RADHA IVORY

Corruption, Asset Recovery, and the Protection of Property in Public International Law

The Human Rights of Bad Guys

CAMBRIDGE

CORRUPTION, ASSET RECOVERY, AND THE PROTECTION OF PROPERTY IN PUBLIC INTERNATIONAL LAW

In recovering assets that are or that represent the proceeds, objects, or instrumentalities of grand corruption, do states violate the human rights of politically exposed persons, their relatives, or their associates? Radha Ivory asks whether cooperative efforts to confiscate illicit wealth are compatible with rights to property in public international law. She explores the tensions between the goals of controlling high-level, high-value corruption and ensuring equal enjoyment of civil and political rights. Through the jurisprudence of regional human rights tribunals and the literature on confiscation and international cooperation, Ivory shows how asset recovery is a human rights issue and how principles of legality and proportionality have mediated competing interests in analogous matters. In cases of asset recovery, she predicts that property rights will likewise enable questions of individual entitlement to be considered in the context of collective concerns with good governance, global economic inequality, and the suppression of transnational crime.

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The Human Rights of Bad Guys

by

RADHA IVORY

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R. D. I., Brisbane, November 2013

ABBREVIATIONS

ACHR	American Convention on Human Rights
ADB	Asian Development Bank
ADRDM	American Declaration of the Rights and Duties of Man
AfCHPR	African Charter on Human and Peoples' Rights
AfCmHPR	African Commission on Human and Peoples' Rights
AfCtHPR	African Court on Human and Peoples' Rights
AHRD	ASEAN Human Rights Declaration
AHRLR	African Human Rights Law Reports
APEC	Asia-Pacific Economic Cooperation
ArCHR	Arab Charter on Human Rights
ArHRCmte	Arab Human Rights Committee
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
BGE	*Bundesgerichtsentscheide*
BIS	Bank for International Settlements
CDIHR	Cairo Declaration on Islamic Human Rights
CIS	Commonwealth of Independent States
CISCHR	Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms
COE	Council of Europe
COECivCC	Council of Europe Civil Law Convention on Corruption
COECrimCC	Council of Europe Criminal Law Convention on Corruption
COECrimCC-AP	Additional Protocol to the Council of Europe Criminal Law Convention on Corruption
COEMLC 1990	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)
COEMLC 2005	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)
COSP	Conference of the States Parties to the United Nations Convention against Corruption

DEM	Deutsche Mark
DRC	Democratic Republic of Congo
EBRD	European Bank for Reconstruction and Development
EC	European Community(ies)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR-P1	Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR-P7	Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice (of the European Union)
ECmHR	European Commission of Human Rights
ECOWAS	Economic Community of West African States
ECOWAS-PAC	Protocol on the Fight Against Corruption to the Treaty on the Economic Community of West African States
ECtHR	European Court of Human Rights
EGC	General Court (of the European Union)
EHRR	European Human Rights Reports
EIF	entry into force
EITI	Extractive Industries Transparency Initiative
EmbA	Federal Act of March 22, 2002 on the Implementation of International Sanctions (Swiss) (or Embargos Act) (*Bundesgesetz vom 22. März 2002 über die Durchsetzung von internationalen Sanktionen, Embargogesetz, EmbG*)
EMRK	*Europäischen Menschenrechtskonvention*
ESC	Economic and Social Council (of the United Nations)
ETS	European Treaty Series
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EUCPFI	Convention on the protection of the European Communities' financial interests
EUCPFI-P1	Protocol to the Convention on the protection of the European Communities' financial interests
EUCPFI-P2	Second Protocol to the Convention on the protection of the European Communities' financial interests
EU Dec.	European Union (Framework) Decision
EUOCC	Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
FAC	Federal Administrative Court (Switzerland)
FAO	Food and Agriculture Organization (of the United Nations)
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act (USA)

FDF	Federal Department of Finance of the Swiss Confederation (*Eidgenössisches Finanzdepartement, EFD*)
FDFA	Federal Department of Foreign Affairs of the Swiss Confederation (*Eidgenössisches Departement für auswärtige Angelegenheiten, EDA*)
FIU	financial intelligence unit
FOJ	Federal Department of Justice and Police of the Swiss Confederation, Federal Office of Justice (*Eidgenössisches Justiz- und Polizeidepartement, Bundesamt für Justiz, BJ*)
FYR Macedonia	The Former Yugoslav Republic of Macedonia
GA	General Assembly (of the United Nations)
GBP	British pounds
GDR	German Democratic Republic
GR	General Register number (Philippines Supreme Court Reports)
GRECO	Council of Europe's Group of States against Corruption
HRLJ	*Human Rights Law Journal*
IACAC	Inter-American Convention against Corruption
IACMACM	Inter-American Convention on Mutual Assistance in Criminal Matters
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
IMAC	Federal Act of March 20, 1981 on International Mutual Assistance in Criminal Matters (Swiss) (*Bundesgesetz vom 20. März 1981 über internationale Rechtshilfe in Strafsachen, Rechtshilfegesetz, IRSG*)
MESICIC	Mechanism for Follow-up on the Implementation of the IACAC
MLA	mutual legal assistance
MLAT(s)	mutual legal assistance treaty(ies)
MNE(s)	multinational enterprise(s)
MOU	memorandum(a) of understanding
NCB	non-conviction-based
NGO(s)	non-governmental organization(s)
NIEO	New International Economic Order

OAG	Federal Authorities of the Swiss Confederation, Office of the Attorney General (*Die Bundesverwaltung der Schweizer Eignenossenschaft, Bundesanwaltschaft*)
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OECD-ABC	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Organisation for Economic Co-operation and Development Anti-Bribery Convention)
OECD-WGB	Organisation for Economic Co-operation and Development Working Group on Bribery in International Business Transactions
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal of the European Union
PEP(s)	politically exposed person(s)
RIAA	Federal Act of October 1, 2010 on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act) (*Bundesgesetz vom 1. Oktober 2010 über die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen, RuVG*)
SADC	Southern African Development Community
SADC-MLAP	Protocol on Mutual Legal Assistance in Criminal Matters to the Treaty of the Southern African Development Community
SADC-PAC	Protocol Against Corruption to the Treaty of the Southern African Development Community
SC	Security Council (of the United Nations)
SRVG	Federal Act on Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Swiss), Consultation Draft of May 8, 2013 (Freezing and Restitution of Illicit Assets Act) (*Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen, SRVG, Vorentwurf vom 8. Mai 2013*)
StAR	Stolen Asset Recovery Initiative (of the World Bank and the UNODC)
TCL	transnational criminal law
TEU	Treaty on European Union
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organization)
UNC	Charter of the United Nations
UNCAC	United Nations Convention against Corruption

UNCATND	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
UNCTAD	United Nations Conference on Trade and Development
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
USC	United States Code
USD	United States dollars
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization

1

Introduction

In recovering assets that are or that represent the proceeds, objects, or instrumentalities of corruption, do states violate international human rights, such as the right to property? This book poses a question about the relationship between means and ends in public international law. The first part of the riddle, "corruption," is the subject of some thirteen multilateral conventions on crime control. The second, "asset recovery," is tied to the fundamental principle of "the return of assets" in the United Nations Convention against Corruption (UNCAC), the most recent and comprehensive anti-corruption treaty.[1] The third, (individual) "rights to property," were once a catch cry of the revolutionary French and American bourgeoisie and are now individual and collective entitlements in international treaties and, perhaps, customary international law. Theirs is not a simple story of universal entitlements circumscribed, of the fundamental rights of deposed autocratic leaders – the "bad guys" of our time – to a "fair go" when new governments seek to (re)claim expatriated illicit wealth. The concepts themselves are far from hard-edged. And their relationship unfolds in the decentralized and loosely coordinated system of public international law against a backdrop of concerns with the pernicious effects of globalization, global income inequality, and "bad governance," as well as the lack of accountability of states and international organizations for people(s) beyond their territorial and institutional borders.

The international anti-corruption treaties, with which the story begins, were concluded in rapid succession during the 1990s and the first decade of this century.[2] In the United States (US), President Carter's Foreign Corrupt Practices Act (FCPA) was increasingly perceived as placing American businesses at a competitive disadvantage *vis-à-vis* their international rivals.[3] Rather than repeal the provisions, the Clinton administration encouraged its foreign

[1] New York, October 31, 2003, in force December 14, 2005, 2349 UNTS 41, ILM, 43 (2004), 37.

[2] See generally Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 219–245; Glynn, Kobrin, and Naim, "The Globalization of Corruption," pp. 7–27; Lash, "Corruption and Economic Development"; McCoy and Heckel, "Global Anti-Corruption Norm," 65–90.

[3] 15 USC §§ 78dd-1; Wallace, *The Multinational Enterprise*, pp. 1130–1131.

counterparts to adopt similar standards,[4] supporting treaty negotiations under the auspices of the Organization of American States (OAS)[5] and the Organisation for Economic Co-operation and Development (OECD).[6] Following the conclusion of OAS and OECD conventions in 1996 and 1997 (respectively),[7] members of the Council of Europe (COE) brokered their criminal law convention and its protocol[8] with the participation of several other nations, including the US, Canada, and Mexico.[9] Within the European Communities (EC, now the European Union or EU),[10] two protocols to an earlier convention on the communities' financial interests were being agreed,[11] along with a treaty on the corruption of EC officials[12] and, sometime later, a framework decision on

[4] See, esp., Andreas and Nadelmann, *Policing the Globe*, pp. 55–56.

[5] Glynn, Kobrin, and Naim, "The Globalization of Corruption," p. 23; Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 244; Posadas, "Combating Corruption," 382–383.

[6] See generally Pieth, "Introduction," pp. 5–10; Posadas, "Combating Corruption," 364–383; Schroth, "The United States and Bribery Conventions," 593.

[7] Inter-American Convention against Corruption, Caracas, March 29, 1996, in force March 6, 1997, ILM, 35 (1996), 724; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, December 17, 1997, in force February 15, 1999, ILM, 37 (1998), 1.

[8] Criminal Law Convention on Corruption, Strasbourg, January 27, 1999, in force July 1, 2002, 2216 UNTS 225, 173 ETS; Additional Protocol to the Criminal Law Convention on Corruption, Strasbourg, May 15, 2003, in force February 1, 2005, 2466 UNTS 168, 191 ETS. See also Civil Law Convention on Corruption, Strasbourg, November 4, 1999, in force November 1, 2003, 2246 UNTS 3, 174 ETS. On the history of the COE anti-corruption treaties, see further Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 316–337.

[9] The other observer states were Belarus, Bosnia and Herzegovina, Georgia, Holy See, and Japan: Council of Europe, Explanatory Report to the COE Criminal Law Convention on Corruption, available at www.conventions.coe.int/Treaty/en/Reports/Html/173.htm, accessed October 15, 2013 (COECrimCC Explanatory Report), para. 137.

[10] On the history of the EU anti-corruption treaties and legislative instruments, see generally Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 282–316; Stessens, "The International Fight against Corruption," 896–897; Szarek-Mason, "The European Union Policy against Corruption," p. 56.

[11] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, Brussels, July 26, 1995, in force October 17, 2002, OJ 1995 No. C316, November 27, 1995, p. 49; Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests – Statements made by Member States on the adoption of the Act drawing up the Protocol, Brussels, September 27, 1996, in force October 17, 2002, in accordance with Art. 11, OJ 1996 No. C313, October 23, 1996, p. 2; Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests – Joint Declaration on Article 13 (2) – Commission Declaration on Article 7, Brussels, June 19, 1997, in force May 19, 2009, OJ 1997 No. C221, July 19, 1997, p. 12.

[12] Council Act of May 26, 1997 drawing up, on the basis of Article K.3 (2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the

corruption in the private sector.[13] At the turn of the new century, member states of the African Union (AU),[14] the Economic Community of West African States (ECOWAS),[15] the Southern African Development Community (SADC),[16] and the United Nations (UN) dedicated four more treaties to the prevention and suppression of corruption.[17] Previously, the UN had addressed bribery in its convention on transnational organized crime.[18]

That so many states concluded so many anti-corruption treaties so quickly is attributable to a variety of social, political, and intellectual developments apart from the "hegemonic leadership"[19] of the US. During the 1970s and 1980s, political scandals involving undisclosed relationships between lawmakers, companies, and, in some countries, criminal organizations had intensified public awareness of corruption in Western Europe, East Asia, and North America.[20] The findings of the Watergate investigation were, in fact, crucial in persuading US federal legislators to draft and pass the FCPA.[21] Almost a decade-and-a-half later, the end of the Cold War decreased incentives for Western governments to tolerate corruption as the price of Third World support and exposed high levels of corruption within the collapsed socialist regimes.[22] It also enabled (if not inspired) their policy-makers to set new security priorities around issues that they had traditionally seen as national policing matters.[23] In the meantime, new

European Communities or officials of Member States of the European Union, Brussels, May 26, 1997, in force September 28, 2005, OJ 1997 No. C195, June 25, 1997, p. 2.

[13] Council Framework Decision 2003/568/JHA of July 22, 2003, on combating corruption in the private sector, July 22, 2003, in force July 31, 2003, OJ 2003 No. L192, July 31, 2003, p. 54.

[14] African Union Convention on Preventing and Combating Corruption, Maputo, July 11, 2003, in force August 5, 2006, ILM, 43 (2004), p. 1. See generally Snider and Kidane, "Combating Corruption in Africa," 699–700.

[15] Protocol on the Fight Against Corruption to the Treaty on the Economic Community of West African States, December 21, 2001, reprinted UNODC, "Compendium of International Legal Instruments on Corruption," pp. 211–223.

[16] Protocol Against Corruption to the Treaty of the Southern African Development Community, Blantyre, August 14, 2001, in force July 6, 2005, available at www.sadc.int/about-sadc/overview/sa-protocols, accessed September 13, 2013.

[17] On the conclusion of the UNCAC, see Vlassis, "Challenges in International Criminal Law," pp. 925–931.

[18] United Nations Convention against Transnational Organized Crime, New York, November 15, 2000, in force September 19, 2003, 2225 UNTS 209 (UNTOC). See further Schloenhardt, "Transnational Organized Crime," pp. 955–965.

[19] Andreas and Nadelmann, *Policing the Globe*, p. 55.

[20] Della Porta, "Corruption in Italy," pp. 35–49; Della Porta and Mény, "Introduction," pp. 2–6; Glynn, Kobrin, and Naim, "The Globalization of Corruption," p. 9; McCoy and Heckel, "Global Anti-Corruption Norm," 70.

[21] Posadas, "Combating Corruption," 348–359.

[22] Glynn, Kobrin, and Naim, "The Globalization of Corruption," pp. 9–10; Lash, "Corruption and Economic Development," 85; Stessens, "The International Fight against Corruption," 897.

[23] Glynn, Kobrin, and Naim, "The Globalization of Corruption," p. 10. Cf. Andreas and Nadelmann, *Policing the Globe*, pp. 157–165.

research on the political economy of development had undermined the classic depiction of corruption as a "second best solution" to economic and administrative efficiency.[24] Concerns with the negative effects of corruption on economic growth and democratic decision-making in developing states were, in turn, taken up by international organizations, national development agencies, and global non-governmental organizations (NGOs) in pursuing governance, accountability, and transparency agendas.[25] Developing states themselves portrayed the bribery of public officials by multinational enterprises (MNEs) as another way in which the former colonial powers sought to maintain control over political and economic decisions in the periphery.[26]

The mix of factors that prompted states to negotiate, sign, and ratify the anti-corruption treaties is more than apparent in the treaties themselves. Their preambles proclaim the dangers of corruption to social stability and security, economic competition and development, and the values of democracy and human rights; they identify linkages between corruption and organized criminality, drug trafficking, and terrorism; they call for a unified and coordinated international response. Their operative provisions then recommend and require the criminalization of defined acts and omissions within and outside the territories of party states, as well as cooperation between parties for the purposes of identifying, investigating, prosecuting, and sanctioning those acts. In this respect, the anti-corruption treaties mirror the conventions for the suppression of narcotics trafficking, organized crime, and terrorist financing,[27] which have latterly been described as forming a "transnational criminal law" (TCL).[28] They also overlap with and presuppose the existence of bilateral and multilateral treaties and instruments on money laundering and mutual legal assistance (MLA, MLATs) in criminal matters. As for the UNCAC's provisions on asset recovery, these are said to reflect developing states' concerns with high-value, high-level political (grand)[29] corruption and the participation, tacit or

[24] Lash, "Corruption and Economic Development," 87–92.

[25] See generally Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 245–227; Pancotto Bohrer Munhoz, "Corruption in the Eyes of the World Bank"; Tamesis, "International Development Organisations," pp. 129–139.

[26] Gathii, "Defining the Relationship," 138–139.

[27] International Convention for the Suppression of the Financing of Terrorism, New York, December 9, 1999, in force April 10, 2002, 2178 UNTS 197; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, December 20, 1988, in force November 11, 1990, 1582 UNTS 165 (UNCATND); UNTOC.

[28] Boister, "Transnational Criminal Law?" 954; *Introduction to Transnational Criminal Law*, Ch. 1. On corruption as TCL, see also Bacio Terracino, *The International Legal Framework*, p. 3.

[29] For similar definitions, see Lash, "Corruption and Economic Development," 87; Moody-Stuart, "Costs of Grand Corruption," 19; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., para. 1.07. Cf. Rose-Ackerman, "Greed, Culture, and the State," 132 ("corruption at the top of the state hierarchy that involves political leaders and their close

otherwise, of financial institutions in encouraging the flight of illicit wealth abroad.[30] They recall earlier non-binding instruments on bribery and corruption, transnational corporations, and illicit payments. They echo, in purpose and practice, collective reparations for historical wrongs.[31]

Asset recovery is, however, an elusive concept in public international law. Though "the return of assets" is proclaimed a fundamental principle of the UNCAC and "asset recovery" is a convention objective and the subject of an entire convention chapter,[32] neither term is expressly defined in the UNCAC or, for that matter, in any of the other anti-corruption treaties, MLATs, and suppression conventions surveyed here.[33] Moreover, when the term "asset recovery" is read in the context of the UN convention, in light of its purpose, preparatory works, and the circumstances of its conclusion,[34] two definitions emerge. As I will argue, asset recovery expresses the goal that "politically exposed persons" (PEPs) and their close family members and associates will be significantly less able to move corruption-related wealth through financial institutions, and that states with jurisdiction over corruption offenses will be better able to obtain or regain ownership of those assets or substitute items. Simultaneously, asset recovery is a catchall for the unilateral and cooperative legal processes by which state parties achieve the return of wealth. Of these processes, I will be most concerned with what I call cooperative confiscations, i.e., the compulsory assumption of ownership of illicit wealth by a state with enforcement jurisdiction over those things (the haven state) at the behest of a state with legislative and judicial competence over the alleged offense (the victim state). Because such procedures are rarely possible when PEPs are still in power, and in light of ongoing upheavals in the Middle East, I will be concentrating on cooperative confiscations that follow or occur as part of "radical political transformation[s]."[35]

Defined here as "internationally guaranteed legal entitlements of individuals *vis-à-vis* the state, which serve to protect fundamental characteristics of the human person and his or her dignity,"[36] human rights may be both supported or restricted by states' efforts to prevent and suppress corruption. In enforcing criminal laws against corruption, states may infringe "classical" civil and

associates and concerns the award of major contracts, concessions, and the privatization of state enterprises"); Transparency International, "Plain Language Guide," p. 23 ("Acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good").

30 Pieth, "Recovering Stolen Assets," p. 9.

31 Roht-Arriaza, "Reparations in International Law," pp. 655–698.

32 UNCAC, Preamble, Arts. 1(b), 51, Ch. V.

33 See also Vlassis, "Challenges in International Criminal Law," pp. 928, 930.

34 Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, in force January 27, 1980, 1155 UNTS 331 (VCLT), Art. 31(1)–(2).

35 Teitel, *Transitional Justice*, p. 4.

36 Kälin and Künzli, *International Human Rights*, p. 32. See also Nowak, *The International Human Rights Regime*, pp. 1–5.

political liberties,[37] which (very roughly defined) regulate the individual's relationship to the organized state.[38] Equally, through some acts of official corruption and some attempts to shield corrupt actors from exposure, states may violate their duties to protect, respect, and fulfill other rights of other people. Inherently discriminatory, corruption places a variety of civil and political, economic, social, and cultural rights at risk.[39] The consequences of corruption are also such that it has been described as a threat to the collective rights to self-determination and development.[40] Some have even gone so far as to say that a "right to a corruption-free society" is emerging in customary international law.[41] Equally, anti-corruption arguments have been criticized as justifying policies that further exclude the poor and disempower certain kinds of states,[42] whilst fair trial and contract rights have been described as liable to abuse by powerful and rich defendants who seek to prevent or defeat corruption prosecutions.[43]

The many aspects of the relationship between corruption and human rights are, if anything, more apparent in the relationship between asset recovery and human rights to property. Constitutional or public law rights to property are often understood as negative claims that correlate with governmental duties to refrain from extinguishing or detrimentally affecting individual relationships

[37] See generally International Council on Human Rights Policy and Transparency International (ICHRP and TI), "Integrating Human Rights," p. 83; Human Rights Council, Note by the United Nations High Commissioner for Human Rights transmitting to the Human Rights Council the report on the United Nations Conference on anti-corruption, good governance and human rights (Warsaw, November 8 and 9, 2006), A/HRC/4/71, February 12, 2007; OHCHR, United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, November 8–9, 2006, Background Note, UN Doc. HR/POL/GG/SEM/2006/2, paras. 5–9.

[38] Foster, *Human Rights and Civil Liberties*, p. 4; Stone, *Textbook on Civil Liberties*, pp. 3–4.

[39] See generally Bacio Terracino, "Corruption as a Violation"; "Linking Corruption and Human Rights," 243–246; Boersma, *Corruption as Violation and Crime?*; Gathii, "Defining the Relationship," 126, 147–151, 173–176; Human Rights Council, Comprehensive study on the negative impact of the nonrepatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights, UN Doc. A/HRC/19/42 (December 14, 2011), Ch. III; ICHRP and TI, "Making the Connection"; Kenya National Commission on Human Rights, "Human Rights Dimensions of Corruption"; Ngugi, "Making the Link"; Kumar, *Corruption and Human Rights in India*, Ch. 2; Rajagopal, "Dialectic of the Relationship," 499–500. See, e.g., Putsch, "Einschränkung der Pressefreiheit in Südafrika."

[40] Bantekas and Lutz, *International Human Rights Law*, pp. 513–514; Kofele-Kale, *Combating Economic Crimes*, pp. 132–134; *International Responsibility for Economic Crimes*, pp. 108–109.

[41] Kofele-Kale, "Corruption Free Society," 165; *Combating Economic Crimes*, p. 133.

[42] Gathii, "Defining the Relationship," 126, 180–197; Ngugi, "Making the Link," 250; Rajagopal, "Dialectic of the Relationship," 502–503.

[43] Gathii, "Defining the Relationship," 126, 160–171.

with respect to things, i.e., private property.[44] Private property has been justified, variously, as a natural right that checks the state's power to oppress the individual; as the most efficient method for the allocation and exploitation of scarce resources; and as a condition for the development of human personality and the enjoyment of other rights.[45] However, the institution of private property is also criticized as protecting existing distributions of wealth.[46] Further, property may be collective or communal, as well as private,[47] and rights to property may be immunities from exclusion from the category of potential owners or positive claims to minimum amounts of property.[48] So, if illicit wealth is a form of property, its permanent removal and transfer to another state would seem to interfere with its holder's right to peaceful enjoyment, and that right may, in turn, compete with other (collective or individual) rights to those things.

The relationship between corruption, asset recovery, and human rights to property becomes even more complicated when it is framed as an issue of public international law. Rights to property have a particularly dubious pedigree in public international law. During much of the twentieth century, states debated the limits to their power as sovereigns to expropriate the property of aliens.[49] Whilst capitalist/developed states tended to argue for the existence of a so-called "international standard of treatment" in customary international law, developing/post-colonial and socialist nations generally advocated a "national treatment" standard.[50] They portrayed the international standard, particularly the alleged requirement of "prompt, adequate, and effective" compensation,[51] as a "Trojan horse" for the maintenance of colonial control, particularly of natural resources.[52] Property rights were, partly in

44 Waldron, *Private Property*, pp. 17–20; "Property and Ownership".

45 See generally Benn, "Property," pp. 71–74; Harris, *Property and Justice*, Pt. II; Munzer, *A Theory of Property*, Pt. II; "Property," pp. 758–761; Rosas, "Property Rights," pp. 133–158 at 133; Waldron, *Private Property*, Chs. 1, 6, 20; "Property and Ownership."

46 Harris, *Property and Justice*, pp. 167, 258–264; Munzer, *A Theory of Property*, pp. 1–2, 98–110; Waldron, *Private Property*, pp. 18–19.

47 Waldron, *Private Property*, pp. 37–42; "Property and Ownership." Cf. Harris, *Property and Justice*, pp. 109–112.

48 Waldron, *Private Property*, pp. 16–24. Cf. Harris, *Property and Justice*, p. 169; Munzer, *A Theory of Property*, pp. 24–27.

49 Focarelli, "International Law in the 20th Century," pp. 498–499.

50 See, e.g., Brownlie, *Principles of Public International Law*, pp. 524–528; Dolzer, *Eigentum, Enteignung und Entschädigung*, pp. 19–21; Lowenfeld, *International Economic Law*, pp. 469–485; Qureshi and Ziegler, *International Economic Law*, paras. 14.003, 14.023; Shaw, *International Law*, pp. 823–829; Sornarajah, *Foreign Investment*, pp. 119–134.

51 Dolzer, *Eigentum, Enteignung und Entschädigung*, pp. 20–21; Lowenfeld, *International Economic Law*, pp. 475–481; Qureshi and Ziegler, *International Economic Law*, para. 14.023.

52 Sornarajah, *Foreign Investment*, p. 126. See also Brownlie, *Principles of Public International Law*, pp. 525, 531, 537.

consequence,[53] omitted from the International Covenant on Civil and Political Rights (ICCPR)[54] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[55] However, they figure in several other global human rights instruments and in regional human rights treaties.[56]

If one concentrates on the regional treaty-based guarantees, as I do in this book, the question remains: How to analyze the relationship between these rights to property and the obligations to prevent and suppress corruption by cooperating in confiscation cases for the purposes of asset recovery? The anti-corruption treaties do not create individual (or corporate) criminal responsibility for acts of corruption in public international law. Rather, they require states to take steps within their jurisdictions to criminalize defined conduct and to cooperate with each other in the investigation, prosecution, and punishment of those crimes. The crimes themselves are only sometimes called acts of corruption and, a broad convergence notwithstanding, the treaties describe neither the crimes nor the duties to criminalize in exactly the same terms. Much the same can be said for the treaties' provisions on confiscation and, to a lesser extent, cooperation. In identifying and describing "corruption offenses" and "asset recovery mechanisms" in the anti-corruption treaties, one is generally describing slightly different frameworks for national lawmaking rather than substantive and procedural norms with direct effect in public international law.

My approach is to pose the question: Will states violate individual rights to property, as set forth in regional human rights treaties, when they undertake cooperative confiscations in the manner envisaged by the anti-corruption and related treaties and instruments? More precisely, I ask whether regional human rights tribunals are likely to find that states have violated treaty-based human rights to property by directly enforcing confiscation orders issued by other states with respect to the proceeds, objects, or instrumentalities of grand corruption or substitute assets. A regional focus allows me to identify, describe, compare, and analyze international treaty-based human rights to property in the absence of (private) property provisions in the ICCPR or ICESCR. And, whilst the regional tribunals have not dealt precisely with this problem, they have grappled with its composite issues: the protection afforded to former PEPs, their family members, and associates; the compatibility of confiscation orders with rights to property and due process; the applicability of human rights norms to acts of cooperation in criminal matters; and the right of collectives to wealth and resources, just to name a few.

[53] See generally Dolzer, *Eigentum, Enteignung und Entschädigung*, pp. 85–94; Higgins, "The Taking of Property," 356. Cf. Rosas, "Property Rights," pp. 136–139.

[54] New York, December 16, 1966, in force March 23, 1976, 999 UNTS 171.

[55] New York, December 16, 1966, in force January 3, 1976, 993 UNTS 3. Cf. Kaiser, "Art. 1 ZPI," para. 5 (reading limited protection for intellectual property into the ICESCR, Art. 15(1)(c)).

[56] See further p. 31 and following below and Chapters 5 and 6.

The book has four substantive parts. Chapter 2 begins with the definitions of corruption, asset recovery, and human rights to property. None of these concepts has a single agreed meaning in common usage and none is conclusively defined in public international law: all are controversial. For the concepts of corruption and asset recovery, I offer working definitions drawn from soft and hard international instruments and the UNCAC's preparatory works. Protections for property I define using the legal-theoretical literature. I find them within all regional systems for human rights protection, notwithstanding their omission from the twin covenants and long-running controversies about their status within customary international law. Moreover, several instruments create particular property entitlements – free disposition of (natural) wealth and resources – for particular groups. The tension between collective and individual interests in asset recovery becomes apparent in the examples at the end of Chapter 2. The survey of Swiss asset recovery efforts, from the early "success stories" to the ongoing challenges of the Arab Spring, illustrates the practical "barriers to recovery," as well as the steps, unilateral and cooperative, that states have taken to overcome them.

Informed by academic commentary and the reports of international monitoring bodies, Chapters 3 and 4 then describe the duties to criminalize conduct and cooperate for the purposes of confiscation under the anti-corruption treaties and related MLA treaties and instruments. Chapter 3 opens with the provisions on jurisdiction, i.e., the obligations to assume regulatory competence with respect to convention offenses committed within and, in some cases, beyond a state's territory. Chapter 3 then surveys the acts and omissions that states must or may deem unlawful under the anti-corruption treaties. States, it seems, have duties to establish or to consider establishing a range of offenses that would be considered corrupt according to the working definition. They must also penalize conduct that serves to conceal corruption, prevent its prosecution, and/or facilitate the enjoyment of related illicit wealth. Generally, states are permitted to implement and enforce these prohibitions in accordance with established rules and principles of domestic law. However, the anti-corruption treaties do set minimum standards in matters of prescription and procedure that present particular problems in corruption cases or that are judged particularly important for the suppression of transnational crime. These include minimum standards on confiscation and cooperation for the purposes of confiscation, which are detailed in Chapter 4. There I determine that states have duties to empower their locally competent authorities to restrain and permanently remove various forms of illicit wealth from offenders and, sometimes, third parties. States typically commit to assist each other in giving effect to confiscation orders when the assets to which the orders relate are within the jurisdiction of another state party.

Though their criminalization, confiscation, and cooperation provisions thus touch upon protected human interests, the anti-corruption and related MLA

treaties and instruments only rarely explain how they relate to international human rights standards. Typically, they moderate that relationship through general conflict clauses, caveats for compliance with national law, and specific, if indirect, references to particular human rights norms. Against this background, Chapters 5 and 6 hypothetically apply regional, treaty-based human rights to property to confiscation orders that are issued and enforced for the purposes of asset recovery. Chapter 5 is devoted to Art. 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR-P1):[57] it is the longest chapter of this book. Not only is the regional jurisprudence on Art. 1 ECHR-P1 most extensive, but PEPs and related parties have invested illicit wealth in Europe and have continuing incentives to do so. The questions in Chapter 5 are thus: Would the European right to property cover the orders at issue in asset recovery cases? If so, would it be infringed by the enforcement of such foreign confiscation orders? And would such interferences be justified as lawful and proportionate to the general interest, broadly or narrowly defined? In providing answers to these questions, Chapter 5 also considers the rights to a fair trial under Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the freedom from retrospective criminal laws and penalties under Art. 7 ECHR, the prohibition on discrimination under Art. 14 ECHR, and requirement of governmental good faith under Art. 18 ECHR. It concludes that the European Court of Human Rights (ECtHR) is likely to find that cooperative confiscation orders issued for the purposes of asset recovery are within the scope of Art. 1 ECHR-P1 and compatible with that norm. The court would insist that a haven state acts lawfully and proportionately, in particular, that it provides an aggrieved party with a fair opportunity to judicially contest enforcement orders. However, it would afford ECHR haven states a wide margin of appreciation in determining which foreign orders they enforce. The ECtHR's apparent reticence to inquire into the circumstances in which foreign confiscation orders are rendered is a point of criticism, as is the complexity of its domestic confiscation case law.

As countries in Asia, Africa, the Americas, and the Middle East may be or become havens for illicit wealth, Chapter 6 undertakes a similar inquiry using these regional property guarantees. Its focus is the inter-American and pan-African jurisprudence, which is remarkable for its stricter interpretation of the proportionality requirement and its recognition of group rights to property. Article 21 of the American Convention on Human Rights (ACHR)[58] has been

[57] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, March 20, 1952, in force May 18, 1954, 9 ETS.

[58] American Convention on Human Rights, San José, November 22, 1969, in force July 18, 1978, 1144 UNTS 143.

read to protect tribal land claims and Art. 21 of the African Charter on Human and Peoples' Rights (AfCHPR)[59] is a peoples' right to free disposition of wealth and natural resources (permanent sovereignty). I ask whether the recognition of collective or communal property entitlements and rights to development in the "other" regional systems may prompt those tribunals to adopt narrower readings of individual rights to property – even to enunciate positive obligations to seek or assist with asset recovery. The interaction between individual and group rights to property is a particular theme within Chapter 6.

The book finishes, in Chapter 7, with a review of the arguments in the previous chapters, a statement of the general conclusions, and an apologia for the inquiry itself. When the problem is corruption and the goal is asset recovery, concern with human rights to property may seem severely misplaced. Commentators have already warned of the reactionary potential of international property guarantees and the need for restraint on the part of regional human rights tribunals in using those entitlements to restrict redistributive decisions. The need for caution would seem to be greater still in matters of international cooperation and criminal law, and in situations of transitional justice.[60] I acknowledge these concerns in Chapter 7 whilst arguing for rights to property in the supervision of anti-corruption and pro-asset-recovery measures. Unlike the "pure" lawfulness and fair trial guarantees, human rights to property expressly require a contextualization of competing substantive claims: Individual and collective interests are acknowledged and assessed in relation to each other and not as fictional absolutes. Regional human rights tribunals may rightly afford states broad margins of appreciation in enforcing cooperative confiscation orders that aim at asset recovery. However, in so doing, they should not deprive the right to property of all its substantive content and its potential for illuminating the connections between claims. To question the relationship between corruption/asset recovery and human rights to property is not to prevent the return of wealth but to identify the political choices that the "fight against corruption" and the weapon of "asset recovery" entail.

[59] African Charter on Human and Peoples' Rights, Nairobi, June 27, 1981, in force October 21, 1986, 1520 UNTS 217.

[60] For a definition of "transitional justice," see The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, UN Doc. S/2004/616 (August 23, 2004), para. 8.

2

Concepts, sources, and case studies

In "Politics and the English Language," George Orwell warned that "[the] invasion of one's mind by ready-made phrases . . . can only be prevented if one is constantly on guard against them."[1] We use language to persuade and we may use – and repeat – imprecise expressions to hide our disagreements and/or the consequences of our decisions. Heeding Orwell's warning, my argument begins with the definitions of corruption, asset recovery, and human rights to property in common (English) usage and public international law. I then illustrate how asset recovery has been attempted or achieved in practice when Switzerland has been the haven state. Switzerland's financial center was once reputed to be a safe harbor for illicit wealth. Even after its laws on money laundering, MLA, and banking secrecy changed, it encountered difficulties in returning victim states those ill-gotten gains. In overcoming these barriers to recovery, Switzerland created new cooperative confiscation rules and used alternative, unilateral asset restraint procedures. The case studies show how efforts to enable asset recovery may raise issues of human rights that are analyzed in later chapters.

2.1 Corruption

Dictionary definitions of "corruption" are remarkable for their consistency and their breadth. Not only does corruption denote the moral or physical dissolution or destruction of people or things but it also means the breach of a public duty, particularly through bribery.[2] "Bribery" in common English usage includes the giving of things of value to improperly influence public or private decision-makers, as well as the receipt of such items by such persons.[3] German and French derivatives of *corrumpere* have similar connotations, as do the equivalent Spanish, Russian, Arabic, and Mandarin Chinese

[1] Orwell, "Politics and the English Language," p. 964.

[2] Simpson and Weiner (eds.), *Oxford English Dictionary*, corrupt, v, corruption n., para. 6. See also Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 1.01–1.02; ICHRP and TI, "Making the Connection," pp. 15–18.

[3] Simpson and Weiner (eds.), *Oxford English Dictionary*, bribe n., para. 2(b), bribery n., paras. 2, 4. Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., para. 1.03.

words.[4] However, none of these definitions refers to "corruption" as a subject of regulation in international law. The primary sources of public international law are international treaties, international customs, and general principles of law representing fundamental rules in national legal systems.[5] Judicial decisions and the opinions of legal academics are subsidiary sources, which are used to determine the existence and interpretation of particular rules.[6] Non-binding but legally significant standards (soft laws) may evidence a customary rule or indicate areas of normative development.[7] The question is, which of these sources contains rules on corruption and how, if at all, do they define corruption?

2.1.1 International and transnational criminal law distinguished

While most international legal rules are concerned with relations between states and international organizations,[8] which are the primary subjects of international law,[9] a small but increasingly important subset of norms regulates the criminal law obligations of individuals.[10] By criminal law, I mean general prohibitions that are directed at individuals (or entities), enforced by states, and punished by penal sanctions and social opprobrium.[11] International crimes are criminal law norms that render persons directly liable for certain acts of serious violence (e.g., war crimes, genocide, and crimes against humanity) under public international law.[12] They are sourced, at least on one view, in

[4] Adwan, "Corruption Terminology in Arabic"; Karpovich, *Corruption in Russia*, p. 6; Kwong, *Corruption in China*, p. 3; Rey (ed.), *Le Grande Robert*, corruption, paras. 1, 3, 4; Wissenschaftlicher Rat der Dudenredaktion (ed.), *Wörterbuch der deutschen Sprache*, korrumpieren, korrupt.

[5] Charter of the United Nations and Statute of the International Court of Justice, San Francisco, June 26, 1945, in force October 24, 1945, 1 UNTS XVI, Art. 38(1). See further Brownlie, *Principles of Public International Law*, p. 5; Cassese, *International Law*, p. 183; Peters, *Völkerrecht*, para. 6.01; Shaw, *International Law*, pp. 70–71; Thirlway, "The Sources of International Law."

[6] ICJ Statute, Art. 38(1)(d). See further Cassese, *International Law*, pp. 196–197; Boyle, "Soft Law"; Brownlie, *Principles of Public International Law*, pp. 24–25.

[7] Cassese, *International Law*, p. 196; Peters, *Völkerrecht*, para. 6.46.

[8] American Law Institute, *Restatement the Third*, s. 101. See also Hobe, *Einführung in das Völkerrecht*, p. 8; Seidl-Hohenveldern (ed.), *Lexikon des Rechts*, pp. 514–516.

[9] Cassese, *International Law*, pp. 3, 71–73.

[10] Cassese et al., *International Criminal Law*, pp. 4–5, 19–21; Cryer et al., *International Criminal Law and Procedure*, p. 3.

[11] See Cryer et al., *International Criminal Law and Procedure*, p. 3, citing Williams, "The Definition of Crime"; Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, pp. 6–7, citing Hart, "The Aims of the Criminal Law."

[12] Bassiouni, "The Discipline of International Criminal Law," pp. 3, 33–39; "The Subjects of International Criminal Law," pp. 41–42; Cassese et al., *International Criminal Law*, p. 3; Hobe, *Einführung in das Völkerrecht*, p. 257; Werle, *Principles of International Criminal Law*, para. 72.

international customs, treaties, and general principles of law.[13] Such substantive norms are enforced indirectly by domestic agencies and courts and directly by bodies established under public international law and operating according to further international legal rules on criminal procedure.[14] The totality of these substantive and procedural rules in public international law may be considered international criminal law in the narrow sense.[15]

International crimes in the narrow sense are distinguished from offenses that states establish within their jurisdictions pursuant to so-called "suppression conventions."[16] These multilateral treaties typically encourage and oblige their signatories to take steps within their jurisdictions to criminalize transnational criminal conduct, i.e., "offences whose inception, prevention, and/or direct or indirect effects involv[e] more than one country."[17] The suppression conventions envisage that transnational crimes will be investigated, tried, and punished under domestic law, typically through cooperation between states in criminal matters.[18] Prof. Neil Boister proposes the term, "transnational criminal law," to describe "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects."[19]

[13] Bantekas, *International Criminal Law*, pp. 4–8; Bassiouni, "The Discipline of International Criminal Law," pp. 3, 33–39; Cryer et al., *International Criminal Law and Procedure*, pp. 9–12. Cf. Cassese, *International Law*, p. 436; Cassese et al., *International Criminal Law*, pp. 5, 11, 13–20.

[14] Cassese et al., *International Criminal Law*, p. 3; Bassiouni, "The Discipline of International Criminal Law," pp. 14–15.

[15] Cassese et al., *International Criminal Law*, pp. 3, 5. See also Cryer et al., *International Criminal Law and Procedure*, pp. 5–6; Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, p. 4; Werle, *Principles of International Criminal Law*, paras. 72–76. Cf. Hobe, *Einführung in das Völkerrecht*, pp. 257–258.

[16] Bantekas, *International Criminal Law*, p. 9; Boister, "Transnational Criminal Law?" 954; *Introduction to Transnational Criminal Law*, pp. 14, 18–19; "Human Rights in the Suppression Conventions," 200; Cassese et al., *International Criminal Law*, pp. 18–21; Cryer et al., *International Criminal Law and Procedure*, pp. 3–6; Hobe, *Einführung in das Völkerrecht*, pp. 257–258; Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, p. 3. Cf. Obokata, *Transnational Organised Crime*, pp. 30–33 (recognizing but criticizing the clarity of the distinction between TCL and international criminal law with respect to organized crime).

[17] Ninth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Interim Report by the Secretariat: Results of the supplement to the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, on Transnational Crime, Cairo, April 29–May 8, 1995, UN Doc. A/CONF.169/15/Add.1 (April 4, 1995), para. 9. See also UNTOC, Art. 3(2), and further Boister, *Introduction to Transnational Criminal Law*, pp. 3–4.

[18] Boister, "Transnational Criminal Law?" 961–962; *Introduction to Transnational Criminal Law*, pp. 14, 16; Cryer et al., *International Criminal Law and Procedure*, pp. 6, 335–336.

[19] Boister, "Transnational Criminal Law?" 955; *Introduction to Transnational Criminal Law*, p. 13. See also Bantekas, *International Criminal Law*, p. 240; Cryer et al., *International Criminal Law and Procedure*, pp. 5–6; Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, p. 3; Sunga, *The Emerging System of International Criminal Law*, p. 4. Cf. Schomburg et al., "Einleitung," para. 107.

Suppression conventions are an obvious place to investigate the concept of corruption and, more particularly, to define offenses of corruption in public international law. None of the international criminal tribunals established to date has been given jurisdiction over corruption,[20] and neither bribery nor corruption is commonly considered to be a crime in customary international law.[21] Conversely, between 1995 and 2005, states concluded no less than thirteen suppression conventions, one supranational legislative instrument, and one civil law convention on corruption: All but one has entered into force (see Table 2.1).[22]

In this book, I call the binding anti-corruption suppression conventions and the EU's framework decision on private sector corruption "the anti-corruption treaties."[23] Similar in structure and content, they seek to control and repress corruption by requiring state parties to:

- take legislative or other measures to prevent corruption in the public and/or private sectors;
- criminalize specified acts and omissions and recognize criminal or quasi-criminal corporate liability for those offenses;
- cooperate with each other with respect to the detection, investigation, prosecution, and punishment of convention offenses, as well as the provision of technical assistance; and
- establish intergovernmental procedures for monitoring the implementation of the treaties in domestic law.[24]

The treaties reflect concerns that corruption threatens democracy, economic development, and social stability;[25] facilitates other criminal behaviors,

[20] Starr, "Extraordinary Crimes," 1281.

[21] See, e.g., Cassese et al., *International Criminal Law*, pp. 4, 18; Cryer et al., *International Criminal Law and Procedure*, p. 5; Hobe, *Einführung in das Völkerrecht*, p. 257. Cf. Bantekas, "Corruption as an International Crime"; *International Criminal Law*, p. 257; Kofele-Kale, "Patrimonicide"; "Corruption Free Society"; *International Responsibility for Economic Crimes*, pp. 75–78.

[22] See generally Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 219–240; Bantekas, *International Criminal Law*, pp. 252–257; Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, pp. 622–623, 649–662; Posadas, "Combating Corruption," 345–414; Sandgren, "Corruption of Foreign Public Officials"; Stessens, "The International Fight against Corruption," 896–900; Vlassis, "Challenges in International Criminal Law," pp. 907–938.

[23] I exclude from this definition the COECivCC, which concerns only the civil law consequences of corruption, and the ECOWAS-PAC, which has not yet entered into force: OECD, "CleanGovBiz: International Conventions."

[24] Nicholls et al., *Corruption and Misuse of Public Office*, para. 9.04. See further Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., Pt. VI.

[25] AUCPCC, Preamble, Art. 2(4); COECrimCC, Preamble; ECOWAS-PAC, Preamble; EU Dec. 2003/568/JHA, Preamble; IACAC, Preamble; OECD-ABC, Preamble; SADC-PAC, Preamble; UNCAC, Preamble; as well as GA Res. 58/4, United Nations Convention against Corruption, UN Doc. A/RES/58/4 (November 21, 2003), Preamble.

