including confiscation of unlawfully obtained assets⁴. The formal legal method became the basis for the study of confiscation as a legal construct. In a comparative context a set of standards and experience of national regulation (on the example of Ukraine) were considered.

2. Confiscation of proceeds and property related to crime: a discussion about its social predestination

The issue of confiscation of proceeds and property related to crimes is one of the most complex and controversial in modern criminology and criminal law. It is at the center of a whole system of interrelated problems simultaneously focusing many scientific and practical contradictions.

The first circumstance that attracts attention is the criminal activity features. As a result of globalization we are witnessing a sharp increase of transnational crime. This takes many forms, including trafficking in drugs and

⁴ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property/Updated on 30 April 2020. Council of Europe/European Court of Human Rights, p. 59.

weapons; smuggling of human beings; the abuse of new technologies to steal, defraud and evade the law; and the laundering of the proceeds of crime. Organized crime, shadow economy and corruption in the national and transnational dimensions undermine the democratic and economic basis of societies through the investment of illegal money, weakening of institutions and a loss of confidence in the rule of law⁵.

This tendency is especially evident in countries with transitional economies and unstable democracies, where finally unformed institutions and imperfect legal regulation cannot effectively resist the destructive effects of organized economic crime and corruption.

Criminal statistics are indicative in this regard: official data indicate an insignificant number of economic crimes committed by organized structures, as well as corruption. For example, in Ukraine during recent years the proportion of crimes committed by organized criminal structures amounted to no more than 0.8% in the overall structure of crime. About the same number are the most common corruption crimes (related to obtaining or providing an illegal benefit).

However, the official data do not coincide with the real picture - the population of Ukraine is not against the death penalty introduction for corruption crimes. This was evidenced by the results of sociological polls which were conducted in 2015-2016, although in general only 5% of the population supports the death penalty. Therefore, there is no reason to talk about the bloodthirstiness of Ukrainians. However, the emotional mood of citizens can be understood.

The country is shaken by corruption scandals, and independent researchers have established that in terms of the average amount of bribe Ukraine ranks second after Russia in the post-Soviet space. It is no coincidence that sociological polls in 2020 show that 71% of Ukrainians practically does not see the of anti-corruption reforms effectiveness⁶.

At the same time, the anti-corruption bodies' activities results are rather depressing than inspiring hope. Detentions of the various levels of authority officials mostly do not end with convictions and real terms of imprisonment. What is about proceeds and property related to crimes, then, according to independent experts NABU managed to return to the budget for the entire period of its (NABU) existence only 0.26% of the caused to the state damage tentatively established during the investigative actions⁷.

The COVID-19 outbreak increased corruption risks. The health sector is particularly exposed: the procurement system, bribery in medical-related services, corruption in new product research and development (R&D), including conflicts of

⁵ Woodiwiss, Michael and Hobbs, Dick. "Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric of Organized Crime Policing in America and Britain". *The British Journal of Criminology*, Vol.49 (1) (January 2009): 106-128.

⁶ The results of a public opinion poll conducted by the Ilko Kucheriv Democratic Initiatives Foundation in January 2020 in the framework of the Program to promote public activity "Join!" Accessed September 12, 2020. <https://dif.org.ua/article/ukraintsi-zalucheni-do-gromadskoi-diyalnosti-ale-unikayut-aktivnoi-uchasti>.

⁷ Why the activity of anti-corruption bodies is ineffective? Accessed September 12, 2020. <https://ua.112.ua/statji/zahruzly-v-skandalakh-chomu-roboty-antykoruptsiinykh-orhaniv-neefektyvna-526338.html>.

interest and the role of lobbying, COVID-19-related fraud. The private sector is also exposed to considerable corruption risks⁸.

Thus, a vicious circle is gradually forming: when the growth of crime leads to the involvement of broad masses into criminal activity and, as a consequence, to a further crime increasing. The destabilization of the economic system is compounded by confusion of direct and indirect proceeds of crime, since bona fide assets are used to conceal illicit assets⁹.

This situation brings us to a discourse about the social conditioning of organized crime and corruption which should determine the optimal anti-criminal activity model of the state. Of course, this model should include both reflection (work on the fact of already committed crimes) and prevention of the commission of primary crimes.

If we take into account the business nature of modern criminal activity then the concept of economic conditioning is undoubtedly updated with the ensuing views on preventive activity. Let us consider the pro and contra of this context.

Economic conditioning advocates pose the question: to what extent does crime follow the pattern of potential gains to illegal activity? And their answer is: potential gains are a major empirical driver of criminal activity and a crucial part of the economic model of crime¹⁰.