Table 2.1: *International treaties and supranational legislative instruments on corruption*

AUCPCC: African Union Convention on Preventing and Combating Corruption, Maputo, July 11, 2003, in force August 5, 2006

COECivCC: Civil Law Convention on Corruption, Strasbourg, November 4, 1999, in force November 1, 2003

COECrimCC: Criminal Law Convention on Corruption, Strasbourg, January 27, 1999, in force July 1, 2002

COECrimCC-AP: Additional Protocol to the Criminal Law Convention on Corruption, Strasbourg, May 15, 2003, in force February 1, 2005

ECOWAS-PAC: Protocol on the Fight Against Corruption to the Treaty on the Economic Community of West African States, December 21, 2001, not in force

EU Dec. 2003/568/JHA: Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector, July 22, 2003, in force July 31, 2003

EUCPFI: Convention on the protection of the European Communities' financial interests, Brussels, July 26, 1995, in force October 17, 2002

EUCPFI-P1 and P2: Protocol and Second Protocol to the Convention on the protection of the European Communities' financial interests, Brussels, September 27, 1996 and June 19, 1997, in force October 17, 2002 and May 19, 2009

EUOCC: Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Brussels, May 26, 1997, in force September 28, 2005

IACAC: Inter-American Convention against Corruption, Caracas, March 29, 1996, in force March 6, 1997

OECD-ABC: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, December 17, 1997, in force February 15, 1999

SADC-PAC: Protocol Against Corruption to the Treaty of the Southern African Development Community, Blantyre, August 14, 2001, in force July 6, 2005

UNCAC: United Nations Convention against Corruption, New York, October 31, 2003, in force December 14, 2005

UNTOC: United Nations Convention against Transnational Organized Crime, New York, November 15, 2000, in force September 19, 2003

particularly organized criminality, drug trafficking, and terrorism;[26] distorts economic competition;[27] and endangers other social goods, such as human rights and corporate social responsibility.[28]

2.1.2 Soft law norms on corruption

Non-binding and internally binding instruments also influence how corruption is internationally understood and addressed, including in criminal law. From the mid-1970s, states created several "soft laws" on corruption as members of international and regional organizations. Beginning with Res. 3514 (XXX) of 1975, the General Assembly of the United Nations (GA) and its Economic and Social Council (ESC) endorsed a number of resolutions and reports on corrupt practices, particularly those of transnational corporations.[29] Similarly, before the conclusion of their anti-corruption treaties, the COE and OECD oversaw the creation of non-binding, preventative, and repressive anti-corruption principles and recommendations.[30] These

[26] EUCPFI, Preamble; EUOCC, Preamble; IACAC, Preamble; SADC-PAC, Preamble; UNCAC, Preamble; UNTOC, Preamble.

[27] COECrimCC, Preamble.

[28] AUCPCC, Preamble; COECrimCC, Preamble; EUCPFI-P2, Preamble; SADC-PAC. On the goals of the anti-corruption treaties, see generally Stessens, "The International Fight against Corruption," 894–895.

[29] See, e.g., GA Res. 3514 (XXX), Measures against corrupt practices of transnational and other corporations their intermediaries and others involved, UN Doc. A/RES/3514(XXX) (December 15, 1975); ESC Res. 2041, Corrupt practices, particularly illicit payments, in international commercial transactions, UN Doc. E/RES/2041 (August 5, 1976); ESC, Report of the Ad hoc Intergovernmental Working Group on the Problem of Corrupt Practices on its First, Second, Third and Resumed Sessions, UN Doc. E/6006 (July 5, 1977) reprinted ILM, 16 (1977), 1236; ESC Res. 2122 (LXIII), Corrupt practices, particularly illicit payments, in international commercial transactions, UN Doc. E/RES/2122(LXIII) (August 4, 1977); GA Res. 51/59, Action against corruption, UN Doc. A/RES/51/59 (January 28, 1997); GA Res. 51/191, Declaration against Corruption and Bribery in International Commercial Transactions, UN Doc. A/RES/51/191 (February 21, 1997), Annex. See further Bacio Terracino, *The International Legal Framework*, pp. 56–71; Wallace, *The Multinational Enterprise*, pp. 1124–1126, nn. 62–69.

[30] COE Committee of Ministers, Res. 97(24) on twenty guiding principles for the fight against corruption, Strasbourg, November 6, 1997 (COE Twenty Principles); OECD, Recommendation of the Council of the OECD on Bribery in International Business Transactions, C(94)75 (May 27, 1993), reprinted ILM, 33 (1994), 1389; Revised Recommendation of the Council on Combating Bribery in International Business Transactions, C(97)123/FINAL (May 23, 1997), reprinted ILM, 36 (1997), 1061; Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, C(2009)159/REV1/FINAL (November 26, 2009) as amended by C(2010)19 (February 18, 2010), available at http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=258&InstrumentPID=258&Lan, accessed October 15, 2013 (OECD Recommendation 2009).

instruments remain in force, as revised, and are standards for evaluation by the OECD's Working Group on Bribery in International Business Transactions (OECD-WGB) and COE's Group of States against Corruption (GRECO). Furthermore, in the Asia-Pacific, where there is no regional anti-corruption treaty, the OECD and the Asian Development Bank (ADB) have helped establish an intergovernmental forum on corruption with its own non-binding standards and system for review.[31] The OECD has established a similar regional initiative with states in North Africa and the Middle East.[32]

International organizations have committed themselves to combating corruption in and through their work. On the one hand, a number of institutions have integrated the fight against corruption or the fight for related goods, such as governance and accountability, into their operational priorities, thereby becoming conduits for project funding.[33] On the other hand, international organizations have adopted internally binding standards and systems to respond to allegations of misconduct involving their organizations' funds, projects, and personnel.[34] In each respect, the efforts of international financial institutions stand out.[35] The World Bank addresses corruption – "the abuse of public office for private gain" – as part of its poverty reduction mandate.[36] It also prohibits "corrupt practices" in its projects, procurement processes, and consultancies,[37] as do the other multilateral development

[31] ADB/OECD Initiative, "The ADB/OECD Anti-Corruption Initiative." See also APEC, APEC Anti-Corruption Code of Conduct for Business (September 2007), available at http://publications.apec.org/publication-detail.php?pub_id=269, accessed August 23, 2013.

[32] OECD, "Middle East and North Africa Initiative."

[33] See e.g., Council of Europe, "Action against Economic Crime"; OECD, "Policy Paper and Principles"; United Nations Development Programme, "Anti-Corruption"; UNODC, "Action Against Corruption."

[34] See e.g., FAO, Policy on Fraud and Improper Use of the Organization's Resources, Administrative Circular No. 2004/19 (June 24, 2004); UNHCR, "Inspector General's Office: Internal Review" (website); WIPO, General Assembly, Revised Terms of Reference of the WIPO Audit Committee; Revised WIPO Audit Charter, WO/GA/34/15 (September 18, 2007).

[35] See generally Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 245–248; McCoy and Heckel, "Global Anti-Corruption Norm," 78; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 15.172–15.191; Pancotto Bohrer Munhoz, "Corruption in the Eyes of the World Bank," 699; Wallace, *The Multinational Enterprise*, p. 1125, n. 65.

[36] The World Bank, "Helping Countries Combat Corruption," p. 8; "Governance and Anticorruption," p. 1. See also the World Bank, "Strengthening Governance, Tackling Corruption," p. 7.

[37] IBRD/The World Bank, Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (2011); Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (2006), para. 1.16(a)(i); On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants

lenders.[38] Five of those institutions mutually enforce each other's sanctioning decisions through a "cross-debarment" regime.[39]

Non-state, non-governmental actors have developed their own anti-corruption standards, strategies, and definitions of corruption, acting alone and in conjunction with governmental and intergovernmental organizations. In the late 1970s, the International Chamber of Commerce formulated Rules to Combat Extortion and Bribery in Business Transactions.[40] From the early 1990s, Transparency International (TI) enjoyed considerable success in campaigning for a global prohibition regime against corruption and promoting its own anti-corruption indices, projects, and research.[41] Its definition of corruption – "[t]he abuse of entrusted power for private gain" – is influential.[42] Since the turn of the new century, governments, business, international organizations, and/or civil society groups have

(2006, revised 2011), para. 7(a), all available at http://go.worldbank.org/CVUUIS7HZ0, accessed October 15, 2013.

38 International Financial Institutions Anti-Corruption Task Force, Uniform Framework for Preventing and Combating Fraud and Corruption (2006), available at http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf, accessed August 23, 2013, para. 1, first indent. See, e.g., ADB, Procurement Guidelines (2013), available at www.adb.org/documents/procurement-guidelines, accessed August 23, 2013, para. 1.14(a)(i); EBRD, Procurement Policies and Rules for Projects Financed by the European Bank for Reconstruction and Development (2010), available at www.ebrd.com/pages/workingwithus/procurement/project/policies.shtml, accessed October 14, 2013, para. 2.9(iii). See further Seiler and Madir, "Sanctions Regimes of Multilateral Development Banks," 8–11.

39 Agreement for Mutual Enforcement of Debarment Decisions, April 9, 2010, available at http://lnadbg4.adb.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/$FILE/cross-debarment-agreement.pdf, accessed October 15, 2013. See further Seiler and Madir, "Sanctions Regimes of Multilateral Development Banks," 11–25.

40 International Chamber of Commerce, Commission on Ethical Practices, "Extortion and Bribery in International Business Transactions," November 29, 1977, 131st Session of the Council of the International Chamber of Commerce, Publication 315 (November 29, 1977), ILM, 17 (1978), 417, Pt. III; International Chamber of Commerce, "Extortion and Bribery in International Business Transactions, 1996 Revisions to the ICC Rules of Conduct" (March 26, 1996), ILM, 1306 (1996), 1307–1310. See also Heimann and Hirsch, "Anti-Corruption Efforts by the International Chamber of Commerce," pp. 170–174; Posadas, "Combating Corruption," 366–367; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 5.94–5.98; Wallace, *The Multinational Enterprise*, pp. 1124–1125, n. 63.

41 McCoy and Heckel, "Global Anti-Corruption Norm," 78; Nadelmann, "Global Prohibition Regimes," 479. On TI, see generally Transparency International, "Corruption Perceptions Index"; "Research."

42 Transparency International, "Plain Language Guide," p. 14. For similar definitions, see Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Fighting Corruption in the EU, COM(2011) 308 final, 6 June 2011, n. 1 ("abuse of power for private gain"); International Chamber of Commerce, "Corruption Explained" ("the abuse of entrusted power for private financial or non-financial gain").

established so-called "multi-stakeholder" initiatives against corruption.[43] For example, the UN Global Compact encourages businesses to "work against" corruption, particularly "extortion and bribery,"[44] whilst the Extractive Industries Transparency Initiative (EITI) compares payments to governments, as disclosed by companies, with receipts from companies, as disclosed by governments.[45]

2.1.3 A common definition of corruption in public international law?

Binding and non-binding, these instruments and organizations require or encourage their participants to prevent and suppress conduct that would be considered corrupt according to dictionary definitions. A question is whether they commonly define corruption, or even whether they create a general principle on the meaning of corruption in public international law. Looking at the anti-corruption treaties, as well as the non-binding standards that preceded and paralleled them, it would seem that states have taken at least four approaches to the definition of that term.[46]

First, some of the earliest and best-known anti-corruption treaties and instruments apply to and call for the criminalization of corrupt conduct without mentioning the words "corrupt" or "corruption." The OECD convention requires state parties to criminalize and sanction the actual and attempted *bribery* of foreign public officials in international business transactions.[47] Similarly, prior to the adoption of its first protocol, the Convention on the protection of the European Communities' financial interests (EUCPFI) only applied to "*fraud* affecting the European Communities' financial interests."[48]

Second, the UNCAC and United Nations Convention against Transnational Organized Crime (UNTOC), as well as the Council of Europe Criminal Law Convention on Corruption (COECrimCC), mention corruption without expressly defining that term or deeming certain acts or omissions "corrupt."[49] Typifying this approach,[50] the UNCAC addresses itself to the "problem" or

[43] See further Pieth, "Collective Action and Corruption."

[44] UN Global Compact, The Ten Principles, available at www.unglobalcompact.org/aboutthegc/thetenprinciples, accessed October 16, 2013, Principle 10.

[45] EITI International Secretariat, The EITI Standard (July 11, 2013), available at http://eiti.org/document/standard, accessed October 16, 2013, esp. Requirement 4.

[46] Cf. Bacio Terracino, *The International Legal Framework*, pp. 18–21 (undertaking a similar inquiry but constructing slightly different categories).

[47] OECD-ABC, Art. 1. [48] EUCPFI, Arts. 1–2 (emphasis added).

[49] See also Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., para. 1.04.

[50] See also GA Res. 51/59, para. 7; GA Res. 51/191, Annex, para. 1 (referring to "corrupt practices," "corruption and bribery," and "all forms of corruption, bribery and related illicit practices" without defining those terms).

"phenomenon" of corruption and uses that term and its variants over seventy times in its title, preamble, and operative provisions. However, it neither defines corruption in the abstract nor does it list as "corrupt" certain acts and omissions. Rather, in Ch. III, it calls on state parties to establish or consider establishing as offenses in domestic law:

- bribery of domestic and foreign public officials and officials of international organizations;
- embezzlement, misappropriation, or other diversion of property by public officials;
- bribery and embezzlement in the private sector;
- trading in influence and abuse of functions;
- illicit enrichment;
- laundering of proceeds and concealment of property resulting from conventions offenses; and
- the obstruction of justice.[51]

Third, the African Union Convention on Preventing and Combating Corruption (AUCPCC), the Inter-American Convention against Corruption (IACAC), and the Protocol Against Corruption to the Treaty of the Southern African Development Community (SADC-PAC) require their state parties to criminalize or consider criminalizing listed acts of corruption[52] and to determine between themselves whether other acts are to be dealt with as such.[53] The early GA and ESC resolutions similarly condemned "all corrupt practices, *including* bribery," and "[r]eaffirm[ed] the right of any State to adopt legislation and to investigate and take appropriate legal action [against corrupt corporate practices] in accordance with its national laws and regulations."[54] Alone amongst the third group of treaties, the SADC-PAC includes an abstract definition of "corruption," which effectively limits the types of conduct that its state parties may add to their common list.[55]

The remaining anti-corruption treaties and non-binding (or internally binding) instruments define "corruption" for the purposes of imposing civil, criminal, or administrative sanctions. Under the Protocol to the Convention on

[51] UNCAC, Arts. 15–25.

[52] AUCPCC, Art. 4; IACAC, Arts. VI(1)–IX, XI(1); SADC-PAC, Art. 3. See also ECOWAS-PAC, Art. 6.

[53] AUCPCC, Art. 4(2); IACAC, Art. XI(2); SADC-PAC, 3(2).

[54] GA Res. 3514 (XXX), paras. 1–2 (emphasis added); ESC Res. 2041, Preamble; ESC Res. 2122 (LXIII), Preamble.

[55] SADC-PAC, Art. 1 ("any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others"). See also Bacio Terracino, *The International Legal Framework*, p. 19.

the protection of the European Communities' financial interests (EUCPFI-P1) and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (EUOCC), EU member states undertake to criminalize "active corruption" and "passive corruption."[56] Each definition corresponds to definitions of bribery in other treaties.[57] Likewise, the concept of "corrupt practices" used by international financial institutions would embrace both bribery and the trading in influence as defined by the anti-corruption conventions.

2.1.4 Preliminary conclusions

Corruption is an international legal concept without an agreed meaning.[58] While several treaties and soft law instruments mention corruption in their titles, preambles, and operative provisions, only a minority define corruption in the abstract. Most of the treaties use the term but require state parties to criminalize specified behaviors (e.g., bribery, misappropriation, and the abuse of influence)[59] or an open-ended catalog of corrupt acts; others omit the word corruption entirely. In all, the offenses and concepts of corruption are independent of the motives for prosecution of the victim state. This reflects the logic of the suppression conventions and the principle of sovereignty in public international law; however, it also suggests that corruption, as an international criminological concept, is open to manipulation.[60] Whether this potential is checked, at the international level, by grounds for refusal or abuse of process clauses in human rights treaties is an issue that I will return to in later chapters. For now, I provisionally define corruption as misuses of power or office for private gain that states are encouraged or required to criminalize within their jurisdictions under the anti-corruption treaties.[61]

2.2 Asset recovery

As an abstract concept, "asset recovery" appears equally if not more obscure than corruption.[62] The *Oxford English Dictionary* mentions no such compound and a brief search of the internet suggests that the phrase often refers to

56 EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1). See also COECivCC, Art. 2.
57 Szarek-Mason, "The European Union Policy against Corruption," p. 59.
58 Bacio Terracino, *The International Legal Framework*, p. 20.
59 OECD, "Corruption: A Glossary of Standards," p. 22.
60 See, e.g., Human Rights Watch, "Azerbaijan: Rights Lawyer Imprisoned"; ICHRP and TI, "Making the Connection," p. 63; Kofele-Kale, *Combating Economic Crimes*, pp. 7–8.
61 See also Stessens, "The International Fight against Corruption," 900.
62 Simpson and Weiner (eds.), *Oxford English Dictionary*, asset, n., para. I, recovery, n., para. I(2)(a) and (4)(a). See also Wissenschaftlicher Rat der Dudenredaktion (ed.), *Der grosse Duden*, herausgeben, para. 2, Vermögenswerte; Rey (ed.), *Le Grande Robert*, recouvrement, para. 1.

outcomes and processes unrelated to corruption.[63] This variety of usage is less apparent in state practice[64] but is reflected in academic discourse.[65] Even the UNCAC fails to define "asset recovery" expressly and (as far as I can tell) no other treaty mentions the term by name.[66] Thus, the definition of "asset recovery" is to be derived from the UNCAC, from the ordinary meaning of those words in their context and in light of the convention's purpose.[67] As this reading generates two definitions, one broad/purposive and another narrow/ procedural,[68] it is necessary to consider the preparatory works of the UNCAC and the circumstances of its conclusion.[69]

2.2.1 The broad definition

On the one hand, asset recovery is a purpose in the UNCAC – an ideal state of affairs to be achieved using a suite of preventative and repressive measures. The UNCAC treats asset recovery as a situation, not yet attained, in which senior public officials who engage in acts of corruption, as well as their relatives and close associates, are unable to move corruption-related assets through the formal financial system and victim states are able to regain or obtain those assets or substitutes when they are moved into another jurisdiction. This reading derives from Art. 1(b) UNCAC, which describes "[t]he purpose of the convention . . . [as] promot[ing], facilitat[ing] and support[ing] international cooperation and technical assistance in the prevention of and fight against

63 A search for the term "asset recovery" in Google Switzerland (www.google.ch) on November 6, 2013, yielded some 2.19 million results. Of the first thirty, twelve concerned the anti-corruption treaties.

64 See, e.g., COSP, Open-Ended Intergovernmental Working Group on Asset Recovery, Towards an effective asset recovery regime: networks (background paper), UN Doc. CAC/COSP/WG.2/2011/3 (June 22, 2011), para. 21 (citing the Asset Recovery Inter-Agency Network of Southern Africa, ARINSA); Decreto No. 4.991, de 18 de fevereiro de 2004 (Brazil) (establishing the *Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional*); Council Decision 2007/845/JHA of December 6, 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ 2007 No. L103–105, December 18, 2007; US Department of Justice and US Department of State, "Asset Recovery Tools & Procedures," p. 2 (noting the establishment of a Kleptocracy Asset Recovery Initiative).

65 A search for the term "asset recovery" in Westlaw's Combined World Journals and Law Reviews database on November 5, 2013, generated some 156 results for the two previous years. Of these, "asset recovery" was mentioned *inter alia* in entries on insolvency, confiscation, fraud, and the anti-corruption treaties.

66 See also Boister, *Introduction to Transnational Criminal Law*, p. 236.

67 Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, in force January 27, 1980, 1155 UNTS 331, Art. 31(1)–(2).

68 See also Puckett, "Clans and the Foreign Corrupt Practice Act," 830–834.

69 VCLT, Art. 32.

corruption, including in asset recovery" and from the measures that state parties are to take or consider taking in Ch. V UNCAC. States are, namely, to reduce the chances that their financial institutions will hold illicit wealth and enable other state parties to ameliorate the (financial) consequences of corruption through legal proceedings in their jurisdictions.

The measures with respect to financial institutions are set forth in the second and second last articles of Ch. V. Article 52 UNCAC requires state parties to ensure that financial institutions within their jurisdictions use increased care (diligence) in establishing and maintaining customer relationships, especially those involving "high-value accounts" and "accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates."[70] To encourage the detection and reporting of "suspicious transactions" to "competent authorities," state parties are to take a variety measures.[71] These range from the issuing of advisories to financial institutions,[72] to preventing the establishment of so-called "shell banks,"[73] to considering asset disclosure systems for public officials.[74] Under Art. 58 UNCAC, state parties are encouraged to establish so-called financial intelligence units (FIUs), which "receiv[e], analys[e] and disseminat[e]" suspicious transactions reports within and beyond their jurisdictions.[75]

Articles 52 and 58 UNCAC recall the soft law standards on PEPs that have been issued by the Financial Action Task Force (FATF) and the Wolfsberg Group of financial institutions.[76] The FATF defines "foreign PEPs" as "individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials."[77] "[M]iddle ranking or more junior individuals" are not covered.[78] The Wolfsberg Group defines PEPs more narrowly still as natural persons "holding senior, prominent or important positions with substantial authority over policy, operations or the use or allocation of government-owned resources." It suggests that "Heads of State and Government," as well as "Ministers, Senior Judicial Officials; high-ranking

[70] UNCAC, Art. 52(1). [71] UNCAC, Art. 52(2)–(6). [72] UNCAC, Art. 52(2).
[73] UNCAC, Art. 52(4). [74] UNCAC, Art. 52(5). See also UNCAC, Art. 8(5).
[75] UNCAC, Art. 58. See also The Egmont Group, "What is an FIU?"
[76] FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, Paris, 2012, available at www.fatf-gafi.org/recommendations, accessed October 15, 2013 (FATF Recommendations), Pt. D (esp. para. 12), Glossary; The Wolfsberg Group, "Frequently Asked Questions on Politically Exposed Persons."
[77] FATF Recommendations, Glossary.
[78] FATF Recommendations, Glossary. Cf. definition of "Domestic PEPs" (individuals to whom prominent public functions are or have been entrusted "domestically").

Officers holding senior positions in the armed forces; Members of ruling Royal Families with governance responsibilities; Senior Executives of state-owned enterprises; Senior Officials of major political parties" are sufficiently senior, prominent, or important to qualify as PEPs.[79]

The remaining articles in Ch. V relate to the gaining or regaining of corruption-related assets by states that have jurisdiction over corruption offenses or that have incurred losses through acts of corruption. Under Art. 53 UNCAC, state parties are to permit each other to initiate domestic civil actions to establish title to or ownership of property "acquired through the commission of an offence established in accordance with this Convention."[80] They are also to enable their courts to order the payment of compensation or damages to state parties harmed by corruption and to recognize other state parties as legitimate owners in confiscation proceedings.[81] By Art. 54 UNCAC, they are to establish mechanisms to enable their competent authorities to give effect to requests for MLA by freezing, seizing, and confiscating property acquired through or involved in the commission of a convention offense. Article 55 UNCAC is then a requirement to cooperate with such requests "to the greatest extent possible within [a] domestic legal system."[82] Article 57 UNCAC is a set of rules on the sharing of confiscated funds between requesting and requested state parties. The other provisions deal with the spontaneous exchange of information between national authorities and the conclusion of further bilateral or multilateral agreements and arrangements.[83]

The resolutions that preceded the inclusion of Ch. V in the UNCAC support the broad/purposive interpretation of asset recovery. In Res. 55/188, the GA invited the expert group drafting the terms of reference for negotiations of the UNCAC "to examine the question of illegally transferred funds and the repatriation of such funds to the countries of origin."[84] It also called for "increased international cooperation … in regard to devising ways and means of preventing and addressing illegal transfers, as well as repatriating illegally transferred funds to the countries of origin, and call[ed] upon all countries and entities concerned to cooperate in this regard."[85] The ESC subsequently reiterated the request and asked the expert group to consider, as a possible item for negotiations, "[d]eveloping the measures necessary to ensure that those working in banking systems and other financial institutions contribute to the prevention of the transfer of funds of illicit origin derived from acts

[79] The Wolfsberg Group, "Frequently Asked Questions on Politically Exposed Persons," Qn. 3.

[80] UNCAC, Art. 53(a). [81] UNCAC, Art. 53(b)–(c). [82] UNCAC, Art. 55(1).

[83] UNCAC, Arts. 56, 59.

[84] GA Res. 55/188, Preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin, UN Doc. A/RES/55/188 (January 25, 2001), para. 5.

[85] GA Res. 55/188, para. 3.

of corruption, for example, by recording transactions in a transparent manner, and to facilitate the return of those funds."[86] In so doing, it noted its "alarm" at the transfer of funds "from countries of origin to international banking centres and financial havens" and recognized confidentiality, privacy, and bank secrecy as barriers to recovery.[87]

The notion that states should neither receive nor retain foreign illicit wealth was carried over into the drafts and proposals made during negotiations for the UNCAC. By its terms of reference, the GA's Ad Hoc Committee for the Negotiation of a Convention against Corruption (Ad Hoc Committee) was to consider "preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds" as an element of the convention.[88] In all revisions, Ch. V included measures on prevention, identification, restraint, confiscation, cooperation, and repatriation.[89] Until the fifth revision,[90] it bore the title "Preventing and Combating the Transfer of Assets, including Funds of Illicit Origin Derived from Acts of Corruption and Recovering Such Assets."[91] Representatives from developed and developing states had emphasized the need for measures to prevent the transfer of funds derived from corruption and to facilitate their repatriation to the countries of origin.[92]

[86] ESC Res. 2001/13, Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds, UN Doc. E/RES/2001/13 (July 24, 2001), para. 1(a)–(b).

[87] ESC Res. 2001/13, Preamble.

[88] GA Res. 56/260, Terms of reference for the negotiation of an international legal instrument against corruption, A/RES/56/260 (April 9, 2002), para. 3.

[89] Ad Hoc Committee, Draft United Nations Convention against Corruption, UN Doc. A/AC.261/3 (Pt. IV) (January 4, 2002); Revised draft United Nations Convention against Corruption, UN Doc. A/AC.261/3/Rev.1/Add.1 (July 5, 2002); Revised draft United Nations Convention against Corruption, UN Doc. A/AC.261/3/Rev.3 (February 5, 2003); Revised draft United Nations Convention against Corruption, UN Doc. A/AC.261/3/Rev.4 (May 12, 2003); Revised draft United Nations Convention against Corruption, UN Doc. A/AC.261/3/Rev.5 (August 15, 2003).

[90] A/AC.261/3/Rev.5.

[91] Cf. Ad Hoc Committee, Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption, Proposals and contributions received from Governments, United States: proposed chapter on recovery of assets, UN Doc. A/AC.261/IPM/18 (December 5, 2001), Ch. V.

[92] Ad Hoc Committee, Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its 1st session, held in Vienna from January 21 to February 1, 2002, UN Doc. A/AC.261/4 (March 14, 2002), paras. 26, 28–29, 44; Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its 2nd session, held in Vienna from June 17 to 28, 2002, UN Doc. A/AC.261/7 (July 5, 2002), para. 21, Annex, paras. 9–10; Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its 4th session, held in Vienna from January 13 to 24, 2003, UN Doc. A/AC.261/13 (February 3, 2003), paras. 9–14; Report of the Ad Hoc Committee for the

Finally, since the conclusion of the UNCAC, its Conference of the States Parties (COSP),[93] the Group of Eight (G-8) and Group of Twenty (G-20),[94] international organizations,[95] and commentators[96] have interpreted asset recovery to be preventative and restitutory.

2.2.2 *The narrow definition*

The UNCAC also narrowly defines asset recovery as the legal processes by which states use each other's coercive powers to obtain or regain ownership of proceeds and objects of corruption or substitute assets. Not only do Arts. 53–54 and 57 all appear in Ch. V UNCAC, but the words, "to recover" and "recovery," are used in other parts of the convention to refer to the (re)gaining of assets already abroad.[97] For example, in the preamble to UNCAC, the parties announce their determination "to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery." Then, in Ch. VI, they provide that training programs could address "[p]reventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds."[98] More striking still, in the last three revisions of

Negotiation of a Convention against Corruption on its 5th session, held in Vienna from March 10 to 21, 2003, UN Doc. A/AC.261/16 (April 14, 2003), paras. 13–15.

93 COSP, Asset Recovery (background paper), UN Doc. CAC/COSP/2006/6 (November 16, 2006), para. 19; Joining Forces for Successful Asset Recovery (background paper), UN Doc. CAC/COSP/2008/11 (December 21, 2007); Open-ended Intergovernmental Working Group on Asset Recovery, Preparing the ground for reviewing the asset recovery chapter: proposed multi-year workplan, 2011–2015 (background paper), UN Doc. CAC/COSP/WG.2/2011/4 (June 22, 2011), para. 2. See also GA Res. 64/237, Preventing and combating corrupt practices and transfer of assets of illicit origin and returning such assets, in particular to the countries of origin, consistent with the United Nations Convention against Corruption, UN Doc. A/RES/64/237 (March 31, 2010), paras. 7, 13.

94 G-20, Declaration: Summit on Financial Markets and the World Economy (November 15, 2008), reprinted ILM, 48 (2009), 416, 421; Leaders' Statement: the Pittsburgh Summit (September 24–25, 2009), available at http://ec.europa.eu/commission_2010-2014/president/pdf/statement_20090826_en_2.pdf, accessed October 15, 2013, para. 15; US Department of State, "Deauville Partnership." Cf. G-20, Toronto Summit Declaration (June 26–27, 2010), reprinted in *Law & Business Review of the Americas*, 16 (2010), 625, para. 40.

95 StAR, "Towards a Global Architecture," pp. 31–32. See also The Swiss Confederation and StAR, "No Safe Havens," pp. 3, 5.

96 Jorge, "Asset Recovery in the UN Convention against Corruption"; Kofele-Kale, *International Responsibility for Economic Crimes*, pp. 201–203; Pieth, "Recovering Stolen Assets," p. 9; Vlasic and Noell, "Fighting Impunity"; Webb, "The UN Convention against Corruption," 206–212.

97 Puckett, "Clans and the Foreign Corrupt Practice Act," 830. See, e.g., UNCAC, Art. 46(3)(k).

98 UNCAC, Art. 60(1)(e).

the draft convention "[r]ecovery of assets" was defined as "the procedure for the transfer or conveyance of all the property or assets, their proceeds or revenue, acquired through acts of corruption covered by this Convention from the receiving State Party where the assets are located to the affected State Party, even if they have been transformed, converted or disguised."[99] In a 2011 joint report, the OECD, the Stolen Asset Recovery Initiative (StAR) of the World Bank and the UN Office on Drugs and Crime (UNODC) similarly defined asset recovery as "the process of tracing, freezing, and returning illegally acquired assets to the jurisdiction of origin."[100]

2.2.3 Preliminary conclusions

In my submission, the term "asset recovery" is used to denote both a purpose and process in the UNCAC. It expresses the goal that PEPs (and their relatives and close associates) will be significantly less able to move corruption-related wealth through financial institutions and that states with jurisdiction over corruption offenses will be better able to obtain (or regain) ownership of those assets or substitute items. Simultaneously, "asset recovery" is a catchall for the legal processes by which state parties obtain or regain ownership of such assets, be they processes of unilateral (civil) litigation in the courts of the state with jurisdiction over the assets, or the freezing, seizure, confiscation, and repatriation of such assets at the request of the state with jurisdiction over the offense. The convention's text, read in the light of the preparatory documents and the resolutions associated with its conclusion, indicate that the drafters favored the first meaning without ever completely abandoning the second. For clarity, this book uses the term "asset recovery" to denote the goal of:

- preventing the movement of corruption-related (or illicit) wealth through regulated financial institutions by or for PEPs; and
- ensuring that illicit wealth is secured and transferred to the state with adjudicative jurisdiction over the offense, especially if it is also the state that entrusted the PEP with his/her "prominent public functions."

Defined in this way, asset recovery is a topic not merely of the UNCAC but also of other anti-corruption treaties and other treaties and instruments on international cooperation in criminal matters. It is to be achieved, amongst other things, through "cooperative confiscations," i.e., the compulsory assumption of ownership of illicit wealth by a state with jurisdiction over those things (the "haven state") at the behest of a state with legislative and judicial competence

99 Ad Hoc Committee, Revised Draft UNCAC A/AC.261/3/Rev.3–A/AC.261/3/Rev.5, each at Art. 2(p).

100 Organisation for Economic Co-operation and Development and Stolen Asset Recovery Initiative, "Tracking Anti-Corruption and Asset Recovery Commitments," p. 23.

over the alleged offense (the "victim state"). Cooperative confiscation may be classified, in turn, as a form of minor judicial or mutual legal assistance,[101] whether it is initiated by a request or a notice for mutual recognition.[102] It has been called a type of criminal procedure based on an international division of labor.[103]

2.3 Human rights to property

More difficult to pinpoint than either corruption or asset recovery are the meanings of "human rights" and "property." Starting again with the *Oxford English Dictionary*, human rights to property would seem to be fundamental entitlements of natural persons that relate to certain types of things or certain types of normative relationships to things or through things to other people.[104] But this definition says nothing about the sources of such rights or their scope, limits, and correlative duties (or duty-bearers). All of these issues have been highly problematic in the literature[105] and are unavoidable for a comparison of asset recovery techniques and protections for property in public international law.

2.3.1 The concept of human rights to property in public international law

Borrowing from Profs. Walter Kälin and Jörg Künzli, I provisionally define human rights in public international law as "internationally guaranteed legal entitlements of individuals *vis-à-vis* the state, which serve to protect fundamental characteristics of the human person and his or her dignity in peacetime

[101] Bantekas, *International Criminal Law*, pp. 356–357; Donatsch, Heimgartner, and Simonek, *Internationale Rechtshilfe*, pp. 33–34; Gleß, *Internationales Strafrecht*, paras. 259–260. Cf. Bassiouni, "Modalities of International Cooperation," pp. 7–9, 13; Schomburg et al., "Einleitung," paras. 15–18 (both differentiating "minor" legal assistance from execution of confiscation orders as foreign [penal] judgments).

[102] Cryer et al., *International Criminal Law and Procedure*, pp. 102–103. For a comparison of "request" and "mutual recognition" models of cooperation, see Klip, *European Criminal Law*, pp. 342–357.

[103] Schomburg et al., "Einleitung," para. 97 (ein "international-arbeitsteiliges Strafverfahren").

[104] Simpson and Weiner (eds.), *Oxford English Dictionary*, human, adj. and n., para. S2, property, n., paras. 1(b), 3(b)–(c), 4.

[105] On rights, see, e.g., Hohfeld, "Fundamental Legal Conceptions" (1913); "Fundamental Legal Conceptions" (1917); Wenar, "Rights." On human rights, see, e.g., Baehr, *Human Rights*, pp. 1–55; Bantekas and Lutz, *International Human Rights Law*, pp. 10–42; Clayton and Tomlinson, *Law of Human Rights*, paras. 1.01–1.19; Brownlie, *Principles of Public International Law*, Ch. 25; Donnelly, "International Human Rights," pp. 31–48; Kälin and Künzli, *International Human Rights*, Pts. 1–2; Nickel, "Human Rights"; Ramcharan, *Human Rights Treaty Law*, Ch. 1. On property, see, e.g., Harris, *Property and Justice*; Honoré, "Ownership"; Mattei, *Basic Principles*; Munzer, *A Theory of Property*; Penner, "Bundle of Rights"; *The Idea of Property*; Waldron, *Private Property*.

and in times of armed conflict."[106] They come into being as treaty rules, customs, and general principles of public international law.[107] They can be said to correlate with state duties to *respect* (i.e., not to interfere with the enjoyment of rights);[108] *protect* (i.e., to prevent and remedy violations of rights);[109] and *fulfill* (i.e., to establish laws and institutions that ensure rights can be enjoyed in full).[110] They are described as "universal, indivisible and interdependent and interrelated,"[111] and in generations.[112] Testing Kälin and Künzli's definition, the third generation of human rights are group entitlements. They, in particular, are said to manifest a cosmopolitan sense of obligation to help people who are suffering in other political communities (states).[113]

How property is defined in regional human rights treaties is a question to which I will return in Chapters 5 and 6. In the meantime, my baseline definition of property is a collection ("bundle") of normative relationships between people with respect to tangible and intangible things.[114] The institution of property may be organized around the idea that *private* ("particular") individuals and groups should control decisions about the use of resources.[115] But it may also be *collective*, in that resources are managed by "the community as a whole" in the social interest, or *communal*, in that "resources are governed by rules whose

[106] Kälin and Künzli, *International Human Rights*, p. 32. See also Nowak, *The International Human Rights Regime*, pp. 1–5.

[107] Kälin and Künzli, *International Human Rights*, p. 37. See also Brownlie, *Principles of Public International Law*, pp. 555–565. Cf. Shaw, *International Law*, pp. 266–276.

[108] Kälin and Künzli, *International Human Rights*, pp. 96, 98; Ramcharan, *Human Rights Treaty Law*, p. 124.

[109] Kälin and Künzli, *International Human Rights*, pp. 96, 101, 109; Ramcharan, *Human Rights Treaty Law*, pp. 34, 129.

[110] Kälin and Künzli, *International Human Rights*, pp. 96, 112; Ramcharan, *Human Rights Treaty Law*, p. 133.

[111] GA, World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (July 12, 1993) (Vienna Declaration), para. 5. Cf. Donnelly, "International Human Rights"; Kälin and Künzli, *International Human Rights*, pp. 19–30.

[112] Baehr, *Human Rights*, p. 6.

[113] Salomon, "Legal Cosmopolitanism." See also Kleingeld and Brown, "Cosmopolitanism" (though also cautioning cosmopolitans to be wary of "strong" claims to self-determination and culture).

[114] Donahue, "The Future of Property," p. 30; Hohfeld, "Fundamental Legal Conceptions" (1913), 21–24; "Fundamental Legal Conceptions" (1917), 742–744; Mattei, *Basic Principles*, p. 18; Munzer, *A Theory of Property*, pp. 17–24; Waldron, *Private Property*, pp. 26–33; "Property and Ownership." Cf. Gray, "The Disintegration of Property"; Harris, *Property and Justice*, Ch. 8; Penner, "Bundle of Rights," 739; *The Idea of Property*, p. 152. On the absence of the "bundle of rights" metaphor in European civil law traditions but "equivalent 'relational' ideas" of property, see Mattei, *Basic Principles*, pp. 20, 31–33, 123–124.

[115] Waldron, *Private Property*, pp. 38–40; "Property and Ownership." Cf. Harris, *Property and Justice*, pp. 101–103.

point is to make them available for use by all or any members of the society."[116] "Owners," in any case, enjoy "the maximum degree of formalized control over a scarce resource" in a particular legal system.[117] In systems that recognize liberal (private) ownership, that control typically includes "the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, the liability to execution, and the incident of residuarity."[118] As for rights *to* property, these may be:

- negative rights that correlate with governmental duties to refrain from extinguishing or detrimentally affecting property;
- negative rights that limit governmental power to exclude persons from the category of potential owners; and
- positive rights that correlate with governmental duties to ensure that persons have minimum amounts of property.[119]

On this definition, rights to property may be first generation civil or political rights; second generation economic, social, or cultural rights; or third generation collective rights.[120] Assuming they protect "fundamental characteristics of the human person and his or her dignity," the issue is whether they are part of public international law.

2.3.2 The sources of international human rights to property

2.3.2.1 Treaty-based human rights to property

In the decades following World War II, member states of regional political and economic integration organizations in Europe and the Americas created several treaties expressly or implicitly dedicated to the protection of human rights. These included, or were subsequently expanded to include, articles on

[116] Waldron, *Private Property*, pp. 37–42; "Property and Ownership." Cf. Harris, *Property and Justice*, pp. 109–112.

[117] Mattei, *Basic Principles*, p. 77 citing Honoré, "Ownership." See also Munzer, *A Theory of Property*, pp. 22–23.

[118] Honoré, "Ownership," 166–179, esp. 165. See also Harris, *Property and Justice*, p. 126; Mattei, *Basic Principles*, p. 77. Cf. Penner, "Bundle of Rights," 754–767; *The Idea of Property*, pp. 67–78.

[119] Clayton and Tomlinson, *Law of Human Rights*, para. 18.01; Çoban, *Property Rights within the European Convention on Human Rights*, pp. 125–127; Janis, Kay, and Bradley, *European Human Rights Law*, p. 519; Waldron, *Private Property*, pp. 16–24. Cf. Harris, *Property and Justice*, p. 169; Munzer, *A Theory of Property*, pp. 24–27.

[120] On property as a first and second generation right, see Krause, "The Right to Property," p. 143. On property as a third generation right, see further p. 35 and following and p. 281 and following below.

property.[121] In the early 1980s, states in Africa followed suit with a pan-African human rights charter and right to property.[122] After the Cold War, former Soviet republics and Arab states recognized public law human entitlements to property at the regional level.[123] As it stands, the Asia/Pacific is the only region without a dedicated human rights treaty, though the human rights declaration of the Association of Southeast Asian Nations (ASEAN) does contain a property guarantee.[124]

There is, however, no general global treaty-based human right to property.[125] Whilst the Universal Declaration of Human Rights (UDHR) proclaims that "[e]veryone has a right to own property alone as well as in association with others," and that "[n]o one shall be arbitrarily deprived of his property,"[126] disagreements between socialist, capitalist, and Third World states meant that a right to property was omitted from the binding covenants, the ICCPR and ICESCR.[127] Other provisions of the twin covenants provide indirect protection

121 American Declaration of the Rights and Duties of Man, Bogota, Columbia, 1948, OAS Res. XXX, Ninth International Conference of American States (1948), reprinted OAS, Inter-American Court of Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System: Updated to 2003 (Inter-American Court of Human Rights: San José, 2003), pp. 19–27, Art. XXIII; ACHR, Art. 21; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, November 4, 1950, in force September 3, 1953, 5 ETS read with the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, March 20, 1952, in force May 18, 1954, 9 ETS, Art. 1; Charter of Fundamental Rights of the European Union, Strasbourg, December 12, 2007, in force December 1, 2009, OJ 2010 No. C83, March 30, 2010, p. 2, Art. 17.

122 AfCHPR, Art. 14.

123 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Minsk, May 26, 1995, in force August 11, 1998, reprinted *HRLJ*, 17 (1996), 159 (unofficial translation), Art. 26; Arab Charter on Human Rights, Tunis, May 22, 2004, in force March 15, 2008, reprinted *HRLJ*, 12 (2005), 893 (unofficial translation), Art. 31.

124 ASEAN, "ASEAN Human Rights Declaration," available at www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration, accessed September 20, 2013.

125 Cremer, "Eigentumsschutz," para. 142; Dolzer, *Eigentum, Enteignung und Entschädigung*, pp. 85–93; Golay and Cismas, "Legal Opinion: The Right to Property"; Higgins, "The Taking of Property," 259–348; Kälin and Künzli, *International Human Rights*, p. 431; Krause and Alfredsson, "Article 17."

126 GA Res. 217 (III), International Bill of Human Rights, UN Doc. A/RES/217(III)A-E (December 10, 1948), Declaration of Human Rights, Art. 17.

127 Craven, *The International Covenant on Economic, Social and Cultural Rights*, p. 25; Cremer, "Eigentumsschutz," para. 142; Dolzer, *Eigentum, Enteignung und Entschädigung*, pp. 85–93; Kälin and Künzli, *International Human Rights*, p. 431; Krause, "The Right to Property," pp. 143–144; Rosas, "Property Rights," pp. 133, 136–138.

for property,[128] and some special-purpose global human rights conventions include express property-related entitlements.[129]

2.3.2.2 Rights to property in customary international law

The failure of states to include a right to property in the twin covenants added to the uncertainty about the existence of a right to property in customary international law.[130] As mentioned in the Introduction, states have intensely disputed the scope of their sovereign power to interfere with the property of non-nationals.[131] Though they agreed they could expropriate property in the public interest, they differed as to whether this power was subject to special, internationally determined conditions when the property-holder was a national of another state; if so, they disputed what those conditions might be.[132] Was the alien property-holder entitled to a special standard of treatment under international law, such as "prompt, adequate, and effective compensation" (the Hull Formula)?[133] Was he/she (or it) only entitled to the same treatment as national

128 Joseph, Schultz, and Castan, *The International Covenant on Civil and Political Rights*, paras. 23.44–23.49; Rosas, "Property Rights," p. 138.

129 See generally Kälin and Künzli, *International Human Rights*, p. 432. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, in force October 21, 1950, 75 UNTS 288, Arts. 33, 53; Convention relating to the Status of Refugees, Geneva, July 28, 1951, in force April 22, 1954, 189 UNTS 137, Arts. 8, 13–14, 18, 29–30; International Convention on the Elimination of All Forms of Racial Discrimination, New York, March 7, 1966, in force January 4, 1969, 660 UNTS 195, Art. 5(d)(v); Convention on the Elimination of All Forms of Discrimination against Women, New York, December 18, 1979, in force September 3, 1981, 1249 UNTS 13, Arts. 15(2), 16(h); Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, December 18, 1990, in force July 1, 2003, 220 UNTS 3, Art. 15.

130 At least for those who do not regard the UDHR as itself reflective of the customary law on human rights. See further Simma and Alston, "The Sources of Human Rights Law," 85, esp. n. 6.

131 Brownlie, *Principles of Public International Law*, Ch. 24; Dolzer, "Expropriation of Alien Property"; *Eigentum, Enteignung und Entschädigung*, pp. 1–6, 14–34, 84–95; Dolzer and Schreuer, *International Investment Law*, pp. 11–17; Herdegen, *Internationales Wirtschaftsrecht*, paras. 20.1–20.3; Krause, "The Right to Property," pp. 144–145; Lowenfeld, *International Economic Law*, Ch. 15; Qureshi and Ziegler, *International Economic Law*, para. 14.002; Shaw, *International Law*, pp. 827–842; Sornarajah, *Foreign Investment*, pp. 120–143.

132 Brownlie, *Principles of Public International Law*, pp. 533–536; Dolzer, "Expropriation of Alien Property," 557–572; *Eigentum, Enteignung und Entschädigung*, pp. 15–34; Herdegen, *Internationales Wirtschaftsrecht*, paras. 20.1–20.3; Krause, "The Right to Property," p. 146; Qureshi and Ziegler, *International Economic Law*, paras. 14.003–14.007; Shaw, *International Law*, pp. 827–829; Sornarajah, *Foreign Investment*, pp. 128–129.