According to opinion of experts who have investigated the problem concerning crime's infiltration of the legal economy, the results obtained support the validity of the rational choice perspective by showing how criminal organizations weigh risks and rewards in their decisions to invest. This confirmed a risk-reward approach, based on the rational choice perspective¹¹.

Within the framework of economically determined rational behavior it is entirely naturally to use legal structures, like trusts and companies, which facilitate a range of commercial activities. It provides opportunities for those involved in serious crimes for gain to control, convert and conceal their illicit finances, usually with the assistance of professional intermediaries, such as lawyers or financial advisors¹².

Thus, organized economic crime and corruption form a segment of dirty money which also feeds them. With this in mind the benefits of fighting "dirty

⁸ Mrčela, Marin. "Corruption Risks and Useful Legal References in the context of COVID-19". Strasbourg, 15 April 2020. Accessed September 12, 2020. <https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context-of-covid-1/16809e33e1>

⁹ Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime. United Nations Office on Drugs and Crime, Vienna 2012, p. 81.

¹⁰ Draca, Mirko, Koutmeridis, Theodore and Machin, Stephen. "The Changing Returns to Crime: Do Criminals Respond to Prices?" *The Review of Economic Studies*, Vol. 86 (3) (May 2019): 1228-1257.

¹¹ Dugato, Marco, Favarin, Serena and Giommoni, Luca. "The Risks and Rewards of Organized Crime Investments in Real Estate". *The British Journal of Criminology*, Vol. 55 (55) (September 2015): 944-965.

¹² Lord, Nicolas J, Campbell, Liz J and Van Wingerde, Karin. "Other People's Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-collar, Corporate and Organized Crimes". *The British Journal of Criminology*, Vol. 59 (5) (September 2019): 1217-1236.

money” (punitive, preventive, reparative, etc.) are obvious. Therefore, confiscation is becoming one of the main objectives when dealing with organized crime and other serious offences, including corruption¹³.

It should be noted that confiscation in this context acts as a kind of bridge that can connect public and private interests in limiting crime. Of course, the researchers point out that private organizations are acting in their own self-interest. Should the responsibilities imposed on the state by the European Convention on Human Rights be borne by private profit-making bodies?¹⁴ Certainly, we are not talking about providing private companies with the functions of law enforcement or judicial authorities; however courts should be more open to criminal claims brought by a wider range of third parties, such as third-sector organizations involved in crime detection¹⁵.

Thus, we state that the economic vision of the conditionality of crime naturally determines the need for normative regulation and using of confiscation of proceeds and property related to crimes. The economic motivation for criminal behavior is the most stable and simultaneously rational. Therefore, penalties, including confiscation, seem to be a rational response from the legislator in terms of impact on offenders and persons who have selfish motivation and may commit crimes in the future.

The position of economic conditioning proponents seems logical enough. However, those experts who are subject to fundamental criticism concerning economic analysis of organized crime do not agree with it. The findings from the Dutch Organized Crime Monitor highlight social embeddedness (also in cases of transnational organized crime), social relations, work relations, leisure activities and sidelines and life events shaping involvement in organized crime and developments in criminal careers, and manipulation and violence embedded in social relations. The latter demonstrate that offender behavior is not so much driven by market mechanisms, but rather by the ‘visible hand’ of social relations, and the ‘visible hand’ of manipulation and violence¹⁶.

However, if this is the case, then penalties in general and confiscation, in particular, are a path to an unreasonable expansion of state compulsion which is ineffective in preventing crime. Indeed, in this case there is no connection between the motivational dimension of the crime problem and measures to influence on it. An important argument, among other things, is the formal legal gaps and contradictions that arise in the process of regulating and applying confiscation.

For example, Arie Freiberg (1992, 2000) noted that laws for the

¹³ Simonato, Michele. “Confiscation and fundamental rights across criminal and non-criminal domains”. *ERA Forum: Journal of the Academy of European Law* 18 (2017): 365-379.

¹⁴ Palmer, Stephanie. “Public functions and private services: A gap in human rights protection”. *International Journal of Constitutional Law*, Vol. 6 (3-4) (July-October 2008): 585-604.

¹⁵ Holder, Jeremy. “The courts’ development of the criminal law and the role of declarations”. *Legal Studies*, Vol. 40 (1) (2020): 42-54.