133 Hackworth, "Property Rights" (with extracts from US Secretary of State Hull's note to the Mexican Ambassador to the US of July 21, 1938); American Law Institute, *Restatement the Third*, s. 712. See generally Lowenfeld, *International Economic Law*, pp. 475–481.

property-holders (the Calvo Doctrine)?[134] Or was he/she (or it) entitled to something else again, such as "appropriate compensation"[135] in all the circumstances or the "[p]roper administration of civil and criminal justice?"[136]

The controversy about the customary standard of treatment abated somewhat with the end of the Cold War and the proliferation of investment treaties. But it has not been replaced by consensus.[137] Even if there is a customary human right to property, it is not clear whether it would apply to interferences that aim at asset recovery. Preparatory documents suggest that the word "deprivation" in Art. 17 UDHR was intended to refer only to compensable takings.[138] Legal academics and international organizations have also favored the view that measures to enforce domestic criminal laws are compatible with customary property norms.[139] In her 1982 lectures to the Hague Academy of International Law, Dame Rosalyn Higgins found there was:

> accept[ance] at both the municipal and international levels that private property may be used for authorized punitive purposes – it may be taken as a fine or a judgment execution. These "takings" are for purposes of State authority widely perceived as legitimate. They do not, except in a negative sense, enrich society as a whole. They are wholly different in kind from the sorts of takings of property that a Marxist would find desirable – because it would lead to a redistribution of property.[140]

Thirty years later, her view finds support in the thickening web of norms on corruption, money laundering, and confiscation, which are described in Chapter 4.[141]

[134] Qureshi and Ziegler, *International Economic Law*, para. 14.005.

[135] GA Res. 1803 (XVII), Permanent sovereignty over natural resources, UN Doc. A/RES/1803(XVII) (December 14, 1962), para. 4. See also Brownlie, *Principles of Public International Law*, p. 526; Qureshi and Ziegler, *International Economic Law*, para. 14.007.

[136] Shaw, *International Law*, p. 825.

[137] Dolzer and Schreuer, *International Investment Law*, pp. 15–17; Krause, "The Right to Property," p. 145; Sornarajah, *Foreign Investment*, pp. 29, 82–85.

[138] ESC, Commission on Human Rights, Drafting Committee, Draft outline of International Bill of Rights, UN Doc. E/CN.4/AC.1/3 (June 4, 1947), Art. 22; First Session, Report of the Drafting Committee to the Commission on Human Rights, UN Doc. E/CN.4/21 (July 1, 1947), Annex A, Art. 22 (containing separate paragraphs on states' rights to "regulate the acquisition and use of private property" and individual rights not to be "deprived of . . . property without just compensation"). On the drafting history of Art. 17, see further van Banning, *Human Right to Property*, pp. 36–40. On the ECtHR's interpretation of the words "deprivation" and "use," see further p. 184 and following below.

[139] Brownlie, *Principles of Public International Law*, p. 536; Higgins, "The Taking of Property," 276; UNCTAD, "Taking of Property," pp. 14–15.

[140] Higgins, "The Taking of Property," 276. See also ESC Commission on Human Rights, Drafting Committee, First Session, Summary of Record of Eighth Meeting, UN Doc. E/CN.4/AC.1/SR.8, p. 9.

[141] See also *Varvara* v. *Italy*, App. No. 17475/09 (ECtHR, October 29, 2013) (not final), Partly Dissenting Opinion of Judge Pinto de Albuquerque.

Further, even if a customary (human) right to property applies to cooperative confiscations, it is unlikely to assist former PEPs or related parties who are aggrieved by such proceedings. Customary human rights are only enforceable, at the international level, through the institution of diplomatic protection,[142] which allows a state to invoke "the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."[143] When asset recovery is on the agenda, the aggrieved person's home state is typically the state that is requesting the enforcement of the confiscation order. It will have little incentive to assert a customary right to property on the person's behalf. If its policies on asset recovery change, it may withdraw the request or obstruct it in other ways.

2.3.2.3 A peoples' right to property in public international law?

Given the impact of grand corruption on government revenues and resources, a final question is whether states and/or their populations benefit from rights to property with respect to illicit wealth in public international law. As I discuss in Chapter 6, some individual, treaty-based human rights to property have been read to protect some customary collective claims to things. In addition, several international instruments provide for peoples' free disposition of (or permanent sovereignty over) natural wealth and resources. Common Article 1(2) ICCPR and ICESCR states that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." The terms of common Art. 1(2) are reflected in GA Res. 1803 (XVII) on the Permanent Sovereignty over Natural Resources[144] and amplified in resolutions on the New International Economic Order (NIEO).[145] Rights to free disposition and development likewise feature in the regional human rights instruments that were concluded amongst developing or newly developed states.[146] The broader right of self-determination is

[142] Oberleitner, "Towards an International Court of Human Rights." Cf. *Diallo (Guinea* v. *DRC)* (ICJ, November 30, 2010), Separate Opinion of Judge Trinidad, para. 23 (distinguishing "human rights protection" and "diplomatic protection").

[143] GA, Report of the International Law Commission on the Work of its 58th Session (May 1 to June 9 and July 3 to August 11, 2006), Official Records Sixty-First Session Supplement No. 10, UN Doc. A/61/10, Ch. IV (Draft Articles on Diplomatic Protection), Art. 1. See generally Shaw, *International Law*, pp. 808–819.

[144] GA Res. 1803 (XVII).

[145] GA Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3201 (May 1, 1974), para. 4(e); GA Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 (December 12, 1974), Art. 2(1).

[146] See further Chapter 6.

regarded as a norm of customary international law and asserted as a part of *jus cogens*.[147]

Whether rights to free disposition confer entitlements on victim communities to the return of illicit wealth is another question. Commentary highlights several ambiguities in the right to permanent sovereignty, all of which would be relevant to such a claim. To begin, Art. 1(2) ICCPR and ICESCR omits mention of rights, merely giving permission to peoples to "freely dispose" of certain collective assets.[148] This wording underscores the issue of whether self-determination is a right and/or a principle in general international law[149] and raises the question of whether Art. 1(2) imposes duties on states or merely confers liberties on peoples. The concept of "peoples" is also notoriously ill-defined: It has been equated, variously, with the state, populations of independent states, (some) intra-state minorities, colonial peoples, and non-colonized peoples who are subject to alien domination or foreign occupation.[150] The definition of "people" partly determines whether the right to free disposition is an external right (of states) to deploy collective wealth and natural resources without undue foreign interference or an internal right (of populations within states) to have decisions about the disposal of natural wealth and resources made in their interests.[151] Primary duty-bearers would be other

[147] Nowak, *CCPR Commentary*, p. 3; Report of the International Law Commission, 53rd Session (April 23–June 1 and July 2–August 10, 2001), UN Doc. A/56/10, Art. 26, Commentary, para. 5. Cf. Schrijver, *Sovereignty Over Natural Resources*, p. 375. See also *Case Concerning East Timor (Portugal* v. *Australia)* (1995) ICJ Reports 90, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* (2004) ICJ Report 136, para. 88. For another restatement of the right to self-determination, see GA Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (October 24, 1970); Vienna Declaration, para. 2.

[148] Cf. ICCPR and ICESCR, Art. 1(3).

[149] GA, Draft International Covenants on Human Rights, Annotation Prepared by the Secretary-General, UN Doc. A/2929 (July 1, 1955), paras. 2–5; Summers, *Peoples in International Law*, pp. 379–386.

[150] Brownlie, "Rights of Peoples," pp. 5–6; Cassese, "Self-Determination of Peoples," pp. 95–96; Crawford, "The Rights of Peoples," pp. 64–65; Nowak, *CCPR Commentary*, pp. 20–22; Schrijver, *Sovereignty Over Natural Resources*, pp. 8–9; UN Doc. A/29/29, para. 9. For a review of the literature and GA debates, see (respectively) Knop, *Diversity and Self-Determination*, pp. 51–65; Summers, *Peoples in International Law*, pp. 166–175. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (2010) ICJ Reports 403, paras. 79, 82.

[151] See, esp., Cassese, "Self-Determination of Peoples," p. 103; Duruigbo, "Permanent Sovereignty and Peoples," 65–66; Kofele-Kale, *International Responsibility for Economic Crimes*, p. 110; Miranda, "Intrastate Natural Resource Allocation," 804; Nowak, *CCPR Commentary*, p. 26; Rosas, "Right to Self-Determination," pp. 117–118; Yusuf, "Equal Rights and Self-Determination," p. 389. Cf. Crawford, "The Rights of Peoples," pp. 64–65; Schrijver, *Sovereignty Over Natural Resources*, pp. 311, 371.

states, on the one hand, and the national governments, on the other: Whether foreign investors and foreign governments would be obliged to secure the right in those two dimensions is an open question.[152] In any case, it is uncertain whether the things at issue in asset recovery litigation would constitute "natural wealth and resources." The term is seldom discussed in the literature and is defined neither in the covenants nor in general international law.[153] Further, given their ordinary meaning in their original, post-colonial context,[154] they would seem to equate with those attributes of a people's physical environment that may be exploited or extracted rather than the financial assets that derive from them.[155] Finally, Art. 1(2) ICCPR and ICESCR contains several interrelated qualifications that are, in turn, subject to the blanket qualifications in common Art. 47 ICCPR and Art. 25 ICESCR.[156] The qualifications signal a further issue, namely, the interaction between collective rights to free disposition and individual rights to property within the regional treaties and in general international law.

2.3.3 Preliminary conclusions

To comprehensively define human rights, let alone human rights to property, is to embark on a legal and philosophical project that is outside the scope of this book. That said, I have provisionally defined human rights to property as international legal norms that limit governmental power to extinguish or detrimentally affect private, collective, or communal relationships with respect to things. I have assumed that they serve to protect human dignity. Defined in this way, human rights to property are found in the UDHR, some special-purpose global human rights conventions, and regional human rights treaties. These standards – taken alone or together with new rights to property in international investment treaties and domestic constitutions – may also show

[152] Cf. Yusuf, "Equal Rights and Self-Determination," p. 384; *Portugal* v. *Australia* (1995) ICJ Reports 90, Dissenting Opinion of Judge Weeramantry, pp. 209–215; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* (2004) ICJ Reports 136, paras. 155–159.

[153] Schrijver, *Sovereignty Over Natural Resources*, pp. 14–15. See also UN Doc. A/2929, pp. 38–45; Draft International Covenants on Human Rights: Report of the Third Committee, Prepared by Hermod Lannung, UN Doc. A/3077 (December 8, 1955), paras. 44, 65.

[154] Schrijver, *Sovereignty Over Natural Resources*, pp. 1, 5–6, 20–24; Salomon, "From NIEO to Now," 39–40.

[155] Schrijver, *Sovereignty Over Natural Resources*, pp. 11–19. Cf. Miranda, "Intrastate Natural Resource Allocation," 801.

[156] "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." See generally Nowak, *CCPR Commentary*, pp. 24–25; Summers, *Peoples in International Law*, pp. 180–181.

that states now accept individual and collective rights to property in general international law. Whether such rights apply to and would be invoked in asset recovery cases is much less certain and would involve a much more detailed inquiry into state opinion and practice than can be conducted here. Thus, my focus will be on individual rights to property in regional human rights treaties, as well as collective interests as they are recognized in those instruments.

2.4 Case studies

Abstract definitions of corruption, asset recovery, and human rights to property set the limits for this book by enabling me to identify the international norms that I describe and compare. They do not say much about how those concepts relate to each other or whether these relationships are important, however. This will be determined by the ways in which states seek to recover and return illicit wealth. Hence, I end this chapter with a brief survey of asset recovery cases in which Switzerland has been a haven jurisdiction. Criticized as a safe harbor for PEP illicit wealth in the 1980s and 1990s, Switzerland has sought to defend and restore its reputation by reforming its laws, supporting asset recovery projects, and actively helping victim states to request its assistance.[157]

2.4.1 The success stories

During the mid-1980s and the early 2000s, Switzerland cooperated with the Philippines, Peru, and Nigeria to return more than USD 1 billion in assets that had been found in its financial institutions and traced to disgraced senior political figures and their relatives and associates. These cases are rightly known as asset recovery "success stories,"[158] although the cooperating governments encountered many difficulties in seeking to (re)gain/return the funds.

2.4.1.1 The Philippines versus Ferdinand and Imelda Marcos

Ferdinand and Imelda Marcos dominated Philippine politics from 1965 until a military and popular uprising removed Ferdinand Marcos from the presidency in February 1986.[159] Anticipating political developments, in March 1986, the Swiss Federal Council unilaterally froze hundreds of millions of US dollars held by Marcos, his family and associates in Swiss bank accounts.[160] The freeze allowed Switzerland to prevent the dissipation of funds during the transition

[157] See further Pieth, "Die Herausgabe Vermögenswerte," p. 498; Zellweger, "Swiss Policy on Restitution."
[158] Pieth (ed.), *Recovering Stolen Assets*, Pt. I.
[159] Marcelo, "The Long Road from Zurich to Manila," pp. 90–91.
[160] Marcelo, "The Long Road from Zurich to Manila," p. 93; *Los Angeles Times*, "Swiss Government Freezes Marcos' Accounts"; Ramasastry, "Secrets and Lies?" 431.

and before the receipt of an MLA request. Shortly thereafter, the Philippines requested Swiss assistance in obtaining further information about the Marcos' Swiss holdings and corrupt activities, as well as in preserving evidence and restraining, confiscating, and eventually repatriating those funds.[161]

In December 1990, the Swiss Federal Supreme Court ordered the transfer of documents to the Philippines and approved "in principle" the repatriation of funds;[162] however, it deferred the actual transfer of the monies until a final decision had been issued by a Philippine criminal court and the Philippines government had provided assurances that those proceedings would be conducted fairly in accordance with Art. 14 ICCPR.[163] The court also specified that the Philippines had to commit to inform Switzerland of developments in ongoing confiscation and compensation claims.[164] At the time, some 10,000 individuals were struggling to collect USD 2 billion in damages, which had been awarded them under the US Alien Tort Claims Act[165] and which the Philippines, at one point, had committed to partially honor.[166] The Philippines had previously discontinued its own civil action under the US Racketeering and Corrupt Organizations Act[167] when Ferdinand Marcos' estate and Imelda Marcos authorized US customs authorities and banks to hand over frozen cash and seized valuables.[168]

In August 1995, the Philippines again requested the confiscation and repatriation of the Swiss dollar deposits, relying on new proceedings in the Philippines and amendments to the Swiss Federal Act of March 20, 1981, on International Mutual Assistance in Criminal Matters (IMAC)[169] that relaxed the requirement for a final judgment.[170] The amounts were remitted to an

[161] Bundesgerichtsentscheide (BGE) 113 Ib 257 (July 1, 1987), p. 262. See further Marcelo, "The Long Road from Zurich to Manila," pp. 93–94; Salvioni, "Recovering the Proceeds of Corruption."

[162] BGE 116 Ib 452 (December 21, 1990), pp. 462–463.

[163] BGE 123 II 595 (December 10, 1997), p. 624. See further FOJ, "Philippines Given Access to Over USD 683 Million"; Salvioni, "Recovering the Proceeds of Corruption," p. 84.

[164] BGE 123 II 595 (December 10, 1997), pp. 622, 624.

[165] 28 USC § 1350.

[166] For an overview of the facts, see *Maxim Hilao* v. *The Estate of Ferdinand Marcos* 910 F. Supp. 1460 (February 3, 1995), 1493–1494; *Maxim Hilao* v. *The Estate of Ferdinand Marcos* 103 F.3d 767 (9th Cir. 1996), pp. 771–772; *Maxim Hilao* v. *The Estate of Ferdinand Marcos and Others* 393 F.3d 987 (9th Cir. 2004), p. 989–992.

[167] 18 USC §§ 1961–1968, esp. § 1964.

[168] *The Republic of the Philippines* v. *Ferdinand E. Marcos and Others* 818 F.2d 1473 (9th Cir. 1987); *The Republic of the Philippines* v. *Ferdinand E. Marcos and Others* 862 F.2d 1355 (9th Cir. 1988); *Hilao* v. *Marcos* 94 F.3d 539 (9th Cir. 1996), p. 542.

[169] Bundesgesetz vom 20. März 1981 über internationale Rechtshilfe in Strafsachen (Rechtshilfegesetz, IRSG) (SR 351.1) available in unofficial English translation at www.rhf.admin.ch/rhf/de/home/straf/recht/national/sr351-1.html, accessed October 15, 2013.

[170] BGE 123 II 595 (December 10, 1997), pp. 589, 613–614; Marcelo, "The Long Road from Zurich to Manila," p. 94; Pieth, "Die Herausgabe Vermögenswerte," pp. 501–502; Salvioni, "Recovering the Proceeds of Corruption," pp. 79–80.

escrow account at the Philippine National Bank in 1998 and released in 2003 after the Philippine Supreme Court found in favor of the Republic in a confiscation action. The Presidential Commission on Good Governance had succeeded in arguing that:

- amounts or property acquired by Imelda or Ferdinand Marcos during their official terms were manifestly out of proportion to their salaries or legitimate incomes;
- the Marcoses had failed to rebut the resulting presumption that the assets were unlawfully acquired; and,
- hence, the assets were forfeit to the state.[171]

As a result, the Philippines received USD 683 million from Switzerland.[172]

2.4.1.2 Nigeria versus Sani Abacha

Brought to power in 1993 by a military coup, General Sani Abacha led Nigeria's military government until his sudden death in 1998.[173] Five years in office, General Abacha and his affiliates acquired an estimated USD 1–5 billion[174] through embezzlements from the Nigerian Central Bank, the inflation of government contracts, and the solicitation of foreign bribes.[175] His immediate military successors decreed the return of such assets and established a special panel to investigate alleged acts of corruption under the Abacha regime.[176] Based on the panel's findings, Nigeria charged two of the general's sons and an associate with property offenses and sought the help of foreign governments in gathering evidence and tracing, restraining, and confiscating suspected illicit wealth.[177]

Switzerland granted Nigeria's requests for the handing over of documents and frozen assets in January 2002 and August 2004,[178] its Federal Supreme

[171] An Act Declaring Forfeiture in Favor of the State any Property Found to have been Unlawfully Acquired by any Public Officer or Employee and Providing for Proceedings Therefore, approved June 18, 1955, ss. 2, 6, cited *Republic* v. *Sandiganbayan* GR No. 152154 (July 15, 2003), per Corona J (for the court).

[172] Schweizerischer Bundesrat, Botschaft zum Bundesgesetz über die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen (RuVG) (April 28, 2010), Anhang 1, available in unofficial English translation at www.eda.admin.ch/eda/en/home/topics/finec/poexp.html, accessed October 15, 2013 (Dispatch on the RIAA).

[173] Daniel and Maton, "A Nation's Thief," pp. 63–64; Monfrini, "The Abacha Case," p. 42.

[174] Human Rights Watch, "Nigeria: Criminal Politics," p. 13, n. 16. Cf. Basel Institute on Governance, "Cases: Sani Abacha."

[175] BGE 131 II 169 (February 7, 2005).

[176] Daniel and Maton, "A Nation's Thief," p. 66; Monfrini, "The Abacha Case," p. 43.

[177] Monfrini, "The Abacha Case," p. 45.

[178] See FOJ, "Abacha's Accounts Frozen as Provisional Measure: Nigeria has 3 Months to File a Request for Mutual Legal Assistance"; "Further Legal Assistance Files Handed Over in Abacha Case: Guarantees of a Fair Trial in Nigeria"; "Abacha Assets to be Handed Over to Nigeria: Switzerland Doesn't Provide a Refuge for Funds of Criminal Origin."

Court affirming that funds could be repatriated without a "final and executable" Nigerian order because they were clearly of criminal origin.[179] The court read the IMAC as subject to the extended confiscation provisions of the Swiss Criminal Code.[180] These created a rebuttable presumption that assets of a participant or supporter of a criminal organization were at the organization's disposal. General Abacha and his accomplices had established a criminal structure, the goals of which were to divert funds belonging to the Nigerian Central Bank and otherwise to profit from corrupt transactions.[181] As no evidence of the legitimate origins of the funds was forthcoming, the court held that the frozen amounts (USD 508 million) could be handed over to Nigeria for use in World Bank-monitored projects.[182]

Out-of-court settlements, money laundering investigations, and MLA proceedings in Switzerland, Liechtenstein, Luxembourg, and Jersey led to the repatriation of further amounts to Nigeria.[183] Civil proceedings in the United Kingdom (UK) also enabled the Nigerian government to test the respondents' evidence, though judicial review applications delayed the provision of assistance and the lack of freezing orders allowed the dissipation of the funds.[184] A "global settlement" between prosecutors in several jurisdictions and General Abacha's survivors and associates also failed.[185] Had Abacha's son not repudiated the deal, it would have resulted in the voluntary transfer of USD 1 billion in frozen funds to the Bank for International Settlements (BIS) in favor of Nigeria and the cessation of criminal and MLA proceedings against the parties to the agreement.[186]

2.4.1.3 Peru versus Vladimiro Lenin Montesinos Torres

In the final success story, Peru sought Switzerland's assistance in recovering monies associated with Vladimiro Lenin Montesinos Torres, who had been

[179] BGE 131 II 169 (February 7, 2005). See also BGE 129 II 268 (April 23, 2003) and, further, Monfrini, "The Abacha Case," pp. 55–59.

[180] IMAC, art. 74a; Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 (SR 311.0) (Swiss Criminal Code), art. 72 (then art. 59); BGE 131 II 169 (February 7, 2005), 183–184, para. 9.1.

[181] BGE 131 II 169 (February 7, 2005), 184, para. 9.1. See also Pieth, "Die Herausgabe Vermögenswerte," p. 504.

[182] FOJ, "Abacha Assets to be Handed Over to Nigeria: Switzerland Doesn't Provide a Refuge for Funds of Criminal Origin."

[183] Daniel and Maton, "A Nation's Thief," p. 77; FOJ, "More Abacha Funds Returned: USD 50 Million Transferred to BIS after Out-of-Court Settlement"; Monfrini, "The Abacha Case," pp. 51, 54; swissinfo.ch, "Abacha's Son Found Guilty in Geneva."

[184] See further *R* v. *Secretary of State* [2001] EWHC Admin 787 Official Transcript (per Tuckey LJ); Daniel and Maton, "A Nation's Thief," pp. 74–76; Monfrini, "The Abacha Case," p. 54.

[185] Monfrini, "The Abacha Case," p. 52.

[186] FOJ, "Out-of-Court Settlement in the Abacha Case: Nigeria to Receive More than a Billion USD; the Countries Concerned Cooperate in the Implementation of the Settlement."

de facto head of Peruvian intelligence and chief advisor to Peruvian President Alberto Fujimori.[187] After the collapse of the Fujimori government in 2000, Montesinos was convicted and sentenced in Peru for the assumption of public functions, abuse of authority, misappropriation, conspiracy, bribery, illegal enrichment, and arms smuggling.[188] Aided by new criminal procedure laws,[189] the Peruvian government then obtained almost USD 180 million in foreign Montesinos-related assets:

- USD 50 million found by a Swiss magistrate to be illegal commissions on government contracts and therefore transferable to Peru without a criminal conviction or confiscation order;[190]
- USD 72.5 million relinquished voluntarily by Cayman and Swiss bank account holders pursuant to agreements with Peruvian prosecutors;[191] and
- USD 55 million forfeited by US and Peruvian courts as the proceeds of embezzlement and money laundering.[192]

The monies were paid into a special-purpose fund, which the Peruvian government had established to "allow [it] to manage the recovered assets transparently and in a manner fitting to their purpose";[193] nonetheless, commentators have voiced concerns about how the funds were actually dispersed.[194]

2.4.2 The failed states

In a second set of cases, also connected to political transitions of the 1980s and 1990s, the Swiss government was unable to hand over assets in response to requests for assistance. Political instability in the victim states delayed the MLA process and resulted in the expiry of statutes of limitations. Switzerland responded, in the second of these cases, by introducing a special-purpose asset recovery law.

[187] Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH, "Montesinos Factsheet"; Jorge, "The Peruvian Efforts," p. 90; Swiss Federal Council, Dispatch on the RIAA, Annex 1.
[188] Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH, "Montesinos Factsheet."
[189] Jorge, "The Peruvian Efforts," pp. 113–115; Brun et al., *Asset Recovery Handbook*, p. 15.
[190] FOJ, "Montesinos Case: Switzerland Transfers 77 Million US Dollars to Peru"; Jorge, "The Peruvian Efforts," pp. 117–118.
[191] FOJ, "Montesinos Case: Switzerland Transfers 77 Million US Dollars to Peru"; Jorge, "The Peruvian Efforts," pp. 117–118, 122–123.
[192] Jorge, "The Peruvian Efforts," pp. 118–120, 123.
[193] Swiss Federal Council, Dispatch on the RIAA, Annex 1.
[194] Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH, "Montesinos Factsheet"; Jimu, "Managing the Proceeds of Asset Recovery."

2.4.2.1 The DRC versus Mobutu Seso Seko

In July 2009, the Swiss Federal Council released assets linked to the deceased former Congolese Head of State, Mobutu Seso Seko, and his family.[195] Some USD 7 million in bank deposits and real estate[196] had been frozen in May 1997 following a request for legal assistance by the Democratic Republic of Congo (DRC).[197] When, in 2003, the DRC failed to pursue its MLA request, the Swiss Federal Council imposed an executive freeze of three years based on Art. 184(3) Swiss Federal Constitution.[198] That freeze was then extended three times until April 2009 to allow the Congolese government to make further representations to the Swiss authorities.[199] However, by the time it had submitted a criminal complaint at the beginning of 2009, the statutes of limitations for the offenses of money laundering and membership of a criminal organization had expired.[200] Public interest objections and "twelve years of [Swiss] efforts" notwithstanding,[201] the council lifted the freeze.

2.4.2.2 Haiti versus Jean-Claude "Baby Doc" Duvalier

The *Dechoukaj* ("uprooting") of President Jean-Claude "Baby Doc" Duvalier in February 1986[202] was quickly followed by Haiti's request to Switzerland for assistance in tracing, freezing, and repatriating assets connected to the ex-President and his family.[203] The Swiss authorities identified a number of suspicious accounts, including one held in the name of a Liechtenstein foundation beneficially owned by Baby Doc's mother.[204] By 2007, the MLA proceedings were declared to be without a prospect of success and the Swiss executive froze the accounts; the freeze was extended to allow Haiti to

[195] FDFA, "Switzerland is Forced to Unfreeze Mobutu Assets." See generally Häflinger, "Frühe Weihnachten für den Mobutu-Clan"; Swiss Federal Council, Dispatch on the RIAA, Annex 2.

[196] FDFA, "Extension of the Final Prolongation of the Freezing of Mobutu's Assets"; FOJ, "Mobutu Villa in Savigny to be Sold – Proceeds to be Transferred into a Blocked Account."

[197] Swiss Federal Council, Dispatch on the RIAA, Annex 2.

[198] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (SR 101) (Federal Constitution of the Swiss Confederation of April 18, 1999) available in unofficial translation at www.admin.ch/org/polit/00083/index.html, accessed October 15, 2013.

[199] Swiss Federal Council, Dispatch on the RIAA, Annex 2.

[200] Swiss Criminal Code, arts. 72, 97–98, 260ter, 305bis. See further Federal Authorities of the Swiss Confederation, Office of the Attorney General (OAG), "Fall Mobutu: Die BA eröffnet kein Verfahren."

[201] FDFA, "Switzerland is Forced to Unfreeze Mobutu Assets"; Swiss Federal Council, Dispatch on the RIAA, Annex 2.

[202] Wilentz, "The Dechoukaj This Time."

[203] BGE 136 IV 4 (January 12, 2010), p. 5; Swiss Federal Council, Dispatch on the RIAA, Annex 3.

[204] BGE 136 IV 4 (January 12, 2010), p. 5.

recommence local criminal proceedings and the MLA process with Switzerland.[205] In February 2009, the Office of the Attorney General of Switzerland (OAG) ordered the funds be returned to Haiti for use in humanitarian projects, reasoning that the Duvalier family was a criminal organization and that the funds had not been shown to have a licit source.[206]

However, the Swiss Federal Supreme Court invalidated the attorney's decision on appeal.[207] First, echoing the reasoning of the OAG in the Mobutu case, it held that the request for assistance was inadmissible: The statute of limitations for membership of a criminal organization had expired in 2001, fifteen years after the putsch against Duvalier.[208] Second, it rejected the alternative argument that the funds were inextricably linked with political assassinations and crimes against humanity for which there was no statute of limitations.[209] In the view of the court, it would have been necessary to demonstrate a direct connection between each of those offenses and the assets in question.[210]

The Swiss Federal Council again froze the funds while the Swiss Parliament considered a new federal law on the restitution of PEP illicit wealth.[211] The Federal Act of October 1, 2010, on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (Restitution of Illicit Assets Act or RIAA),[212] which came into effect on February 1, 2011, allows Switzerland to hand over assets to states that lack the institutional capacity to pursue a pending MLA request in relation to the assets of PEPs or their close associates.[213] The Federal Council may order the freezing and the Federal Administrative Court the forfeiture of such assets, including by relying on a rebuttable presumption of unlawful acquisition.[214] The presumption applies when:

> a. the wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person; and

205 Swiss Federal Council, Dispatch on the RIAA, Annex 3, p. 47.

206 BGE 136 IV 4 (January 12, 2010), p. 7; Swiss Federal Council, Dispatch on the RIAA, Annex 3.

207 BGE 136 IV 4 (January 12, 2010), pp. 15–16.

208 BGE 136 IV 4 (January 12, 2010), pp. 12–13.

209 BGE 136 IV 4 (January 12, 2010), pp. 13–14.

210 BGE 136 IV 4 (January 12, 2010), p. 14.

211 FDFA, "The Duvalier Accounts Remain Blocked while a Draft Law will be Reviewed that could Permit Illicit Assets to be Confiscated."

212 Bundesgetz über die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen (RuVG) vom 1. Oktober 2010 (Stand am 1. Februar 2011) (SR 196.1) available in unofficial English translation at www.eda.admin.ch/eda/en/home/topics/finec/poexp.html, accessed October 15, 2013. See further FOJ, "The Federal Council Presents a Draft Law on the Restitution of Illicit Assets to the Two Chambers of Parliament."

213 RIAA, Arts. 1, 2(b)(2).

214 RIAA, Arts. 2, 5, 6.

b. the level of corruption in the country of origin or surrounding the politically exposed person in question during their term of office is or was acknowledged as high.[215]

On February 2, 2011, the Federal Council applied the RIAA to the Duvalier assets, ordering a further administrative freeze and authorizing the Federal Department of Finance (FDF) to apply for forfeiture orders from the Federal Administrative Court.[216] In September 2013, the Federal Administrative Court granted the application. It found that the respondent foundation and Duvalier family members had failed to explain an extraordinary increase in the assets of the frozen account in circumstances in which the presumption applied.[217] It also rejected an argument that the Federal Council's final freezing order was invalid and that the RIAA was unconstitutional due *inter alia* to the presumption of innocence in Art. 6 ECHR, the prohibition on respective penalties in Art. 7(1) ECHR, and the rights to proportionality and property in Swiss federal law.[218] If the judgments are not successfully appealed, the assets will be returned to Haiti as funding for programs that aim to "improve the living conditions of the [Haitian] people . . . , strengthen the Rule of Law in [Haiti] and to fight the impunity of criminals."[219]

In the meantime, Duvalier has returned to Haiti where he was initially investigated for corruption offenses and crimes of violence, including crimes against humanity.[220] On January 30, 2012, a little more than a year after his arrival, the investigating magistrate dismissed all but the least serious charge of misappropriation, claiming that the statute of limitations had expired for the other offenses.[221] Just days before, President Michel Martelly had told the Associated Press that he had "little appetite" for a Duvalier trial;[222] he later denied that he would be "seek[ing] [to] pardon" his predecessor.[223] Challenges to the magistrate's decision by both Duvalier and his alleged victims are pending before the Haitian Court of Appeal.[224] According to the Swiss

215 RIAA, Art. 6(1) (unofficial translation).
216 Federal Department of Finance of the Swiss Confederation (FDF), "Department of Finance Initiates Forfeiture of Frozen Duvalier Assets"; FDFA, "Duvalier Assets to be Forfeited on the Basis of New Restitution Act"; "FAQ: New Act on the Restitution of Illicit Assets (RIAA)."
217 C-2528/2011 (FAC, September 24, 2013), para. 5.4.4.
218 C-1371/2010 (FAC, September 23, 2013); C-2528/2011 (FAC, September 24, 2013), paras. 6–9.
219 RIAA, Arts. 8, 9(1) (unofficial translation).
220 Human Rights Watch, "Haiti's Rendezvous with History," pp. 24–25.
221 Human Rights Watch, "Duvalier Ruling Disappoints Justice"; *The Economist*, "Haiti's Judiciary: Just What the Doc Ordered."
222 Associated Press, "Haitian Leader Could Pardon Duvalier."
223 Ferreira, "Haiti Papers Over the Past."
224 Douchet and Archibold, "Haitian Ex-Dictator Is Questioned in Court Over Reign"; The Centre for Justice and Accountability, "The 'Baby Doc' Duvalier Prosecution."

Federal Department of Foreign Affairs (FDFA), the Haitian criminal proceedings against Duvalier are "not likely to have any influence on the confiscation procedure with regard to the Duvalier assets in Switzerland."[225]

2.4.3 The counter-terrorist sanctions regimes

Executive asset freezes are by no means limited to Switzerland or to the goal of asset recovery. Also known as targeted financial sanctions, these coercive measures are intended to limit the financial and economic activities of individuals or groups so as to restrict or cause them to change their behavior.[226] In their most familiar form, they are ordered by the UN Security Council (SC) under Ch. VII of the Charter of the United Nations (UNC)[227] to address threats to international peace and security.[228] The SC identifies the targeted individuals and groups in the resolution establishing the sanctions regime and/or in a list created by one of its sub-committees. Alternatively, it charges UN member states with implementing the sanctions against anyone who meets the criteria in the resolution.[229] Either way, targeted financial sanctions differ from restraining orders imposed to achieve asset recovery as they do not give effect to MLA requests or mutual recognition notices; they do not presuppose a connection between a thing and an offense; and they do not (necessarily) culminate in the confiscation of the frozen assets.[230]

From the late 1990s, the SC passed a series of resolutions by which it required UN member states to take steps to interdict finance for Islamic terrorism.[231] By Res. 1267 (1999) and 1333 (2000) (as amended), it required them to freeze the funds and financial resources of Usama bin Laden, the Al-Qaida organization,

[225] FDFA, "FAQ: New Act on the Restitution of Illicit Assets (RIAA)," Qn. 8.

[226] See generally Biersteker and Eckert, "Strengthening Targeted Sanctions," p. 5, n. 2; Cameron, "UN Targeted Sanctions," 159–160, 162–163; "The ECHR, Due Process, and UNSC Counter-Terrorism Sanctions," pp. 4–9; Eckes, *EU Counter-Terrorist Policies*, Ch. 1, esp. pp. 15–22; Farrall, *Sanctions and the Rule of Law*, Ch. 1, esp. pp. 6–9, 143, Annex 2; Fassbender, "Targeted Sanctions and Due Process"; The Swiss Confederation, UN Secretariat, and Watson Institute for International Studies Brown University, "Targeted Financial Sanctions: A Manual for Design and Implementation," p. ix.

[227] San Francisco, June 26, 1945, in force October 24, 1945, 1 UNTS XVI.

[228] See Biersteker and Eckert, "Strengthening Targeted Sanctions," p. 5. On sanctions ordered unilaterally by particular states or supranational organizations, see Cameron, "UN Targeted Sanctions," 162; Farrall, *Sanctions and the Rule of Law*, p. 7.

[229] Cameron, "UN Targeted Sanctions," 164–166; Eckes, *EU Counter-Terrorist Policies*, pp. 25–31, 37–43; Farrall, *Sanctions and the Rule of Law*, pp. 145–157. See, e.g., SC Res. 1373 (2001) adopted by the Security Council at its 4385th meeting, on September 28, 2001, UN Doc. S/RES/1373(2001), para. 1(c)–(d).

[230] See also Ivory, "Recovering Terrorist Assets in the United Kingdom," pp. 245–248.

[231] See generally Cameron, "The ECHR, Due Process, and UNSC Counter-Terrorism Sanctions," p. 4; Eckes, *EU Counter-Terrorist Policies*, pp. 23–37; Farrall, *Sanctions and the Rule of Law*, pp. 374–395.

and the Taliban.[232] All states were to ensure that no further financial resources were made available to bin Laden, Al-Qaida, or the Taliban or associated individuals, groups, undertakings, and entities as identified by the Al-Qaida Sanction Committee. The Swiss Federal Council issued an order to implement SC Resolutions 1267 and 1333,[233] as did other states and the EU.[234] However, the EU sanctions regime has been challenged on human rights grounds before EU courts,[235] and a complaint about Swiss anti-terrorist travel restrictions has been decided by Strasbourg's Grand Chamber.[236] Such cases are likely to influence how national and international courts deal with targeted financial sanctions that are used to achieve the *outcome* of asset recovery, as occurred during the Arab Spring.

2.4.4 The Arab Spring

The ongoing upheavals in the Middle East and North Africa are an important coda to this survey. Not only did the protesters complain of endemic political

[232] SC Res. 1267 (1999) adopted by the Security Council at its 4051st meeting, on October 15, 1999, UN Doc. S/RES/1267(1999); SC Res. 1333 (2000) adopted by the Security Council at its 4251st meeting, on December 19, 2000, UN Doc. S/RES/1333(2000); SC Res. 1363 (2001) adopted by the Security Council at its 4352nd meeting, on July 30, 2001, UN Doc. S/RES/1363(2001); SC Res. 1390 (2002) adopted by the Security Council at its 4452nd meeting, on January 16, 2002, UN Doc. S/RES/1390(2002); SC Res. 1452 (2002) adopted by the Security Council at its 4678th meeting, on December 20, 2002, UN Doc. S/RES/1452(2002); SC Res. 1455 (2003) adopted by the Security Council at its 4686th meeting, on January 17, 2003, UN Doc. S/RES/1455(2003); SC Res. 1526 (2004) adopted by the Security Council at its 4908th meeting, on January 30, 2004, UN Doc. S/RES/1526(2004); SC Res. 1730 (2006) adopted by the Security Council at its 5599th meeting, on December 19, 2006, UN Doc. S/RES/1730(2006); SC Res. 1735 (2006) adopted by the Security Council at its 5609th meeting, on December 22, 2006, UN Doc. S/RES/1735(2006); SC Res. 1822 (2008) adopted by the Security Council at its 5928th meeting, on June 30, 2008, UN Doc. S/RES/1822(2008); SC Res. 1904 (2009) adopted by the Security Council at its 6247th meeting, on December 17, 2009, UN Doc. S/RES/1904(2009).

[233] Verordnung vom 2. Oktober 2000 über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung "Al-Qaïda" oder den Taliban (SR 946.203) (as amended).

[234] See esp. Council Common Position of February 26, 2001, concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (2001/154/CFSP), OJ 2001 No. L57, February 27, 2001, p. 1; Council Regulation (EC) No. 881/2002 of May 27, 2002, OJ 2002 No. L129, May 29, 2002. See generally Eckes, *EU Counter-Terrorist Policies*, pp. 43–51.

[235] On the EU courts' decisions, see further n. 226 above and p. 193 and following and p. 245 and following below.

[236] *Nada* v. *Switzerland*, App. No. 10593/08 (2013) 56 EHRR 18. See also BGE 133 II 450 (November 14, 2007).

corruption,[237] but Switzerland unilaterally froze assets connected to leaders of the fallen regimes, as well as their family members and associates.[238] Following the flight of Tunisian President Zine El-Abidine Ben Ali and the resignation of Egyptian President Hosni Mubarak in January and February 2011, the Swiss Federal Council used its constitutional emergency powers to impose a three-year freeze on "monies and economic resources owned or under the control of [listed] natural persons, enterprises, and organizations."[239] It made it an offense to conceal, deal with, or transfer such monies and resources without government authorization.[240] It subsequently imposed measures on members and associates of Muammar el-Qaddafi's regime in Libya and Bashar al-Asaad's regime in Syria, albeit under the Federal Act of March 22, 2002, on the Implementation of International Sanctions (Embargos Act or EmbA).[241]

[237] Levey, "Snapshot: Fighting Corruption After the Arab Spring"; Sheahan, "Global Corruption Index Reflects Arab Spring Unrest."

[238] See generally EDA-Direktion für Völkerrecht, Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen (SRVG), Erläuternder Bericht zum Vorentwurf, Stand vom 8. Mai 2013, pp. 7, 9.

[239] Swiss Federal Constitution, Art. 184(3); Verordnung über Massnahmen gegen gewisse Personen aus Tunesien vom 19. Januar 2011 (SR 946.231.175.8), Art. 1(1) as amended by Verordnung über Massnahmen gegen gewisse Personen aus Tunesien Änderung vom 4. Februar 2011 (SR 946.231.175.8); Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februar 2011 (SR 946.231.132.1), Art. 1(1) (author's translation). See further FDFA, "Federal Council Orders Freeze of Any Assets Held by Former Tunisian President Ben Ali in Switzerland"; "Update of Annex to the Ordinance on Measures Against Certain Individuals from Tunisia"; "Amendment to the Annex to the Ordinance on Measures Against Certain Individuals from Tunisia"; "Federal Council Orders Freezing of Any Assets of Egypt's Former President Hosni Mubarak in Switzerland"; "Amendment to the Ordinance on Measures against Certain Persons from the Arab Republic of Egypt."

[240] Verordnung über Massnahmen gegen gewisse Personen aus Tunesien vom 19. Januar 2011, Arts. 1(2), 5(1)–(2); Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februar 2011, Arts. 1(2), 5(1)–(2).

[241] Bundesgesetz vom 22. März 2002 über die Durchsetzung von internationalen Sanktionen (Embargogesetz, EmbG) (SR 946.231) available in unofficial English translation at www.seco.admin.ch/themen/00513/00620/00621/index.html?lang=en, accessed October 15, 2013; Verordnung über Massnahmen gegen gewisse Personen aus Libyen vom 21. Februar 2011 (SR 946.231.149.82); Verordnung über Massnahmen gegenüber Syrien vom 18. Mai 2011 (SR 946.231.172.7), arts. 2–3; Verordnung über Massnahmen gegenüber Syrien vom 8. Juni 2012 (SR 946.231.172.7), Art. 10. See further FDFA, "Freeze on Assets"; Swiss Federal Council, "Sanctions against Libya"; Staatssekretariat für Wirtschaft, "Weitere Sanktionsmassnahmen gegenüber Libyen"; "Verordnung über Massnahmen gegen Syrien"; "Verschärfung der Sanktionen gegenüber Syrien."

Other states and international organizations issued equivalent orders in response to the Tunisian,[242] Egyptian,[243] and Syrian upheavals.[244] Furthermore, with respect to the situation in Libya, the SC required UN member states to "freeze . . . all funds, other financial assets and economic resources which are owned or controlled . . . by individuals or entities" named in an annexed list, as well as those of "the Libyan authorities, as designated" by a new SC sub-committee, and "individuals and entities acting on their behalf or at their direction, or by entities owned or controlled by them."[245] UN member states were, moreover, to ensure that no such funds, financial assets, or economic resources were made available to or for the benefit of listed parties by their nationals or "individuals or entities within their territory."[246] In addition, "[c]onsidering that widespread and systematic attacks . . . against the civilian population may amount to crimes against humanity,"[247] the SC referred the Libyan situation to the Prosecutor of the International Criminal Court (ICC) and authorized a military intervention.[248]

[242] See, e.g., Council Decision 2011/72/CFSP of January 31, 2011, concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ 2011 No. L28, February 2, 2011, p. 62; Council Regulation No. 101/2011 of February 4, 2011, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia, OJ 2011 No. L28, February 5, 2011, p. 62 (EU); Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2011–78, March 23, 2011 (Canada).

[243] See, e.g., Council Decision 2011/172/CFSP of March 21, 2011, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, OJ 2011 No. L76, March 21, 2011, p. 63; Council Regulation No. 270/2011 of March 21, 2011, concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt, OJ 2011 No. L76, March 21, 2011, p. 4 (EU).

[244] See, e.g., Council Regulation (EU) No. 442/2011 of May 9, 2011, concerning restrictive measures in view of the situation in Syria, OJ 2011 No. L121, May 10, 2011, p. 1; Council Decision 2011/782/CFSP of December 1, 2011, concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP No. L319, December 2, 2011, p. 56; Council Decision 2012/739/CFSP of November 29, 2012, concerning restrictive measures against Syria and repealing Decision 2011/782/CFSP, OJ 2012 No. L 330, November 29, 2012, p. 21; Council Decision 2013/255/CFSP of May 31, 2013, concerning restrictive measures against Syria, OJ 2013 No. L 147, June 1, 2013, p. 14 (EU); Executive Order 13572 of April 29, 2011, Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria; Executive Order 13573 of May 19, 2011, Blocking Property of Senior Officials of the Government of Syria (US); Executive Order of August 18, 2011, Blocking Property of the Government of Syria and Prohibiting Certain Transactions with respect to Syria (US). On the Arab League sanctions, see MacFarquhar and Bakri, "Isolating Syria, Arab League Imposes Broad Sanctions"; Shelton and Wright-Carozza, *Regional Protection of Human Rights*, pp. 99–100.

[245] SC Res. 1970 (2011) adopted by the Security Council at its 6491st meeting, on February 26, 2011, UN Doc. S/RES/1970(2011), para. 17; SC Res. 1973 (2011) adopted by the Security Council at its 6498th meeting, on March 17, 2011, UN Doc. S/RES/1973(2011), para. 19.

[246] SC Res. 1970, para. 17; SC Res. 1973, para. 19.

[247] SC Res. 1970, Preamble.

[248] SC Res. 1970, para. 4; SC Res. 1973, para. 4.

In the almost three years since these orders were issued, several of the targeted Arab and North African leaders have been arrested, convicted, or killed. In a series of trials *in absentia*, Tunisian courts found Ben Ali, members of his family, and his associates guilty *inter alia* of corruption, property, drug, weapons, and customs offenses, as well as torture.[249] Ben Ali himself was convicted for complicity in the murder of protesters.[250] Mubarak and his former interior minister were held criminally responsible for failing to prevent such killings but later successfully appealed;[251] a handful of charges for passive bribery and embezzlement against the former president and his sons were dismissed due to the expiry of the statute of limitations.[252] According to media reports, all of these charges are to be the subject of retrials; meanwhile, Mubarak has been released into house arrest.[253] As for the former Libyan regime, Seif al-Islam el-Qaddafi is detained in Libya awaiting trial before the ICC;[254] his father and brother, Muatassim, were killed in the custody of a revolutionary militia.[255] President Ali Abdullah Saleh of Yemen resigned on the promise of immunities from prosecution for himself and his entourage.[256] This leaves only King Hamad bin Isa in charge of Bahrain and Bashar al-Asaad tenuously in control of war-torn Syria.

Though the Swiss executive freezing orders do not mention asset recovery and do not expressly connect the freezing of funds to the commission of an offense,[257] the return of assets is clearly the goal of the Swiss and Arab regimes. Both Tunisian and Egyptian representatives have lodged MLA requests for

[249] Adetunji, "Ben Ali Sentenced to 35 Years in Jail"; Deutsche Presse Agentur, "Ben Ali zu weiterer langer Haftstrafe verurteilt"; *Los Angeles Times*, "Tunisia: Court Sentences 25 Relatives of Ben Ali and his Wife to Prison"; Reuters, "Tunis Court Finds Former Leaders Guilty of Torture"; Stauffer, "Kurzer Arm der tunesischen Justiz," p. 5.

[250] Byrne, "Zine al-Abidine Ben Ali Gets Life."

[251] *New York Times*, "Times Topics: Hosni Mubarak"; UPI, "Mubarak Retrial Suspended until October."

[252] Associated Press, "Historic Trial in Egypt: Hosni Mubarak Faces Justice from his Bed"; El Sheikh, "Egypt: Mubarak's Trial Extended"; *New York Times*, "Times Topics: Hosni Mubarak."

[253] Kirkpatrick and Nordland, "Mubarak is Moved from Prison to House Arrest"; UPI, "Mubarak Retrial Suspended until October."

[254] *Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (The Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*), No. ICC-01/11–01/11 (ICC, May 31, 2013).

[255] *New York Times*, "Times Topics: Muammar el-Qaddafi (1942–2011)." See also NZZOnline, "Ghadhafi-Sohn Saif al-Islam in Libyen festgenommen"; Stamp and Elgood, "Gaddafi's Children in Exile, on the Run, or Dead."

[256] Bolliger, "Immunität für Jemens Autokraten"; Fahim and Kasinof, "Yemen's Leader Agrees to End 3-Decade Rule."

[257] Cf. EU Dec. 2011/72/CFSP, Preamble, para. 2, Art. 1; EU Dec. 2011/172/CFSP, Preamble, para. 2; Executive Order 13566, Preamble (referring to the risk of misappropriation in justifying and describing of the scope of the measures).

freezing and/or repatriation of assets with Switzerland,[258] and have met with Swiss officials regarding bilateral efforts at restitution.[259] The Swiss FDFA, for its part, has said that the freezes are intended "to ensure that the legitimate owners of these assets are discovered by the judge and that any eventual unlawfully acquired assets can be returned to the State in question."[260] The Swiss Federal Prosecutor has unilaterally opened investigations into organized crime and money laundering offenses with respect to the former Tunisian and Egyptian regimes.[261] An Egyptian government committee is tracing Mubarak-related illicit wealth abroad;[262] similar "asset recovery" committees have been established by Libya and Tunisia.[263]

Whether and, if so, when these joint efforts result in the transfer of frozen funds to the "countries of origin" remains to be seen, however. In 2013, there was renewed political unrest in Tunisia and Egypt, with the assassination of two prominent opposition figures in Tunis and the return to military rule in Cairo.[264] Egyptian and Tunisian authorities have encountered challenges within the Swiss legal system.[265] Because the Swiss government may not spontaneously share information it has gathered from financial institutions as suspicious transaction reports, Egypt is said to have struggled to complete its MLA requests. Further, the Federal Criminal Court at one point ruled that Egypt could not access the prosecutor's files in the local criminal proceedings as it could not be trusted to observe its undertaking not to use the information before the conclusion of the parallel MLA proceedings.[266] The court's concern with the unstable "institutional situation" in Egypt prompted the Swiss Federal Prosecutor to temporarily suspend its consideration of the Egyptian requests as

[258] EDA, SRVG Bericht, p. 7.

[259] FDFA, "Egyptian-Swiss Expert Meeting on Frozen Assets Restitution." See also FDFA, "Swiss Delegation of Experts in Cairo"; "Federal President Calmy-Rey at EU-Tunisia Task Force Meeting in Tunis"; "Swiss-Tunisian Expert Talks on Frozen Assets"; "Amendment to the Ordinance on Measures against Certain Persons from the Arab Republic of Egypt." See also FDFA, "Restitution of Illicit Assets in the Context of the Arab Spring: Meeting of Experts in Lausanne."

[260] FDFA, "Freeze on Assets." See also Federal Authorities of the Swiss Confederation, "Federal Council Orders Freeze of Any Assets Held by Former Tunisian President Ben Ali in Switzerland."

[261] EDA, SRVG-Bericht, p. 7.

[262] Mikhail, "Egypt Panel Seeks to Recover Mubarak Assets Abroad."

[263] See S/2013/99, paras. 207, 233–236. COSP, Open-Ended Intergovernmental Working Group on Asset Recovery, Progress made in the implementation of asset recovery mandates, UN Doc. CAC/COSP/WG.2/2013/3 (June 28, 2013), para. 67.

[264] Hottinger, "The Arab Revolutions in Transition," pp. 13–16.

[265] Saad et al., "The Egyptian Perspective," pp. 20, 22–24; swissinfo.ch, "Swiss 'Slow' to Return Tunisia Assets."

[266] Bundesstrafgericht (December 12, 2012), RR.2012.122. See further EDA, SRVG-Bericht, p. 18; Saad et al., "The Egyptian Perspective," pp. 23–24.

well.[267] Meanwhile, the Council of the EU has sought to enable member states to unilaterally share intelligence about the frozen funds;[268] however, the courts have removed parts of the asset freeze with respect to Tunisia. In May 2013, the EU's first instance court found insufficient evidence that some listed members of the Ben Ali family were "persons 'responsible for misappropriation of Tunisian State funds' [or] their associates."[269] Hence, the freezing decisions violated the right to property and had to be annulled.

As for Libya, the SC has "[e]xpresse[d] its intention to ensure that assets frozen . . . shall . . . be made available to and for the benefit of the people of the Libyan Arab Jamahiriya."[270] It has relaxed the asset freeze with respect to some entities,[271] "[s]tressing that national ownership and national responsibility are key to establishing sustainable peace and the primary responsibility of national authorities in identifying their priorities and strategies for post-conflict peace-building."[272] What will happen to the remaining funds, especially those connected to the Qaddafi family, is unclear. Once identified,[273] some may be subject to cooperative processes aimed at asset recovery; however, this presupposes that Libya is willing and able to obtain domestic confiscation orders and request assistance in their enforcement.[274] It also assumes that any orders so obtained would satisfy the requirements of haven states, given the procedures observed in Libya and competing third party claims.[275] Meantime, the

[267] Häuptli, "Rechtshilfe an Ägypten ausgesetzt"; news.ch, "Verfahren zu Mubarak-Gelder soll weitergehen."

[268] Council Regulation No. 1099/2012, Art. 1(3); Council Regulation No. 1100/2012, p. 16, Art. 1(3).

[269] Case T-187/11, *Trabelsi and Others* v. *Council of the EU* (May 28, 2013); Case T-200/11, *Al Matri* v. *Council of the EU* (May 28, 2013); Case T-188/11, *Chiboub* v. *Council of the EU* (May 28, 2013).

[270] SC Res. 1970, para. 18; SC Res. 1973, para. 20. See also SC Res. 2040 (2012) adopted by the Security Council at its 6733rd meeting, on March 12, 2012, UN Doc. S7RES/2040 (2012), para. 9; SC Res. 2040 (2012) adopted by the Security Council at its 6733rd meeting, on March 12, 2012, UN Doc. S/RES/2040 (2012), para. 9; SC Res. 2095 (2013) adopted by the Security Council at its 6934th meeting, on March 14, 2012, UN Doc. S/RES/2095 (2013), para. 13.

[271] SC Res. 2009 (2011) adopted by the Security Council at its 6620th meeting, on September 16, 2011, UN Doc. S/RES/2009 (2011), paras. 14–16, 19. See further Carste and Leftly, "Prosecutors Fly to Libya to Freeze Gaddafi's Swiss Assets"; Chellel, "Libyan Rebels Seek Qaddafi Family's UK Cash, Hampstead Mansion"; Dudin, "Deutschland will eingefrorene Milliarden wieder auftauen"; Quinton, "The Quest for Libya's Frozen Assets"; Richter, "As Libya Takes Stock, Muammar Gaddafi's Hidden Riches Astound."

[272] SC Res. 2009, Preamble.

[273] See S/2013/99, paras. 216, 228–230.

[274] See S/2013/99, paras. 207, 233–236. Cf. *Admissibility Decision (Gaddafi)* (ICC, May 31, 2013), Pt. V.

[275] See generally Criddle, "Humanitarian Financial Intervention," 613–614. See also *African Commission on Human and Peoples' Rights* v. *Libya (Order of Provisional Measures)*, App. No. 002/2013 (AfCtHPR, March 15, 2013).

panel established pursuant to SC Res. 1973 has reported attempts by UN member states "to confiscate Libyan assets, or to sell them, without reference to the legal Libyan owners."[276] It is also possible that some of the monies could be sought to satisfy ICC fines or forfeiture orders imposed on members or associates of the former regime.[277] However, the ICC prosecutor would have to demonstrate that the "proceeds, property and assets derived directly or indirectly from [the offense] without prejudice to the rights of *bona fide* third parties,"[278] much like the Swiss Attorney General in the initial action against Duvalier.

The challenges associated with the Arab Spring have prompted the Swiss Federal Council to prepare a new consolidated law on asset recovery.[279] Now a consultation draft, the Federal Act on Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (SRVG) would apply when there is reason to presume that a foreign PEP or a close associate is guilty of corruption or other crimes.[280] Its freezing, confiscation, and restitution provisions are modeled on Swiss state practice under Art. 184(3) Swiss Federal Constitution and the RIAA.[281] Thus, the SRVG would empower the Swiss Federal Council to freeze assets with a view to later acts of cooperation when governments or members of governments in "notoriously corrupt" states have lost or are about to lose power.[282] The Federal Council would also be entitled to freeze assets with a view to confiscation when attempts at cooperation have failed due to severe institutional deficiencies in the victim state or the insufficiency of its procedural guarantees according to European and international human rights standards.[283] When cooperation has failed, the Federal Administrative Court may forfeit the frozen assets if they are relevantly connected to a PEP (or close associate) and illicitly acquired; a presumption of illicit acquisition in almost identical terms to that in the RIAA would

276 S/2013/99, para. 221.
277 See further McCarthy, "What Happens to the Frozen Fortune?"
278 Rome Statute of the International Criminal Court, Rome, July 19, 1998, in force July 1, 2002, 2187 UNTS 3, Art. 77(2)(b).
279 Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte politisch exponierter Personen (SRVG), Vorentwurf vom 8. Mai 2013, available in German at www.admin.ch/ch/d/gg/pc/documents/2259/SRVG_Entwurf_de.pdf, accessed October 15, 2013. For an introduction to the draft law in English, see FDFA, "The Federal Council Opens the Consultation Procedure on the Draft of the Federal Act on the Freezing and Restitution of Potentates' Assets"; Adam and Zellweger, "Proposed Swiss Comprehensive Act on Asset Recovery," p. 175.
280 SRVG, Art. 1. For definitions, see Art. 2.
281 EDA, SRVG-Bericht, pp. 23–25.
282 SRVG, Art. 2 (other conditions relate to the connection between the assets and the PEP [or related party] and the protection of Swiss national interests).
283 SRVG, Art. 4(1)(d), (2). Bundesgesetz vom 20 März 1981 über internationale Rechtshilfe in Strafsachen (IRSG), SR 351.1, art. 2(a) (referring to the ECHR and ICCPR), discussed further EDA, SRVG-Bericht, pp. 29–30.

apply.[284] Confiscated wealth would be used in programs that aim to "improve the living conditions of the population . . . or to strengthen the rule of law in the country of origin and so to contribute to the avoidance of impunity."[285] Other provisions deal *inter alia* with the power of the FDFA to unilaterally share bank data,[286] the rights of third parties,[287] and administrative and judicial review.[288] Notably, challenges based on a lack of proportionality are inadmissible and freezing orders are entirely immune from judicial review.[289] At most, a listed party may request the FDFA remove his/her (or its) name from the annex to an order.[290]

Outside Switzerland, there would appear to be increasing international support for the goal of asset recovery by Arab states. Canada has passed a special-purpose asset freezing law and the UK is reported to be reviewing its legal framework on the "repatriat[ion of] stolen assets."[291] At the international level, the G-8's Deauville Partnership with Arab Countries in Transition has adopted an Action Plan on Asset Recovery, as part of which a first Arab Forum on Asset Recovery was convened in September 2012 and a second in October 2013.[292] Switzerland, which hosts the Lausanne Seminars on asset recovery,[293] participated.[294] These developments suggest further Swiss-style innovation in efforts to achieve asset recovery under the UNCAC, as well as coordination among haven and victim jurisdictions in multilateral settings.[295]

2.4.5 Preliminary conclusions

The case studies demonstrate several of the practical challenges involved in confiscating illicit wealth through processes of international cooperation in criminal matters. Even if suspected illicit wealth is still available and can be identified and restrained, requesting-*cum*-victim states may struggle to obtain criminal convictions and/or final confiscation orders against

[284] SRVG, Arts. 14–15. See further p. 43 and following above.
[285] SRVG, Arts. 17–18 (author's translation). Cf. RIAA, Arts. 8–9.
[286] SRVG, Arts. 11–13. [287] SRVG, Art. 16. [288] SRVG, Arts. 20–21.
[289] SRVG, Art. 21(3)–(4). [290] SRVG, Art. 20(1).
[291] Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (Canada); *Hansard*, HC, vol. 555, col. 76WS, December 17, 2012 (UK). See further, EDA, SRVG-Bericht, pp. 14–15.
[292] The Kingdom of Morocco and the United Kingdom, "Chair's Statement"; StAR, "Arab Asset Recovery Forum"; US Department of State, "Deauville Partnership with Arab Countries in Transition."
[293] See further FDFA, "International Expert Meeting on the Arab Spring and Asset Recovery."
[294] Qatar and United States, "Chair's Statement"; The Kingdom of Morocco and the UK, "Chair's Statement."
[295] Adam and Zellweger, "Proposed Swiss Comprehensive Act on Asset Recovery," p. 181.

former senior public officials or their family members and associates. The official's capture of the apparatus of government during his/her term;[296] the new government's ambivalence towards litigation against the former regime;[297] the prosecutorial or judicial authorities' lack of access to evidence about the offense or funds;[298] and the official's death, flight, or immunity from prosecution[299] may all impede the initiation or "successful" conclusion of criminal or confiscation proceedings in the victim state. When investigations, trials, or confiscation proceedings do take place, they may seem to deviate from standards of fair procedure demanded by the requested-*cum*-haven jurisdictions.[300] Concerns about the fairness of foreign procedures may prompt requested states to seek assurances. But, they may also result in the rejection of freezing order or MLA requests *ex officio* or upon appeal by interested parties.[301] Haven state skepticism towards the goal of asset recovery may also cause or compound delays in the processing of requests, permitting the dissipation of assets or evidence or enabling affected parties to plead the expiry of statutes of limitations.[302]

It is therefore unsurprising that cooperative confiscation processes have been most successful when requesting and/or requested states have modified their rules on cooperative restraint or confiscation or have employed alternative strategies for securing the return of illicit wealth to victim states. Civil and criminal proceedings in haven jurisdictions have netted substantial returns and provided incentives for settlements between asset-holders and prosecutors. Prosecutors have used their collective bargaining power to negotiate global settlements with family members of PEPs and others close to former regimes. In addition, states and international organizations have imposed financial sanctions with respect to current or serving leaders, apparently to secure those funds and economic resources for potential (cooperative) confiscations. Some have passed or are considering special-purpose laws on asset recovery. With each procedural reform or new unilateral action, states have lessened or circumvented the apparent strictures of cooperative confiscations; whether they do so at the expense of

[296] Jorge, "The Peruvian Efforts," pp. 112, 124–125.

[297] Stephenson et al., *Barriers to Asset Recovery*, pp. 25–26, 66. See also Greenberg et al., *Stolen Asset Recovery*, pp. 165–166.

[298] Bertossa, "What Makes Asset Recovery So Difficult?" p. 26; Pieth, "Recovering Stolen Assets," pp. 10–11; Stephenson et al., *Barriers to Asset Recovery*, pp. 58–59.

[299] Greenberg et al., *Stolen Asset Recovery*, pp. 1, 8; Stephenson et al., *Barriers to Asset Recovery*, p. 66.

[300] Bertossa, "What Makes Asset Recovery So Difficult?" p. 25; Greenberg et al., *Stolen Asset Recovery*, pp. 84, n. 149; Stephenson et al., *Barriers to Asset Recovery*, pp. 21–22.

[301] See also Stephenson et al., *Barriers to Asset Recovery*, pp. 20, 23.

[302] See also Stephenson et al., *Barriers to Asset Recovery*, pp. 24–25, 90–91.

established substantive and procedural rights in international law is a question for later chapters.

2.5 Conclusions

In describing the relationship between asset recovery measures in corruption cases and human rights to property in public international law, an initial problem is to define the key concepts. None has a universally agreed meaning which is stable between academic disciplines and political communities. Common usage of corruption emphasizes the characteristics of decay, spoilage, or decomposition in a moral or physical sense, as well as breaches of public duty through acts of bribery. But international legal definitions differ between the treaties and non-binding instruments, to the extent that they define corruption at all. The concept of asset recovery is equally elusive: It connotes a variety of goals and processes in common usage and in the UNCAC, where it is nonetheless connected to the convention's fundamental principles. Finally, the sources, scope, and requirements of human rights to property are problematic in philosophy and (international) law.

These challenges notwithstanding, I have provisionally defined and sourced the concepts of corruption, asset recovery, and human rights to property in public international law. Corruption was, first, a misuse of power or office for private gain that states were encouraged or required to criminalize under one of the anti-corruption treaties. Asset recovery was, second, the goal of preventing the movement of corruption-related (or illicit) wealth through regulated financial institutions by or for PEPs, and of ensuring that illicit wealth is secured and transferred to the state with legislative and adjudicative jurisdiction over the corruption offense. I distinguished asset recovery from the cooperative measures that states have deemed apt for ensuring the return of illicit wealth. Human rights to property were, third, positive and negative rights that pertain to the allocation and enjoyment of thing-based relationships and that serve to protect the human person and human dignity. They appear, as individual and collective entitlements, in regional human rights treaties and some global instruments. The proliferation of property clauses may strengthen the case for a right to property in customary international law.

With so much clear, I described several attempts by Switzerland and states in Asia, the Americas, Africa, and the Middle East to cooperate in the recovery/return of illicit wealth. The case studies demonstrated typical difficulties in securing and enforcing conviction and confiscation orders with respect to former PEPs and their relatives and associates. They showed how states attempt to circumvent these problems by retrospectively creating new cooperative confiscation rules and using alternative, unilateral procedures. These innovations were pivotal in the asset recovery success stories but may well give rise

to challenges and refusals in future cases. Anticipating this possibility, states, international organizations, and NGOs have called on governments to prevent "abuses" of due process guarantees, "legal procedures," and grounds for refusing assistance.[303] Whether their concerns are justified is at the heart of the questions explored in this book.

[303] COSP, Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech from October 24 to 28, 2011, UN Doc. CAC/COSP/2011/14 (November 10, 2011), Res. 4/4, para. 8; Stephenson et al., *Barriers to Asset Recovery*, pp. 23, further, pp. 21, 83; Transparency International UK, "Laundering and Looted Gains," p. 39.

3

Criminalizing corruption

To say that corruption is the misuse of power or office for private gain is not to say when corruption is a criminal offense and how it is to be investigated, prosecuted, and punished. Provisionally defining the term "corruption" in Chapter 2, I noted the ambiguity of that concept in public international law and the need for further definition with respect to the criminalization provisions in the suppression conventions. Hence, in this chapter, I describe the acts and omissions that states are encouraged or required to establish as criminal offenses within their jurisdictions under the anti-corruption treaties. Beforehand, I sketch the treaties' rules on the assumption of jurisdiction; afterwards, I outline their provisions on the detection, investigation, and prosecution of corrupt and corruption-related conduct. In interpreting each set of provisions, I draw on the reports of the treaties' monitoring bodies, the similarities and differences in their wording, as well as their preparatory works and academic commentary.[1] Having done so, I identify the ways in which state parties are required or encouraged to cooperate with respect to confiscation in Chapter 4.

3.1 Jurisdiction

International rules that require states to criminalize corrupt acts and omissions and to cooperate with respect to the confiscation of corruption-related wealth presuppose a division of regulatory competence between states, in other words, rules on jurisdiction.[2] They assume that the state with authority to prohibit, try, and punish an act of corruption is not the state with authority over the assets

[1] VCLT, Arts. 31(3)(c), 32(a).

[2] Boister, *Introduction to Transnational Criminal Law*, p. 16. On the concept of jurisdiction, see Cryer et al., *International Criminal Law and Procedure*, pp. 43–44; Lowe and Staker, "Jurisdiction," p. 313; Malanczuk, *Akehurst's International Law*, p. 109. On jurisdictional rules in the suppression conventions, see Boister, *Introduction to Transnational Criminal Law*, Ch. 12; Shaw, *International Law*, pp. 673–680. On the jurisdictional rules in the anti-corruption treaties, see ADB/OECD Initiative, "Criminalisation of Bribery," pp. 39–42; Bacio Terracino, *The International Legal Framework*, pp. 170–181; UNODC, "UNCAC Legislative Guide," paras. 491–493.

that are subject to the confiscation order.[3] The goal of asset recovery therefore presupposes rules that allocate legislative, judicial, and executive jurisdiction over corruption offenses between states.[4] Norms that require or empower state parties to "prescribe . . . the reach"[5] of their criminal laws against corruption are the subject of this section.

3.1.1 Mandatory grounds for assuming jurisdiction

The anti-corruption treaties require their state parties to establish jurisdiction over offenses committed in their territories. In the AUCPCC, COECrimCC, and OECD-ABC,[6] as well as in the anti-corruption treaties of the EU,[7] the duty applies to offenses committed "in part" in a state party's territory. The IACAC, SADC-PAC, UNCAC, and UNTOC require only that state parties establish jurisdiction over offenses committed "in" their territory;[8] however, the *travaux préparatoires* to the UNCAC (UNCAC Interpretative Notes) indicate that this wording "reflect[s] the understanding that the offense might be committed in whole or in part in the territory of the State Party."[9] Hence, it would seem most likely that the anti-corruption treaties require their state parties to assume jurisdiction when at least one element of the offense took place in their territory, regardless of whether the offense was commenced or completed in another state.[10]

[3] On the importance of jurisdictional rules for cooperative confiscation, see Stessens, *Money Laundering*, pp. 209, 215.

[4] On the distinction between legislative, judicial, and executive jurisdiction in public international law, see Malanczuk, *Akehurst's International Law*, pp. 109–110; Shaw, *International Law*, pp. 649–651.

[5] Boister, *Introduction to Transnational Criminal Law*, p. 135.

[6] AUCPCC, Art. 13(1)(a); COECrimCC, Art. 17(1)(a); OECD-ABC, Art. 4(1). On the degree of physical connection, see Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on November 21, 1997, ILM, 37 (1998), 8 (OECD-ABC Commentaries), para. 25.

[7] EU Dec. 2003/568/JHA, Art. 7(1)(a); EUCPFI, Art. 4(1), first indent; EUCPFI-P1, Art. 6(1)(a); EUOCC, Art. 7(1)(a).

[8] IACAC, Art. V(1); SADC-PAC, Art. 5(1)(a); UNCAC, Art. 42(1)(a); UNTOC, Art. 15(1)(a).

[9] GA Res. A/58/422/Add.1, Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its 1st to 7th sessions: addendum, UN Doc. A/58/422/Add.1 (October 7, 2003), para. 41.

[10] On "subjective" or "objective" territorial jurisdiction, see generally Cryer et al., *International Criminal Law and Procedure*, pp. 46–47; Lowe and Staker, "Jurisdiction," pp. 321–322; Malanczuk, *Akehurst's International Law*, pp. 110–111. On the anti-corruption treaties, see COECrimCC Explanatory Report, para. 79; Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 275–276; Pieth, "Article 4." See also OECD-WGB, Chile I, paras. 63–65; Canada III, p. 4, para. 16; Israel II, paras. 148–150; Mexico III, paras. 18–23; Sweden III, paras. 71–74, 79, 82; United Kingdom IIbis, para. 263.

Whereas the territoriality principle is the only mandatory basis for assuming jurisdiction in the OECD-ABC,[11] the IACAC, UNCAC, and UNTOC also insist that a state party assume jurisdiction over an offense if the alleged offender is present in its territory and it refuses to extradite that person because he/she is one of its nationals.[12] Under Art. 17(3) COECrimCC an equivalent duty applies to a party that has declared its right not to assume extraterritorial jurisdiction in part or in full over offenses by or involving its nationals, public officials, or members of its domestic public assemblies. Similarly, under EU Dec. 2003/568/JHA, and the EUOCC, EUCPFI, and EUCPFI-P1, EU member states are required to establish extraterritorial jurisdiction over convention offenses committed by their nationals on foreign territory if they may not extradite those individuals because they are nationals.[13] Hence, the second mandatory ground for assuming jurisdiction in the anti-corruption treaties is *aut dedere aut judicare*.[14]

3.1.2 Discretionary grounds for assuming jurisdiction

In three other situations, state parties are empowered but only sometimes required to establish extraterritorial jurisdiction over convention offenses.

3.1.2.1 The active nationality principle

The first and most common discretionary ground for assuming extraterritorial jurisdiction is the nationality of the alleged offender.[15] The COECrimCC, EU Dec. 2003/568/JHA, IACAC, UNCAC, UNTOC, and the EUCPFI and its protocol allow, and the AUCPCC and SADC-PAC require, their parties to claim jurisdiction over convention offenses committed anywhere by their nationals or habitual residents;[16] the COECrimCC and EUCPFI-P1 also enable

[11] Cf. Pieth, "Article 4," pp. 281–283.

[12] IACAC, Art. V(3); OECD-ABC, Art. 10(4); UNCAC, Art. 42(3); UNTOC, Art. 15(3). On the UNCAC and UNTOC, see also Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, p. 350. On the special problems of the territoriality principle in anti-corruption prosecutions, see Bacio Terracino, *The International Legal Framework*, pp. 171–173.

[13] EU Dec. 2003/568/JHA, Art. 7(3); EUCPFI, Arts. 4(2), 5(1); EUCPFI-P1, Arts. 6(2), 7(1); EUOCC, Arts. 7(2), 8(1).

[14] See further Bassiouni and Wise, *Aut Dedere Aut Judicare*, pp. 3–5.

[15] On the "active personality" or "active nationality" principles, see generally Cryer et al., *International Criminal Law and Procedure*, pp. 47–49; Lowe and Staker, "Jurisdiction," pp. 323–324; Malanczuk, *Akehurst's International Law*, p. 111. On the principle in the anti-corruption treaties, see Bacio Terracino, *The International Legal Framework*, pp. 173–175.

[16] AUCPCC, Art. 13(1)(b); COECrimCC, Art. 17(1)(b); EU Dec. 2003/568/JHA, Art. 7(1)(b); EUCPFI, Art. 4(1), third indent; EUCPFI-P1, Art. 6(1)(b); EUOCC, Art. 7(1)(b); IACAC, Art. V(2); SADC-PAC, Art. 5(1)(b); UNCAC, Art. 42(2)(b); UNTOC, Art. 15(2)(b).

their state parties to prosecute some non-national public figures.[17] Under the OECD-ABC, nationality is a mandatory ground for jurisdiction over the bribery of foreign public officials if the state in question already prosecutes its nationals for offenses committed abroad.[18] It may be qualified by the dual criminality requirement, but only if this is a "general principl[e] or conditio[n]" of that state's legal system and it is met wherever the state, on whose territory the offense was committed, deemed the act unlawful.[19] Further, as the nationality principle has particular relevance to the regulation of MNEs, which have operations or subsidiaries in multiple jurisdictions,[20] the treaties' provisions on nationality should be read with their provisions on bribery through intermediaries and corporate liability, as well as the rules for determining corporate nationality in general international law.[21]

3.1.2.2 The passive personality and protective principles

Second, the AU, COE, EU, and UN treaties allow their state parties to assume jurisdiction over offenses that affect their nationals or threaten their interests.[22]

On the one hand, the COECrimCC, EUCPFI-P1, and EUOCC require state parties that have not declared otherwise to establish jurisdiction over a public bribery offense that "involves" or is "against" one of its public officials or one of its nationals who is simultaneously an official of an international organization within the purview of the treaty.[23] The UNCAC and UNTOC provide, in similar but more ambiguous terms, that state parties "may also establish [their] jurisdiction over [convention offenses] when [t]he offence is committed against a national of that State Party."[24] The *travaux préparatoires* to the

[17] COECrimCC, Art. 17(1)(b); EUCPFI-P1, Art. 6(1)(b). On the nationality principle in the COECrimCC, see the GRECO, Azerbaijan III(I), para. 63; Estonia III(I), para. 75; Poland III(I), para. 68; Serbia III(I), para. 72.

[18] OECD-ABC, Art. 4(2). For commentary and practice on the nationality principle in the OECD-ABC, see OECD-WGB, Argentina I, p. 13; Argentina II, paras. 173–175; Canada III, paras. 117–121; Chile II, paras. 154–156. See further Bacio Terracino, *The International Legal Framework*, n. 739; Pieth, *Harmonising Anti-Corruption Compliance*, p. 17.

[19] OECD-ABC Commentary, para. 26.

[20] OECD-WGB, United Kingdom IIbis, paras. 51–52. See also Pieth, "Article 4," pp. 285–286. On host state control through jurisdiction, see Wallace, *The Multinational Enterprise*, pp. 589–596.

[21] *Liechtenstein* v. *Guatemala* (1955) ICJ Reports 4; *Barcelona Traction Light and Power Company Limited (Belgium* v. *Spain), Second Phase, Judgement* (1970) ICJ Reports 3, paras. 32–49. See further Cryer et al., *International Criminal Law and Procedure*, p. 48; Pieth and Ivory, "Corporate Criminal Liability"; Stessens, *Money Laundering*, p. 233; below, p. 66 and following.

[22] On the passive personality and protective principles, see generally Malanczuk, *Akehurst's International Law*, pp. 111–112.

[23] COECrimCC, Art. 17(1)(c) and (2); EUCPFI-P1, Art. 6(1)(c) and (2); EUOCC, Art. 7(1)(c) and (2). Cf. GRECO, Serbia III(I), para. 73.

[24] UNCAC, Art. 42(2)(a); UNTOC, Art. 15(2)(a).

UNTOC indicate that the concept of an offense "against" a national reflects an understanding "that States Parties should take into consideration the need to extend possible protection . . . to stateless persons who might be habitual or permanent residents in their countries."[25] The explanatory reports to the European instruments say, more usefully, that state parties may criminalize acts of corruption in which their nationals or officials are public sector bribees; whether this is a manifestation of the protective or passive personality principles is not clear.[26]

On the other hand, the AUCPCC and UNCAC allow state parties to assume jurisdiction over convention offenses that only harm their interests. Under the AUCPCC, state parties "ha[ve] jurisdiction" over extraterritorial acts of corruption that "affec[t], in the view of the State concerned, [their] vital interests or the deleterious or harmful consequences or effects of such offenses impact on a State Party."[27] Under the UNCAC, state parties may establish jurisdiction over convention offenses "committed against the State Party."[28] It is submitted that these provisions could enable AUCPCC and UNCAC state parties to assume jurisdiction over extraterritorial acts of corruption that do not involve their nationals or public officials and that do not affect matters within their territory. Given their wide scope, they are likely to overlap with broader interpretations of the passive personality and territoriality principles, as well as the universality principle.[29]

3.1.2.3 Other discretionary grounds

Third, a number of the anti-corruption treaties preserve their state parties' power to establish jurisdiction on other extraterritorial grounds in domestic law. The COECrimCC and, in similar terms, the AUCPCC, IACAC, and SADC-PAC "[do] not exclude any criminal jurisdiction exercised by a Party in accordance

[25] GA Res. A/55/383/Add.1, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its 1st to 11th sessions: addendum, UN Doc. A/55/383/Add.1 (November 3, 2000) (UNTOC Interpretative Notes), para. 26. See further Androulakis, *Globalisierung der Korruptionsbekämpfung*, p. 350.

[26] COECrimCC Explanatory Report, para. 81. Cf. Council of the EU, Explanatory Report on the Protocol to the Convention on the protection of the European Communities' financial interests (Text approved by the Council on December 19, 1997), OJ 1998 No. C11, January 15, 1998, p. 5 (EUCPFI-P1 Explanatory Report), para. 6.2(c); Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Text approved by the Council on December 3, 1998), OJ 1998 No. C391, December 15, 1998, p. 1 (EUOCC Explanatory Report), para. 7.2(c). See further Androulakis, *Globalisierung der Korruptionsbekämpfung*, p. 330.

[27] AUCPCC, Art. 13(1)(d). See also Androulakis, *Globalisierung der Korruptionsbekämpfung*, p. 340; Snider and Kidane, "Combating Corruption in Africa," 735.

[28] UNCAC, Art. 42(2)(d). See also Androulakis, *Globalisierung der Korruptionsbekämpfung*, p. 350.

[29] Malanczuk, *Akehurst's International Law*, p. 111; Pieth, "Article 4," p. 270.

with national law."[30] This language is recalled in the UNCAC and the UNTOC, though it is expressed to be "[w]ithout prejudice to norms of general international law."[31] Commentary on the COECrimCC suggests that these provisions were intended to allow states to establish universal jurisdiction over convention offenses,[32] an observation apparently confirmed by the GRECO and OECD-WGB in their reports on state practice.[33] Noting the reluctance of states to consider corruption a core international crime, Dr. Julio Bacio Terracino cautions against such a broad construction of the treaty provisions.[34]

3.1.3 Preliminary conclusions

Whether a state is competent to criminalize an act of corruption will depend, in practice, on the anti-corruption treaties to which it is party and the grounds for jurisdiction that it has claimed or disclaimed for itself in domestic and international law. The international anti-corruption treaties provide a mixture of discretionary and mandatory grounds. They require state parties to assume power to prescribe convention offenses committed wholly or partly in their territory and by nationals whom they refuse to extradite. In addition, they variously empower state parties to criminalize conduct in which their nationals, officials, or interests are implicated, or the assumption of jurisdiction is otherwise in accordance with national and/or international law. Such broad rules are intended to ensure that "transnational criminals are not able to use national boundaries to avoid the law."[35] They take for granted that states will resolve competing claims of jurisdiction[36] and that persons with connections to multiple jurisdictions are nonetheless able to foresee the applicable criminal laws.[37]

3.2 Prescription

All of the anti-corruption treaties surveyed here contain extensive provisions on the criminalization of corruption.[38] These require state parties to adopt

[30] COECrimCC, Art. 17(4). See also AUCPCC, Art. 13(2); IACAC, Art. V(4); SADC-PAC, Art. 5(2).
[31] UNCAC, Art. 42(2); UNTOC, Art. 15(2).
[32] COECrimCC Explanatory Report, para. 83.
[33] GRECO, Estonia III(I), para. 74; OECD-WGB, Belgium II, paras. 108–111; Estonia I, para. 97; Israel II, para. 167; Turkey II, para. 132. Cf. Shaw, *International Law*, pp. 673–674.
[34] Bacio Terracino, *The International Legal Framework*, p. 177.
[35] Boister, *Introduction to Transnational Criminal Law*, p. 135.
[36] See, e.g., EUCPFI, Art. 6(2); EUOCC, Art. 9(2); OECD-ABC, Art. 4(3); UNCAC, Art. 42(5). See further Boister, *Introduction to Transnational Criminal Law*, pp. 152–153.
[37] Boister, *Introduction to Transnational Criminal Law*, pp. 20–21, 126–127, 137.
[38] Cf. COECivCC.

or consider adopting measures to establish defined acts and omissions as criminal offenses within their jurisdictions. Though they require varying degrees of consistency between national criminal laws and provide differing opportunities for declarations and reservations,[39] they proceed from the assumption that harmonized criminal prohibitions on corruption facilitate fair economic competition between state parties and enable international cooperation in criminal matters.[40] The criminalization provisions are thus integral to a description of cooperative confiscations that are used to achieve asset recovery. Here, I identify, describe, and compare them as they would be committed by a principal, though all instruments require the criminalization of other forms of participation, as well as attempts to commit some or all of these offenses.[41]

3.2.1 Offenses

3.2.1.1 Bribery in the public sector

As bribery of public officials is the archetypal form of corruption in common usage, it is not surprising that it is also the most common subject of criminalization provisions in the anti-corruption treaties. The majority of the treaties call on state parties to criminalize illicit transactions by which various types of "public official" make various transactional acts or omissions in connection with their public mandates in exchange for undue advantages – for themselves or others. They distinguish between acts of public bribery in which the bribee derives his/her public authority from the state party criminalizing the conduct (domestic bribery) and acts of bribery in which the bribee is an official of another state, political community, or international organization (foreign or transnational bribery). They also separate the unlawful act of the briber in offering, promising, or giving the bribe (active bribery)

[39] AUCPCC, Art. 24; COECrimCC, Arts. 36–38; SADC-PAC, Art. 7(1); UNCAC, Arts. 30(9), 65(1); UNTOC, Arts. 11(6), 34. See also OECD-ABC, Preamble; OECD-ABC Commentaries, paras. 2–3. See further Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 256, 265, 284–286, 299, 334, 340–341; Low, "The United Nations Convention against Corruption," 4; Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 246–248; Makinwa, "Transnational Bribery," 32–35; Pieth, "Introduction," pp. 26–30; Posadas, "Combating Corruption," 384–386; UNODC, "UNCAC Legislative Guide," paras. 18–22.

[40] Harari and Julen Berthod, "Articles 9, 10, and 11," p. 410; Makinwa, "Transnational Bribery," 33–34; Pieth, "Introduction," p. 21.

[41] AUCPCC, Art. 4(i); COECrimCC, Art. 15; EU Dec. 2003/568/JHA, Art. 3; EUCPFI, Art. 2(1); EUCPFI-P1, Art. 5(1); EUOCC, Art. 5(1); IACAC, Art. VI(1)(e); OECD-ABC, Art. 1(2); SADC-PAC, Art. 3(h); UNCAC, Art. 27; UNTOC, Art. 8(3). See further UNODC, "UNCAC Legislative Guide," paras. 341–344.

from the unlawful act of the bribee in soliciting or accepting the bribe (passive bribery).[42] Most of the provisions are mandatory.[43]

As for the wording of the offense provisions, Art. 1(1) OECD-ABC would seem to be the template for public sector bribery provisions in the COE, EU, and UN treaties.[44] It provides:

> Each State Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[45]

The apparent models for the public bribery provisions in the AUCPCC and SADC-PAC are Arts. VI(1)(a)–(b) and VIII IACAC,[46] which call for the criminalization of the following acts of corruption:

> The solicitation or acceptance, directly or indirectly, by [or offering or granting, directly or indirectly,] to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;[47]
>
> . . .
>
> [T]he offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.[48]

Differences in wording notwithstanding, common elements of public sector bribery under the anti-corruption treaties emerge.

[42] Stessens, "The International Fight against Corruption," 901–904.

[43] The exceptions are IACAC, Art. VIII (active transnational bribery); UNCAC, Art. 16(2) (passive foreign bribery); UNTOC, Art. 8(2) (active and passive foreign bribery). See also COECrimCC, Art. 37(1) (declarations with respect to the criminalization of domestic and foreign bribery under Arts. 4–6, 8, 10, 12).

[44] COECrimCC, Arts. 1(a), 2–3; COECrimCC-AP, Arts. 2–3; EUCPFI-P1, Arts. 1(a)–(c), 2–3; EUOCC, Arts. 1(a)–(c), 2–3; UNCAC, Arts. 15–16; UNTOC, Art. 8(1). On the "mutually supporting and complementary" relationship between the OECD-ABC and UNCAC, see OECD Recommendation 2009, Preamble.

[45] OECD-ABC, Art. 1(1).

[46] AUCPCC, Art. 4(1)(a)–(b); SADC-PAC, Arts. 3(a)–(b), 6(1). See Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, pp. 338–341.

[47] IACAC, Art. VI(1)(a)–(b). See also IACAC, Art. VII.

[48] IACAC, Art. VIII.

The briber Though all acts of bribery presuppose a transaction between two or more parties, the anti-corruption treaties generally do not describe the briber. The UNCAC, UNTOC, and AUCPCC omit direct reference to the briber by formulating the offense as the "offering, promising, or giving" to or the "solicitation or acceptance" by public officials. The OECD-ABC and COECrimCC mention the briber but only to require the criminalization of public bribery by "any person."[49] The IACAC and SADC-PAC alone specify that state parties are to criminalize active transnational bribery "by [their own] nationals, persons having their habitual residence in [their] territory, and businesses domiciled there."[50]

Further information about the identity of the briber can be drawn from the articles on corporate (criminal) liability in the COE, OECD, EU, and UN treaties and related soft law instruments.[51] These require state parties to ensure that legal persons can be held liable and sanctioned for convention offenses. The inter-American and African instruments do not expressly address the liability of legal persons, though the AUCPCC and SADC-PAC do require state parties to introduce measures to prevent and combat acts of corruption "committed in and by private sector entities" or their "agents."[52] According to the AUCPCC, "private sector" means "the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government."[53]

The bribee Whereas most conventions say very little about the bribers, all say expressly who may be a bribee. In so doing, they distinguish foreign and domestic bribery; they determine the relevance of domestic or organizational notions of an "official"; and they identify the political communities whose human representatives may be involved in this form of corruption. Some of the treaties separately define the key terms, whereas others embed definitions in the substantive offense provisions.

First, in requiring state parties to criminalize active foreign bribery, Art. 1(4) OECD-ABC defines a "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country,

[49] COECrimCC, Art. 2; COECrimCC-AP, Art. 2; OECD-ABC, Art. 1. See further COECrimCC Explanatory Report, para. 35; Zerbes, "Article 1," pp. 55–56.

[50] IACAC, Art. VIII; SADC-PAC, Art. 6(1).

[51] COE Twenty Principles, para. 5; COECrimCC, Art. 18; EU Dec. 2003/568/JHA, Art. 5; EUCPFI-P2, Art. 3; OECD-ABC, Arts. 2, 3(2); OECD Recommendation 2009, Annex I, para. B; UNCAC, Art. 26; UNTOC, Art. 10. See also EUCPFI, Art. 3. See further Pieth, "Article 2," p. 175; Pieth and Ivory, "Corporate Criminal Liability."

[52] AUCPCC, Art. 11(1); SADC-PAC, Art. 4(2). See also AUCPCC, Art. 5(2).

[53] AUCPCC, Art. 1(1).

including for a public agency or public enterprise; and any official or agent of a public international organization." The commentaries elaborate *inter alia* on the notions of a "public function," "public agency," "public enterprise," "public international organization," and "foreign country."[54] The resulting concept of a "foreign public official" is autonomous of definitions in national legal systems.[55] Both institutional and functional, it covers:

- individuals who have been appointed or elected to an office in one of the three branches of government in states and some non-state "organised foreign area[s] or entit[ies]";
- individuals who in fact carry out "activities in the public interest" for those foreign regimes, as well as their special-purpose agencies and non-commercial enterprises in public and private law; and
- individuals who are agents and officials of organizations established by "states, governments, and other public international organizations."[56]

Second, with different words, the inter-American and African anti-corruption treaties also create broad and autonomous definitions of public sector bribees. The IACAC provides, at Art. I, that:

> "Public function" means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy.
>
> "Public official", "government official", and "public servant" means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

The definition of public official in Art. I IACAC is recalled in Art. 1 AUCPCC and Art. 1 SADC-PAC. Neither African convention defines "public function." Rather, the AUCPCC requires state parties to criminalize the bribery of "public officials or any other person" regardless of the nature of their office or their functions;[57] the SADC-PAC integrates a definition of public functions into its definition of public official: "'Public Official' means any person in the employment of the State, its agencies, local authorities or parastatals and includes any

[54] OECD-ABC Commentaries, paras. 12–18.

[55] OECD-ABC Commentaries, para. 3. On the principle of autonomy, see, e.g., OECD-WGB, Argentina I, pp. 4–5, 27; Belgium II, paras. 118–122; Estonia I, paras. 124–132; Portugal II, paras. 132–133; Russia I, para. 20.

[56] See further Zerbes, "Article 1," pp. 57–97. For national definitions that were or were potentially narrower than the convention's definition, see, e.g., OECD-WGB, Finland III, paras. 13–14; Ireland II, paras. 169–174; Korea II, paras. 103–105; Portugal III, paras. 34–36; Slovenia II, para. 141.