¹⁶ Kleemans, Edward R. “Organized crime and the visible hand: A theoretical critique on the economic analysis of organized crime”. *Criminology and Criminal Justice*, Vol. 13 (5) (November 2013): 615-629.

confiscation of the proceeds of crime was offered as new and potent weapon against organized crime. Governments have expected too much from the legislation despite the lack of evidence regarding its effectiveness, this type of legislation has become progressively more severe. Moreover these drastic laws have the potential to undermine some of the important foundations of the criminal justice system¹⁷. Preventive law enforcement increases social welfare by hindering the infliction of criminal harm, but produces inconvenience costs to the general public, because it requires interfering with the acts of innocents as well as attempters¹⁸.

Obviously, this discussion is of great theoretical and practical importance. However, is it possible to find something that can bring together the positions of scientists and provide guidance to legislators and law enforcement agencies in the prevention of organized economic crime and corruption? We believe that the consideration of not so much motivation as the modus operandi as its objectification can be brought to the fore. For example, the ICCS defining the criminal act on the basis of behavioral descriptions: the legal specification here acts as a derivative characteristic of the act¹⁹.

Consequently, criminal-legal measures can also be determined taking into account the orientation towards the objective consequences of the crime elimination. For example, Radha Ivory (2018) writes in relation to corruption that most treaties on corruption require their state parties to create offences out of certain behaviors. States are, furthermore, required to punish transgressions with penal sanctions and to enhance the prospects for prosecution or asset recovery by undertaking select criminal responsibility²⁰.

Thus, confiscation of proceeds and property related to crime can be applied both within the concept of economic conditioning of crime, and in the case of its rejection.

Of course, national legislators consider the confiscation regulation format enough differently. So, some jurisdictions establish criminal confiscation yet limit the authority to confiscate to the offence for which the offender was convicted. Other jurisdictions take a broader approach permitting confiscation relevant to the convicted offences as well as confiscation of any other proceeds of crime that can be tied to a serious crime or predicate offence beyond a reasonable doubt²¹.

¹⁷ Freiberg, Arie. "Criminal Confiscation, Profit and Liberty". *Australian & New Zealand Journal of Criminology*, Vol. 25 (1) (March 1992): 44-82; Freiberg, Arie and Fox, Richard. "Evaluating the Effectiveness of Australia's Confiscation Laws". *Australian & New Zealand Journal of Criminology*, Vol. 33 (3) (December 2000): 239-265.

¹⁸ Mungan, Murat C. "Optimal Preventive Law Enforcement and Stopping Standards". *American Law and Economics Review*, Vol. 20 (2) (2018): 289-317.

¹⁹ International Classification of Crime for Statistical Purposes (ICCS): Version 1.0 February 2015 Prepared by United Nations Office on Drugs and Crime (UNODC). Accessed September 12, 2020. <https://unstats.un.org/unsd/statcom/doc15/BG-ICCS-UNODC.pdf>.

²⁰ Ivory, Radha. "Beyond transnational criminal law: anti-corruption as global new governance". *London Review of International Law*, Vol. 6 (3) (November 2018): 413-442.

²¹ Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime. United Nations Office on Drugs and Crime, Vienna 2012. p. 81.

We believe that the shortcomings that are naturally inherent in any format of confiscation regulation can be reduced if legislators are clearly focused on the Rule of Law. Democracy and respect for Human Rights have long enjoyed much more attention. In the 21st century, however, the autonomy of the Rule of Law and its importance have become evident²².

This determines the increased attention to respect and protection of fundamental human rights, even when it comes to the offender or the beneficiary of the crime. The obligation imposed on a state party by the ECHR includes protecting everyone within the Convention's jurisdiction; moreover, providing an effective remedy for any breach is not limited to government bodies. The absence of an effective remedy against a non-government actor or an inadequate remedy against a state actor may result in a violation of the ECHR²³.

Thus, on the issue of confiscation in the light of the rule of law doctrine national law and enforcement must find a balance between property rights and the expediency of criminal property measures, adhering to basic international law standards and taking into account the ECHR practice.

3. International standards regarding confiscation of proceeds and property related to crime

Standards on the confiscation application are contained in numerous international legal acts. Their totality is large enough. Therefore, it is advisable to classify documents on various grounds:

1. According to the level there can be global and regional (European) acts. By global acts we mean those that are accepted by the UN or its structures. European (Council of Europe and EU) standards are the most interesting for Ukraine as a country that is oriented towards the European legal space.

2. According to content we can distinguish those acts that relate to crime/its certain types. In them confiscation is mentioned in several provisions as one of a number of measures concerning influence on the offender. Along with this there is a corpus of acts that directly fix the standards (procedures, algorithms) for confiscation regulation and application

Among them the most important and indicative for countries with a transitional system are (we will indicate them in chronological sequence) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)²⁴; Convention on Combating Bribery of Foreign Public Officials in

²² Rule of Law. Accessed September 12, 2020. https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=RU

²³ Palmer, Stephanie. "Public functions and private services: A gap in human rights protection". *International Journal of Constitutional Law*, Vol. 6 (3-4) (July-October 2008): 589.