[57] AUCPCC, Art. 4(1)(a)–(b). See further Snider and Kidane, "Combating Corruption in Africa," 714.

person holding office in the legislative, executive or judicial branch of a State or exercising a public function or duty in any of its agencies or enterprises."[58]

Third, the COE and EU treaties and the UNTOC distinguish between domestic and foreign bribery but refer back to the definition of officials established by the state or organization that the bribee allegedly represents.[59] Thus, the COECrimCC requires state parties to criminalize the active and passive bribery of "public officials" and "members of public assemblies" – domestic and foreign – as well as "officials of international organizations," "members of international parliamentary assemblies," and "judges and officials of international courts."[60] It defines "public official" by reference to the national, criminal law definitions of "official," "public officer," "mayor," "minister," or "judge" in the state for which the person performs those functions.[61] According to the convention's explanatory report, the other terms would receive a similar interpretation.[62] Similarly, in requiring member states to criminalize "corruption" by "national officials" and "community officials" ("officials"),[63] the EUCPFI-P1 and EUOCC defer to "definitions of 'official' and 'public officer' in the national [criminal] law of the Member State in which the person in question performs that function," as well as EU staff regulations and conditions of employment.[64] Finally, under the UNTOC, a "public official" is a "public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function."[65]

Fourth, the UNCAC adapts the autonomous and dependent definitions of public sector bribees in the preceding instruments. On the one hand, its definition of "foreign public official" and "international civil servant" largely follows the OECD-ABC's definition of "foreign public official," though it does not define the terms "foreign country," "public function," "public entity," or "public enterprise."[66] On the other hand, for most of its provisions, it says a "public official" shall be:

[58] SADC-PAC, Art. 1.

[59] GRECO, Azerbaijan III(I), para. 53; Latvia III(I), para. 88; OECD-WGB, Norway II, para. 91. Cf. GRECO, Armenia III(I), para. 80; Czech Republic III(I), para. 70.

[60] COECrimCC, Arts. 4–6, 9–11. See also COECrimCC-AP, Arts. 2–6.

[61] COECrimCC, Art. 1(a). See also COECrimCC, Art. 1(b); COECrimCC Explanatory Report, paras. 27–28, 45; GRECO, Russia III(I), para. 51.

[62] COECrimCC Explanatory Report, paras. 30, 45, 49, 51, 58–59, 63. See also COE, Explanatory Report on the Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191), available at http://conventions.coe.int/treaty/en/Reports/Html/191.htm, accessed October 15, 2013 (COECrimCC-AP Explanatory Report), paras. 9–17.

[63] EUCPFI-P1, Arts. 1(a)–(c), 2(1), 3(1); EUOCC, Arts. 1(a)–(c), 2(1), 3(1).

[64] EUCPFI-P1, Art. 1(a)–(c); EUOCC, Art. 1(a)–(c).

[65] UNTOC, Art. 8(4).

[66] UNCAC, Art. 2(b)–(c).

(i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;
(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
(iii) any other person defined as a "public official" in the domestic law of a State Party.[67]

Public official has a special meaning in "some specific measures" in Ch. II UNCAC.[68]

A public official under the UNCAC is thus someone who holds a government office in a state party; someone who performs a public function for a state party or a public authority; and someone who has been deemed a public official under domestic law. The concepts of public functionaries and officials in sub-paragraphs (ii) and (iii) are clearly dependent on domestic law definitions of those terms – in the law of either the state party for which the persons perform the functions or the state party that is applying the convention.[69] The definition of office holder in sub-paragraph (i) appears, by contrast, to be autonomous, having regard both to its ordinary meaning and to its similarity to the definition of foreign public official in Art. 1(4) OECD-ABC and Art. 2(b) UNCAC. However, with respect to sub-paragraph (i), "[t]he *travaux préparatoires* indicate that . . . each State Party shall determine who is a member of the categories mentioned . . . and how each of those categories is applied."[70] Therefore, even Art. 2(1)(i) UNCAC may be interpreted as dependent on domestic law.

To summarize, all anti-corruption treaties call for the criminalization of bribery involving public officials. The AU, OAS, OECD, and SADC treaties establish definitions of the bribee that are autonomous of definitions in national law and that apply to individuals who have been appointed, elected, or selected to carry out an office within one of the three branches of government, as well as individuals who perform public functions for the state and certain related organizations. The OECD-ABC also applies expressly to officials of public international organizations and the AUCPCC to bribery of public officials and "any other person." Conversely, the COE and EU treaties and the UNTOC identify (member) states and a wide range of international bodies as

[67] UNCAC, Art. 2(1).
[68] UNCAC, Art. 2(c)(iii) ("any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;").
[69] Bacio Terracino, *The International Legal Framework*, p. 83.
[70] Cf. UNCAC Interpretative Notes, para. 4. See also UNODC, "UNCAC Legislative Guide," para. 145.

sources of "public power" but defer largely to legal or organizational definitions of those roles. Similarly, though the UNCAC appears to define "foreign public officials" and "official of a public international organization" at least partially autonomously of definitions in domestic law, its three-fold definition of domestic public officials has several dependent elements.

Third party beneficiaries and intermediaries The briber and the bribee are not the only persons who may be involved in an act of public sector bribery. Most public sector bribery provisions require the criminalization of transactions in which the direct or ultimate beneficiary of the bribe is someone other than the public official.[71] It is said that undue advantages may be "for that official or for a third party";[72] "for [the official] himself or herself or for anyone else";[73] "for himself or for a third party";[74] and "for the official himself or for another person or entity."[75] The beneficiary may be a natural person, legal entity, or "anyone else," whether or not there is a relationship – political, sentimental, or otherwise – between the beneficiary and bribee.[76] Commenting on Art. 1(1) OECD-ABC, Prof. Ingeborg Zerbes argues that the state is the only entity that cannot be the beneficiary of a bribe for benefits to the state do not violate the interests that the offense of bribery of foreign public officials is supposed to protect.[77]

Further, the treaties all require their parties to ensure that persons may be imputed with acts of public bribery undertaken by third parties.[78] They all provide that undue advantages may be given, offered, promised, solicited,

[71] Cf. IACAC, Art. VIII; SADC-PAC, Art. 6(1). See further OECD-ABC Commentaries, para. 6; COECrimCC Explanatory Report, para. 36; COECrimCC-AP Explanatory Report, para. 23; Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 267–268; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 13.42–13.45; UNODC, "UNCAC Legislative Guide," para. 197; Zerbes, "Article 1," pp. 96–98.

[72] OECD-ABC, Art. 1(1). See further, e.g., OECD-WGB, Iceland II, p. 24; Israel I, para. 23; Korea II, para. 106.

[73] COECrimCC, Arts. 2–3. See further e.g., GRECO, Bulgaria III(I), para. 61; Croatia III(I), para. 50; Lithuania III(I), para. 71; Romania III(I), para. 102; Switzerland III(I), para. 79.

[74] EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1).

[75] AUCPCC, Art. 4(1)(a); IACAC, Art. VI(a)–(b); SADC-PAC, Art. 3(a)–(b); UNCAC, Arts. 15–16; UNTOC, Art. 8(1). On the OECD-ABC, see Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., para. 13.42–13.44.

[76] On the COECrimCC, see the COECrimCC Explanatory Report, para. 36; GRECO, Croatia III(I), para. 50. On the OECD-ABC, see OECD-WGB, Argentina I, pp. 5–6, 27; Russia I, para. 22; Slovak Republic II, para. 25; Turkey II, para. 168; Zerbes, "Article 1," p. 97.

[77] Zerbes, "Article 1," p. 98. Cf. OECD-WGB, United Kingdom IIbis, paras. 36–41. Cf. Bacio Terracino, *The International Legal Framework*, p. 104.

[78] See generally Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 13.39–13.41; Zerbes, "Article 1," pp. 119–124.

accepted, etc. "directly or indirectly"[79] or "directly or through intermediaries."[80] None says when a person should be imputed with the acts, omissions, and states of mind that constitute bribery offenses, though commentary and recommendations on the OECD-ABC indicate that individuals and corporations should be held liable for the active bribery of foreign public officials by natural and legal persons who act on their behalf and whose offenses they fail reasonably to prevent, detect, and/or repress.[81] With respect to passive bribery of domestic and EU public officials, the explanatory reports on the COECrimCC, EUCPFI-P1, and EUOCC likewise acknowledge that the involvement of an intermediary "would extend the scope of passive bribery to include indirect action by the official, [and] necessarily entails identifying the criminal nature of the official's conduct, irrespective of the good or bad faith of the intermediary involved."[82]

The objective elements Objectively, public bribery occurs when individuals or entities undertake specified acts involved in the conferral of undue advantages on public officials or their third party beneficiaries. In active bribery, the acts are "the promis[ing], offering or giving"[83] and "offering or granting"[84] and, in passive bribery, "solicitation or acceptance,"[85] as well as "the request or receipt . . . of any undue advantage . . . or the acceptance of an offer or promise of such an advantage."[86] These acts would appear to be distinct[87] and capable of being established without evidence of "a meeting of the minds" between the briber and bribee,[88] let alone proof that the bribe actually reached the bribee or

[79] AUCPCC, Art. 4(1)(a)–(b); COECrimCC, Arts. 2–3; IACAC, Arts. I(a)–(b), VIII; SADC-PAC, Arts. 3(1)(a)–(b), 6(1); UNCAC, Arts. 15–16; UNTOC, Art. 8(1).

[80] OECD-ABC, Art. 1; EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1).

[81] OECD-ABC Commentaries, para. 6; OECD Recommendation 2009, Annex II, para. A(6). See also OECD-WGB, United States I, p. 5. Cf. Zerbes, "Article 1," pp. 121, 125–126.

[82] COECrimCC Explanatory Report, para. 42; EUCPFI-P1 Explanatory Report, para. 2.2, see also para. 3.2; EUOCC Explanatory Report, para. 2.2, see also para. 3.2. For a non-compliant provision, see GRECO, Monaco III(I), para. 105.

[83] COECrimCC, Art. 2; COECrimCC-AP, Art. 2; UNCAC, Arts. 15(a)–16(1); UNTOC, Art. 8(1)(a).

[84] AUCPCC, Art. 4(1)(b); IACAC, Arts. VI(1)(b), VIII; SADC-PAC, Arts. 3(b), 6(1).

[85] AUCPCC, Art. 4(1)(a); IACAC, Art. VI(1)(a); SADC-PAC, Art. 3(a); UNCAC, Arts. 15(b), 16(2); UNTOC, Art. 8(1)(b).

[86] COECrimCC, Art. 3.

[87] GRECO, Armenia III(I), paras. 78–79; Azerbaijan III(I), para. 56; Latvia III(I), para. 85; Ukraine III(I), para. 63; OECD-WGB, Chile I, paras. 10–13, 29, Russia I, paras. 10–13.

[88] GRECO, France III(I), paras. 77–84; Greece III(I), para. 111; Luxembourg III(I), para. 78, Monaco III(1), para. 102; OECD-WGB, Belgium II, paras. 113–114; France II, paras. 114–115; France III, paras. 19–20, 30–31; Germany III, paras. 35–36; Luxembourg II, paras. 97–98.

had the intended effect on the bribee's behavior.[89] In other words, the offenses of passive and active bribery are independent of each other and their intended results, their objective elements being exclusively concerned with the transactional acts of the alleged offender in a given case.[90]

The bribe To constitute bribery within the meaning of the suppression conventions, the transactional acts must pertain to particular types of valuable things. The COECrimCC, its protocol, and the two UN conventions speak of "undue advantage[s]";[91] the EUCPFI-P1 and EUOCC of "advantage[s] of any kind whatsoever";[92] and the IACAC and SADC-PAC of "any article of monetary value, or other benefit, such as a gift, favor, promise or advantage."[93] In a slight variation on the IACAC formulation, the AUCPCC refers to "goods of value."[94]

Although the treaties do not elaborate on their concepts of things or value, they can be read to refer to tangible and intangible things that have improved or would have improved the position of the intended recipient – financially or otherwise – as assessed from the perspective of a reasonable person in the position of the alleged bribee.[95] This conclusion finds support in the text of IACAC and SADC-PAC, which refer to "articles of monetary value, or other benefits";[96] in commentaries to the COE, EU, OECD, and UN instruments;[97] and in monitoring reports by the OECD-WGB and GRECO.[98]

[89] COECrimCC Explanatory Report, para. 36; GRECO, Netherlands III(I), para. 89; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 13.33, 13.35–13.38; OECD-WGB, Italy II, paras. 116–120; Sweden III, paras. 21, 35; Stessens, "The International Fight against Corruption," 903; UNODC, "UNCAC Legislative Guide," para. 197.

[90] COECrimCC Explanatory Report, para. 36; UNODC, "UNCAC Legislative Guide," para. 197. See also COECrimCC-AP Explanatory Report, para. 23; EUCPFI-P1 Explanatory Report, paras. 2.2, 3.2; EUOCC Explanatory Report, paras. 2.2, 3.2; GRECO, Romania III(I), para. 96; OECD, "Corruption: A Glossary of Standards," pp. 21–22; Kubiciel, "Core Criminal Law Provisions," 146–147; Stessens, "The International Fight against Corruption," 901.

[91] UNCAC, Arts. 15–16; UNTOC, Art. 8(1).

[92] EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1).

[93] IACAC, Arts. VI(1)(a)–(b), VIII; SADC-PAC, Arts. 3(a)–(b), 6(1).

[94] AUCPCC, Art. 4(1)(a)–(b).

[95] See also Bacio Terracino, *The International Legal Framework*, p. 97.

[96] IACAC, Arts. VI(1)(a)–(b), VIII; SADC-PAC, Arts. 3(a)–(b), 6(1).

[97] COECrimCC Explanatory Report, para. 37; COECrimCC-AP Explanatory Report, para. 24; EUCPFI-P1 Explanatory Report, para. 2.4; EUOCC Explanatory Report, para. 2.4; Kubiciel, "Core Criminal Law Provisions," 144; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 13.46–13.52; UNODC, "UNCAC Legislative Guide," para. 196. Cf. Zerbes, "Article 1," pp. 102–103.

[98] From the GRECO, see Armenia III(I), para. 81; Azerbaijan III(I), para. 57; Bulgaria III(I), para. 63; Lithuania III(I), para. 70; Moldova III(I), para. 55; Monaco III(I), para. 104; Spain III(I), para. 92; Ukraine III(I), para. 65. From the OECD-WGB, see Brazil I, p. 4–5; Bulgaria II, pp. 3, 28; Bulgaria III, paras. 9–10; Chile I, paras. 14–15; Chile II, para. 142;

The COECrimCC, OECD-ABC, UNCAC, and UNTOC also stipulate that the benefit or advantage be "undue." At least under the OECD-ABC, undue does not mean illegal but without written legal authority from the foreign state. This follows from para. 8 of the Commentaries to the OECD-ABC (OECD-ABC Commentaries), which provide that there is no offense "if the advantage was permitted or required by the written law or regulation, including case law."[99] Similarly, the explanatory report to the COECrimCC states: "'Undue' for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective 'undue' aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts."[100]

The consideration for the bribe In each of the treaties, the undue advantage must be promised, offered, given, solicited, accepted, etc., as an inducement for the public official to act or refrain from acting in connection with his/her functions or official duties. This requirement is expressed with the phrase "in order that the official act or refrain from acting in relation to the performance of official duties" in the OECD-ABC;[101] "for him or her to act or refrain from acting in the exercise of his or her functions" in the COECrimCC;[102] and "in exchange for any act or omission in the performance of his [or her] public functions," in the IACAC.[103] The AUCPCC, SADC-PAC, UNCAC, and UNTOC combine these phrases in the formulations "in exchange for any act or omission in the performance of his or her public functions"[104] and "in order that the official act or refrain from acting in the exercise of his or her official duties."[105] The EUCPFI-P1 and EUOCC refer "to act[ing] or refrain[ing] from acting in accordance with [the official's] duty or in the exercise of his functions in breach of his official duties."[106]

In effect, these provisions describe the consideration for the bribe. It is submitted that they all require state parties to criminalize transactions in

Greece III, para. 34; Poland I, p. 4; Russia I, para. 15; Russia III(I), para. 15; Spain II, para. 120; United States I, p. 4.

[99] See also OECD, "Corruption: A Glossary of Standards," pp. 33, 47; OECD-WGB, Australia I, pp. 3, 23; Australia II, paras. 139–141, 147; Stessens, "The International Fight against Corruption," 904; Zerbes, "Article 1," p. 112.

[100] COECrimCC Explanatory Report, para. 38; COECrimCC-AP Explanatory Report, para. 25; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., para. 13.46. See also GRECO, Denmark III(I), paras. 66, 67; Finland III(I), para. 99.

[101] OECD-ABC, Art. 1(1).

[102] COECrimCC, Arts. 2–3; COECrimCC-AP, Arts. 2–3.

[103] IACAC, Arts. VI(1)(a)–(b).

[104] AUCPCC, Art. 4(1)(a)–(b); SADC-PAC, Arts. 3(a)–(b), 6(1).

[105] UNCAC, Arts. 15–16; UNTOC, Art. 8(1).

[106] EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1).

which the promised act or omission is related to the official's mandate even if it is beyond his/her formal competence. The OECD-ABC expresses this principle in its definition of "act or refrain from acting in relation to the performance of official duties," which includes "any use of the public official's position, whether or not within the official's authorised competence."[107] The GRECO has made like observations of the COECrimCC,[108] whilst the explanatory report to the COECrimCC confirms that "the decisive element of the offense [is] not whether the official had any discretion to act as requested by the briber but whether he had been offered given or promised a bribe in order to obtain something from him."[109]

Nonetheless, it would seem that state parties to the COECrimCC, EUCPFI-P1, EUOCC, OECD-ABC, and UNCAC may limit the offense of public bribery to situations in which the official has or would have breached a legal duty. So, the OECD-ABC Commentaries and the UNCAC Interpretative Notes confirm that foreign bribery provisions will be correctly implemented if national laws define the offense "in terms of payment to 'induce a breach of the official's duty,'" provided that all officials are regarded as having a minimum duty of impartiality.[110] The EUCPFI-P1 and EUOCC include breach of duty as an element of active and passive corruption of national and community officials and other officials subject to the assimilation requirement.[111] Under the COECrimCC, state parties may declare that they will only criminalize active and passive bribery of foreign and international public officials "to the extent that the public official or judge acts or refrains from acting in breach of his duties."[112]

The mental elements The OECD-ABC, COECrimCC, UNCAC, UNTOC, EUOCC, and EUCPFI-P1 stipulate that state parties must criminalize acts and

[107] OECD-ABC, Art. 1(4)(c). See further Zerbes, "Article 1," pp. 136–137. For national offense provisions that were found to apply to a narrower range of conduct than the convention, see, e.g., OECD-WGB, Argentina I, pp. 6, 27–28; Belgium II, paras. 115–117; Bulgaria III, para. 16; Czech Republic II, paras. 144–148; Estonia I, paras. 39–42, 189–191; Estonia II, paras. 123–125; Finland II, pp. 16–17; Finland III, paras. 14, 18–20; Russia I, paras. 23–24; Slovak Republic III, para. 21; Slovenia II, paras. 144–147; Spain II, paras. 116–118; Spain III, para. 28.

[108] See, e.g., GRECO, Belgium III(I), para. 95; Bosnia and Herzogovina III(I), para. 89; Croatia III(I), para. 51; Greece III(I), para. 110; Moldova III(I), paras. 57–58; Slovenia III(I), para. 80; FYR Macedonia III(I), para. 67.

[109] COECrimCC Explanatory Report, para. 39. See also COECrimCC-AP Explanatory Report, para. 26.

[110] OECD-ABC Commentaries, para. 3; UNCAC Interpretative Notes, para. 24. See also OECD-WGB, Austria III, paras. 19–20; Switzerland II, paras. 93–94; Zerbes, "Article 1," pp. 137–138.

[111] EUCPFI-P1, Arts. 2(1), 3(1), 4; EUOCC, Arts. 2(1), 3(1), 4.

[112] COECrimCC, Art. 36. See further GRECO, Germany III(I), para. 109.

omissions constituting bribery "when [these are] committed intentionally" or "deliberate[ly]."[113] It would seem that the minimum duty is to criminalize transactional acts undertaken with a certain knowledge or volition,[114] though the instruments do not describe how much awareness or choice is required or the range of facts to which it must relate.[115] Commenting on the notion of intention in Art. 1(1) OECD-ABC, Zerbes argues that "a certain degree of knowledge [of all the elements of the offense], going beyond inattentiveness or carelessness" is the convention standard.[116] Her conclusions align with those of other commentators on the OECD-ABC and the OECD-WGB.[117] The African and inter-American instruments do not mention intent[118] but they specify that the solicitation, acceptance, offering, and granting of benefits to or by a public official must be "*in exchange for* any act or omission in the performance of his public functions" (emphasis added).[119] This language, in my submission, implies a specific form of awareness and volition as well.

In addition, the IACAC, OECD-ABC, SADC-PAC, and UNCAC allow state parties to limit the offense of active foreign bribery to considerations sought in a certain context or for a particular purpose, i.e., "in connection with any economic or commercial transaction";[120] "in order to obtain or retain business or other improper advantage in the conduct of international business";[121] or "in relation to the conduct of international business."[122] None of these concepts is exhaustively defined in the treaties. But the OECD-ABC Commentaries do make clear that "small facilitation payments" are not transactional acts with this purpose and that "'[o]ther improper advantage[s]' [are things] to which the company concerned was not clearly entitled."[123] The OECD-WGB has also refused to limit the notion of "international business" to transactions

[113] OECD-ABC, Art. 1(1); COECrimCC, Arts. 2–3; COECrimCC-AP, Arts. 2–3; EUCPFI-P1, Arts. 2(1), 3(1); EUOCC, Arts. 2(1), 3(1); UNCAC, Art. 15(a)–(b); UNTOC, Art. 8(1)(a)–(b). See further EUOCC Explanatory Report, para. 2.1; EUCPFI-P1 Explanatory Report, para. 2.1.

[114] See Zerbes, "Article 1," pp. 157–158.

[115] ADB/OECD Initiative, "Criminalisation of Bribery," p. 29; Nicholls et al., *Corruption and Misuse of Public Office*, 2nd edn., paras. 13.56–13.58.

[116] Zerbes, "Article 1," pp. 158–159. See also Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, p. 266; Nicholls et al., *Corruption and Misuse of Public Office*, paras. 10.52–10.54; Stessens, "The International Fight against Corruption," 903.

[117] OECD-WGB, Ireland II, paras. 181–183; Mexico II, para. 40; New Zealand II, paras. 156–161; South Africa II, paras. 191–192. Cf. OECD-WGB, United States I, pp. 2–3, 5. See also OECD-WGB, Australia III, para. 17 (no requirement in the convention of an intention to bribe a *particular* foreign public official).

[118] Makinwa, "Transnational Bribery," 31.

[119] AUCPCC, Art. 4(1)(a)–(b); IACAC, Arts. VI(1)(a)–(b), VIII; SADC-PAC, Art. 3(a)–(b).

[120] IACAC, Art. VIII; SADC-PAC, Art. 6(1).

[121] OECD-ABC, Art. 1(1).

[122] UNCAC, Art. 16(1)–(2).

[123] OECD-ABC Commentaries, paras. 5, 9. See also OECD, "Corruption: A Glossary of Standards," p. 24; Zerbes, "Article 1," pp. 150–157.

undertaken for profit between officials of one state and legal entities with their head offices in another.[124] The interpretive notes to the UNCAC indicate that "'the conduct of international business' is intended to include the provision of international aid."[125] The COECrimCC and UNTOC omit an additional purposive element and so require the introduction of broader offenses.[126] That said, the UNTOC is generally restricted to offenses that are "transnational in nature" and "involv[e] an organized criminal group," as defined.[127]

Other elements Alone amongst the treaties, the EUCPFI-P1 requires harm or damage to a public interest.[128] In requesting, receiving, or providing an advantage or giving or accepting a promise of such an advantage, it specifies that the offender must have damaged or have been likely to damage the EC's (EU's) financial interests. The concept of damage is only weakly elaborated in the protocol's explanatory report.[129] However, in my submission, it is likely to involve acts detrimental to European "expenditure" and "revenue." This follows from the definition of "fraud affecting the European Communities' financial interests" in the main convention[130] and the acknowledgement in the preamble to the EUCPFI-P1 that state parties are "[a]ware that the financial interests of the European Communities may be damaged or threatened by other criminal offenses, particularly acts of corruption by or against national and Community officials, responsible for the collection, management or disbursement of Community funds under their control."

Preliminary conclusions The anti-corruption treaties require the criminalization of at least one form of public sector bribery, an offense in which human or corporate bribers and public official bribees transact with respect to advantages or benefits and conduct related to the official's mandate. Depending on the treaty and the provision in question, the official may represent the state that is prosecuting the offense; the briber may be a natural person or legal entity; the advantage may be something that the bribee was not due; and the briber and bribee may both commit an offense covered by the convention. In some treaty provisions, the transactions need only be criminalized when they occur with a certain purpose, within certain contexts, or with certain consequences.

[124] OECD-WGB, Canada II, paras. 66–70; Canada III, paras. 15–24, 39; Japan I, pp. 12–13; Japan II, paras. 25–27, 146–148. See also OECD-WGB, Brazil I, p. 7; United States II, paras. 98–10, p. 33.

[125] UNCAC Interpretative Notes, para. 25; UNODC, "UNCAC Legislative Guide," para. 208.

[126] COECrimCC Explanatory Report, para. 49; GRECO, Turkey III(I), para. 68; United States III(I), para. 152; OECD, "Corruption: A Glossary of Standards," p. 24.

[127] UNTOC, Art. 3(1)–(2). See further, GRECO, Monaco III(1), para. 108.

[128] Cf. IACAC, Art. XII; UNCAC, Art. 3(2)

[129] EUCPFI-P1 Explanatory Report, Art. 2.

[130] EUCPFI, Art. 1.

3.2.1.2 Bribery in the private sector

Traditionally a matter for domestic civil and administrative law,[131] private sector (or private-to-private) bribery is now the subject of criminalization requirements in the AU, COE, SADC, and UN anti-corruption treaties, as well as EU Dec. 2003/568/JHA. Articles 7 and 8 COECrimCC provide as follows:

> Active bribery in the private sector
>
> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.
>
> Passive bribery in the private sector
>
> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally, in the course of business activity, the request or receipt, directly or indirectly, by any persons who direct or work for, in any capacity, private sector entities, of any undue advantage or the promise thereof for themselves or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in breach of their duties.[132]

Articles 7 and 8 are the apparent templates for the private bribery provisions in the other instruments. They are repeated with minor amendments in EU Dec. 2003/568/JHA and in the UNCAC, albeit in discretionary form.[133] The AUCPCC and SADC-PAC also use the wording of the COECrimCC but combine the passive and active versions of the offense.[134] Across the instruments, the elements of bribery offenses in the private sector generally mirror those of bribery offenses in the public sector.[135] Differences pertain to the identity of the bribee, the requirement of a breach of duty, and the context of the offense.[136]

[131] COECrimCC Explanatory Report, para. 52; Rose, "Introduction," pp. 1–6; Stessens, "The International Fight against Corruption," 914–915.

[132] COECrimCC, Arts. 7–8.

[133] EU Dec. 2003/568/JHA, Art. 2(1)(a)–(b); UNCAC, Art. 21(a)–(b). See further Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of July 22, 2003, on combating corruption in the private sector, Brussels, June 6, 2011, COM(2011) 309 final (EU Dec. 2003/568/JHA Report), p. 2.

[134] AUCPCC, Arts. 4(1)(e), 5(1); SADC-PAC, Arts. 3(e), 7(2).

[135] COECrimCC Explanatory Report, paras. 53, 56; UNODC, "UNCAC Legislative Guide," para. 300.

[136] COECrimCC Explanatory Report, para. 53.

The bribee The most obvious difference between public and private sector bribery is the identity of the bribee. Under the COECrimCC, "any persons who direct or work for, in any capacity, private sector entities" may solicit or accept or be promised, offered, or given an undue advantage.[137] The word, "entities," according to the COECrimCC's Explanatory Report, refers to bodies with legal personality, as well as bodies that are legally identified with their human stakeholders.[138] "*Private sector* entit[ies]" are owned, "entirely or to a determining extent," by private persons. They are distinguished from "[p]ublic entities," which are "outside the scope of this provision."[139] Looking at the contextual element of the offense, the report writers would further limit private sector entities to entities with profit-making objectives.[140] As for "recipient persons," these are said to be employees and managers at all levels, as well as others who "engage the responsibility of the company," such as consultants, partners, external advisors, agents, etc.[141] Only shareholders and "independent owners of businesses" (owner-operators) would be excluded from the category of potential private sector bribees.[142]

The other instruments describe the private sector bribee in similar though not identical terms. The UNCAC speaks of "any person who directs or works, in any capacity, for a private sector entity."[143] Insofar as the words "in any capacity" only describe the persons who "work for" private sector entities, Art. 21 UNCAC is narrower than Arts. 7 and 8 COECrimCC; in other respects, however, the COECrimCC's and UNCAC's descriptions of the bribee are the same. The African treaties cover "any person who directs or works for, in any capacity, a private sector entity"[144] and the EU decision covers "a person who in any capacity directs or works for a private-sector entity."[145] Elsewhere, they indicate that private sector entities include organizations that do not aim at profit maximization for private owners.[146] They are therefore broader than the COECrimCC, at least as that convention was interpreted by the authors of its Explanatory Report.

The consideration After the identity of the bribee, the most striking difference between public and private sector bribery is the element of breach of duty: All

[137] COECrimCC, Arts. 7–8.
[138] COECrimCC Explanatory Report, para. 54. See also GRECO, Croatia III(I), para. 52; Moldova III(I), para. 59; Romania III(I), para. 106.
[139] COECrimCC Explanatory Report, para. 54.
[140] COECrimCC Explanatory Report, para. 53.
[141] COECrimCC Explanatory Report, para. 54. See also Huber, "Supranational Measures," p. 582.
[142] COECrimCC Explanatory Report, para. 54; GRECO, Germany III(I), para. 112. Cf. GRECO, Romania III(I), para. 106.
[143] UNCAC, Art. 21(a)–(b).
[144] AUCPCC, Art. 4(1)(e); SADC-PAC, Art. 3(e).
[145] EU Dec. 2003/568/JHA, Art. 2(1).
[146] AUCPCC, Art. 1(1); EU Dec. 2003/568/JHA, Art. 2(2). On the EU decision, see further Androulakis, *Die Globalisierung der Korruptionsbekämpfung*, p. 296.

private sector bribery offenses may be limited to situations in which the bribee would breach a duty in furnishing the consideration for the bribe.[147] According to Dr. Guy Stessens, this requirement reflects a principal–agent concept of corruption in which bribery violates the duty of loyalty inherent in certain social relationships of trust and confidence.[148] According to the explanatory report to the COECrimCC, "[t]he expression, 'in breach of their duties' does not aim only at ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal's affairs or business."[149] For this reason, the GRECO has recommended that states also criminalize acts of private bribery of which the victim entity was aware or approved, and/or which caused the entity no harm.[150] Article 1 EU Dec. 2003/568/JHA second indent similarly states: "The concept of breach of duty in national law should cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person who in any capacity directs or works for a private sector entity."

The context and consequences of bribery Finally, private bribery offenses under the COECrimCC, EU Dec. 2003/568/JHA, and UNCAC are said to occur "in the course of economic, financial or commercial activities"[151] or "business activit[ies]."[152] By declaration, the offenses in EU Dec. 2003/568/JHA may be further limited to "conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services."[153]

For the authors of the COECrimCC's explanatory report, the obligation to criminalize private sector bribery "in the course of business activities" limits the offense to transactions with respect to "commercial activit[ies]."[154] A similar interpretation would appear to have been adopted in EU Dec. 2003/568/JHA, which applies expressly to "business activities within profit and non-profit entities."[155] By contrast, the drafters of the UNCAC replaced the words "business activities" with the words "economic, financial or commercial activities" in

147 AUCPCC, Art. 4(1)(e); COECrimCC, Arts. 7–8; EU Dec. 2003/568/JHA, Art. 2(1)(a)–(b); SADC-PAC, Art. 3(e); UNCAC, Art. 21(a)–(b). See also Stessens, "The International Fight against Corruption," 915.

148 Stessens, "The International Fight against Corruption," 915–916. See also Heine, "Comparative Analysis," pp. 11–12; Huber, "Supranational Measures," p. 576.

149 COECrimCC Explanatory Report, para. 55.

150 GRECO, Belgium III(I), para. 101; Croatia III(I), para. 53; Luxembourg III(I), paras. 82–83.

151 UNCAC, Art. 21.

152 COECrimCC, Arts. 7–8; EU Dec. 2003/568/JHA, Art. 2(1).

153 EU Dec. 2003/568/JHA, Art. 2(3).

154 COECrimCC Explanatory Report, para. 53. See also GRECO, Albania III(I), para. 53; Armenia III(I), para. 85; Croatia III(I), para. 52; Belgium III(I), paras. 39, 101.

155 EU Dec. 2003/568/JHA, Art. 2(2).

the fourth revisions of the draft convention.[156] Unexplained, this change seems to have broadened the scope of private bribery provisions from profit-oriented activity to activity that relates to the income and expenditure of a private sector entity or the management of its pecuniary resources.[157]

3.2.1.3 Trading and abusing influence

The anti-corruption treaties also target so-called "background corruption"[158] by calling on state parties to criminalize the trading in and abuse of influence. A trade in influence is, on the one hand, an intentional transaction involving the exercise of improper influence over the decision-making of a public official (domestic, foreign, or international) in exchange for an undue advantage. It must be criminalized under the AUCPCC, COECrimCC, and SADC-PAC and must be considered for criminalization under the UNCAC.[159] Article 12 COECrimCC, which reappears with some amendments in the African and UN treaties,[160] reads:

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

The abuse of influence is, on the other hand, the act of seeking to distort public decision-making to obtain an undue advantage. It is the subject of a discretionary criminalization requirement in the IACAC. By Art. XI(1)(c), state parties undertake to consider establishing as an offense "[a]ny act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he

[156] Ad Hoc Committee, Revised Draft UNCAC A/AC.261/3/Rev.4, Art. 32. See also Ad Hoc Committee, Proposals and contributions received from Governments: amendment to article 32/Italy, UN Doc. A/AC.261/L.192 (March 19, 2003). Cf. Huber, "Supranational Measures," p. 582 (on the earlier version of the UNCAC article).

[157] Simpson and Weiner (eds.), *Oxford English Dictionary*, economic, n. and adj., para. B(1)(b); finance, n., para. 1(6); financial, adj., para. 1.

[158] COECrimCC Explanatory Report, para. 64; OECD, "Corruption: A Glossary of Standards," p. 26.

[159] See also OECD-ABC Commentaries, para. 19; OECD, "Corruption: A Glossary of Standards," p. 26, n. 1.

[160] AUCPCC, Art. 4(1)(f); SADC-PAC, Art. 3(f); UNCAC, Art. 18.

illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property."

Together, these provisions require or recommend the criminalization of conduct that threatens to distort decision-making by public authorities or officials. The COECrimCC, UNCAC, and SADC-PAC stigmatize transactions that are supposed to secure the application of improper influence and the IACAC stigmatizes the acts of influence that result in the improper conferral of a benefit. The differences between the two influence-based offenses are apparent from their elements. Like public sector bribery, trading in influence is an intentional transactional act involving an undue advantage and a public official.[161] It differs from bribery in that it involves a "corrupt trilateral relationship" between an influence seeker, an influence peddler, and a public official.[162] It occurs (roughly) whenever a person promises, offers, gives, requires, receives, or accepts an undue advantage or promise thereof to improperly influence a public official's decision-making.[163] The application of influence need not be unlawful;[164] the public official need not have known of the transaction between the influence seeker and the influence peddler;[165] and the influence peddler need not have had or used the influence he/she had or claimed to have had.[166] The authors of the COECrimCC Explanatory Report conclude that improper influence and "acknowledged forms of lobbying" are distinguished from each other by the "corrupt intent of the influence peddler."[167] However, concerns that Art. 12 may require restrictions on freedom of political expression prompted several state parties to enter reservations.[168] The GRECO has also warned that "broad and far-reaching transpositions of Article 12 of the Convention may frustrate the actual purpose of the criminalisation of trading in influence and reflect badly on the standards the Convention sets."[169]

[161] COECrimCC Explanatory Report, paras. 64–67; OECD, "Corruption: A Glossary of Standards," pp. 25–26; UNODC, "UNCAC Legislative Guide," para. 281. See also GRECO, Azerbaijan III(I), para. 59.

[162] COECrimCC Explanatory Report, para. 65; GRECO, Belgium III(I), paras. 53, 102; Ireland III(I), para. 71; OECD, "Corruption: A Glossary of Standards," p. 26; UNODC, "UNCAC Legislative Guide," para. 281.

[163] GRECO, Belgium III(I), para. 54. See also GRECO, Spain III(I), para. 96.

[164] GRECO, Estonia III(I), para. 72; Poland III(I), para. 66.

[165] GRECO, Hungary III(I), paras. 91–92; Slovakia III(I), para. 107; United States III(I), para. 158.

[166] GRECO, Belgium III(I), paras. 56, 102; Bulgaria III(I), para. 66; Czech Republic III(I), para. 77; Italy III(I), para. 111; Luxembourg III(I), para. 84; Slovenia III(I), para. 83.

[167] COECrimCC Explanatory Report, para. 65. See also Bacio Terracino, *The International Legal Framework*, pp. 125–126.

[168] GRECO, Finland III(I), paras. 70, 105; Sweden III(I), para. 83; Switzerland III(I), para. 89; Netherlands III(I), para. 91; United Kingdom III(I), para. 131.

[169] GRECO, Latvia III(I), para. 94.

By contrast, the abuse of influence in Art. XI(1)(c) IACAC is made out whenever a person acts or refrains from acting to obtain a decision from a public authority that would allow him/her (or it) to illicitly benefit or gain. It does not require a transaction in relation to an undue advantage and it does not presuppose a division of functions between an influence seeker, influence peddler, and public official.[170] That said, a narrow reading of the words "whereby he illicitly obtains for himself or for another person any benefit or gain" would see Art. XI(1)(c) IACAC apply only when the person actually gains or benefits.

3.2.1.4 Abuse of functions and breach of duty

The AUCPCC, IACAC, SADC-PAC, and UNCAC call on state parties to criminalize or consider criminalizing other misuses of public (or private) office or functions for reward. Mandatory Art. VI(1)(c) IACAC requires state parties to sanction individuals who perform their duties with the motive of "illicitly obtaining benefits," i.e., "[a]ny act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party." The AUCPCC and SADC-PAC reproduce Art. VI(1)(c) IACAC, though the AUCPCC extends the duty to acts or omissions by "other person[s]."[171] In somewhat different terms, optional Art. 19 UNCAC calls on state parties to consider criminalizing "the abuse of functions or position," i.e., "when committed intentionally . . . the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."

The AUCPCC, IACAC, SADC-PAC, and UNCAC foresee the creation of offenses involving acts or omissions in the discharge of a public official's or functionary's duties or functions for improper purposes and, under the UNCAC, with intent. Article 19 UNCAC foresees the criminalization of unlawful conduct that is intended to secure for the official or a third party an advantage to which the official is not entitled.[172] It would include, for example, "improper disclosure by a public official of classified or privileged information."[173] Article VI(1)(c) IACAC and its parallel provisions in the AUCPCC and SADC-PAC apply to any act that has as its objective securing a benefit for an official or a third party through an illicit process. Reports of the Committee of Experts of the Mechanism for Follow-up on the Implementation of the IACAC (MESICIC) indicate that Art. VI(1)(c) IACAC

[170] UNODC, "UNCAC Legislative Guide," para. 281.
[171] AUCPCC, Art. 4(1)(c); SADC-PAC, Art. 3(c).
[172] See also Snider and Kidane, "Combating Corruption in Africa," 726.
[173] UNCAC Interpretative Notes, para. 31.

captures an equally broad range of offenses.[174] It would also appear to overlap with optional Art. XI(1)(b) IACAC, which addresses the improper use of classified or confidential information or property belonging to the state or "any firm or institution in which it has a proprietary interest," and with passive bribery provisions.[175] Breach of duty and abuse of function provisions do not, however, require a transactional act between an official and a third party. Therefore, unlike passive bribery offenses, they may apply to opportunistic misbehavior by a person (official) acting alone.

3.2.1.5 The diversion and misuse of assets

The anti-corruption treaties also call on state parties to criminalize three acts and omissions by which public officials and some participants in the private sector improperly redirect assets. Optional Art. XI(1)(d) IACAC firstly describes an offense of:

> [t]he diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.

This article is incorporated as a mandatory obligation in the AUCPCC and SADC-PAC,[176] although the AUCPCC refers to diversions by public officials "and any other person."[177] Second, Art. 17 UNCAC requires state parties to criminalize intentional "embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity." It is a mandatory obligation, which applies to "any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position."[178] A corresponding obligation to consider criminalizing embezzlement in the private sector appears at Art. 22 UNCAC.[179] Third, Art. 1(2) EUCPFI requires EU member states to criminalize "fraud affecting the European Communities' financial interests." To paraphrase Art. 1(1) EUCPFI, it impugns various forms of intentional conduct – from the presentation of false, incorrect, or incomplete statements, to the failure to disclose required information – which effect "the misappropriation or wrongful

[174] See also Bacio Terracino, *The International Legal Framework*, pp. 128–129. See, e.g., Committee of Experts of the MESICIC, Brazil II, pp. 35–36; Columbia II, pp. 35–37; Guatemala II, pp. 31, 33; United States II, pp. 33–35, 40.

[175] Snider and Kidane, "Combating Corruption in Africa," 724–726.

[176] AUCPCC, Art. 4(1)(d); SADC-PAC, Art. 3(d).

[177] AUCPCC, Art. 4(1)(d).

[178] UNCAC, Art. 17.

[179] See further Low, "The United Nations Convention against Corruption," 11.

retention of funds" and "the illegal diminution of the resources" with respect to European budgets.[180] Article 2(2) EUCPFI exempts state parties from the need to criminalize "minor fraud" involving small amounts, as do the interpretive notes to Art. 22 UNCAC.[181]

As Ms. Lucinda Low has already observed of the UNCAC, most provisions on diversion "are fairly self-explanatory."[182] The AUCPCC, IACAC, SADC-PAC, and UNCAC foresee the punishment of public or government officials and some participants in the private sector who divert (or embezzle or misappropriate) certain things of value that were entrusted or given to them "by virtue of [their] position[s]." They must do so with intent or with an improper purpose and they may do so for their own benefit or the benefit of a third party. Only the EUCPFI specifies the acts and omissions that constitute the forbidden dealings with things and the consequences for the revenue or expenditure of the victim institution. The other conventions rely on the ordinary meaning of the operative terms.[183] Since the words are not synonyms,[184] the diversion offense in Art. 17 UNCAC would seem to be the broadest in the treaties.[185]

3.2.1.6 Illicit enrichment

Beginning with IACAC,[186] three anti-corruption treaties call for the criminalization of illicit enrichment, i.e., a significant increase in the assets, primarily of a public official, that he/she cannot reasonably explain by reference to his/her (lawful) income[187] or his/her lawful earnings during the performance of his/her functions.[188] Mandatory Art. IX IACAC states:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.

The UNCAC's discretionary Art. 20 similarly provides:

> Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence,

[180] EUCPFI, Art. 1(1)(a) and (b), each at the first indent.
[181] UNCAC Interpretative Notes, para. 29.
[182] Low, "The United Nations Convention against Corruption," 8.
[183] See, e.g., Simpson and Weiner (eds.), *Oxford English Dictionary*, diversion, n., para. 1(a); embezzlement, n., para. (b); misappropriation, n.
[184] Cf. UNCAC Interpretative Notes, para. 30.
[185] Snider and Kidane, "Combating Corruption in Africa," 726.
[186] Snider and Kidane, "Combating Corruption in Africa," 728.
[187] UNCAC, Art. 20; AUCPCC, Art. 1(1).
[188] IACAC, Art. 9.

> when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Under Art. 8(1) AUCPCC, the obligation to "adopt necessary measures to establish . . . an offence of illicit enrichment" is subject "to the provisions of . . . domestic law." Illicit enrichment is defined in Art. 1(1) to "mea[n] the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income."

Mandatory and discretionary, the treaties' illicit enrichment provisions are intended to help states secure convictions of those who misuse their positions of trust or office for private gain.[189] In a prosecution for illicit enrichment, there is no need to prove that the official obtained the assets through corrupt acts or omissions.[190] Rather, once the state shows that the official possessed excessive wealth, the official must "offer a reasonable or credible explanation" as to the origins of the wealth or be liable for the offense.[191] The criminalization of illicit enrichment is thus said to "addres[s] the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes"[192] (or, presumably, engaged in other criminal acts).[193] Illicit enrichment offenses also obviate the need for states, in subsequent confiscation proceedings, to show that assets in the possession or control of an offender (or his/her relatives or associates) are the direct or indirect proceeds of a corruption offense.[194]

The anti-corruption treaties afford states considerable discretion in criminalizing illicit enrichment.[195] First, they do not say whether illicit enrichment is a strict liability offense, a stand-alone *mens rea* offense, or a device for easing the burden of proving (other) acts of corruption.[196] The IACAC and AUCPCC make no mention of a state of mind and the UNCAC provides simply that the *fact* of a significant increase in wealth is to be "committed intentionally."[197] Second, the objective elements of illicit enrichment may be either possession of significantly increased wealth or the failure to provide a justification for such possession.[198] Only Art. IX IACAC provides the timeframe for measuring the inexplicable

189 Kofele-Kale, "Presumed Guilty," 912.
190 Cf. Lewis, "Presuming Innocence," 305, 308; Muzila et al., *On the Take*, pp. 3, 7, 12–13.
191 UNODC, "UNCAC Legislative Guide," para. 297. See also ICHRP and TI, "Integrating Human Rights," p. 65.
192 UNODC, "UNCAC Legislative Guide," para. 296.
193 Boersma, *Corruption as Violation and Crime?* p. 38.
194 Muzila et al., *On the Take*, p. 5.
195 Wilsher, "Inexplicable Wealth," 28 (commenting on the UNCAC).
196 Wilsher, "Inexplicable Wealth," 30–32.
197 Muzila et al., *On the Take*, pp. 20–22; Lewis, "Presuming Innocence," 305–308; Wilsher, "Inexplicable Wealth," 28.
198 Muzila et al., *On the Take*, p. 20. Cf. Kofele-Kale, *Combating Economic Crimes*, p. 122.

increase in assets[199] and none of the treaties specify which "assets" are to be considered "of" the official, which increases are "significant," and what earnings or income are "lawful."[200] In addition, the offense in Art. 8(2) AUCPCC applies to inexplicable increases in wealth "of a public official *or any other person*."[201] Third, when it comes to rebutting the presumption, the anti-corruption treaties do not indicate whether state parties are to place a legal or an evidential burden of proof on the accused.[202] With the legal (or persuasive) burden, an accused avoids the charge by proving the licit origins of the assets according to the civil standard (e.g., on the balance of probabilities); with the evidential burden, it is sufficient that he/she (or it) raises a reasonable doubt about the assets' illicit origins.[203] Fourth, illicit enrichment provisions are all qualified by reference to existing standards in local law: state parties' "constitutio[ns]," "the fundamental principles of [their] legal systems,"[204] or "provisions of domestic law."[205]

Such "escape clauses" were intended to accommodate objections from North American and Western European states that illicit enrichment prosecutions violate due process rights.[206] Nevertheless, there is strong support among international organizations, anti-corruption advocates, and commentators for the proposition that illicit enrichment offenses may be drafted compatibly with fair trial guarantees.[207] In particular, the suppression of corruption is presented as an important public interest and a presumption of illicit acquisition as a potentially proportionate restriction on the right to a presumption of innocence. Prosecutors, it is said, must be required to prove the facts that give rise to the presumption – a significant and inexplicable increase in wealth experienced by a relevant person over a relevant period of time – according to the criminal

[199] Muzila et al., *On the Take*, p. 16.

[200] Muzila et al., *On the Take*, pp. 13–16, 18–21; Lewis, "Presuming Innocence," 305–306; Wilsher, "Inexplicable Wealth," 42–43.

[201] AUCPCC, Art. 1(1) (emphasis added).

[202] Cf. Kofele-Kale, "Presumed Guilty," 912.

[203] See generally Lewis, "Presuming Innocence," 305–307; Wilsher, "Inexplicable Wealth," 30–32.

[204] IACAC, Art. IX; UNCAC, Art. 20.

[205] AUCPCC, Art. 8(1).

[206] Particularly the presumption of innocence, but also the right to silence and privilege against self-incrimination: Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 281–283. See further Muzila et al., *On the Take*, pp. 22–26; Jayawickrama, Pope, and Stolpe, "Easing the Burden of Proof," 27; Lewis, "Presuming Innocence," 309, 312–313, 359–360; Wilsher, "Inexplicable Wealth," 29–30.

[207] UN Doc. A/HRC/19/42, para. 46; ICHRP and TI, "Integrating Human Rights," pp. 65–66; Jayawickrama, Pope, and Stolpe, "Easing the Burden of Proof," 27–28; Kofele-Kale, "Presumed Guilty," 914–915; *Combating Economic Crimes*, pp. 63–67, 126–129; Lewis, "Presuming Innocence"; Muzila et al., *On the Take*, p. 31; Wilsher, "Inexplicable Wealth," 40–42. Cf. Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 281–285; Snider and Kidane, "Combating Corruption in Africa," 728–729.

standard.[208] It is then argued that the accused must be entitled to rebut the presumption by raising a reasonable doubt about the illicit origins of the assets (i.e., by discharging the evidential burden),[209] or, for a minority, by proving the licit source of the assets according to the civil standard (i.e., to discharge the legal burden of proof).[210] Either way, commentators would accord the finder of fact a discretion not to rely on the presumption even if the conditions for its application are met.[211] Finally, it is said that illicit enrichment provisions must be drafted in a manner that is legally certain[212] and applied in proceedings that are otherwise fair.[213] This last requirement points to a dilemma for anti-corruption activists: In states with high levels of corruption and limited investigative capacity, institutional guarantees for the rule of law may also be weak. In this setting, does the criminalization of illicit enrichment enhance or undermine governance?[214] Put another way, does any decrease in the incidence of corruption offset the increase in power of the executive and justify the unsafe convictions that may result in the meantime?

3.2.1.7 Money laundering and concealment

Each of the offenses mentioned so far results in the offender or a third party acquiring something of value. The acts of knowingly using or hiding these things of value are to be criminalized as money laundering or concealment under several anti-corruption treaties.

The duty to criminalize money laundering is mandatory in the AUCPCC, COECrimCC, EUCPFI-P2, OECD-ABC, UNCAC, and UNTOC. Recalling Art. 1(b)–(c) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNCATND),[215] the AUCPCC, UNCAC, and UNTOC require their state parties to establish three offenses that involve

[208] See, e.g., ICHRP and TI, "Integrating Human Rights," pp. 65–66; Kofele-Kale, "Presumed Guilty," 943; *Combating Economic Crimes*, pp. 127–128; Jayawickrama, Pope, and Stolpe, "Easing the Burden of Proof," 27; Muzila et al., *On the Take*, p. 24.

[209] Lewis, "Presuming Innocence"; Jayawickrama, Pope, and Stolpe, "Easing the Burden of Proof," 28; Wilsher, "Inexplicable Wealth," 42. See also Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 281–285; Muzila et al., *On the Take*, pp. 24–25.

[210] Kofele-Kale, "Presumed Guilty," 914–915, 942–944.

[211] ICHRP and TI, "Integrating Human Rights," p. 65; Kofele-Kale, *Combating Economic Crimes*, p. 128.

[212] See, e.g., ICCPR, Art. 15(1); ECHR, Art. 7(2); ACHR, Art. 9; AfCHPR, Art. 7. See also Muzila et al., *On the Take*, pp. 20, 33–34.

[213] See also Lewis, "Presuming Innocence," 359–363; Muzila et al., *On the Take*, p. 39.

[214] Snider and Kidane, "Combating Corruption in Africa," 729 (arguing that "implementation of this provision . . . should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment").

[215] Vienna, December 20, 1988, in force November 11, 1990, 1582 UNTS 165.

intentional dealings with proceeds of crime.[216] For example, Article 23 UNCAC states that:

> 1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally:
>
> (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offense to evade the legal consequences of his or her action;
>
> (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
>
> (b) Subject to the basic concepts of its legal system:
>
> (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
>
> (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offenses established in accordance with this article.

State parties have an obligation to draft that offense so as to apply to the "widest range" of offenses generating proceeds (predicate offenses), including "at a minimum a comprehensive range of criminal offences established in accordance with this Convention."[217]

The COECrimCC and EUCPFI-P2 describe money laundering in similar terms,[218] though they do so by incorporating the definitions from the COE's 1990 money laundering convention (COEMLC 1990),[219] which was later augmented by the COE's 2005 convention on money laundering and the financing of terrorism (COEMLC 2005),[220] and the EU Council Directive 91/308/EEC,[221] which has since been replaced by Directive

216 AUCPCC, Art. 6; UNCAC, Art. 23; UNTOC, Art. 6(1). See generally Carr and Goldby, "Recovering the Proceeds of Corruption," 174–176; Stessens, *Money Laundering*, p. 113.

217 UNCAC, Arts. 2(h), 23(2)(a)–(b).

218 COECrimCC, Art. 13; EUCPFI-P2, Art. (1)(e).

219 Council of Europe Convention on Laundering, Search, Seizure and the Confiscation of the Proceeds from Crime 1990, Strasbourg, November 8, 1990, in force September 1, 1993, 1862 UNTS 69, 141 ETS, Art. 6(1)–(2).

220 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, May 16, 2005, in force May 1, 2008, 198 ETS, Art. 9(1).

221 Council Directive 91/308/EEC of June 10, 1991, on prevention of the use of the financial system for the purpose of money laundering, OJ 1991 No. L166, June 28, 1991, p. 77.

2005/60/EC.[222] The OECD-ABC does not describe the offense but requires its state parties to make the bribery of foreign public officials a predicate offense to money laundering on the same basis as the bribery of domestic public officials.[223] Though there is no dedicated money laundering provision in the IACAC or SADC-PAC, each treaty requires its state parties to criminalize "[t]he fraudulent use or concealment of property derived from any acts" that must be criminalized under Art. VI IACAC and Art. 3 SADC-PAC (respectively).[224] The AUCPCC requires and UNCAC recommends the creation of a similar offense.[225]

Hence, anti-corruption treaties require state parties to criminalize a broad range of intentional conduct by which an offender or third party is put in a position to preserve or enjoy illicit proceeds of corruption offenses. The objective elements of the offenses vary from "conversion," "transfer," "concealment," and "disguise" to "acquisition," "possession," "use," and "retention," all of which are acts commonly involved in hiding and reinvesting funds of illicit origins.[226] The mental elements of knowledge and intent connect the conduct with the predicate offense and so differentiate criminal from non-criminal transactions with the proceeds of crime; they may be inferred from objective factual circumstances.[227] The anti-corruption treaties generally require state parties to deem, as predicates, those offenses that they must or may establish in accordance with their terms.[228] Exceptionally, the UN conventions require state parties to "seek to" apply the offense of money laundering to "the widest range of predicate offenses" and, in certain circumstances, the UN conventions and the EU directive require states to regard acts or omissions that took place abroad as predicates to money laundering.[229]

[222] Council Directive 2005/60/EC of the European Parliament and of the Council of October 26, 2005, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ 2005 No. L309, November 25, 2005, pp. 15.

[223] OECD-ABC, Art. 7. [224] IACAC, Art. VI(d); SADC-PAC, Art. 3(g).

[225] AUCPCC, Art. 4(1)(h); UNCAC, Art. 24.

[226] Carr and Goldby, "Recovering the Proceeds of Corruption," 175; Stessens, *Money Laundering*, p. 84.

[227] COEMLC 1990, Art. 6(2)(c) and (3)(a); COEMLC 2005, Art. 9(2)(c); EU Directive 2005/60/EC, Art. 1(5); UNCAC, Art. 28; UNTOC, Art. 6(2)(f). Cf. UNCATND, Art. 1(3). See further COE, Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), available at http://conventions.coe.int/Treaty/EN/Reports/Html/141.htm, accessed October 15, 2013 (COEMLC 1990 Explanatory Report), para. 32; Stessens, *Money Laundering*, p. 114; UNODC, "UNCAC Legislative Guide," paras. 233–234, 237, 241, 244.

[228] AUCPCC, Arts. 4(1)(h), 6(a)–(c); COEMLC 1990, Arts. 1(e), 13; EU Directive 2005/60/EC, Art. 2(4) and (5)(e); EUCPFI-P2, Art. 1(e); IACAC, Art. VI(d); SADC-PAC, Art. 3(g); UNCAC, Arts. 2(h), 23(2)(a)–(b), 24; UNTOC, Arts. 2(h), 6(2)(a)–(b).

[229] EU Directive 2005/60/EC, Art. 1(3); UNCAC, Art. 23(b)–(c); UNTOC, Art. 6(2)(b)–(c).

3.2.1.8 Obstruction of justice

Finally, the UNCAC and UNTOC require state parties to criminalize conduct intended to disrupt a proceeding or law enforcement action in relation to a convention offense.[230] Article 25 UNCAC refers to:

> (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offenses established in accordance with this Convention.
> (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Article 23(b) UNTOC is identical except insofar as it refers to "offenses *covered by* this Convention" (emphasis added). In both provisions, the first limb of the offense targets the intentional use of "stand-over tactics" – physical force, threats or intimidation – as well as bribery to influence witnesses or others called upon to produce evidence in a proceeding.[231] The second limb requires state parties to prohibit the use of stand-over tactics to interfere with justice or law enforcement officials who are exercising their official duties in relation to convention offenses.[232] It is without "prejudice [to] the right of States Party to have legislation that protects other categories of public official."[233]

3.2.2 Defenses

Whereas all the anti-corruption treaties require their state parties to criminalize or consider criminalizing corrupt acts and omissions, none describes the situations in which states must exclude or consider excluding a person's criminal liability. In other words, the treaties neither mandate nor recommend particular or general defenses to charges of bribery, the abuse of influence and functions, breach of duty, trading in influence, illicit enrichment, diversion and misuse of assets, money laundering and concealment, or the obstruction of

[230] UNCAC, Art. 25(a)–(b); UNTOC, Art. 23(a)–(b). See further UNODC, "UNCAC Legislative Guide," para. 256.
[231] UNCAC, Art. 25(a); UNTOC, Art. 23(a). See further UNODC, "UNCAC Legislative Guide," paras. 256–257.
[232] UNCAC, Art. 25(b); UNTOC, Art. 23(b). See further UNODC, "UNCAC Legislative Guide," para. 259.
[233] UNCAC, Art. 25(b); UNTOC, Art. 23(b). See further UNODC, "UNCAC Legislative Guide," para. 260.

justice. The UNCAC and UNTOC provide that "the description . . . of the applicable legal defenses or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a state party";[234] the European, African, and inter-American instruments omit mention of defenses altogether.

That said, when it is read with its official commentaries and associated soft law standards, the OECD-ABC substantially restricts the discretion of state parties to provide special grounds of exculpation for the active bribery of foreign public officials.[235] The commentaries state that an offense will be committed even when the payment of the bribe was necessary to obtain or retain the business or the improper advantage.[236] Hence, they limit the scope for duress, coercion, extortion, emergency, and solicitation defenses under the convention.[237] As is relevant to authorization, "cultural," or "developmental" defenses,[238] they also make clear that foreign bribery is an offense irrespective of whether it is perceived to be part of local custom and/or is tolerated by local authorities.[239] Similarly, "the value of the advantage, [and] its results" should not affect a person's liability for bribery of foreign public officials.[240] Only small "facilitation" payments "to induce [foreign] public officials to perform their functions" need not be criminalized,[241] though the Council of the OECD regards them as "corrosive" and recommends that they be periodically reviewed.[242]

Further, in my submission, state parties have a general duty of good faith under public international law not to introduce or retain principles or rules of law that legalize acts and omissions that they are supposed to make criminal.[243]

234 UNCAC, Art. 30(9); UNTOC, Art. 11(6). See further OECD, "Corruption: A Glossary of Standards," pp. 47–48.
235 See generally Zerbes, "Article 1," pp. 111–113, 118–119.
236 OECD-ABC Commentaries, paras. 1, 7.
237 ADB/OECD Initiative, "Criminalisation of Bribery," p. 32; OECD Recommendation 2009, Annex I, para. A, first sentence; OECD-WGB, Bulgaria III, para. 19; Hungary II, para. 140; Italy II, paras. 128–140; Italy III, paras. 28–35; United Kingdom IIbis, paras. 58–62; Russia I, para. 26; Puckett, "Clans and the Foreign Corrupt Practice Act," 848.
238 ADB/OECD Initiative, "Criminalisation of Bribery," p. 36; Puckett, "Clans and the Foreign Corrupt Practice Act," 851–856. On a "socially-acceptable gift" defense, see OECD-WGB, Slovak Republic II, paras. 172–177.
239 OECD-ABC Commentaries, para. 7. Cf. OECD-ABC Commentaries, para. 8. See also OECD-WGB, Chile II, para. 147.
240 OECD-ABC, Commentaries, para. 7. For applications of this principle, see OECD-WGB, Czech Republic II, para. 35; Finland II, pp. 16–17; Finland III, paras. 21–22; Italy II, paras. 116–120.
241 OECD-ABC, Commentaries, para. 9. On the limits on the facilitation payment exception, see, e.g., OECD-WGB, Canada III, paras. 29–39; Denmark II, paras. 184–187. For a comparison to the COECrimCC, see GRECO, United States III(I), para. 153.
242 OECD Recommendation 2009, paras. VI–VII. See, e.g., OECD-WGB, Canada III, paras. 29–39; Denmark III, para. 40.
243 VCLT, Art. 26.

It would seem that, on this basis, the GRECO has assessed special defenses to public bribery and trading in influence in its third round of evaluations.[244]

3.2.3 *Penalties*

The anti-corruption treaties regulate the sanctions for corruption and corruption-related offenses. The COECrimCC, EU Dec. 2003/568/JHA, EUCPFI, EUCPFI-P1, EUOCC, and OECD-ABC require "effective, proportionate and dissuasive" punitive measures,[245] including custodial sentences for human offenders and monetary penalties for legal persons.[246] In addition, they are to establish or to consider establishing additional (non-criminal) sanctions, such as disqualifications from office for natural persons and injunctive, supervisory, and winding-up orders for legal persons.[247] State parties to the COECrimCC and OECD-ABC must also ensure consistency between sanctions for convention offenses and similar offenses under national law.[248] By contrast, the UNCAC and UNTOC avoid an autonomous minimum sanctioning standard. Acknowledging the principle that "offences shall be prosecuted and punished in accordance with [the domestic law of a State Party],"[249] they merely require state parties to impose sanctions that "take into account the gravity of [the] offence."[250] The AUCPCC, IACAC, and SADC-PAC omit express reference to sanctions;[251] but, in requiring state parties to establish acts of corruption as "criminal" offenses, they implicitly require the imposition of "criminal" penalties. Whether the notion of "criminal" penalties is autonomous from or dependent on local sanctioning standards and principles is a question that is beyond the scope of this work.

[244] See e.g., GRECO, Armenia III(I), para. 90; Croatia III(I), paras. 44, 57; Latvia III(I), para. 96; Moldova III(I), paras. 63–64; Spain III(I), para. 99; Turkey III(I), para. 73.

[245] COECrimCC, Art. 19(1); EU Dec. 2003/568/JHA, Arts. 4(1), 6(2); EUCPFI, Art. 2(1); EUCPFI-P1, Art. 5(1); EUOCC, Art. 5(1); OECD-ABC, Art. 3(1). On the OECD-ABC, see further Cullen, "Article 3," pp. 212–220; OECD-WGB, United Kingdom III, paras. 61, 72.

[246] COECrimCC, Art. 19(1)–(2); EU Dec. 2003/568/JHA, Arts. 4(2), 6(1); EUCPFI, Arts. 2(1), 5(1); EUCPFI-P1, Art. 5(1); EUCPFI-P2, Art. 4(1); EUOCC, Art. 5(1); OECD-ABC, Art. 3(1)–(2).

[247] EU Dec. 2003/568/JHA, Arts. 4(2), 6(1); EUCPFI-P1, Art. 5(1); EUOCC, Art. 5(2); OECD-ABC, Art. 3(4); UNCAC, Art. 30(6)–(8).

[248] GRECO, Albania III(I), para. 55; Croatia III(I), paras. 20, 69; Finland III(I), paras. 102, 104; Iceland III(I), paras. 68–70; Lithuania III(I), para. 79; Malta III(I), paras. 92–93; Netherlands III(I), para. 93; OECD-ABC, Art. 3(1); OECD-WGB, Austria II, para. 139; Bulgaria II, para. 44.

[249] UNCAC, Art. 30(9); UNTOC, Art. 11(6).

[250] UNCAC, Art. 30(1); UNTOC, Art. 11(1).

[251] Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 278–279.

3.2.4 *Preliminary conclusions*

From bribery in the public sectors to the diversion of assets and illicit enrichment, the anti-corruption treaties require their state parties to criminalize or consider criminalizing a range of conduct that involves actual or potential misuses of public or private power or office for private gain. The anti-corruption treaties use similar terminology to describe these corruption offenses, although they define the key terms so as to apply to slightly different groups of people, things, and situations.[252] They also leave much – including in the definition of defenses and penalties – to the discretion of states. The same can be said of the remaining offenses, which prevent the detection, investigation, or prosecution of other offenses and/or enable offenders to enjoy the rewards of crime. My concern is with corruption offenses since wealth associated with money laundering and concealment is typically within the enforcement jurisdiction of the haven state.[253] Likewise, I focus on the offenses as described in the anti-corruption treaties since they provide a framework for cooperation and indicate the direction of normative developments in domestic criminal law.[254]

3.3 Enforcement

The anti-corruption treaties presume that each state party will enforce convention offenses in accordance with domestic rules and principles on criminal procedure. The suggestions of some commentators notwithstanding, the treaties do not establish centralized regional or global anti-corruption tribunals.[255] To the contrary: They set minimum standards on those aspects of anti-corruption investigations and prosecutions that are particularly fraught in corruption cases.

3.3.1 *Detection*

Several instruments address the reluctance of individuals to report suspicions of corruption and to appear as witnesses in corruption-related court proceedings.[256] On the one hand, articles on accounting and financial reporting by officials and financial institutions aim to expose irregularities that are indicative of corruption.[257] On the other hand, articles on the protection of

[252] For an example of the difficulties caused by implementing the conventions each with separate laws, see OECD-WGB, Greece III; Spain III, paras. 18–23.
[253] Stessens, *Money Laundering*, Ch. 3.
[254] Stessens, "The International Fight against Corruption," 893, 900.
[255] Harms, "Holding Public Officials Accountable"; Reisman, "Harnessing International Law," 58–59.
[256] ADB/OECD Initiative, "Anti-Corruption Policies," pp. 43–45.
[257] AUCPCC, Arts. 5(4), 7; COE Twenty Principles, paras. 8, 12; IACAC, Art. III(1), (4), and (10); OECD Recommendation 2009, paras. IX(ii), X(a)–(b); OECD-ABC, Art. 8;

complainants, witnesses, victims of crime, and experts are intended to encourage all potential informants to report their concerns in good faith.[258] Somewhat against the trend, the African treaties also oblige state parties to "*punish* those who make false or malicious reports against innocent people."[259]

3.3.2 *Prevention and investigation*

The anti-corruption treaties describe the qualities of people and institutions who are responsible for upholding laws against corruption: They must be assured independence in their work and possess the knowledge, skills, resources, and powers necessary to execute their mandates.[260] Article 4(1)(d) SADC-PAC requires the creation, maintenance and strengthening of "institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption." It is modeled on Art. III(9) IACAC, which is also recalled in Art. 5(3) AUCPCC, a mandatory provision that refers expressly to "national anti-corruption authorities or agencies." Article 20 COECrimCC omits mention of specialized units but provides that:

> Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

Redacting the language of the inter-American and African instruments, Art. 6 UNCAC obliges state parties to "ensure the existence of a body or bodies . . . that *prevent[s]* corruption by . . . [i]mplementing [anti-corruption policies] . . .

UNCAC, Arts. 8(4), 12(1) and (3), 14(2), 52(1) and (6); UNTOC, Art. 7(1). See ADB/OECD Initiative, "Effective Prosecution of Corruption," p. 5.

[258] AUCPCC, Art. 5(5); COECrimCC, Art. 22; IACAC, Art. III(8); OECD Recommendation 2009, paras. X(C)(v), XI(i) and (iii); SADC-PAC, Art. 4(e); UNCAC, Arts. 13(2), 32–33; UNTOC, Arts. 24–26. See further OECD-WGB, Finland III Follow-Up, para. 5; Germany III Follow-Up, para. 5; Poland III, paras. 139–143; Portugal III, paras. 170–171; Sweden III, paras. 138–140.

[259] AUCPCC, Art. 5(7); SADC-PAC, Art. 4(f) (emphasis added).

[260] AUCPCC, Arts. 5(3), 20(4)–(5); COECrimCC, Art. 20; COE Twenty Principles, para. 3; IACAC, Art. III(9); SADC-PAC, Art. 4(1)(g); OECD-ABC, Art. 5 (read with Commentaries, para. 27); UNCAC, Arts. 11, 36. For examples of state practice, see, e.g., OECD-WGB, Argentina II, para. 100–102; Chile II, para. 105; Czech Republic III, paras. 96–99; Russia I, para. 77. See also OECD-WGB, France III, paras. 112–114; Poland III, paras. 82–90; Portugal III, paras. 85–92; Sweden III, paras. 95–98; United Kingdom III, paras. 134–137 (sufficiency of resources).

and increasing and disseminating knowledge about the prevention of corruption."[261] In terms similar to Art. 20 COECrimCC, it requires these agencies be granted "necessary independence" and "material resources," and "specialised" and adequately trained staff.[262] Under the COECrimCC, UNCAC, and UNTOC (other) competent authorities are to be permitted the use of "special investigative techniques,"[263] such as undercover operations, "controlled deliveries," and electronic surveillance of persons and accounts.[264] These measures raise human rights issues of their own but will not be considered further here.

3.3.3 *Procedural guarantees*

Though several of the anti-corruption treaties start with reference to values like justice, legitimacy, and the rule of law,[265] very few expressly consider the position of the suspect or defendant during the investigation or prosecution.[266] Exceptionally, state parties to the AUCPCC "undertake to abide by . . . the principles [of] [r]espect for democratic principles and institutions, popular participation, the rule of law and good governance [and] [r]espect for human and peoples' rights in accordance with the [AfCHPR] and other relevant human rights instruments."[267] Moreover, the AUCPCC requires them to provide the accused a "fair trial" in accordance with pan-African and international human rights standards:

> Subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and People's Rights and any other relevant international human rights instrument recognised by the concerned States Parties.[268]

The preamble to the UNCAC "acknowledges" "the fundamental principles of due process of law in criminal proceedings." Its measures to protect witnesses, experts, and victims are also expressed to be "without prejudice to the rights of the defendant, including the right to due process";[269] the same wording is used

261 UNCAC, Art. 6(1) (emphasis added).
262 UNCAC, Art. 6(2).
263 COECrimCC, Art. 23(1); UNCAC, Art. 50; UNTOC, Art. 20. See also COECrimCC Explanatory Report, paras. 114–115; COEMLC 1990 Explanatory Report, paras. 79–90.
264 UNCAC, Arts. 2(i), 50; UNTOC, Arts. 2(i), 20.
265 COECrimCC, Preamble; IACAC, Preamble; SADC-PAC, Preamble; OECD-ABC, Preamble.
266 See also Boersma, *Corruption as Violation and Crime?* p. 2. For a similar observation of international and transnational criminal law instruments generally, see Gleß, *Internationales Strafrecht*, para. 36.
267 AUCPCC, Art. 3(1)–(2).
268 AUCPCC, Art. 14. See further Snider and Kidane, "Combating Corruption in Africa," 746.
269 UNCAC, Art. 32(2). See also UNCAC, Art. 30(6) ("procedures through which a public official . . . may . . . be removed, suspended or reassigned by the appropriate

in the UNTOC.[270] However, neither the UNCAC nor the UNTOC expressly mentions human rights as a category of norm, let alone stipulates that their provisions are to align with state parties' other international obligations to respect, protect, and fulfill human rights.[271] In fact, Art. 65(2) UNCAC and Art. 43(3) UNTOC allow state parties to adopt "more strict or severe measures . . . for preventing and combating" convention offenses. The other anti-corruption treaties simply require law enforcement measures be in accordance with a state party's "legal system,"[272] "national law,"[273] "domestic law and . . . treaties,"[274] or "basic" or "fundamental"[275] national legal principles.[276] Since they refer back to existing and entrenched basic norms, these qualifications may limit state parties' freedom to introduce exceptional rules for convention offenses. However, the interpretation of national rules and principles is, in practice, a matter for each state party. The *lack* of continuity in fundamental legal principles is characteristic of profound political transitions, which are associated with the recovery of wealth from former PEPs and related parties.[277]

3.3.4 Non-enforcement

A number of the anti-corruption treaties specify the considerations that state parties may and must take into account in deciding whether to exercise their enforcement jurisdiction. They deal with prosecutorial discretion, immunities, statutes of limitations, and the principles of *ne bis in idem* and sovereignty. Similar provisions appear in the related non-binding anti-corruption instruments.

3.3.4.1 Investigative and prosecutorial discretions

The OECD and UN conventions restrict states' discretion not to investigate or prosecute corruption or corruption-related crimes. The OECD-ABC is most demanding. It requires state parties to refrain from considering

authority, *bearing in mind respect for the principle of the presumption of innocence*" [emphasis added]).

270 UNTOC, Art. 24(2).

271 ICHRP and TI, "Making the Connection," pp. 3, 7; Ivory, "Transparency and Opacity." See also Boister, "Human Rights in the Suppression Conventions."

272 UNTOC, Art. 9(1). See also Arts. 10(1), 13(1), 20(1).

273 COECrimCC, Art. 23(1) (special investigative techniques).

274 IACAC, Arts. XIII(7), XIV(1), XV; SADC-PAC, Arts. 8(4), 10(8). See also IACAC, Art. XVI; SADC-PAC, Arts. 4(2), 6(1).

275 UNCAC, Arts. 30(6) and (8), 50(1); UNTOC, Art. 20(1).

276 On such "escape hatches," see generally Low, "The United Nations Convention against Corruption," 4; Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 248–249.

277 Teitel, *Transitional Justice*, p. 11.

their national economic interests; the potential effect of proceedings upon relations with other states; or the identity of implicated natural or legal persons when investigating and prosecuting active foreign bribery.[278] The OECD-WGB also monitors national enforcement efforts. In its third round of evaluations, it has expressed "serious concern" about the lack of foreign bribery prosecutions in several states.[279] The UNCAC and UNTOC provisions on "[p]rosecution, adjudication, and sanctions" are much looser. Article 30(3) UNCAC and Art. 11(2) UNTOC require state parties to "endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences." Ironically, with qualifiers like the "maximiz[ation of] effectiveness" and "due regard to . . . deter[rence]," the UN conventions give state parties considerable scope to restrict or retain investigative and prosecutorial discretions in domestic law.

3.3.4.2 Immunities from jurisdiction

Immunities for public officials are expressly addressed in the UNCAC, COECrimCC, and EUCPFI-P1.[280] Article 30(2) UNCAC requires state parties to "establish and maintain . . . an appropriate balance . . . between any immunities or jurisdictional privileges . . . and the possibility . . . of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention." This proportionality requirement only applies to "*its* public officials," however.[281] Therefore, state parties are free to recognize immunities and privileges with respect to officials of other states or international organizations in accordance with general international law.[282] The COECrimCC and

[278] OECD-ABC, Art. 5. See also OECD Recommendation 2009, Annex I, para. D. See further Cullen, "Article 5," pp. 311–325; OECD-WGB, United Kingdom IIbis, paras. 93–103; United Kingdom III, paras. 118–129; Spain III, para. 103.

[279] See, e.g., the Executive Summaries of OECD-WGB, Denmark III, p. 5; Netherlands III, p. 5; Portugal III, p. 5; Spain III, pp. 5–6. Cf. OECD-WGB, Germany III, p. 4; United States III, p. 4.

[280] COECrimCC, Art. 16; EUCPFI-P1, Art. 4(5); UNCAC, Art. 30(2). See also OECD-WGB, Russia I, para. 78 (broad immunities for some categories of persons as potentially incompatible with Art. 1 OECD-ABC, "any person").

[281] UNCAC, Art. 30(2) (emphasis added).

[282] On the immunities provisions in anti-corruption treaties and cases, see further Bacio Terracino, *The International Legal Framework*, pp. 195–204; Boister, *Introduction to Transnational Criminal Law*, p. 157; Brun et al., *Asset Recovery Handbook*, p. 30. On immunities in general international law, see Malanczuk, *Akehurst's International Law*, pp. 121–123; Shaw, *International Law*, pp. 687–714.

EUCPFI-1 defer to existing immunities conferred under international agreements. Article 16 COECrimCC provides that "[t]he provisions of this Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity."[283] However, Art. 16 COECrimCC is supplemented in practice by the COE's Twenty Principles for the Fight against Corruption, which "limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society."[284] The GRECO, which monitors the implementation of the COE convention and principles, has found immunities in national law too broad in several evaluations.[285]

3.3.4.3 Statutes of limitations

The application of statutes of limitations to convention offenses is regulated expressly by the OECD-ABC, UNCAC, and UNTOC and implicitly, it would seem, by the COECrimCC.[286] Article 6 OECD-ABC provides that "[a]ny statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence." The UNCAC and UNTOC stipulate that a state party "shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention."[287] If the alleged offender has evaded the authorities, the two UN conventions require the period to be "even longer" or, under the UNCAC, suspended altogether.[288] The requirement in the OECD-ABC that member states adopt "an *adequate* period of time for investigation and prosecution" would seem to be less strenuous that the UN standard;[289] however, it is not subject to the qualification, "where appropriate." The GRECO interprets the criminalization provisions in the COECrimCC as implicitly limiting the parties' power to impose short limitation periods.[290]

[283] See further COECrimCC Explanatory Report, para. 77. See also EUCPFI-P1, Art. 4(5).

[284] COE Twenty Principles, para. 6.

[285] See e.g., GRECO, Bosnia and Herzegovina I, paras. 143–149; Georgia I, paras. 134–138; Greece I, paras. 103–106; Romania I, paras. 101–104.

[286] OECD-ABC, Art. 6; UNCAC, Art. 29; UNTOC, Art. 11(5). On the COECrimCC, see further GRECO, Portugal III(I), para. 101.

[287] UNCAC, Art. 29; UNTOC, Art. 11(5).

[288] UNCAC, Art. 29; UNTOC, Art. 11(5).

[289] OECD-ABC, Art. 6 (emphasis added). See further Bacio Terracino, *The International Legal Framework*, p. 242; Cullen, "Article 6," p. 335.

[290] See, e.g., GRECO, Portugal III(I), para. 101, and further Bacio Terracino, *The International Legal Framework*, p. 243.

3.3.4.4 The principle of *ne bis in idem*

The principle of *ne bis in idem* (double jeopardy) further restricts the power of state parties to the AUCPCC, EUCPFI, EUOCC, and SADC-PAC to enforce convention offenses.[291] The principle is expressed in the AUCPCC and SADC-PAC with the statement that "a person shall not be tried twice for the same offence."[292] In the EUCPFI and EUOCC, the *ne bis in idem* principle applies to "a person whose trial has been finally disposed of in a Member State" and ensures that he/she (or it) "may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State."[293] EU member state parties may, by declaration, create exceptions that reflect the principles of territoriality, active nationality, and essential interests just discussed.[294] The OECD-WGB has criticized a state party to the OECD-ABC for failing to prosecute foreign bribery on this ground.[295] *Ne bis in idem* and the related principle of *ne bis poena in idem* are discussed further in Chapter 5.[296]

3.3.4.5 The principle of sovereignty

The final express limitations on the power of state parties to enforce offenses under the anti-corruption treaties is the principle of sovereignty. Common Art. 4 UNCAC and UNTOC provide:

> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Article 4 qualifies the state parties' power to enforce convention offenses on the basis of the active nationality, passive personality, and protective principles,[297] though it is unclear whether it adds anything to the principle of sovereignty in other international treaties and general international law.[298]

[291] On the lack of a similar express provision in the IACAC, see further Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 288–289.
[292] AUCPCC, Art. 13(3); SADC-PAC, Art. 5(3). On the AUCPCC, see further Snider and Kidane, "Combating Corruption in Africa," 747.
[293] EUCPFI, Art. 7(1); EUOCC, Art. 10(1).
[294] EUCPFI, Art. 7(2); EUOCC, Art. 10(2).
[295] OECD-WGB, Portugal III, paras. 16, 82.
[296] See further p. 210 and following below.
[297] UNCAC, Art. 42(2); UNTOC, Art. 15(2).
[298] UNCAC Interpretative Notes, para. 10.

3.3.5 Preliminary conclusions

The anti-corruption treaties and the related soft law standards reflect the notion that each state party will generally enforce convention offenses in accordance with its domestic legal norms on criminal procedure.[299] They require their state parties to address particular challenges in the detection, investigation, and prosecution of corruption and corruption-related offenses and set broad minimum standards for not investigating or prosecuting those crimes. Nonetheless, the procedures are likely to vary considerably between state parties.[300] The variation will reflect the broader terms of the treaties, as well as the differences in state parties' legal systems, criminal justice policies, and law enforcement capabilities.

3.4 Conclusions

In Chapter 2, I provisionally defined corruption as any misuse of power or office for private gain that states are encouraged or required to criminalize in accordance with the anti-corruption treaties. In this chapter, I surveyed the provisions on criminalization in the anti-corruption treaties. I determined, first, that the anti-corruption treaties empower their state parties to proscribe, prosecute, and punish acts of corruption that are committed within their territories, by or against their nationals, against their interests, or otherwise as they deem appropriate under domestic law. Whether a state actually assumes responsibility for prohibiting and prosecuting a particular convention offense will depend on the grounds for jurisdiction it has claimed or declined, its interpretation of those grounds, and the existence of any grounds for excluding enforcement jurisdiction on the facts of the case. Second, I found that state parties have duties to criminalize or consider criminalizing a range of corrupt and corruption-related behaviors, including but not limited to the bribery of public officials, the abuse or trading of influence, embezzlement, illicit enrichment, money laundering, and the obstruction of justice. The offenses were defined in similar terms, but were unlikely to manifest in identical prohibitions in domestic law due to state parties' discretion in implementing their treaty obligations. I concluded, third, that the anti-corruption treaties allow their state parties to enforce the substantive prohibitions on corruption in accordance with domestic rules on criminal procedure. Their broad minimum standards concerned the special challenges of detecting, investigating, and prosecuting corrupt acts, as well as the nature and severity of the sanctions for corruption. The treaties' provisions on confiscation and cooperation for the purposes of confiscation are my concern in Chapter 4.

[299] OECD-ABC, Art. 5; UNCAC, Art. 30(6); UNTOC, Art. 11(6).
[300] Boister, "Transnational Criminal Law," 953–958.

4

Cooperating for the purposes of confiscation

In agreeing to criminalize the conduct described in Chapter 3, the state parties to the anti-corruption treaties signaled their willingness to prosecute and punish local misuses of power or office for private gain. Simultaneously, they identified the conduct that generates or involves assets that may become the subject of cooperative confiscation efforts under those conventions or related MLATs. First required of state parties to the UNCATND,[1] cooperative confiscation is now the primary measure for achieving asset recovery under the UNCAC. It is seen as a means of deterring the transfer of proceeds, instrumentalities, or objects of corruption or assets of equivalent value to "safe havens" abroad, and of increasing the likelihood that victim states will be able to enforce their criminal laws against corruption – and be recompensed for damage caused.[2] Cooperative confiscation is also particularly significant from a legal policy perspective: Since asset recovery typically necessitates interaction between states with different capacities to guarantee the rule of law, it highlights the tension between obligations to repress and remediate the effects of grand corruption and to secure individual civil and political rights equally. In this chapter, I describe the international framework for cooperative confiscation in corruption cases; I show how states are required or encouraged to ensure that persons may be deprived of illicit wealth, to assist each other with such confiscations, and to cooperate when disposing of confiscated assets. At each point, I identify the relevant treaty provisions before analyzing the content of those obligations using academic and official commentary and the reports of convention monitoring bodies. As the treaties refer and defer to other international standards on cooperation and confiscation, I also consider multilateral and bilateral treaties and supranational legislative instruments on money laundering, the proceeds of crime, and cooperation in criminal matters (again, related MLATs for short).

[1] Art. 5. See further Bantekas and Nash, *International Criminal Law*, p. 252.
[2] Pieth, "Recovering Stolen Assets," pp. 6–9; StAR, "StAR Initiative"; UNODC, "UNCAC Legislative Guide," para. 667.

4.1 The duty to enable confiscation

The realization of the UNCAC's goal of asset recovery presupposes that confiscation powers exist in potential haven states. Most of the anti-corruption treaties and related MLATs therefore require their state parties to modify their laws so as to enable their competent authorities to permanently deprive persons of illicit wealth, as well as to restrain those assets for the purposes of confiscation. Similar in wording, they all recall Arts. 1 and 5 UNCATND.[3]

4.1.1 The international standards on confiscation

Duties to enable the restraint and confiscation of illicit wealth are expressed in the OECD-ABC, UNCAC, and UNTOC, and most of the regional anti-corruption treaties. They also feature in:

- the COE conventions on money laundering and the proceeds of crime;
- the EU framework decisions on money laundering, restraint, and confiscation and a proposal for a directive on freezing and confiscation; and
- an OAS convention and SADC protocol on MLA.

Except for the proposed EU directive, all these instruments have entered into force.

4.1.1.1 The OECD-ABC

In the third paragraph of Art. 3 on sanctions, the OECD-ABC requires its state parties to enable the restraint and confiscation of bribes paid to foreign public officials, as well as the proceeds of such bribery or property that is of corresponding value.[4] Parties that regard confiscation as inappropriate are to enable the imposition of comparable monetary sanctions.[5] The OECD-WGB has interpreted Art. 3(3) to require state parties to enable confiscation with respect to foreign offenses pursuant to requests for assistance made under Art. 9 OECD-ABC.[6]

[3] COE, Explanatory Report on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198), available at http://conventions.coe.int/Treaty/EN/Reports/Html/198.htm, accessed October 15, 2013 (COEMLC 2005 Explanatory Report), paras. 93–94; COEMLC 1990 Explanatory Report, paras. 15, 26; McClean, *UNTOC Commentary*, pp. 153–154; UNODC, "UNCAC Legislative Guide," paras. 403, 422.

[4] See also OECD-ABC Commentaries, paras. 21–23; OECD-WGB, Russia I, para. 53.

[5] OECD-WGB, Germany III, p. 39; Korea II, para. 129; Japan I, pp. 28–29.

[6] See, e.g., OECD-WGB, Switzerland II, paras. 126–127; United States III, paras. 154–155.

4.1.1.2 The regional treaties and instruments

Similar, though not identical, provisions on confiscation appear in the European and African regional MLATs and instruments. The apparent template for the European instruments is Art. 2(1) COEMLC 1990, which requires its state parties to "adopt such legislative and other measures as may be necessary to enable [them] to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds."[7] Article 2(1) COEMLC 1990 is reproduced with minor amendments in Art. 19(3) COECrimCC: "Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds." There is no accompanying duty to enforce foreign confiscation orders on request or to submit such requests to their own competent authorities "for the purposes of obtaining . . . and . . . enforc[ing]" new local orders, such as appear in the COEMLC 1990 and 2005.[8] But, in its evaluations, the GRECO reads Art. 19(3) with Art. 25 COECrimCC to require measures to enable confiscation of illicit wealth pursuant to requests for assistance from other state parties.[9]

The EUOCC and the EUCPFI and its protocols do not mention confiscation; however, EU member states are all parties to one or both of the COE money laundering conventions and bound to implement the EU framework decisions on confiscation.[10] EU Dec. 2001/500/JHA prohibits EU member states from entering reservations to the COEMLC 1990 that would exclude certain offenses from that convention's confiscation provisions "in so far as [they are] punishable by deprivation of liberty or a detention order for a maximum of more than one year."[11] The COEMLC 2005 requires its state parties to apply restraint and confiscation measures to "corruption and bribery" and "fraud."[12] Under EU Dec. 2005/212/JHA, moreover, all EU member states are required to enable confiscation, including in its "extended" form, with respect to some organized crime and terrorism offenses.[13] The proposed directive in COM(2012) 85 final

[7] See also COEMLC 1990, Art. 7(2); COEMLC 2005, Art. 3(1).

[8] COEMLC 1990, Art. 13(1); COEMLC 2005, Art. 23(1).

[9] See, e.g., GRECO, Switzerland I–II, paras. 97–99, 101; US II, paras. 28, 32–39, 46.

[10] See further Gleß, "Einziehungsentscheidungen"; Klip, *European Criminal Law*, pp. 31, 53 (the effect of framework decisions).

[11] Council Framework Decision 2001/500/JHA of June 26, 2001, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities of the proceeds of crime, OJ 2001 No. L182, July 5, 2001, p. 1, Art. 1(a).

[12] COEMLC 2005, Art. 3(2), Appendix.

[13] Council Framework Decision 2005/212/JHA of February 24, 2005, on confiscation of crime related proceeds, instrumentalities and property, OJ 2005 No. L68, March 15, 2005, p. 49, Arts. 2(1), 3.

would expand the general duty by removing the qualification for "criminal offences punishable by deprivation of liberty for more than one year."[14] It would also broaden the specific duty by requiring extended confiscation in relation to all the offenses in Art. 83(1) Treaty on the Functioning of the European Union, including the offenses mentioned in the EUOCC and EU Decs. 2001/500/JHA and 2003/568/JHA.[15]

Modifying the language of the European instruments and the UNCATND, the AUCPCC[16] and SADC-PAC[17] mandate the adoption of measures to permit the confiscation of the proceeds of corruption and corruption-related offenses. Under Art. 8(1)(a) SADC-PAC state parties are "to enable confiscation of proceeds derived from [convention offenses], or property the value of which corresponds to that of such proceeds." A similar obligation appears at Art. 16(1)(b) AUCPCC. The Protocol on Mutual Legal Assistance in Criminal Matters to the Treaty of the Southern African Development Community (SADC-MLAP) omits a general duty to enable confiscation, even though it requires state parties "to give effect to or permit enforcement of" final forfeiture and confiscation orders made by courts in other state parties with respect to the proceeds of crime.[18] Alternatively, they are to "take other appropriate action to secure or [sic] transfer of the proceeds following a request by the Requesting State."[19]

The Inter-American Convention on Mutual Assistance in Criminal Matters (IACMACM)[20] and IACAC are thus the only regional treaties considered here that do not expressly require their state parties to take legislative or other measures to enable the confiscation of illicit wealth at the national level. The inter-American conventions could be read simply as requiring confiscation under existing local rules in the requested state party. Indeed, Art. 10 IACMACM states that "[r]equests for assistance . . . shall be executed in

[14] Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union of March 12, 2012, COM(2012) 85 final, 2012/0036 (COD) (COM(2012) 85 final), Art. 3. On the similarities and differences between the framework decision and the proposed directive, see further COM(2012) 85 final Explanatory Memorandum, pp. 10–11. For background on the proposed directive and its amendments, see Commission Staff Working Paper, Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Impact Assessment, COM(2012) 85 final, SWD(2012) 32 final, para. 4.2.1.

[15] COM(2012) 85 final, Arts. 2(6), 4, read with Treaty on the Functioning of the European Union, OJ 2010 No. C83, March 30, 2010, p. 47, Art. 83(1). See further COM(2012) 85 final Explanatory Memorandum, pp. 10–11; Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union" COM(2012) 85 final – 2012/0036 (COD), OJ 2012 No. C299, October 4, 2012, p. 128, para. 2.1.

[16] Art. 13(1)(a). [17] Art. 5(1)(a).

[18] Luanda, October 3, 2002, in force March 1, 2007, available at www.sadc.int/about-sadc/overview/sa-protocols, accessed October 15, 2013, Art. 22(1).