²⁴ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime Strasbourg, 08.11.1990. Accessed September 12, 2020. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007_b23.

International Business Transactions (1997)²⁵; Criminal Law Convention on Corruption (1999)²⁶; United Nations Convention against Transnational Organized Crime (2000)²⁷; United Nations Convention against Corruption (2003)²⁸; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)²⁹; Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (2014)³⁰.

In the context of this article the following their provisions can be cited:

1. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime draws attention to money-laundering offenses: in particular, Article 6 deals with criminalization and, consequently, punishment for certain acts involving the concealment or disguise of the criminal origin of the other persons` income who are acting intentionally.

2. Part 3 of Article 3 of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions recommends setting a confiscation of the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds.

3. According to Part 3 of Article 19 of Criminal Law Convention on Corruption confiscation is not the only measure, as the state may provide for the possibility of seizure the means of committing crimes and proceeds from them in a way other than confiscation. However, these measures must meet the criteria of effectiveness and adequacy.

4. Article 12 of United Nations Convention against Transnational Organized Crime obliges States Parties to take the greatest possible measures to enable confiscation of proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds, as well as property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention. Article 13 of the said Convention emphasizes the urgent need for international cooperation for the confiscation of such proceeds or property.

²⁵ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997. Accessed September 12, 2020. https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

²⁶ Criminal Law Convention on Corruption, Strasbourg, 27.01.1999. Accessed September 12, 2020. <https://rm.coe.int/168007f3f5>.

²⁷ United Nations Convention against Transnational Organized Crime and the Protocols Thereto/ United Nations Office on Drugs and Crime, Vienna, 2004.

²⁸ United Nations Convention against Corruption/United Nations Office on Drugs and Crime, Vienna, 2004.

²⁹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16.05.2005. Accessed September 12, 2020. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371f>.

³⁰ Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, 2014. Accessed September 12, 2020. <https://eur-lex.europa.eu/eli/dir/2014/42/oj>.

5. Par. “g” of Article 2 of United Nations Convention against Corruption defines confiscation as the permanent deprivation of property by order of a court or other competent authority namely on certain procedural grounds. It is for the purpose of confiscation, in accordance with Part 2 of Article 31 of this Convention, each State Party shall identification, tracing, freezing or seizure of proceeds and property which are the subject of such confiscation (i.e. those related to corruption).

6. According to Part 1 of Article 3 of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

7. Directive 2014/42/EU aims to put forward a common definition of extended confiscation. Expanding the possibilities of confiscation is embodied in Articles 5, 6. Particularly, in Article 6 “Confiscation from a third party” it provides for the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.

Thus, the standards reflect the general logic of the international and European communities, which is the obligation to standardize and widely apply the confiscation of proceeds and property related to crimes, at least: a) proceeds of crime; b) property used to secure the commission of a crime; c) objects and tools of the crime; d) laundered proceeds and property.

The following aspects should be emphasized:

In international documents confiscation is not directly identified as a criminal measure, moreover, the state may use a method other than confiscation, seizure of proceeds and property related to crimes. However, given that it is a matter of committing crimes, it is logical to consider confiscation, at least in the vast majority of cases, as a criminal measure.

It is noteworthy that the term “confiscation” is used in international acts. Although in paragraph “d” of Article 1 of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism the term “confiscation” is used for both punishment and measure (as a result of the application of both punishment and measure should be permanent deprivation of property). Part 2 of Article 2 of this Convention calls on States Parties to confiscate property of “legal or illegal origin” in the event of links to terrorist financing or in the event of the acquisition of property as a result of terrorist activities.

Article 5 of Directive 2014/42/EU contains an indication of “extended confiscation”, which can be applied in the presence of evidence that the value of the property is disproportionate to the lawful income of the convicted person. Herewith at the present stage the confiscation of proceeds and property related to

the crime from third parties, i.e. those who are not subject to socially dangerous acts, but directly or indirectly received from the perpetrator proceeds or property related to crime. However, this applies to cases where these persons knew or should have known that the purpose of such transfer or acquisition was to avoid confiscation. That is, the importance of the rule of law, the components of which are to ensure the clarity and predictability of regulations, is not eliminated or diminished; determining the scope of rights and obligations by law, rather than discretion; ensuring equality before the law; ensuring the fairness of court decisions.

Confiscation, to the extent that it is not understood in international documents, shall be ordered exclusively by a court or other competent authority³¹. However, this does not indicate the use of confiscation exclusively in criminal proceedings, i.e. it may be at least a civil proceeding.

4. Confiscation of proceeds and property related to crime in the ECHR practice context

An important component of understanding the logic and sequence of international standards implementation in law enforcement activities at the national level is the ECHR practice. It is clear that the ECHR decisions and legal positions are based on the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols. However, those international legal documents whose provisions we have cited earlier are part of the substantive and procedural support of human rights in the criminal justice sphere. Therefore, they are also part of generally accepted standards for the protection of human rights and freedoms.

The ECHR practice is based on a number of principles, among which the lawfulness and proportionality are most important. Both these principles are organically interconnected. There is needed a legal basis for any interference with the “peaceful enjoyment” of one’s possessions (lawfulness), and that such an interference, based on public interests, is proportionate to the legitimate aim pursued (proportionality)

The ECHR practice assumes that national legislators should reflect in normative acts only those measures whose severity is determined by the danger of the crime. Only proportional measures are appropriate.

The proportionality test is conducted when there is an interference with a fundamental right and aims to assess whether such an interference pursues a legitimate objective, whether the measure is suitable to reach that objective, whether it is necessary³². With regard to the confiscation of proceeds and property related to crime the principles of lawfulness and proportionality limit of state interference in property rights.

³¹ For example: Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Accessed September 12, 2020. https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

³² Simonato, Michele. “Confiscation and fundamental rights across criminal and non-criminal domains”. *ERA Forum: Journal of the Academy of European Law* 18 (2017): 365-379.

Only in this case the state does have the ethical reasons to restrict the rights and freedoms of offenders. Society, on the other hand, spends limited funds on the most effective measures to prevent crime. Another positive consequence of the relationship between lawfulness and expediency is the prevention of a sliding into the police state in the face of crime increasing. With regard to the confiscation of proceeds and property related to crime the principles of lawfulness and proportionality are stipulate limits of state interference in property right.

Any interference with the rights protected by Article 1 of Protocol No. 1 must meet the requirement of lawfulness. It also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable³³. Wherein the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness³⁴. As well the Court accepted that the confiscation measures should be proportionate, even in the absence of a conviction establishing the guilt of the accused³⁵.

It seems to us that for the development of domestic criminal law, harmonization of the different states legislation for international cooperation in the sphere of combating organized crime and corruption, it is advisable to dwell on several aspects of the ECHR practice.

So, Michele Simonato (2017) addressed the question about the nature of the confiscation measure: is it a criminal penalty or can it be considered a different type of measure other than a penalty? in the first case should the full set of principles and guarantees applicable to criminal cases be applied³⁶. Note that this question presupposes two answers which are based on the ECHR practice. Firstly, domestic law is not prevalent for the Court; on the basis of the Engel criteria the court can consider as criminal any case in connection with which the issue of violation of the requirements of the Convention and the Protocols is raised. Therefore, confiscation can be either a punishment or a measure different from it. Secondly, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. Any interference with the peaceful enjoyment of possessions must, therefore, be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by that provision³⁷.

³³ See, for example, para.109 Judgment on case of *Beyeler v. Italy*: Case of *Beyeler v. Italy* (Application no. 33202/96)/Judgment. Strasbourg, January, 5, 2000. Accessed September 12, 2020. <https://www.ilsa.org/Jessup/Jessup17/Batch%201/Judgment%20of%20the%20ECHR-%20Beyeler%20v.%20Italy%20-2000.pdf>.

³⁴ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property/Updated on 30 April 2020. Council of Europe/European Court of Human Rights. p. 22.

³⁵ *Ibid.*, p. 60.

³⁶ Simonato, Michele, *op. cit.*, p. 365-379.

³⁷ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 22, 23.

What is the subject of confiscation? Confiscation measures may be applied, not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets³⁸. That is, an important factor is the link between property and proceeds with crime (the origin of the property).

What is the purpose of the confiscation? Certainly, there exist a reasonable relationship of proportionality between the means employed and the aim sought to be realized³⁹. Based on this, we can say that the purposes of confiscation are diverse and depend on the object of confiscation. So, a confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities and also guarantees that crime does not pay⁴⁰. If we are talking about the instruments of crime, then confiscation sought to prevent the unlawful use, in a manner dangerous to society, of “possessions” whose lawful origin has not been established⁴¹. The Court reiterates its constant approach that a confiscation measure, even though it does involve a deprivation of possessions, constitutes nevertheless control of the use of property⁴². What regimes of confiscation can be provided for domestic law?