[19] SADC-MLAP, Art. 22(1). [20] Nassau, May 23, 1992, in force April 14, 1996, OASTS 75.

accordance with the domestic law of the requested state." However, the IACAC's duty to facilitate cooperation at Art. VII suggests that state parties must adapt their internal legal orders to enable "forfeiture" under Art. XV(1) pursuant to requests for assistance. This interpretation is loosely supported by the inclusion of a definition of property at Art. I IACAC and by the practice of the Committee of Experts of the MESICIC. In its evaluations, the MESICIC twice recommended that state parties adopt legislation to enable other forms of mutual assistance under Art. XV(1).[21] On three occasions, it found non-compliance with the second paragraph of Art. XIV (mutual technical assistance) because state parties had failed to adopt enabling measures.[22]

4.1.1.3 The UNCAC and UNTOC

Like the regional treaties, both the UNCAC and the UNTOC require their state parties to enable confiscation of instrumentalities, proceeds, and property of corresponding value to proceeds of convention offenses. Recalling the UNCATND and the regional treaties, Art. 31(1) UNCAC provides that:

> Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
> (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

An equivalent obligation appears in Art. 12(1) UNTOC.

In addition, the UNCAC contains an obligation on the adaptation of domestic laws to enable state parties to assist with requests for confiscation. Recognizing that "domestic infrastructure paves the ground for cooperation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State party,"[23] a provision of Ch. V requires measures to enable cooperative confiscations. Article 54(1) UNCAC provides in full:

> Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

[21] Committee of Experts of the MESICIC, Brazil I, pp. 43–44, 50–51; Guyana I, pp. 13, 19.
[22] Committee of Experts of the MESICIC, Bahamas I, pp. 21–22, 27–28; Suriname I, p. 21; Grenada I, pp. 15–16, 21.
[23] UNODC, "UNCAC Legislative Guide," para. 724.

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and
(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Sub-paragraph (a) complements Art. 55(1) UNCAC on the duty to cooperate for the purposes of confiscation by requiring state parties to establish the mechanisms that would enable them to directly or indirectly enforce foreign confiscation orders.[24] Sub-paragraph (b) is an obligation to prosecute offenses against local law that would, in effect, enable the confiscation of "property of foreign origin." Sub-paragraph (c) requires state parties to consider introducing non-conviction-based (NCB) confiscation powers with respect to such property and offenses.

4.1.1.4 Preliminary conclusions

Confiscation has been described as a "powerful measure" for deterring and punishing corruption because it targets "offenders' back pockets" and removes the rewards for crime and the means to commit further offenses.[25] It comes as no surprise that the AUCPCC, COECrimCC, IACAC, OECD-ABC, UNCAC, and UNTOC expressly or implicitly require their state parties to enable confiscation of illicit wealth associated with local and/or foreign offenses pursuant to requests for assistance. Among parties to the EUCPFI, EUOCC, and their protocols, these duties are found in the COEMLC 1990 and 2005, and EU Decs. 2001/500/JHA and 2005/212/JHA, though the decisions may come to be replaced by a directive based on COM(2012) 85 final.

4.1.2 The content of the duty to enable confiscation

The content of the duty to enable confiscation becomes apparent when the treaty provisions are compared to national laws on confiscation as described in the literature and convention monitoring reports. They show that domestic confiscation laws vary in the range of offenses, things, and persons to which

[24] UNODC, "UNCAC Legislative Guide," para. 725.
[25] OECD-WGB, Belgium II, para. 149; Switzerland II, para. 124. On the goals of confiscation in anti-corruption treaties, see also GRECO, Bulgaria I, para. 28; Slovak Republic II, para. 24.

they apply; the procedures by which they determine that wealth is illicit; and the circumstances which they regard in mitigation.

4.1.2.1 The concept of confiscation

With the exception of the IACAC, all of the anti-corruption treaties and related MLATs define confiscation as a permanent or final decision of a court or another competent authority that results in a deprivation of things of value.[26] Repeating the definition in the UNCATND, the OECD-ABC, SADC-MLAP, UNCAC, and UNTOC all define confiscation to "include[e] forfeiture where applicable and [to] mea[n] the permanent deprivation of property by order of a court or other competent authority."[27] The extension of the definition to non-judicial orders is significant since states have empowered members of their executives to order confiscations in connection with acts of official corruption.[28] The African anti-corruption treaties and EU framework decisions adopt slightly narrower concepts,[29] repeating and adapting the definition in Art. 1(d) COEMLC 1990 and 2005. It states that "'confiscation' means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property."[30] On the better view, the COECrimCC also implicitly incorporates this definition of confiscation from Art. 1 COEMLC 1990.[31] It would, therefore, cover decisions from non-criminal but judicial tribunals.[32]

4.1.2.2 The offenses predicate to confiscation

As the definitions make clear, confiscation presupposes the commission of an offense.[33] The conventions specify the range of offenses that should trigger confiscation and implicitly regulate the rules for proving the predicate offense.

[26] AUCPCC, Art. 1(1); COEMLC 1990, Art. 1(d); COEMLC 2005, Art. 1(d); EU Dec. 2005/212/JHA, Art. 1, fourth indent; OECD-ABC Commentaries, para. 22; SADC-MLAP, Art. 1(2); SADC-PAC, Art. 1; UNCAC, Art. 2(g); UNTOC, Art. 2(g). See also UNCATND, Art. 1(f); COM(2012) 85 final, Art. 2(4).

[27] OECD-ABC Commentaries, para. 22; SADC-MLAP, Art. 1(2); UNCAC, Art. 2(g); UNTOC, Art. 2(g). See also UNCATND, Art. 1(f).

[28] GRECO, Georgia II, paras. 11–14, 31; Kofele-Kale, *International Responsibility for Economic Crimes*, pp. 212–214, 223–226. On administrative confiscation generally, see Alldridge, *Money Laundering Law*, p. 73; Gallant, *Money Laundering and the Proceeds*, pp. 58–74. Cf., e.g., GRECO, Albania II, paras. 10, 20; Finland II, para. 11; France II, para. 10, cf. 11; Russia I–II, para. 181.

[29] AUCPCC, Art. 1(1); EU Dec. 2005/212/JHA, Art. 1, fourth indent; SADC-PAC, Art. 1. See also COM(2012) 85 final, Art. 2(4).

[30] COEMLC 1990, Art. 1(d); COEMLC 2005, Art. 1(d).

[31] COECrimCC Explanatory Report, para. 94.

[32] See COEMLC 1990 Explanatory Report, para. 23.

[33] See also COEMLC 2005 Explanatory Report, para. 164.

The range of predicate offenses to confiscation State parties to the anti-corruption treaties commit to enabling confiscation in relation to all offenses established in accordance with their terms.[34] So, the range of predicate offenses to confiscation will vary among state parties to the anti-corruption treaties and between parties to a particular treaty depending on the offenses that they have agreed to criminalize and the offenses that they have, in fact, incorporated into domestic law.[35] In addition, some of the treaties expressly or implicitly empower their state parties to limit confiscation laws to more serious offenses.[36] At present, European states may restrict confiscation to any offense punishable by custodial orders of more than one year.[37] The UNCAC implies that state parties may establish a monetary threshold for (cooperative) confiscations since it allows them to lift provisional measures or refuse confiscation "if the property is of a *de minimis* value."[38] The remaining anti-corruption treaties do not expressly address the minimum threshold for confiscation, though the GRECO and OECD-WGB generally regard such cut-offs as compliant with the COECrimCC and OECD-ABC, even if they recommend all convention offenses be attended by the possibility of confiscation.[39]

The procedure for proving the predicate offense Reflecting states' practice,[40] the anti-corruption treaties permit confiscation with and without conviction. In other words, they recognize that state parties may or may not insist that the predicate offense be established through a criminal procedure according to the criminal standard of proof. Whilst their interpretative provisions depict

[34] AUCPCC, Art. 16(1)(b); COECrimCC, Art. 19(3); IACAC, Art. XV(1); SADC-PAC, Art. 8(1)(a); UNCAC, Arts. 31(1)(a), 54(1); UNTOC, 12(1)(a).

[35] On the COECrimCC, see, e.g., GRECO, Malta II, para. 15. On the UNCAC, see StAR, "Towards a Global Architecture," pp. 15–16.

[36] COEMLC 1990, Art. 2(2); COEMLC 2005, Art. 3(2), Appendix; EU Dec. 2001/500/JHA, Art. 1; EU Dec. 2005/212/JHA, Art. 2(1); UNCAC, Art. 55(7). See also COEMLC 2005 Explanatory Report, paras. 66–67.

[37] COEMLC 1990, Art. 2(2); COEMLC 2005, Art. 3(2); EU Dec. 2001/500/JHA, Art. 1(a). Cf. COM(2012) 85 final, Art. 3(1). See further COEMLC 2005 Explanatory Report, paras. 66–69.

[38] UNCAC, Art. 55(7).

[39] On the COECrimCC, see, e.g., GRECO, Austria I and II, para. 84; Ireland II, para. 32; Netherlands II, para. 25; Romania II, para. 17; Russia I–II, paras. 182, 217; UK II, para. 31. On the OECD-ABC, see OECD-WGB, Austria II, para. 151; Pieth, "Article 3(3)," p. 258, nn. 39, 40. Cf. OECD-WGB, New Zealand II paras. 132–134, p. 45.

[40] See generally Brun et al., *Asset Recovery Handbook*, pp. 9–12; Gallant, *Money Laundering and the Proceeds*, pp. 14–19; Greenberg et al., *Stolen Asset Recovery*, pp. 13–23; Stessens, *Money Laundering*, pp. 30, 40–42. For conviction-based confiscation laws, see, e.g., GRECO, Russia I–II, para. 186; United States II, para. 8; OECD-WGB, Brazil I, p. 14; Estonia II, para. 182. For non-conviction-based confiscation laws, see GRECO, Denmark II, para. 10; Norway II, para. 7; Spain II, para. 9; United Kingdom II, para. 9; United States II, para. 11; OECD-WGB, Canada I, p. 11.

confiscation as a formal determination of a thing's connection to an offense, their operative articles require only that states "provide" that certain things may be confiscated[41] or "take" or "adopt" "measures" as "necessary" to achieve that end.[42] When mention is made of confiscation without conviction in Art. 54(1)(c) UNCAC, it is in an obligation "to consider, in accordance with [the state party's] domestic law."[43] Likewise, the authors of the explanatory reports to the COECrimCC and COEMLC 1990 and 2005 interpreted those conventions to permit – but not require – proof of the predicate offense through conviction.[44] The GRECO also encourages state parties to the COECrimCC to introduce NCB confiscation without describing the failure to do so as a violation of the convention.[45] If it is adopted, COM(2012) 85 final will depart from the permissive model by *requiring* member states to introduce NCB confiscation in relation to some suspects or accused persons who were unable to stand trial, namely, those whose "death or permanent illness . . . prevents any further prosecution; or . . . illness or flight from prosecution or sentencing . . . prevents effective prosecution within a reasonable time, and poses the serious risk that it could be barred by statutory limitations."[46] Whether such confiscation orders would be compatible with European rights to a fair trial and property will be determined in the light of the jurisprudence discussed in Chapter 5.[47]

4.1.2.3 The things liable to confiscation

State parties to the anti-corruption treaties and related MLATs commit themselves to confiscating proceeds, property to a corresponding value of such proceeds, and, in most treaties, instrumentalities of convention offenses. Several instruments define one or more of these concepts, their definitions addressing common differences in domestic confiscation laws.

The concept of proceeds With few exceptions, the anti-corruption treaties and related MLATs expressly define the terms "proceeds," "proceeds of crime," or "proceeds of corruption."[48] In the UNCAC, UNTOC, and COEMLC 2005, "proceeds" or "proceeds of crime" are said to be "property derived from or

41 OECD-ABC, Art. 3(3).
42 AUCPCC, Art. 16(1); COECrimCC, Art. 19(3); SADC-PAC, Art. 8(1); UNCAC, Art. 31(1); UNTOC, Art. 12(1).
43 Cf. StAR, "Towards a Global Architecture," p. 15, table 8.
44 COECrimCC Explanatory Report, paras. 93–94; COEMLC 1990 Explanatory Report, para. 43; COEMLC 2005 Explanatory Report, paras. 164–165.
45 See, e.g., GRECO, Bosnia and Herzegovina II, para. 32; Cyprus II, para. 35; Finland II, paras. 11, 26; Iceland II, paras. 28–29; Italy I–II, para. 84; Russia I–II, paras. 186, 217.
46 COM(2012) 85 final, Art. 5(a)–(b).
47 See p. 230 and following below.
48 AUCPCC, Art. 1(1); COEMLC 1990, Art. 1(a); COEMLC 2005, Art. 1(a); EU Dec. 2001/500/JHA, Art. 3; EU Dec. 2005/212/JHA, Art. 1, first indent; OECD-ABC Commentaries, para. 21; SADC-MLAP, Art. 1; UNCAC, Art. 2(e); UNTOC, Art. 2(e). See also COM(2012) 85 final, Art. 2(1).

obtained, directly or indirectly, through the commission of an offence,"[49] and, in the OECD-ABC, "The 'proceeds' of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery."[50] The COECrimCC omits an express definition of proceeds but, according to the authors of its explanatory report, implicitly incorporates the definition from the COEMLC 1990 (and repeated with slight modifications in EU Dec. 2005/212/JHA).[51] Proceeds would therefore be "any economic advantage from criminal offences [and] may consist of any property as defined in [Art. 1(b) COECrimCC]."[52] The AUCPCC similarly defines proceeds of corruption as "assets of any kind . . . and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption." These notions of proceeds, it is submitted, are broad enough to include the objects of crime, i.e., the "goods subjected to the criminal behavior"[53] in most corruption cases.

Though these definitions make clear that proceeds are things with a certain *type* of connection to an offense, they do not specify the *degree* of connection between the thing and the offense. This omission is problematic first because states have sometimes limited notions of proceeds to the very things acquired through an offense.[54] The COEMLC 2005, SADC-MLAP, UNCAC, and UNTOC address this problem by defining proceeds as things "directly and indirectly" acquired or derived from an offense;[55] the COM(2012) 85 final would include "any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person and any valuable benefits."[56] According to the GRECO and OECD-WGB, state parties to the COECrimCC and OECD-ABC must enable the confiscation of items into which proceeds have been transformed or converted.[57] The COEMLC 2005 and UNCAC require the extension of confiscation laws to such things, as well as to legitimately acquired

[49] UNCAC, Art. 2(e). See also COEMLC 2005, Art. 1(a); SADC-MLAP, Art. 1(2); UNTOC, Art. 2(e); UNCATND, Art. 1(p).

[50] OECD-ABC Commentaries, para. 21.

[51] COECrimCC Explanatory Report, para. 94. See EU Dec. 2005/212/JHA, Art. 1, first indent ("'proceeds' means any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent").

[52] COEMLC 1990, Art. 1(b); COECrimCC Explanatory Report, para. 94.

[53] Stessens, *Money Laundering*, p. 30.

[54] Pieth, "Article 3(3)," p. 262. See, e.g., OECD-WGB, Bulgaria III, para. 48, p. 18; Sweden II, para. 198.

[55] COEMLC 2005, Art. 1(a); SADC-MLAP, Art. 1(2); UNCAC, Art. 2(e); UNTOC, Art. 2(e).

[56] COM(2012) 85 final, Art. 2(1). See further COM(2012) 85 final, Explanatory Report, p. 10.

[57] On the COECrimCC, see GRECO, Austria I–II, para. 87; Bosnia and Herzegovina II, para. 11; Hungary II, paras. 7, 25; Latvia II, para. 17; Russia I–II, para. 183; United States II, para. 13. On the OECD-ABC, see e.g., OECD-WGB, Belgium II, para. 154; Bulgaria III, para. 48, p. 18; Estonia I, para. 84; Sweden II, para. 198; Sweden II Follow-Up, para. 13.

property with which proceeds have been intermingled "up to the assessed value of the intermingled proceeds."[58]

A second issue is whether the conventions implicitly recommend or require the confiscation of amounts over and above the net profits from crime, as is the case under some domestic confiscation laws.[59] On the one hand, the treaties' definitions and operative provisions on confiscation emphasize the causal connection between the thing and the offense, rather than the improvement in the offender's economic position.[60] Monitoring bodies and official commentaries also appear to accept as convention-compliant national confiscation laws that do not make allowances for criminal expenditures;[61] the OECD-WGB has gone so far as to question laws that only "skim off" the illegal gains.[62] On the other hand, as Profs. Peter Alldridge and Mark Pieth separately note, the "proceeds-not-profits doctrine" may result in a particularly severe sentence or order in active bribery cases.[63] Bribery agreements, unlike agreements for the sale of contraband, typically aim at the conclusion of another legitimate transaction, which is to be performed by the briber through investments of his/her (or its) licit funds, time, and expertise.[64] As only a portion of the resulting benefit is therefore attributable to the bribe, they argue that the proceeds-not-profit doctrine results in the confiscation of more than is necessary to ensure that the "crime does not pay."[65]

The concept of instrumentalities Save for the AUCPCC and SADC-PAC,[66] the anti-corruption treaties and related MLATs expressly or implicitly require

[58] COEMLC 2005, Art. 5; UNCAC, Art. 31(4)–(6); UNTOC, Art. 12(3)–(5). See also UNCATND, Art. 5(6).

[59] See generally Stessens, *Money Laundering*, pp. 52–56; Gallant, *Money Laundering and the Proceeds*, pp. 15, 27–28. On the position in Switzerland, see Schmid, "Einziehung von Vermögenswerten," paras. 55–58. On the position in the UK, see Millington and Sutherland Williams, *Proceeds of Crime*, para. 9.46.

[60] Cf. OECD-ABC Commentaries, para. 21 (proceeds defined as "*profits* or other *benefits* derived by the briber" [emphasis added]).

[61] COEMLC 1990 Explanatory Report, para. 21; COEMLC 2005 Explanatory Report, para. 31; GRECO, Albania II, paras. 10, 20; Croatia II, paras. 6, 20; Denmark II, paras. 10, 17; Slovenia II, para. 17; United States II, para. 13; OECD-WGB, Canada III, para. 68, p. 25.

[62] OECD-WGB, Germany III, para. 110, p. 38.

[63] Alldridge, *Money Laundering Law*, p. 134; "Limits of Confiscation," 839–840; Pieth, "Article 3(3)," pp. 259–260.

[64] Pieth, "Article 3(3)," pp. 259–260.

[65] Alldridge, *Money Laundering Law*, pp. 46–58; Pieth, "Article 3(3)," pp. 260–261. See also Gallant, *Money Laundering and the Proceeds*, pp. 2, 15, 32–33, 39–40, 118; Stessens, *Money Laundering*, p. 54.

[66] But cf. AUCPCC, Art. 16(1)(a) (duty to enable identification and restraint); SADC-PAC, Arts. 1(1), 8(1)(b) and (4) (the definition of confiscation; the duty to enable identification and restraint; and the duty to assist with confiscation).

the confiscation of instrumentalities of crime.[67] When not expressly defined,[68] that concept would seem to entail "property" that has been used in and/or is "destined for use in" convention offenses.[69] According to GRECO and OECD-WGB reports, it could include bribes.[70]

Proceeds and instrumentalities as property Central to most definitions of proceeds and instrumentalities are notions of property. According to the UNCAC and UNTOC, "'[p]roperty' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets."[71] Similar definitions appear in the COE, EU, OAS, and SADC anti-corruption treaties and related MLATs.[72] The term "asset" is not defined.

References to property notwithstanding, it would seem that persons who obtain things through corruption seldom become or remain their owners in private law.[73] To generalize, a thief who acquires title to money or negotiable instruments with possession will lose title as soon as he/she (or it) gives factual dominion or control of those things to a third party,[74] e.g., by depositing them with a financial institution.[75] Likewise, if the stolen items are non-cash movables, he/she (or it) will lack title because the owner did not consent to

[67] COECrimCC, Art. 19(3); COEMLC 1990, Art. 2(1); COEMLC 2005, Art. 3(1); EU Dec. 2001/500/JHA, Art. 1 (referring to COEMLC 1990, Art. 2); EU Dec. 2005/212/JHA, Art. 2(1); IACAC, Art. XV(1) ("property . . . used in the commission of offenses"); OECD-ABC, Art. 3(3) ("the bribe"); UNCAC, Art. 23(1)(a); UNTOC, Art. 12(1)(a).

[68] COEMLC 1990, Art. 1(c); COEMLC 2005, Art. 1(c); EU Dec. 2005/212/JHA, Art. 1, third indent. See also COM(2012) 85 final, Art. 2(3).

[69] See COEMLC 1990, Art. 1(c); COEMLC 2005, Art. 1(c); IACAC, Art. XV(1); UNCAC, Art. 31(1)(b); UNTOC, Art. 12(1)(b). See also Alldridge, *Money Laundering Law*, pp. 60–61; Gallant, *Money Laundering and the Proceeds*, pp. 15–16; Simpson and Weiner (eds.), *Oxford English Dictionary*, instrumentality, n.; Stessens, *Money Laundering*, p. 30.

[70] GRECO, Cyprus II, para. 8; Slovak Republic II, para. 28; OECD-WGB, Brazil II, para. 171; Estonia II, para. 167.

[71] UNCAC, Art. 2(d); UNTOC, Art. 2(d). See also UNCATND, Art. 1(q).

[72] COEMLC 1990, Art. 1(b); COEMLC 2005, Art. 1(b); EU Dec. 2005/212/JHA, Art. 1, second indent; IACAC, Art. I; SADC-MLAP, Art. 1(2); SADC-PAC, Art. 1. See also COM(2012) 85 final, Art. 2(2), and the definition of "proceeds of corruption" in AUCPCC, Art. 1(1).

[73] Stessens, *Money Laundering*, p. 62 (on proceeds in general). On the position of parties to, and victims of, corruption in private law, see the diverse contributions to Meyer (ed.), *Civil Law Consequences of Corruption*. For comparative perspectives on the concepts of property and ownership, see Beekhuis, "Civil Law"; Lawson, "Common Law"; Mattei, *Basic Principles*, Ch. 1, esp. pp. 1–7, Ch. 4, esp. pp. 77–78; van Erp, "Comparative Property Law."

[74] On the transfer of ownership of cash and negotiable instruments, see Benjamin, *Financial Law*, paras. 16.04–16.05; Lawson and Rudden, *The Law of Property*, pp. 51–53; Schwenzer, Hachem, and Kee, *Global Sales Law*, para. 40.83 (transfers from non-owners).

[75] Ellinger, Lomnicka, and Hare, *Modern Banking Law*, pp. 119–125, 216–217.

the transfer.[76] At most, he/she (or it) may benefit from a presumption of ownership *vis-à-vis* third parties[77] and/or rules on acquisition through adverse possession or registration.[78] Similarly, persons who appear to obtain rights to immovable or movable things, such as bribes, will not acquire ownership of those things in civil law jurisdictions that regard the validity of the transfer as dependent on the validity of the contract for sale.[79] Whether a third party obtains good title from a bribee or embezzler in possession will depend on the local rules on the transfer of title from non-owners, typically, on the third party's state of mind; the value he/she (or it) gave in exchange for the thing; the market in which he/she (or it) made the acquisition; and the time that has elapsed since the original owner was dispossessed.[80] As for the briber, consideration for bribes – contracts, licenses, and concessions – are often mere personal or statutory rights and so not things capable of ownership in many legal systems.[81]

Difficulties in talking about property in the proceeds (and instrumentalities) of corruption should not be taken to mean that the confiscation provisions only apply to relationships considered proprietary in domestic law. On my submission, the anti-corruption treaties and related MLATs do not define property as a normative relationship or set of normative relationships with respect to things but as things that may be the subject or object of a personal or property relationship in private law. This interpretation is implicit in the distinction between assets and "legal documents or instruments evidencing title to, or interest in, such assets" in conventional definitions of property and proceeds, which make clear that property can be "derived from or obtained . . . through an offense." The equation of property with things is also in keeping with the concept of advantage in the criminalization provisions and with state

[76] For comparative perspectives on the transfers *a non domino*, see Mattei, *Basic Principles*, pp. 106–114; Schwenzer, Hachem, and Kee, *Global Sales Law*, Ch. 39. For a common law perspective, see also Worthington, *Proprietary Interests*, pp. 122, 128.

[77] Mattei, *Basic Principles*, pp. 106–111. See, e.g., Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, SR 210 (Stand am 1. Januar 2012) (Swiss Civil Code), Arts. 926–928.

[78] On adverse possession and registration, see generally Bouckaert and Depoorter "Adverse Possession"; Mattei, *Basic Principles*, pp. 114–117; Schwenzer, Hachem, and Kee, *Global Sales Law*, paras. 39.21–39.22. On the impact of bad faith, see Bouckaert and Depoorter "Adverse Possession," pp. 19, 25–26, 28–30; Schönenberg, *Kulturgut*, p. 128, n. 591 citing Code Civil version consolidée au 9 juillet 2011 (France), Art. 2258. Cf. Swiss Civil Code, Art. 728.

[79] On the distinction between the abstract and causal approaches, see generally Mattei, *Basic Principles*, p. 104; Schwenzer, Hachem, and Kee, *Global Sales Law*, paras. 39.11–39.20; van Erp, "Comparative Property Law," pp. 1060–1061.

[80] Mattei, *Basic Principles*, pp. 107–109: Schwenzer, Hachem, and Kee, *Global Sales Law*, Ch. 40, esp. paras. 40.76–40.82. See also Schönenberg, *Kulturgut*, pp. 112–125.

[81] On the distinction between property and personal rights, see Mattei, *Basic Principles*, pp. 78–79. For a similar observation see, OECD-WGB, Netherlands II, para. 227.

practice.[82] Perhaps in recognition of this, the OECD-ABC omits a definition of property and directs its obligation on restraint and confiscation to improper advantages.[83]

The effect of confiscation on property To say that proceeds are not always property in private law is not to say that confiscation orders never affect property rights. In fact, domestic confiscation laws may be distinguished according to their effect on property in private law.[84] In jurisdictions that use an object-based confiscation model, liability attaches to the instrumentality or proceed or things into which those things can be traced, regardless of the *bona fides* of the current owner; it results in the transfer of title of the "guilty" thing, usually to the state.[85] Value-based confiscation is achieved, conversely, by ordering an individual to pay a sum equivalent to the value of the proceeds of the offense.[86] Similar to a fine, such orders operate against the person who is the subject of the order and not against the things that were the proceeds *per se*.[87] They may thus be met from assets that the person has acquired legitimately and which are otherwise unrelated to the offense (substitute property).[88] In principle, they may not be met out of another person's property.[89]

The COE, EU, OECD, and UN treaties and instruments appear to require object-based confiscation of instrumentalities (including bribes) and object-based and value-based confiscation of proceeds.[90] Each calls for the

[82] For states that confiscate things other than "property," in private law, see GRECO, Hungary II, paras. 5, 25; Switzerland I–II, para. 84; OECD-WGB, Czech Republic II, paras. 219–220; Germany I, p. 9; Norway II, para. 153; United States III, para. 152 (pension plans).

[83] OECD-ABC Commentaries, para. 21.

[84] Stessens, *Money Laundering*, p. 31. See also Alldridge, *Money Laundering Law*, pp. 45–65; Gallant, *Money Laundering and the Proceeds*, pp. 14–15; Greenberg et al., *Stolen Asset Recovery*, pp. 13–14; Mitchell, Taylor, and Talbot, *Confiscation and the Proceeds*, paras. 11.004–11.007; UNODC, "UNCAC Legislative Guide," paras. 398–400.

[85] Stessens, *Money Laundering*, pp. 31–33. On the development of the notion of the "guilty" object, see further Finkelstein, "The Goring Ox"; Gallant, *Money Laundering and the Proceeds*, pp. 58–63.

[86] McClean, *UNTOC Commentary*, pp. 141–142; Stessens, *Money Laundering*, pp. 31, 35–37; UNODC, "UNCAC Legislative Guide," paras. 398–400.

[87] McClean, *UNTOC Commentary*, p. 142; Stessens, *Money Laundering*, pp. 35–36.

[88] Millington and Sutherland Williams, *Proceeds of Crime*, paras. 1.08–1.09, 2.62–2.63; Stessens, *Money Laundering*, pp. 35–36.

[89] GRECO, United States II, para. 10; Millington and Sutherland Williams, *Proceeds of Crime*, para. 16.01. Cf. GRECO, Belgium II, para. 7.

[90] COECrimCC, Art. 19(3); COEMLC 1990, Art. 2(1); COEMLC 2005, Art. 3(1); EU Dec. 2005/212/JHA, Art. 2(1); OECD-ABC, Art. 3(3); UNCAC, Art. 31(1)(a); UNTOC, Art. 12(1)(a). See also COM(2012) 85 final, Art. 2(1); UNCAC Interpretative Notes, para. 57; OECD-WGB, Luxembourg III, paras. 71–72, p. 26; Mexico III para. 36; Spain II, para. 152, p. 46; Pieth, "Article 3(3)," pp. 261–262.

confiscation of the proceeds and instrumentalities of offenses, as well as "property the value of which corresponds to that of such proceeds,"[91] and some define confiscation to include forfeiture,[92] which can be a synonym for object-based confiscation.[93] The authors of the Explanatory Report to the COECrimCC also appear to read the words "directly and indirectly" as a reference to value and object-based confiscation[94] and the GRECO has repeatedly recommended that COECrimCC state parties permit value-based confiscation of untraceable or expatriated proceeds.[95] Conversely, the African and inter-American anti-corruption treaties seem to favor *either* object *or* value-based confiscation: The AUCPCC and SADC-PAC omit reference to forfeiture in their definition of confiscation,[96] while the IACAC omits reference to the value of proceeds and requires only cooperation with respect to forfeiture.[97]

The procedures for proving the connection between the thing and the offense Finally, the anti-corruption treaties permit but do not require the enactment of special evidentiary rules, which help public authorities to prove the connection between the thing and the offense.[98] Presumptions of illicit acquisition (reversed burdens of proof) typically allow decision-makers to conclude that things are proceeds once the government establishes a certain fact in issue – such as a significant and inexplicable increase in wealth or the commission of a certain type of offense – and the property-holder fails to show that the things were legitimately acquired.[99] Both facts are usually subject to the civil standard of proof.[100] Articles 31(8) UNCAC and 12(7) UNTOC mention "the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation" but only as something that state parties "may consider . . . to the extent that such a

91 COECrimCC, Art. 19(3); COEMLC 1990, Art. 2(1); COEMLC 2005, Art. 3(1); EU Dec. 2005/212/JHA, Art. 2(1); OECD-ABC, Art. 3(3); UNCAC, Art. 31(1)(a); UNTOC, Art. 12(1)(a).

92 OECD-ABC Commentaries, para. 22, second sentence; UNCAC, Art. 2(g); UNTOC, Art. 2(g). See also, Pieth, "Article 3(3)," pp. 261–262.

93 Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 25.80 (commenting on the UK).

94 COECrimCC Explanatory Report, para. 94. See also COEMLC 1990 Explanatory Report, paras. 23, 26.

95 GRECO, Andorra I–II, para. 89; Czech Republic II, para. 32; Luxembourg II, para. 18; Ukraine I–II, para. 129.

96 AUCPCC, Art. 1(1); SADC-PAC, Art. 1. Cf. SADC-MLAP, Arts. 21–22.

97 IACAC, Art. XV(1).

98 See, e.g., GRECO, Belgium II, para. 6; Denmark II, paras. 10–11; Portugal II, paras. 8, 18; United Kingdom II, para. 8; OECD-WGB, Estonia II, para. 184; Iceland III, para. 34.

99 See further Gallant, *Money Laundering and the Proceeds*, p. 17; Greenberg et al., *Stolen Asset Recovery*, pp. 60–63; Stessens, *Money Laundering*, pp. 40–41, 66–67; UNODC, "UNCAC Legislative Guide," paras. 425–427.

100 Greenberg et al., *Stolen Asset Recovery*, p. 64.

requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings." The GRECO's comments on the reversed burden of proof are likewise phrased as recommendations.[101]

By contrast, the COEMLC 2005 provides that state parties "shall adopt . . . measures . . . to require that . . . an offender demonstrates the origin of alleged proceeds or other property liable to confiscation," at least in respect of "serious" offenses.[102] More specific still, the EU Dec. 2005/212/JHA requires the member states to enable the confiscation of any "property belonging to persons convicted" of certain offenses "committed within the framework of a criminal organization," so long as it is "fully convinced" that the property was "derived from criminal activities of the convicted person" or "similar criminal activities."[103] In determining whether property is liable to such "extended confiscation," the member states must allow their courts to presume that offenses were committed before the offense for which a person was convicted,[104] or to have regard to the discrepancy between the value of the property and the offender's lawful income.[105] COM(2012) 85 final would simplify the duty to enable extended confiscation by requiring it to be possible in relation to all so-called "Euro-crimes." National courts would be empowered to confiscate other property when, "based on specific facts, a court finds it substantially more probable that the property in question has been derived by the convicted person from similar criminal activities than from other activities."[106] It would limit the extended confiscation provision to prosecutions that were not prescribed by national law, that have not resulted in an acquittal, and that are not otherwise subject to the principle of *ne bis in idem*.[107]

4.1.2.4 The persons affected by confiscation

As part of the laundering process, offenders may transfer things of value to related parties who knew or should have been aware of the connection between the thing and the offense.[108] Further, as individuals may assign, divide, or share interests, confiscation orders may be made against things in which other people just happen to have a stake.[109] Confiscation orders may also compete with civil

[101] UNCAC, Art. 31(8); UNTOC, Art. 12(7). See also GRECO, Albania II, para. 20; Iceland II, paras. 28–29; Slovak Republic II, para. 27.

[102] COEMLC 2005, Art. 3(4).

[103] EU Dec. 2005/121/JHA, Art. 3(2).

[104] EU Dec. 2005/121/JHA, Art. 3(2)(a)–(b).

[105] EU Dec. 2005/121/JHA, Art. 3(2)(c).

[106] COM(2012) 85 final, Arts. 2(6), 4(1).

[107] COM(2012) 85 final, Art. 4(2).

[108] As was Switzerland's argument in the Duvalier case: see p. 43 and following above. See also Brun et al., *Asset Recovery Handbook*, p. 87; GRECO, Andorra I–II, para. 88; Stessens, *Money Laundering*, p. 34–35; Pieth, "Article 3(3)," p. 262.

[109] Alldridge, *Money Laundering Law*, p. 141; Brun et al., *Asset Recovery Handbook*, p. 87; McClean, *UNTOC Commentary*, p. 150; Millington and Sutherland Williams, *Proceeds of Crime*, para. 16.01; Pieth, "Article 3(3)," p. 262.

judgments in favor of persons who were wronged by the criminal, including former public officials.[110] Thus, an important issue in the implementation of international confiscation standards is whether and how state parties are required to recognize the interests of non-offending "third parties" and victims.[111]

The anti-corruption treaties and related MLATs do not limit the duty to enable confiscation to things that are owned, controlled, or possessed by offenders.[112] In fact, their provisions on confiscation – operative and interpretative – generally omit mention of the persons who may be deprived of property. Exceptionally, the OECD-ABC Commentaries define confiscation "without prejudice to rights of victims,"[113] and EU Dec. 2005/212/JHA encourages member states to extend confiscation to property of certain legal and natural persons related to some offenders.[114] COM(2012) 85 final would deem third party confiscation a mandatory ancillary measure when confiscation from the suspected or accused offender "is unlikely to succeed"; the transfer was unaccompanied by consideration or the consideration was below market value; and the third party knew or should have reasonably suspected the illicit origins of the proceeds or the true purpose of the transfer of property corresponding to proceeds (i.e., to avoid confiscation).[115] In addition, monitoring bodies interpret the COECrimCC and OECD-ABC as requiring measures to enable confiscation from a person other than the offender who took their interest in bad faith,[116] especially if legal persons are regarded as "third parties" because they lack capacity for criminal liability in local law.[117]

Protective provisions for third parties appear in several of the conventions. Under Arts. 21(1) and 31(1) COEMLC 1990 and 2005 (respectively), state parties are required to assist with service of judicial documents on "persons affected by . . . confiscation";[118] under Arts. 5 and 8 (respectively) they are "to ensure that [such] interested parties . . . have effective legal remedies in order to

[110] Pieth, "Article 3(3)," p. 262; Schmid, "Sicherungseinziehung," para. 20. See also the Philippines case study discussed at p. 38 and following above.
[111] Pieth, "Article 3(3)," p. 262.
[112] On the UNCATND and COEMLC 1990, see Stessens, *Money Laundering*, p. 33. On the situation in Switzerland, see Schmid, "Einziehung von Vermögenswerten," para. 20.
[113] OECD-ABC Commentaries, para. 22
[114] EU Dec. 2005/212/JHA, Art. 3(1) and (3).
[115] COM(2012) 85 final, Art. 6(1).
[116] See, e.g., GRECO, Armenia I–II, paras. 61, 77; Azerbaijan I–II, para. 81; Bulgaria I, para. 28; Croatia II, para. 20; Czech Republic II, para. 32; Denmark II, paras. 11, 17; Latvia II, paras. 8, 13; Luxembourg II, para. 18; Spain II, para. 20; OECD-WGB, Brazil II, paras. 175–176; Bulgaria II, pp. 25–26; Chile II, para. 185.
[117] OECD-WGB, Argentina II, paras. 225–226, p. 53; Brazil II, para. 175, p. 57; Bulgaria III, para. 52, p. 18; Chile II, para. 185, p. 45; Turkey II, para. 182. Cf. OECD-WGB, Austria II, para. 152; Netherlands III, para. 61. See also Stessens, *Money Laundering*, p. 35.
[118] COEMLC 1990, Art. 21(1); COEMLC 2005, Art. 31(1).

preserve their rights."[119] According to the expert committee on the 1990 convention:

> [t]he legal provisions required by [Art. 5] should guarantee "effective" legal remedies for interested third parties. This implies that there should be a system where such parties, if known, are duly informed by the authorities of the possibilities to challenge decisions or measures taken, that such challenges may be made even if a confiscation order has already become enforceable, if the party had no earlier opportunity to do so, that such remedies should allow for a hearing in court, that the interested party has the right to be assisted or represented by a lawyer and to present witnesses and other evidence, and that the party has a right to have the court decision reviewed.[120]

EU Dec. 2005/212/JHA repeats Arts. 5 and 8 COEMLC 1990 and 2005[121] and preserves, furthermore, "the obligation to respect fundamental rights and fundamental principles, including in particular the presumption of innocence as enshrined in Article 6 of the Treaty on European Union."[122] The preamble of EU Dec. 2005/212/JHA confirms that the member states remain at liberty to apply their "fundamental principles relating to due process, in particular the presumption of innocence, property rights, freedom of association, freedom of the press and freedom of expression in other media."[123]

COM(2012) 85 final is yet more detailed. Acknowledging that its measures would substantially affect the rights of third parties, as well as suspected and accused offenders, the proposed directive finds it "necessary to provide for specific safeguards and judicial remedies . . . to guarantee the preservation of their fundamental rights in the implementation of [its] provisions."[124] Article 8 then reiterates member states' duties to ensure that "reasons are given for any decision to confiscate" and that confiscation decisions are "communicated to the person affected."[125] Persons affected are to be afforded a "right to an effective remedy," and, specifically, an "effective possibility to appeal against the decision to confiscation" in judicial proceedings in which they are legally represented.[126] Suspects "have the right to a fair trial" and suspects and accused persons an opportunity to contest the connection between the thing and the offense.[127] A person cannot be subject to extended confiscation in relation to offenses for which he/she has been finally acquitted "or in other cases where the

[119] COEMLC 1990, Art. 5; COEMLC 2005, Art. 8.
[120] COEMLC 1990 Explanatory Report, para. 31. See further Stessens, *Money Laundering*, p. 77.
[121] EU Dec. 2005/212/JHA, Art. 4. [122] EU Dec. 2005/212/JHA, Art. 5.
[123] EU Dec. 2005/212/JHA, Preamble, para. 11.
[124] COM(2012) 85 final, Preamble, para. 19. [125] COM(2012) 85 final, Art. 8(3).
[126] COM(2012) 85 final, Art. 8(1), (3), (5). [127] COM(2012) 85 final, para. 8(1), (4).

ne bis in idem principle applies."[128] Third parties, for their part, have particular entitlements "to be informed" of and "allowed to participate in" confiscation proceedings in which they "have at least the right to be heard, the right to ask questions and the right to provide evidence before a final decision on confiscation is taken."[129] The directive declares its respect for fundamental rights, "notably the right to property."[130] The significance of these qualifications will become apparent in Chapter 5.

By contrast, the UNCAC and UNTOC, like the UNCATND, merely prohibit constructions of the confiscation provisions that "prejudice the rights of *bona fide* third parties."[131] State parties to UNCAC are required to provide additional information relating to the finality of the confiscation order and attempts to notify third parties and "ensure due process" in any request for assistance.[132] Further, at Arts. 31(10) and 12(9) (respectively), the UNCAC and UNTOC provide that "[n]othing contained in [those] article[s] shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party." As to the rights of victims, the sharing provisions of the UNCAC and UNTOC provide for "priority consideration" to be given "to . . . compensating the victims of the crime."[133] This factor is subordinate to the other principles discussed below.[134]

The remaining treaties are silent on third parties and victim rights, with the exception of the SADC-MLAP.[135] Commenting on Art. 19(3) COECrimCC, the GRECO has acknowledged the need for "transparency" and compliance with regionally binding human rights standards in confiscation proceedings.[136] It appears reluctant, however, to criticize substantive domestic criteria for third party confiscation. If anything, it encourages state parties to amend existing criteria and so as to enable confiscation from some third parties acting in good faith.[137] In its 2006 report on Azerbaijan, the GRECO examining team took the view that:

> the possibility of providing for the confiscation of property transferred and belonging to third parties should be reviewed, in particular in the light of international comparisons, and bearing in mind that the right to peaceful enjoyment of possessions guaranteed by Protocol 1, Article 1 of the

[128] COM(2012) 85 final, para. 4(2). [129] COM(2012) 85 final, para. 8(6)
[130] COM(2012) 85 final, Preamble, para. 18.
[131] UNCAC, Arts. 31(9), 55(9); UNCATND, Art. 5(8); UNTOC, Art. 12(8). See further McClean, *UNTOC Commentary*, p. 150; Stessens, *Money Laundering*, p. 76.
[132] UNCAC, Art. 55(3). [133] UNCAC, Art. 58(3); UNTOC, Art. 14(2).
[134] See further p. 137 and following below.
[135] SADC-MLAP, Art. 22(2) ("The States shall ensure that the rights of *bona fide* third parties and victims shall be respected in the application of this Protocol").
[136] GRECO, Azerbaijan I–II, para. 81; Georgia II, paras. 11, 31.
[137] GRECO, Azerbaijan I–II, para. 81; Estonia II, para. 20; Iceland II, paras. 28–29.

> European Convention on Human Rights, is qualified in ways which other State Parties have regarded as permitting the confiscation of property in the hands of person other than the principal offender. *The GET recommends to make full use in practice of the new provisions allowing for the confiscation of assets of an equivalent value to the proceeds of corruption and to introduce provisions allowing for the confiscation of assets held by third parties.*[138]

The OECD-WGB appears to have taken a similar position insofar as it has approved of national laws that allow confiscation from *bona fide* but gratuitous transferees[139] and has cautioned against the "high burden of proof" with respect to the bad faith of third parties.[140] However, it has also found national laws that protect *bona fide* transferees to be compliant with the OECD-ABC.[141] Pursuant to Commentary 22 on the convention, the OECD-WGB also examines the position of victims in confiscation proceedings.[142]

It follows that states enjoy wide discretion in dealing with the rights of third parties and victims of civil and criminal wrongs in confiscation proceedings. According to the COE and EU money laundering and confiscation instruments, third parties must be given a fair opportunity to contest confiscation orders; they are not entitled to a minimum level of substantive protection, however.[143] The UNCAC and UNTOC seem to defer to third party rights and the need to compensate victims. But the wording of the provisions is vague and leaves much to the discretion of states. The OECD-ABC and COECrimCC implicitly permit states to limit confiscation powers, though they do not set express minimum procedural or substantive standards for the protection of third parties and victims.[144] Third party interests would be addressed, if at all, by the general requirements to implement the conventions consistently with national and international law.[145]

138 GRECO, Azerbaijan I–II, para. 81 (emphasis original).

139 See, e.g., OECD-WGB, Argentina II, para. 226; Denmark II, para. 246; Estonia II, para. 182. See further Pieth, "Article 3(3)," p. 262. See also GRECO, Hungary II, para. 8; Slovenia II, para. 8; OECD-WGB, United Kingdom III, para. 83 (approving of a policy to confiscate proceeds paid as dividends to investors).

140 OECD-WGB, Finland II, pp. 23–24.

141 Pieth, "Article 3(3)," p. 262. See, e.g., OECD-WGB, Belgium II, para. 154; Denmark II, para. 246; Iceland III, para. 33. Cf. OECD-WGB, Brazil II, p. 57.

142 OECD-WGB, Estonia I, para. 87; Iceland III, para. 35; United Kingdom I, p. 10.

143 Stessens, *Money Laundering*, p. 77.

144 Cf. GRECO, Finland II, paras. 6, 26 ("commend[ing] Finland for . . . [giving] precedence of the request for compensation of the injured party over confiscation orders.")

145 AUCPCC, Art. 18(1); COECrimCC, Art. 26; COEMLC 1990, Arts. 12(1), 18(1(b); OECD-ABC, Art. 9; SADC-PAC, Art. 10(1); UNCAC, Arts. 33(1), 55(1); UNTOC, Art. 12(1).