Michele Simonato (2017) answered this question having highlighted traditional concept of confiscation, whereby the deprivation of property follows a conviction for a specific crime; extended confiscation, when property may be confiscated even if it is not proceeds of the crime for which the offender has been convicted; third party confiscation, if they belong to persons other than the offender; non-conviction based confiscation if they are the proceeds of an offence which has not been proven at trial; civil asset forfeiture, even if criminal proceedings against the suspect have not started at all⁴³. Herewith, where confiscation was imposed independently of a criminal charge against third parties, the Court accepted that the authorities may apply confiscation measures not only to persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property⁴⁴. At the same time, as for third party confiscation, then ECHR to some extent restricts their list. It should be reminded that, for example, in Article 6 of Directive 2014/42/EU third parties are understood as those who directly or indirectly

³⁸ Ibid, p. 59.

³⁹ Ibid, p. 60.

⁴⁰ See, for example: para. 58 Case of Denisova and Moiseyeva v. Russia: Case of Denisova and Moiseyeva v. Russia (Application no. 16903/03)/Judgment. Strasbourg, October 4, 2010. Accessed September 12, 2020. <https://lovdata.no/static/EMDN/emd-2003-016903.pdf>.

⁴¹ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 60.

⁴² See, for example: para. 62 Case of Silickienė v. Lithuania: Case of Silickienė v. Lithuania: (Application no.20496/02)/Judgment. Strasbourg, July 10, 2010. Accessed September 12, 2020. [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-110261%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-110261%22]).

⁴³ Simonato, Michele. “Confiscation and fundamental rights across criminal and non-criminal domains”. *ERA Forum: Journal of the Academy of European Law* 18 (2017): 365-379.

⁴⁴ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 60.

received proceeds or property related to a crime from the offender, if they knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value⁴⁵.

In particular, the ECHR has provided an opportunity to apply confiscation to family members and other close relatives of offenders who are believed to be able to informally possess and dispose of “illegal” property on behalf of suspected offenders, or who otherwise did not have the required “good faith” status. For example, in the case of *Silickienė v. Lithuania*⁴⁶, where confiscation was applied to the widow of a corrupt authority official.

Under what conditions confiscation can be considered as a proportionate measure? Of course, the answer to this question depends on the confiscation regime. However, the main difficulties from a human rights perspective arise from the introduction of extended confiscation, third party confiscation, non-conviction based confiscation. So, the Court observed that, common European and even universal legal standards can be said to exist which encourage, in the first place, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction⁴⁷.

As we said earlier, the basis for solving this problem in domestic law is the principle of proportionality, taking into account the purpose of confiscation (a reasonable relationship of proportionality). These provisions are interpreted for each confiscation regime.

For example, in the case of *Phillips v. the United Kingdom* the applicant argued that the confiscation of his property was disproportionate. The national court carried out an examination of the applicant's income and applied the law norms which gave the court the right to consider all the property that during the previous six years had been at the disposal of a person convicted of a drug crime as drug profits⁴⁸.

The applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation⁴⁹.

⁴⁵ Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, 2014. Accessed September 12, 2020. <https://eur-lex.europa.eu/eli/dir/2014/42/oj>.

⁴⁶ Case of *Silickienė v. Lithuania*, Accessed September 12, 2020. [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-110261%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-110261%22]}).

⁴⁷ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property/Updated on 30 April 2020. Council of Europe/European Court of Human Rights. p. 59.

⁴⁸ Case of *Phillips v. the United Kingdom* (Application no. 41087/98)/Judgment, Strasbourg, 12 December 2012. Accessed September 12, 2020. <https://rm.coe.int/09000016806ebe19>.

⁴⁹ McBride, Jeremy. *Human rights and criminal procedure: The case law of the European Court of Human Rights*. Council of Europe Publishing, 2009, p. 301.

On that basis, it was determined that the applicant's income from the drug trafficking amounted to £ 91,400 and a confiscation order was issued for that amount. In its judgment the ECHR stated that the amount to be recovered under the confiscation order corresponded to the amount of income the applicant had received from drug trafficking over the past six years, as well as the amount of money he had been able to obtain from the real estate sale. In the light of these considerations and in view of the importance of the aim pursued the Court found that the interference with the applicant's peaceful possession of his property had been carried out within a reasonable time respecting the principle of proportionality⁵⁰.

Analyzing the proportionality of third party confiscation, we note that it is based on: 1) knowledge of the illegal origin of property; 2) inability to explain the origin of the property; 3) type of crime (severity of the crime); 4) finding out whether the third party is a fictitious owner. However, in any case we are talking about proceeds and property related to crimes, confiscation of all third party property is inadmissible.

What are the procedural guarantees of the confiscation application?

It follows directly from the principles of lawfulness and proportionality that the confiscation application implies certain legal procedures. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair⁵¹. Therefore, fair trial guarantees are an important part of the discourse on standards for the confiscation regulation and enforcement.

It means that any interference with the peaceful enjoyment of possessions must, therefore, be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by that provision⁵².

This rule applies even to the most serious criminal cases related to organized crime activity. So, the operation of the presumption that the property of a person suspected of belonging to a criminal organization represents the proceeds from unlawful activities, if the relevant proceedings afford the owner a reasonable opportunity of putting his or her case to the authorities, is not prohibited per se, especially if the courts are debarred from basing their decisions on mere suspicions⁵³.

Thus, in the decision on the already mentioned case of *Silitskienė v. Lithuania*, the ECHR draws attention that the confiscation application is based on

⁵⁰ Case of *Phillips v. the United Kingdom*, *op. cit.*

⁵¹ *McBride, Jeremy, op. cit.*, p.187.

⁵² Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, p. 23.

⁵³ Case of *Arcuri and Others v. Italy* (Application no. 52024/99) / Decision, Strasbourg, July 5, 2001. Accessed September 12, 2020. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ebc9b>.

proofs of purchase the confiscated assets through reinvestment of illegal income⁵⁴.

The criminal procedure has the task of reconciling two interests that are widely opposed, apparently contradictory: the public interest, of justice, which is to protect the state and the society against those persons who are presumed to have committed crimes and are considered to be dangerous for society and the private interest, which is that of the parties⁵⁵.

Any interference by a public authority with the peaceful enjoyment of “possessions” can only be justified if it serves a legitimate public (or general) interest. In particular, we are talking about measures to combat drug trafficking and smuggling; protection of the interests of the victims of the crime; confiscation of monies acquired unlawfully⁵⁶.

In this sense confiscation provides an opportunity to balance public and private interests while countering organized crime and corruption. All of the above gives us the opportunity to identify the cornerstones for the regulation and application of confiscation of proceeds and property related to crimes for Ukraine as a country with a transitive legal system.

5. Confiscation of proceeds and property related to crime as a promising mean of organized crime and corruption prevention in transitive legal system countries (on the example of Ukraine)

It seems to us that this question formulation is due to the fact that such states experience a special impact of organized crime and corruption:

- on the one hand, states need to determine the most effective measures to criminal activity prevention;

- on the other – developing states can hardly afford to increase spending on the criminal justice system, also including the number of long terms prisoners.

In light of this, confiscation is seen as a highly desirable public policy measure taking into account international standards and ECHR practice.

So, for those countries, where such instrument is defined by the legislation, it is advisable to use it more actively in practice and develop the appropriate court practice⁵⁷.

In domestic law a different format for the regulation of confiscation can be chosen and its volumes can be determined, as well as a list of procedural guarantees for the protection of the rights and freedoms of persons subject to the confiscation procedure.

⁵⁴ Case of Silickienė v. Lithuania: (Application no.20496/02) / Judgment. Strasbourg, July 10, 2010. Accessed September 12, 2020. <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-110261%22%7D%7D>.

⁵⁵ Rus, Călin-Ioan. “Solving causes by report to the principles of the Strasbourg Court”, *Juridical Tribune – Tribuna Juridica*, Vol. 7, Special Issue, October 2017: 253.

⁵⁶ Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property/Updated on 30 April 2020. Council of Europe/European Court of Human Rights, p. 24.

⁵⁷ Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia: Report of OECD Anti-Corruption Network for Eastern Europe and Central Asia, 2018, p. 98.

As for Ukraine, the legal norms body regarding confiscation is large enough. It based by Article 41 of the Constitution of Ukraine which fully complies with international standards and lays down the legal basis for the corruption regulation.

Today in Ukraine concerning with crimes there are legally provided: traditional confiscation which may take place in criminal proceedings usually conditioned by a conviction; third party confiscation, if they belong to persons other than the offender. Meanwhile, the range of crimes is not limited to organized crime and corruption. However, the law requires that there must be serious ones. Also issues of civil asset forfeiture have recently been settled.

It can be said that the confiscation of proceeds and property related to crimes is a multifaceted legal construction within domestic law being consisted of the following elements:

a) confiscation as punishment. It applies only to the guilty person, however, whole property (or its part) of the offender is seized without being connected to the sources of its obtaining. According to report of OECD Anti-Corruption Network for Eastern Europe and Central Asia (2018) the countries of the ACN, where the legislation still provides for the confiscation of all or part of the property of the convicted person as a sanction, should consider the possibility of transitioning from this type of confiscation to the confiscation of instrumentalities and proceeds of crime (the special confiscation)⁵⁸. However, in Ukraine confiscation remains as a punishment; it is provided only for serious mercenary crimes. In our opinion, the problem is not that the criminal law of Ukraine retains such a punishment as confiscation of all or part of the offender's property, but that the range of crimes for which it is assigned is not narrowed as much as possible. We believe that such confiscation can only apply to serious manifestations of organized crime and corruption. This is due to the fact that in Ukraine, as in other countries with a transitional legal system, the systematic fight against organized crime and corruption began relatively recently. Therefore, the rejection of confiscation as a punishment at the present stage will create additional opportunities for avoidance justice for the most dangerous offenders;

b) special confiscation. This is not a punishment, but a criminal law measure. It concerns exclusively proceeds or property related to a concrete crime specific. The parallel existence of confiscation (punishment) and special confiscation (a criminal law measure) in Ukraine is explained by the fact that punishment restricts only the legal rights and freedoms of the offender. The property and proceeds related to crime are illegal a priori. Therefore, the confiscation of such proceeds and property is a special criminal law measure. A special confiscation can also be applied to a person who is not responsible due to age or mental condition. Also, this measure can be applied to third parties. Herewith provide effective guarantees and procedures in legislation protect the rights of bona fide third parties during about confiscation, the relevant safeguards

⁵⁸ Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia: Report of OECD Anti-Corruption Network for Eastern Europe and Central Asia, 2018, p. 99.

to prevent abuse are complied⁵⁹. Unfortunately, the potential for special confiscation is currently not being fully exploited. The sustainable judicial practice is available only for the confiscation of the instruments of crime, but not the proceeds and property as obtained result of crimes;

c) civil asset forfeiture. In that regard, Ukraine accepted the recommendations to consider establishing an autonomous (non-criminal) civil confiscation of unjustified property of a person with compensation of the burden proof against him and the use of relaxed standards of proof (preponderance of evidence, balance probabilities or their analogs) in cases clearly defined by law, with appropriate assurances of procedural guarantees of a fair trial⁶⁰. However, it should be noted that civil confiscation is not related to crimes. In Ukraine, criminal responsibility has been established for unjustified enrichment. But a person can be charged with this crime only if it is a question of sufficiently large amounts of illegal income or property. In the same cases, when the volumes are not so significant to initiate criminal prosecution of the offender, civil confiscation is applied with appropriate regulatory guarantees for the rights and freedoms protection. However, due to the fact that civil confiscation was introduced only last year, there is no judicial practice yet.

Thus, Ukraine, as a country with a transitive legal system is open to accepting international and European standards for regulating the confiscation of proceeds and property related to crimes. However, due to the current situation the legislator cannot give up traditional decisions regarding confiscation as a punishment. At the same time, the possibilities for the confiscation of proceeds and property related to crimes outside of punishment have already been significantly expanded, including in civil proceedings. But the sustainable judicial practice is only being formed.

6. Conclusions

Given the current trends in criminality, then confiscation of proceeds and property related to crime is a necessary tool in the fight against organized crime and corruption. However, its application is associated with increased interference with property rights.

The protection of human rights guarantees are thoroughly regulated in international standards and the ECHR practice which is based on the lawfulness and proportionality principles. Summarizing the provisions of global and European documents, and the ECHR legal positions, it should be noted that there are several modes of confiscation: confiscation in connection with conviction; non-conviction confiscation; confiscation of third parties property; civil confiscation. The confiscation purposes are to deprive crime of economic benefits and control the use of property. However, any regime requires maximum guarantees for the human rights protection and a fair trial.

⁵⁹ Ibid p. 98.

⁶⁰ Ibid, p. 100.

Thus, for countries with a transitional legal system, to which Ukraine belongs, guidelines for the development of legislation regarding confiscation have been formed. However, due to the social and political processes dynamics in such countries, along with the proposed models, traditional means can also be used: for example, a combination of confiscation as a punishment and as a criminal legal measure. The sustainable judicial practice gradual formation is also important.

Based on this, for countries with a transitive legal system it is advisable to propose an improvement in the normative regulation of confiscation of the proceeds and property related to crime, and to expand the possibilities of its application. At the same time, the lawfulness and proportionality of interference with property rights, the rule of a fair trial remain mandatory requirements for the confiscation legal regulation.

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