4.1.2.5 The enforcement of the confiscation order and the discretion not to confiscate

The anti-corruption treaties and related MLATs do not require that confiscation be mandatory[146] nor do they specify that confiscation orders should be enforced in any particular way.[147] State parties would appear, therefore, to be at liberty to determine the consequences of a person's failure to cooperate with the enforcement of a confiscation order and to afford decision-makers discretion *not* to confiscate things when the conditions for confiscation are fulfilled.[148] The GRECO and the OECD-WGB have accordingly accepted that state parties may give competent authorities discretion to refuse, seek, or order confiscation in exceptional circumstances[149] and to make the failure of an individual to satisfy (value-based) confiscation orders punishable by terms of imprisonment.[150] The COEMLC 1990 and 2005 expressly recognize that restrictions on a person's liberty may follow orders for confiscation, in that they provide that such restrictions shall not be imposed if specified in the request.[151] COM(2012) 85 final would require member states to enable the effective execution of confiscation orders,[152] according to the Explanatory Memorandum, by permitting financial investigations and the "appl[ication] of confiscation orders against . . . hidden assets which have 'resurfaced'" after the criminal proceedings are concluded or finalized.[153]

4.1.2.6 Measures to identify and preserve property liable to confiscation

The enforcement of confiscation orders presumes, finally, that illicit wealth is available for confiscation, i.e., that it can be located and protected from dissipation for the duration of the criminal and/or confiscation proceedings. All the instruments therefore require state parties to take measures to enable the

146 Cf. COEMLC 2005, Art. 3(3) (acknowledging "Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime"). See further, e.g., GRECO, Iceland II, para. 26; Luxembourg II, para. 18.

147 On their rules for the disposal of confiscated wealth, see further p. 137 and following below.

148 Stessens, *Money Laundering*, pp. 36–37.

149 See, e.g., OECD-WGB, Austria I, p. 11; Estonia II, para. 182; Israel II, para. 216; New Zealand II, para. 200; Turkey II, para. 182. See generally Greenberg et al., *Stolen Asset Recovery*, pp. 74–77.

150 GRECO, United Kingdom II, paras. 12–13; OECD-WGB, United Kingdom Iter, paras. 55–56; United Kingdom II, paras. 231–232. On imprisonment in default of payment, see Gallant, *Money Laundering and the Proceeds*, pp. 29–30, 33–34.

151 COEMLC 1990, Art. 16(1); COEMLC 2005, Art. 27.

152 COM(2012) 85 final, Art. 9.

153 COM(2012) 85 final Explanatory Memorandum, p. 13.

identification and restraint of suspect wealth earmarked for confiscation.[154] Some address the use of special investigative techniques,[155] and the management of restrained criminal proceeds, objects, and instrumentalities as well.[156] Though a detailed consideration of these provisions is beyond the scope of this work,[157] I note that "freezing" and "seizure" are temporary prohibitions on "the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority."[158] For convenience, I refer to them both as measures of restraint.[159] Writing for StAR, Mr. Kevin Stephenson and colleagues have expressed concern about the time needed to obtain restraining orders in situations of MLA, as well as the ability of affected parties to use frozen funds to pay their living and legal expenses whilst restraining orders are in place.[160] Conversely, in cases on counter-terrorist financial sanctions, the EU courts have noted with approval the exceptions for reasonable living and legal expenses.[161]

4.1.2.7 Preliminary conclusions

In summary, the anti-corruption treaties expressly require their state parties to empower their competent authorities, judicial or executive, to identify, restrain, and permanently remove illicit wealth belonging to an offender or a third party. The obligations apply to the proceeds of convention offenses and, depending on the convention, to substitute assets, objects, and instrumentalities of crime. The things confiscated are referred to generically as property, but it is not necessary that the offender owned them in private law. Rather, interests of *bona fide* third parties and victims are addressed in requirements for fair hearings and notice, and references to implementation in accordance with domestic law. To help the state to prove the offense and the connection between the thing and the offense, the UN conventions and several European instruments recommend or require the adoption of one or more evidentiary devices. Otherwise, state parties

[154] AUCPCC, Art. 16(1)(a); COECrimCC, Art. 23(1); COEMLC 1990, Arts. 3, 11(1); COEMLC 2005, Arts. 4, 5, 16; IACAC, Art. XV(1); SADC-PAC, Art. 8(1)(b); UNCAC, Art. 31(2); UNTOC, Art. 12(2). See also COM(2012) 85 final, Art. 7.

[155] COECrimCC, Art. 23(1); COEMLC 1990, Art. 4; COEMLC 2005, Art. 7(3); UNCAC, Art. 50; UNTOC, Art. 20. See further p. 94 and following above.

[156] COEMLC 2005, Art. 6; UNCAC, Art. 31(3). See also COM(2012) 85 final, Art. 10.

[157] On the typical processes and challenges associated with asset identification and restraint, see Brun et al., *Asset Recovery Handbook*, Chs. 3, 4.

[158] UNCAC Art. 2(f); UNCATND, Art. 1(l); UNTOC, Art. 2(f). See also COEMLC 2005, Art. 1(g) (broadening the definition to include the "destruction" of property); COM(2012) 85 final, Art. 2(5).

[159] Cf. Brun et al., *Asset Recovery Handbook*, pp. 75–76.

[160] Stephenson et al., *Barriers to Asset Recovery* pp. 43–44, 54–55, 94–97.

[161] See further Chapter 5, n. 580 and accompanying text.

possess considerable discretion to determine when and how they regard either fact as established.

4.2 The duty to cooperate for the purposes of confiscation

When the state with jurisdiction over the predicate corruption offense does not have jurisdiction over the proceeds, objects, or instrumentalities of corruption or substitute assets, the question is whether and, if so, how it may ensure the confiscation order is given effect. At the domestic level of obligation, states generally cooperate in criminal matters on the basis of treaties and supranational legislative instruments that have taken or been given effect in national law, as well as local laws on MLA and confiscation.[162] At the international level, they cooperate voluntarily on the basis of international comity and as required by suppression conventions, MLATs, and arrangements.[163] Together, these rules establish a legal basis for cooperation, determining how and when states must and may cooperate or refuse a request for assistance.[164]

4.2.1 The anti-corruption treaties

Each of the anti-corruption treaties contains provisions on cooperation in criminal matters and most of them would seem to require cooperation for the purposes of confiscation. Whereas the COE, EU, OAS, OECD, and SADC treaties require cooperation for the purposes of confiscation under existing instruments, the UN conventions provide detailed rules for cooperation when no applicable treaty or arrangement on cooperation is in place between the parties. In my submission, only the AUCPCC fails to establish a legal basis for cooperation for the purposes of confiscation with respect to convention offenses.

[162] Bantekas, *International Criminal Law*, p. 361; Cryer et al., *International Criminal Law and Procedure*, p. 87; Stephenson et al., *Barriers to Asset Recovery*, pp. 49, 51.

[163] Bantekas, *International Criminal Law*, p. 356; Boister, "Transnational Criminal Law," 954; Cryer et al., *International Criminal Law and Procedure*, p. 102.

[164] On the legal basis for international cooperation in criminal matters, see Bantekas, *International Criminal Law*, pp. 355–356; Bassiouni, "Recognition of Foreign Penal Judgments," pp. 507–508; Cryer et al., *International Criminal Law and Procedure*, p. 85; Donatsch, Heimgartner, and Simonek, *Internationale Rechtshilfe*, pp. 10–11, 15, 18–19; Gleß, *Internationales Strafrecht*, para. 84; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, paras. 17.05–17.07; Stephenson et al., *Barriers to Asset Recovery*, pp. 49–50; Schomburg et al., "Einleitung," paras. 37–40. On the development of the positions in English and Swiss law, see (respectively) McClean, *International Cooperation*, Ch. 5; Gleß, *Internationales Strafrecht*, paras. 234–244.

4.2.1.1 The OECD-ABC

Article 9 OECD-ABC regulates the provision of legal assistance in criminal and some non-criminal investigations and proceedings. It is interpreted as requiring cooperation with respect to restraint and confiscation.[165] In fact, the OECD-WGB has applied the term "asset recovery" to cooperative confiscation in some reports.[166] The first sentence of Art. 9(1) OECD-ABC states:

> Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.

Article 9(2)–(3) modifies the parties' power to "mak[e] mutual legal assistance conditional upon the existence of dual criminality," and to refuse assistance "on the ground of bank secrecy,"[167] just as Art. 5 prohibits them from considering "national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved," when deciding whether to cooperate with other state parties.[168] Otherwise, the state parties' laws, treaties, and arrangements determine the conditions and processes for cooperation.[169]

4.2.1.2 The regional treaties

Like the OECD-ABC,[170] most of the regional anti-corruption treaties require their state parties to cooperate with respect to convention offenses in accordance with existing treaties, laws, and agreements.[171] Likewise, they generally set minimum standards for the interpretation of these other instruments and regulate the grounds for assessing requests for assistance in national and international law.

[165] See, e.g., OECD-WGB, Austria I, p. 20; Belgium II, paras. 156–157; Bulgaria III, para. 100; Canada III, para. 70; Chile II, para. 124; Estonia I, para. 159; Hungary II, para. 100; Ireland I, pp. 32–33; Netherlands II, para. 145; New Zealand II, paras. 132–134.

[166] See, e.g., OECD-WGB, Canada III, para. 69; Finland III, para. 41.

[167] See generally Harari and Julen Berthod, "Articles 9, 10, and 11," pp. 424–425, 429–431.

[168] See OECD-WGB, Argentina II, para. 171; Estonia II, para. 116; France II, paras. 96, 162; as well as United Kingdom II, paras. 151, 163, 170–177; United Kingdom IIbis, Pts. D, G (on Art. 5).

[169] Though the monitoring bodies have insisted that these be efficient and effective: see OECD-WGB Greece III, paras. 122–130 (criticizing a five-agency process as "convoluted" and "a recipe for delay"); Sweden III, paras. 131–132 (recommending follow-up on the "potentially very broad and vague" ground for refusal ["the circumstances are such that the request should not be granted"]).

[170] Harari and Julen Berthod, "Articles 9, 10, and 11," pp. 423–425, 437.

[171] Stessens, "The International Fight against Corruption," 928.

State parties to COECrimCC agree to cooperate "in accordance with international instruments on international co-operation in criminal matters, . . . uniform or reciprocal legislation, and . . . national law . . . for the purposes of investigations and proceedings concerning criminal offences established in accordance with [that] Convention."[172] If no such instrument or arrangements exists, or if one exists but is less favorable,[173] they are to "afford one another the widest measure of mutual assistance by promptly processing requests."[174] According to the COECrimCC Explanatory Report, mutual assistance includes the "restitution of proceeds."[175] State parties may decline such requests if "compliance . . . would undermine [the requested party's] fundamental interests, national sovereignty, national security, or *ordre public*."[176] They may not invoke bank secrecy, however.[177] The EUOCC and the EUCPFI and its protocols simply require state parties to cooperate "in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences,"[178] subject to the principle of *ne bis in idem*.[179]

The IACAC and SADC-PAC also contain a general and a specific obligation on MLA.[180] State parties undertake to "afford one another the widest measure of mutual assistance" under Art. XIV(1) IACAC and Art. 10(1) SADC-PAC. They then promise under Art. XV(1) IACAC and Art. 8(4) SADC-PAC, in largely identical terms,[181] to assist each other with the forfeiture or confiscation of property and proceeds. Article XV(1) IACAC states:

> In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention.

Except as already mentioned,[182] Art. XV(1) IACAC and Art. 8(4) SADC-PAC are similar to Art. 9(1) OECD-ABC and Art. 25(1) COECrimCC. Articles XVI(1) IACAC and 8(2) SADC-PAC also prohibit requested state parties from invoking bank secrecy to refuse assistance, whilst Arts. XVII and XIX

[172] COECrimCC, Art. 25(1).
[173] COECrimCC, Art. 25(2)–(3).
[174] COECrimCC, Art. 26(1).
[175] COECrimCC Explanatory Report, para. 124.
[176] COECrimCC, Art. 26(2).
[177] COECrimCC, Art. 26(3).
[178] EUCPFI, Art. 6(1); EUCPFI-P1, Art. 7(1); EUCPFI-P2, Art. 12(1); EUOCC, Art. 9(1).
[179] EUCPFI, Art. 7; EUOCC, Art. 10. See further Conway, "*Ne Bis in Idem* in International Law"; van den Wyngaert and Stessens, "International *Non Bis In Idem*."
[180] IACAC, Arts. XIV(1), XV(1); SADC-PAC, Arts. 8(4), 10(1).
[181] SADC-PAC, Art. 8(4) replaces "forfeiture" with "confiscation" and "freezing" with "freeing" [sic].
[182] See further p. 114 above.

IACAC restrict states' power to rely on the political offense exception, "the principle on the non-retroactivity in criminal law," and "existing statutes of limitations."[183]

In a marked departure from the other anti-corruption treaties, the AUCPCC contains no clear legal basis for cooperation for the purpose of confiscation. Article 18(1) AUCPCC borrows from Art. 9(1) OECD-ABC but simply mandates "the greatest possible *technical* cooperation and assistance in dealing with requests" (emphasis added). The terms "technical cooperation" and "technical assistance" denote the exchange of professional expertise and training in other anti-corruption treaties.[184] Article 19(3) AUCPCC refers implicitly to the goal of asset recovery, but only requires state parties to "[e]ncourage all countries" "in the spirit of international cooperation . . . to take legislative measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their foreign accounts and facilitating the repatriation of stolen or illegally acquired monies to the countries of origin." Likewise, Art. 16(1)(c) AUCPCC mentions "repatriation of proceeds of corruption" but only specifies the "adopt[ion of] . . . legislative measures . . . to enable" the return of wealth. By contrast, Art. 15(3) AUCPCC clearly states that, "[i]f a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from a State Party with which it does not have such treaty, it shall consider this Convention as a legal basis for all offences covered by this Convention."[185] Similarly, Art. 16(2) AUCPCC expressly requires state parties to "seize and remit" "objects" but it only applies to things that are required as evidence of a convention offense, were "acquired as a result of the offense for which extradition is requested," or "at the time of arrest [were] found in possession of the person claimed or . . . discovered subsequently."

Altogether, the AUCPCC would seem to oblige state parties to enable cooperative confiscation under domestic law without creating a separate legal basis for this form of cooperation in public international law. Since the AUCPCC "supersede[s] the provisions of any treaty or bilateral agreement governing corruption and related offenses between any two or more State Parties,"[186] it may even displace such duties in other instruments. Thus, it remains to be seen whether the AUCPCC supports or hinders asset recovery between African states.[187]

183 On statutes of limitation, see further p. 98 above; on prohibitions on retroactivity, see p. 207 and following below; and on political offense exceptions, see p. 212 and following below.
184 IACAC, Art. XIV(2); UNCAC, Arts. 1(b), 60(1). See Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 253–254.
185 See further Udombana, "Africa's Anti-Corruption Convention," 470–471.
186 AUCPCC, Art. 21.
187 Cf. Snider and Kidane, "Combating Corruption in Africa," 741–742.

4.2.1.3 The UNCAC and UNTOC

Of all the anti-corruption treaties, the UN conventions regulate cooperative confiscations most extensively.[188] They not only oblige their state parties to assist each other for the purposes of confiscation, but they also describe the actions that state parties are to take within their jurisdictions to give effect to these requests, as well as the default rules for making and assessing such requests. These obligations, which are based on Arts. 5(4) and 7 UNCATND,[189] appear at Arts. 13 and 18 UNTOC and Art. 46 and 55 UNCAC. For brevity, I only consider the UNCAC provisions here.

According to Art. 46(1) UNCAC state parties have a general duty to "afford one another the widest measure of legal assistance in investigations, prosecutions and judicial proceedings in relation to offenses covered by this convention." By Art. 46(3) UNCAC, MLA may be sought for the purposes of "recover[ing] . . . assets in accordance with the provisions of chapter V."[190] Within Ch. V, Art. 55(1) UNCAC creates a duty to give effect to requests from state parties "for confiscation of proceeds of crime, property, equipment or other instrumentalities . . . situated in its territory." They "shall, to the greatest extent possible within [their] domestic legal system[s]":

> (a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or
> (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.[191]

If a new, local confiscation order is sought and issued pursuant to Art. 55(1)(a), the criminal proceedings are effectively transferred to the requested state; if the foreign order is enforced directly under Art. 55(1)(b), the requested state effectively enforces the foreign (penal) judgment.[192] In either case, Art. 55(6) deems the UNCAC itself a "necessary and sufficient treaty basis" for the request for confiscation.

The UNCAC's rules for making and assessing MLA requests appear at Art. 46(6)–(30). Together, these paragraphs preserve the parties' existing treaty-

[188] Nicholls et al., *Corruption and Misuse of Public Office*, para. 9.46.
[189] See McClean, *UNTOC Commentary*, pp. 154–162.
[190] UNCAC, Art. 46(3)(k).
[191] UNCAC, Art. 55(1).
[192] Bassiouni, "Modalities of International Cooperation," pp. 11–13; McClean, *UNTOC Commentary*, pp. 155–156; Stessens, *Money Laundering*, pp. 385, 392–394.

based MLA obligations;[193] encourage the parties to conclude other facilitative agreements or arrangements;[194] and establish default rules that operate if there is no such agreement or the parties have opted to apply the UNCAC instead.[195] Of particular importance is the "mini-MLAT" at Art. 46(9)–(29) UNCAC, so-called because it regulates many formal and procedural matters associated with the request for cooperation, including the form, content, and language of the request; the designation of central authorities; and the allocation of the cost of the request.[196] Read with Art. 55 UNCAC, the mini-MLAT also regulates the circumstances in which states may and must not refuse to provide assistance. It gives them a discretion to reject requests that:

- are deficient, trivial, or unsubstantiated;[197]
- require action that would not be prohibited in relation to a similar domestic offense;[198]
- are "contrary to the legal system of the requested State Party relating to mutual legal assistance";[199] or
- are "likely to prejudice the . . . sovereignty, security, *ordre public*, or other essential interests" of the requested state.[200]

The UNCAC also permits states to refuse assistance on the grounds of dual criminality;[201] however, state parties are to "dee[m]" the requirement of dual criminality fulfilled when "the conduct underlying the offence . . . is . . . criminal . . . under the laws of both States Parties."[202] They are also to "take into account the purposes of the Convention" which include "promot[ing], facilitat[ing] and support[ing] international cooperation . . . in asset recovery," as set forth in Art. 1 UNCAC.[203] By contrast, state parties must not refuse a request solely on the ground of bank secrecy or for the reason that the offense relates to a fiscal matter.[204] Otherwise, requests are to be executed by the requested state party in accordance with its domestic law and applicable international agreements or arrangements.[205]

4.2.1.4 Preliminary conclusions

With the exception of the AUCPCC, each of the anti-corruption treaties requires its state parties to cooperate for the purposes of confiscation. The

[193] UNCAC, Art. 46(6). [194] UNCAC, Art. 46(30). See also UNCAC, Art. 59.
[195] UNCAC, Art. 46(7) and (9)–(29). [196] UNCAC, Art. 46(25)–(28).
[197] UNCAC, Arts. 46(21)(a), 55(7). [198] UNCAC, Art. 46(21)(c).
[199] UNCAC, Art. 46(21)(d). [200] UNCAC, Art. 46(21)(b).
[201] UNCAC, Arts. 43(2), 46(9). See further p. 207 and following below.
[202] UNCAC, Art. 43(2) (irrespective of the denomination and categorization of the offense in both states).
[203] UNCAC, Arts. 1(b), 46(9). [204] UNCAC, Art. 46(8) and (22).
[205] UNCAC, Arts. 46(17), 55(4). On the *locus regit actum* principle, see further Stessens, *Money Laundering*, p. 301.

duty is implied in the OECD-ABC, COECrimCC, EUOCC, and EUCPFI and its protocols by the references to legal assistance and cooperation "in" or "for the purposes of" investigations, proceedings, prosecutions, and punishments. In the IACAC and SADC-PAC, the obligation is expressed in a general article on cooperation and a specific article on assistance in matters of forfeiture or confiscation. In the UNCAC and UNTOC, there is also a general duty to "afford . . . legal assistance in investigations, prosecutions and judicial proceedings," and a specific and detailed duty to submit confiscation requests to competent authorities so as to enforce foreign confiscation orders directly or obtain and enforce equivalent local orders.

In all the treaties, the general obligation to cooperate is phrased as a duty to provide the widest, fullest, or broadest measure of assistance that is possible under or in accordance with existing domestic laws and international treaties and arrangements. Most of the treaties omit particular rules on the procedures for requesting assistance and the grounds for assessing and refusing or executing requests. None specifically allows or requires its state parties to reject requests that relate to unfair foreign criminal and/or confiscation proceedings or unlawful or disproportionate foreign confiscation orders, as those human rights are conceived of in local or international law.[206] These omissions are particularly striking in the UNCAC, which covers a large number of diverse states and leaves much in the design of offenses and criminal and confiscation procedures to their discretion. By way of illustration, I review the provisions of other multilateral and bilateral instruments on MLA.

4.2.2 Other international standards

States also have duties to cooperate for the purposes of confiscation under the special-purpose regional and bilateral treaties, legislative instruments, and arrangements on MLA and mutual recognition of foreign orders. These generally determine the form of requests for confiscation, the grounds for refusing such requests, and the methods by which requests are to be given effect.

4.2.2.1 The COEMLC 1990 and 2005

Parties to the COEMLC 1990 and 2005 must "cooperate to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds."[207] They must enforce value- and object-based[208] confiscation orders issued by a court of a requesting state party[209] or submit requests for confiscation to their own competent authorities

[206] On the OECD-ABC, see Harari and Julen Berthod, "Articles 9, 10, and 11," p. 423.
[207] COEMLC 1990, Art. 7(1); COEMLC 2005, Art. 15(1).
[208] COEMLC 1990, Art. 13(3); COEMLC 2005, Art. 23(3).
[209] COEMLC 1990, Art. 13(1)(a); COEMLC 2005, Art. 23(1)(a).

"for the purposes of obtaining an order of confiscation and, if such order is granted, enforce it."[210] It makes no difference under the 2005 convention that the order was "not [a] criminal sanctio[n]" and not conviction-based.[211] But a state may refuse to enforce a request if:[212]

- "the action sought would be contrary to the fundamental principles of the [requested party's] legal system";[213]
- "the execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested Party,"[214] or "compliance with the action sought would be contrary to the principle of *ne bis in idem*";[215]
- the offense is insufficiently important,[216] is a political or fiscal offense,[217] "would not be an offence under the law of the requested Party,"[218] or is not a predicate offense to confiscation under the law of the requested state;[219]
- the things would not be subject to confiscation under the law of requested state, given its "principles . . . concerning the limits of confiscation";[220]
- the confiscation is unenforceable or appealable in the requesting state[221] or "may no longer be imposed or enforced [in the requested state] because of the lapse of time";[222] or
- the request relates to "a decision rendered *in absentia* . . . [which] did not satisfy the minimum rights or defense,"[223] or "[did] not relate to a previous conviction or a decision of a judicial nature."[224]

Requested parties are "bound by" a judge's factual conclusions in the requesting state,[225] and must "recognize any judicial decision taken in the requesting Party regarding rights claimed by third parties."[226] They have discretion to refuse recognition if "third parties did not have adequate opportunity to

[210] COEMLC 1990, Art. 13(1); COEMLC 2005, Art. 23(1).
[211] COEMLC 2005, Art. 23(5).
[212] COEMLC 2005 Explanatory Report, paras. 199–201.
[213] COEMLC 1990, Art. 18(1)(a); COEMLC 2005, Art. 28(1)(a).
[214] COEMLC 1990, Art. 18(1)(b); COEMLC 2005, Art. 28(1)(b).
[215] COEMLC 1990, Art. 18(1)(e); COEMLC 2005, Art. 28(1)(f).
[216] COEMLC 1990, Art. 18(1)(c); COEMLC 2005, Art. 28(1)(c).
[217] COEMLC 1990, Art. 18(1)(d); COEMLC 2005, Art. 28(1)(d) and (e) (excepting the financing of terrorism).
[218] COEMLC 1990, Art. 18(1)(f); COEMLC 2005, Art. 28(1)(g).
[219] COEMLC 1990, Art. 18(4)(a); COEMLC 2005, Art. 28(4)(a).
[220] COEMLC 1990, Art. 18(4)(b); COEMLC 2005, Art. 28(4)(b).
[221] COEMLC 1990, Art. 18(4)(e); COEMLC 2005, Art. 28(4)(e).
[222] COEMLC 1990, Art. 18(4)(c); COEMLC 2005, Art. 28(4)(c).
[223] COEMLC 1990, Art. 18(4)(f); COEMLC 2005, Art. 28(4)(f).
[224] COEMLC 1990, Art. 18(4)(d); COEMLC 2005, Art. 28(4)(d).
[225] COEMLC 1990, Art. 14(2); COEMLC 2005, Art. 24(2).
[226] COEMLC 1990, Art. 22(1); COEMLC 2005, Art. 32(1). On the 1990 convention, see further Stessens, *Money Laundering*, p. 412.

enforce their rights,"[227] or if one of three other conditions for refusing recognition is met.[228]

Both anti money laundering conventions preserve their parties' "rights and undertakings . . . derived from international multilateral instruments concerning special matters,"[229] as well as their right to apply previous MLA agreements and treaties.[230] Furthermore, the parties may supplement, strengthen, or facilitate the application of the COE conventions with more generous treaties on money laundering and the cooperative confiscation of proceeds of crime.[231] In addition, state parties to the 2005 convention that are also members of the EU must use EU "rules governing the particular subject concerned and applicable to the specific case."[232]

4.2.2.2 The EU framework decisions

Though the EU anti-corruption treaties omit express reference to the preservation and confiscation of assets associated with acts of corruption, EU member states have concluded a number of instruments relevant to cooperation for the purposes of confiscation. The Convention of May 29, 2000, on Mutual Legal Assistance in Criminal Matters between Member States of the European Union requires member state parties, on request, and "without prejudice to the rights of *bona fide* third parties, [to] place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners."[233] Then, by a framework decision of October 6, 2006 (EU Dec. 2006/783/JHA),[234] EU member states are obliged to apply the principle of mutual recognition to confiscation orders, i.e., to recognize and execute each other's judicial decisions on confiscation "as quickly as possible, and with as little conflict as possible," as if the foreign decision was a decision of their own courts.[235] Decision 2003/577/JHA creates a similar obligation to recognize and

[227] COEMLC 1990, Art. 22(2)(a); COEMLC 2005, Art. 32(2)(a).

[228] COEMLC 1990, Art. 22(2)(b)–(d); COEMLC 2005, Art. 32(2)(b)–(d).

[229] COEMLC 1990, Art. 39(1); COEMLC 2005, Art. 52(1). See further COEMLC 1990 Explanatory Report, para. 95.

[230] COEMLC 1990, Art. 39(3); COEMLC 2005, Art. 52(3).

[231] COEMLC 1990, Art. 39(2); COEMLC 2005, Art. 52(2).

[232] COEMLC 2005, Art. 52(4).

[233] Council Act of May 29, 2000, establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, May 29, 2000, in force August 23, 2005, OJ 2000 No. C197, July 12, 2000, p. 1, Art. 8(1).

[234] Council Framework Decisions 2006/783/JHA of October 6, 2006, on the application of the principle of mutual recognition to confiscation orders, OJ No. L328, November 25, 2006, p. 59, Arts. 6–7.

[235] Plachta, "Cooperation in Criminal Matters," p. 458; EU Dec. 2006/783/JHA, Art. 7(1). See also Klip, *European Criminal Law*, pp. 356–357, 362–369; Gleß, "Einziehungsentscheidungen," para. 10.

execute freezing orders issued by competent authorities of EU member states.[236] To facilitate the freezing, seizure, and confiscation of property within the EU, member states are to establish Asset Recovery Offices to send and receive requests for cooperation with regard to the "identification and tracing of proceeds and other crime related property."[237] The impact assessment that accompanied COM(2012) 85 final identifies "action on mutual recognition" as its preferred policy option;[238] however, the proposed directive contains no provisions of this nature.

The "reasons for non-recognition or non-execution" in EU Dec. 2006/783/JHA are generally familiar from the COE and EU anti-corruption treaties and two COE anti money laundering conventions.[239] They include:

- deficiencies in the confiscation order or its accompanying certificate;[240]
- the violation of the *ne bis in idem* principle or the lack of dual criminality with respect to the predicate offense to confiscation;[241]
- the issuing of confiscation proceedings in the absence of the person concerned or his/her representative and without his/her actual or implied knowledge or consent;[242] and
- the existence of conflicting privileges, immunities, or rights of other interested parties in the executing state.[243]

Recalling Arts. 5 and 8 COEMLC 1990 and 2005, the decision also provides that "[e]ach Member State shall put in place the necessary arrangements to ensure that any interested party, including a *bona fide* third party, has legal remedies against the recognition and execution of a confiscation order . . . in order to

[236] Council Framework Decision 2003/577/JHA of July 22, 2003, on the execution in the European Union of orders freezing property or evidence, OJ 2003 No. L196, August 2, 2003, p. 45, Arts. 1, 5(1).

[237] Council Decision 2007/845/JHA of December 6, 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ 2007 No. L332, December 18, 2007, p. 103, Arts. 1(1), 3(1).

[238] Commission Staff Working Paper: Executive Summary of the impact assessment accompanying the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union, SWD(2012) 32 final, March 12, 2012, p. 7.

[239] See further Gleß, "Einziehungsentscheidungen," paras. 19–32.

[240] EU Dec. 2006/783/JHA, Art. 8(1).

[241] EU Dec. 2006/783/JHA, Art. 8(2)(a)–(b). Cf. EU Dec. 2006/783/JHA, Art. 6.

[242] EU Dec. 2006/783/JHA, Art. 8(2)(e) as amended by Council Framework Decision 2009/299/JHA of February 26, 2009, on amending Framework Decision 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 No. L81, March 27, 2009, p. 24.

[243] EU Dec. 2006/783/JHA, Art. 8(2)(c)–(d).

preserve his or her rights."[244] Article 1(2) preserves "the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union," as well as "any obligations incumbent on judicial authorities" in member states. Paragraph 13 of the preamble confirms that:

> Nothing in this Framework Decision may be interpreted as prohibiting refusal to confiscate property . . . when objective grounds exist for believing that the confiscation order was issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

As in EU Dec. 2005/212, the member state may continue to apply its own constitutional rules related, among other things, to due process.[245]

4.2.2.3 The IACMACM

Article 1 IACMACM requires state parties to "render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction."[246] The convention applies to all acts punishable by at least a year's imprisonment[247] and to "measures for securing the proceeds, fruits, and instrumentalities of the crime" that are "permitted by [the requested state's] laws."[248] Requests may be refused if:

- the person who is subject to the request has already been sentenced or acquitted in the requesting or requested state (*ne bis in idem* exception);[249]
- the request relates to a political,[250] military,[251] or tax crime,[252] a discriminatory investigation,[253] or a politically motivated prosecution,[254] or was issued by a special or ad hoc tribunal;[255] or
- there would be any "prejudic[e]" to "public policy (*ordre public*), sovereignty, security, or basic public interests."[256]

These provisions do not, however, "create any right on the part of any private persons . . . to impede any request for assistance."[257]

[244] EU Dec. 2006/783/JHA, Art. 9(2)(1), first sentence.
[245] EU Dec. 2006/783/JHA, Preamble, para. 14. [246] IACMACM, Art. 2, first sentence.
[247] IACMACM, Art. 6.
[248] IACMACM, Art. 15. See further McClean, *International Cooperation*, p. 189.
[249] IACMACM, Art. 9(a). [250] IACMACM, Art. 9(c). [251] IACMACM, Art. 8.
[252] IACMACM, Art. 9(f). [253] IACMACM, Art. 9(b). [254] IACMACM, Art. 9(c).
[255] IACMACM, Art. 9(d). [256] IACMACM, Art. 9(e) (emphasis added).
[257] IACMACM, Art. 2, fourth sentence.

4.2.2.4 The SADC-MLAP

The SADC-MLAP obliges its state parties to "provide each other with the widest possible measure of mutual legal assistance in criminal matters,"[258] including in "investigations, prosecutions or proceedings" that concern corruption.[259] Recalling the IACMACM and the Commonwealth's Harare Scheme Relating to Mutual Assistance in Criminal Matters within the British Commonwealth,[260] the protocol defines assistance as "assistance in respect of investigations, prosecutions or proceedings." It requires requested state parties to initiate proceedings for confiscation or forfeiture of the proceeds of crime.[261] According to Art. 6, a state party to the SADC-MLAP may decline requests that:

- relate, in its opinion, to a political and military offense;[262]
- would impair its "sovereignty, security, public order, public interest, or prejudice the safety of any person";[263] or
- fail to conform with the protocol.[264]

Although SADC-MLAP requires state parties to ensure respect for "*bona fide* third parties and victims,"[265] protection of such rights is not a ground for refusal and the protocol does not create private rights "to impede the execution of a request."[266] The protocol prevails over other treaties on MLA between its parties, whether multilateral or bilateral.[267]

4.2.2.5 Bilateral MLATs

Bilateral treaties and non-binding memoranda of understanding (MOU) are increasingly important sources of international norms on MLA – both in their own right and as supplements to suppression conventions and multilateral instruments.[268] Express obligations on the confiscation and/or forfeiture of illicit wealth appear in a model treaty adopted by the GA (UN Model MLAT)[269] and in many bilateral MLATs registered with the

[258] SADC-MLAP, Art. 2(1). [259] SADC-MLAP, Art. 2(3).

[260] Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002, and October 2005.

[261] SADC-MLAP, Arts. 2(2), 21(1). [262] SADC-MLAP, Art. 6(1)–(2).

[263] SADC-MLAP, Art. 6(3). [264] SADC-MLAP, Art. 6(d).

[265] SADC-MLAP, Art. 22(2). [266] SADC-MLAP, Art. 2(6).

[267] SADC-MLAP, Art. 23.

[268] Harari and Julen Berthod, "Articles 9, 10, and 11," pp. 416–417; McClean, *International Cooperation*, p. 234; Stephenson et al., *Barriers to Asset Recovery*, pp. 51–52.

[269] GA Res. 54/117, Model Treaty on Mutual Assistance in Criminal Matters, UN Doc. A/RES/45/117 (April 3, 1991) subsequently amended by GA Res. 53/112, Mutual assistance and international cooperation in criminal matters, UN Doc. A/53/112 (January 20, 1999), Art. 18(5).

UN.[270] The UN Model MLAT requires its would-be parties to identify and restrain suspected proceeds.[271] It provides that "[t]he requested State shall, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State or take other appropriate action to secure the proceeds following a request by the requesting State."[272] In applying the treaty's provision on the proceeds of crime, states are to ensure respect for "the rights of *bona fide* third parties."[273] But, under Art. 4(1), requests may only be rejected for:

- prejudice to the requested state's "sovereignty, security, public order (*ordre public*) or other essential public interests";[274]
- the political nature of the offense or the fact that the offense is only an offense under military law;[275]

[270] See, e.g., Treaty between Canada and the Swiss Confederation on Mutual Assistance in Criminal Matters, Bern, October 7, 1993, in force November 17, 1995, 2026 UNTS 319 (Canada/Switzerland MLAT), Art. 14(1); Treaty between the Republic of Korea and the United States of America on Mutual Assistance in Criminal Matters, Washington, November 23, 1993, in force May 23, 1997, 2396 UNTS 157 (Korea/US MLAT), Art. 17; Treaty between the Government of the Kingdom of Belgium and the Government of Canada on Mutual Legal Assistance in Criminal Matters, Brussels, January 11, 1996, in force April 1, 2003, 2211 UNTS 185 (Belgium/Canada MLAT), Arts. 1(2)(h), 13; Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters, Washington, April 30, 1997, in force September 30, 1999, 2117 UNTS 157 (Australia/US MLAT), Art. 1(1)(h); Agreement between the Government of the Republic of Colombia and the Government of the Republic of Cuba on Mutual Legal Assistance in Criminal Matters, Havana, March 13, 1998, 2403 UNTS 199 (Colombia/Cuba MLAT), Arts. I(4)(g), VIII; Agreement between the Government of the Republic of Korea and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on Mutual Legal Assistance in Criminal Matters, Hong Kong, November 17, 1998, in force February 25, 2000, 2393 UNTS 145 (Korea/Hong Kong MLAT), Art. 1(1)(g); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning Mutual Assistance in relation to Criminal Matters, Dublin, November 26, 1998, in force June 1, 2004, 2356 UNTS 169 (UK/Ireland MLAT), Arts. 1(1), 2(a)–(e); Treaty on Cooperation between the Government of the United Mexican States and the Government of the Eastern Republic of Uruguay concerning Mutual Judicial Assistance in Criminal Matters, Montevideo, June 30, 1999, in force November 7, 2004, 2450 UNTS 339 (Mexico/Uruguay MLAT), Art. VII(2); Treaty between the Republic of Latvia and the People's Republic of China on Mutual Judicial Assistance in Criminal Matters, Beijing, April 15, 2004, in force September 18, 2005, 2379 UNTS 327 (Latvia/China MLAT), Art. 15(1)(2). Cf. Convention between the Kingdom of Belgium and the Kingdom of Morocco on Judicial Assistance in Criminal Matters, Brussels, March 14, 1997, 2317 UNTS 632 (Belgium/Morocco MLAT).

[271] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 18(3) and (4).

[272] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 18(5).

[273] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 18(6).

[274] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(a).

[275] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(b) and (f).

- the discriminatory purpose or effect of the request;[276]
- the violation of the requested state's principles of double jeopardy;[277] and
- the inconsistency of the measures with the requested state's law and practice with respect to local investigations and prosecutions.[278]

A footnote to Art. 4(1) UN Model MLAT explains that states adopting the convention "may wish" to depart from the listed grounds, including by restricting or removing their discretion to refuse assistance with respect to offenses not criminalized in both states.

The UN-registered MLATs appear to repeat, modify, delete, and add to the grounds for refusal in the model treaty.[279] Some dyads permit each other to reject requests that relate to, amongst other things:[280]

- fiscal and capital offenses;[281]
- offenses for which persons have been acquitted, granted amnesty, pardoned, or cannot be prosecuted due to a lapse of time;[282]
- confiscation orders that have been satisfied or could not have been ordered under local law;[283]
- actions that are incompatible with fundamental principles of domestic law;[284] and
- offenses for which the requirement of dual criminality is not satisfied.[285]

4.2.2.6 Preliminary conclusions

Much like the treaties on corruption, treaties and instruments on MLA expressly require cooperation for the purposes of confiscation. They also describe the process for seeking assistance, the grounds for refusing assistance, and, sometimes, the methods for giving effect to foreign confiscation orders. The European instruments were the most demanding in that they obliged their

[276] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(c).
[277] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(d).
[278] GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(e).
[279] Australia/US MLAT, Art. 3(1); Belgium/Canada MLAT, Art. 3(1)–(3); Canada/Switzerland MLAT, Art. 3(1); Colombia/Cuba MLAT, Art. II(1); Korea/Hong Kong MLAT, Art. 4(1); Korea/US MLAT, Art. 3(1); Latvia/China MLAT, Art. 3(1); Mexico/Uruguay MLAT, Arts. III–IV; UK/Ireland MLAT, Art. 6(1).
[280] See, e.g., Mexico/Uruguay MLAT, Art. III(1)(b) (acts *ultra vires* in the requested state); UK/Ireland MLAT, Art. 6(1)(b) (conflicting local investigation or prosecution; danger to the safety of any person; excessive burden on resources of requested state).
[281] Canada/Switzerland MLAT, Art. 3(1)(a); Korea/Hong Kong MLAT, Art. 4(3).
[282] Canada/Switzerland MLAT, Art. 3(1)(c); Colombia/Cuba MLAT, Art. II(1)(c); Korea/Hong Kong MLAT, Art. 4(2)(e); UK/Ireland MLAT, Art. 6(1)(e).
[283] UK/Ireland MLAT, Art. 6(1)(d) and (f).
[284] UK/Ireland MLAT, Art. 6(1)(c).
[285] Colombia/Cuba MLAT, Art. II(1)(e); Korea/Hong Kong MLAT, Art. 4(1)(g); Korea/US MLAT, Art. 3(1)(d) and (2) (limited exception for listed offenses); Latvia/China MLAT, Art. 3(1)(a).

state parties to recognize some foreign decisions and findings of fact. At the same time, they also provided the most extensive and confiscation-specific grounds for refusing to grant requests or execute orders. They also acknowledged at several points the impact of confiscation orders on fundamental rights. In fact, EU Dec. 2006/783/JHA expressly allows states to refuse to cooperate because assistance would be incompatible with the rights of "interested parties, including *bona fide* third parties."[286] State parties to the other instruments could argue that deficiencies in foreign laws or proceedings render the request contrary to its "public interest," "public order," or "fundamental legal principles," or would be domestically unenforceable.[287] Much would depend, however, on the requested state's desire to oppose the request and its constructions of its interests, principles, and laws.[288] The content of those norms may be little known in the requesting state or the affected parties, thus increasing the uncertainty of – and barriers to – recovery.

4.3 The duty to cooperate in the disposal of confiscated illicit wealth

If a state succeeds in confiscating illicit wealth, what will it do with the assets? The general rule – that the requested state determines the allocation of confiscated assets *locus regit actum* – would seem to conflict with one of the rationales for asset recovery – to remediate the economic harm caused to communities by corruption and international transfers of illicit wealth.[289] At the same time, as reports of international monitoring bodies and the case studies show, requested states may be reluctant to return the funds to requesting countries.[290] Haven states may have incurred expense in executing the MLA request; they may suspect that the funds will be re-diverted by other officials in the victim country; and they may doubt that competing interests were adequately considered as part of the confiscation proceeding.[291]

For these reasons, Art. 57 UNCAC provides uniquely detailed and corruption-specific rules on the disposal of confiscated property.[292] It begins by specifying that the "return" of confiscated property "to its prior legitimate owners" is one form of disposal envisaged by the convention and it clarifies that

[286] EU Dec. 2006/783/JHA, Art. 8(2)(d).

[287] Stessens, *Money Laundering*, pp. 305, 400–407.

[288] Stessens, *Money Laundering*, p. 403.

[289] Stessens, *Money Laundering*, pp. 416–418.

[290] See, esp., the "success stories" discussed at p. 38 and following above; OECD-WGB, Switzerland II, para. 127; US III, para. 155.

[291] See also Pieth, "Recovering Stolen Assets," pp. 16–17; Stessens, *Money Laundering*, pp. 411–415; UNODC, "UNCAC Legislative Guide," paras. 768–769.

[292] Cf. AUCPCC, Art. 16(1)(c); COEMLC 1990, Art. 15; COEMLC 2005, Art. 25; EUCPFI-P2, Art. 5, second sentence; IACAC, Art. XV(2); IACMACM, Art. 8(5); SADC-PAC, Art. 8(5)–(6); UNTOC, Art. 14(1).

disposal is to be made "in accordance with the provisions of [the UNCAC]," as well as the requested state's domestic law.[293] It then requires state parties to "enable [their] competent authorities to return confiscated property" on request and in a manner that "tak[es] into account the rights of bona fide third parties."[294] Next, it implies that such laws are to enable the requesting state to obtain the return of embezzled (or embezzled and laundered) public funds and proceeds of other offenses in relation to which the requesting state establishes ownership or a locally recognized claim to damages. In all these cases, Art. 57 notes that the requirement for a "final judgment" may be waived.[295] This indicates that repatriation for the purposes of enabling a *foreign* confiscation is a separate form of cooperation, which may occur even before a conviction or (quasi-criminal) confiscation has been issued or become final in the requesting state.[296] "In all other cases," Art. 57 lists mandatory "priority consideration[s]," i.e., "[the] retur[n] of confiscated property to the requesting State Party, [the] retur[n] [of] such property to its prior legitimate owners or [the] compensati[on] [of] the victims of the crime."[297] It may also make appropriate deductions for "reasonable expenses"[298] and "give special consideration" to one-off asset disposal agreements or "mutually acceptable arrangements."[299]

4.4 Conclusions

This chapter has described the international legal framework for the confiscation of things that are or that represent the proceeds, instrumentalities, or objects of corruption. It began by identifying the provisions of the anti-corruption treaties and related MLATs that require states to enable the confiscation of illicit wealth and regulate its distribution. Examining the content of those duties, it established that states must empower their courts (or other competent authorities) to permanently deprive persons of proceeds, substitute assets, and, in most cases, instrumentalities of convention offenses. Generally, the states may determine the procedure and form of confiscation. They are implicitly permitted to confiscate without conviction, expressly required to enable the confiscation of the value of proceeds, and expressly and implicitly encouraged to extend confiscation powers to property held by third parties. In addition, under the COEMLC 1990 and 2005 and EU Dec. 2005/212/JHA, they must enable decision-makers to presume the illicit origins of things when it has been established that a person committed a serious offense. Similar, but not identical, discretionary obligations appear in the UNCAC and the UNTOC.

[293] UNCAC, Art. 57(1). [294] UNCAC, Art. 57(2). [295] UNCAC, Art. 57(3)(a)–(b).
[296] See further Stessens, *Money Laundering*, p. 414. [297] UNCAC, Art. 57(3)(c).
[298] UNCAC, Art. 57(4). [299] UNCAC, Art. 57(5).

Under the proposed EU directive, extended, third party, and NCB confiscation would be mandatory in certain situations.

As for cooperation, this chapter has shown that most of the anti-corruption treaties and all of the related MLATs require states to assist each other for the purpose of confiscating illicit wealth. With the notable exception of the UNCAC and the UNTOC, the anti-corruption treaties do not address the procedures for placing, assessing, and refusing or executing such requests. The bilateral and regional MLA instruments were considerably more detailed, the COEMLC 1990 and 2005 and the EU Dec. 2006/783/JHA most extensively regulating the parties' discretion to refuse requests and to question foreign decisions of fact and law. They required "interested parties, including *bona fide* third parties" to be afforded opportunities to effectively assert rights affected by confiscation. However, of all the instruments now in force, only EU Dec. 2006/783/JHA expressly lists "the rights of any interested party, including *bona fide* third parties, under the law of the executing State" as (discretionary) grounds for refusal.

5

Asset recovery and European human right(s) to property

At least since the conclusion of the UNCAC, asset recovery has been hailed as a tool for deterring corruption and remediating its harmful consequences. Those consequences have, in turn, been increasingly described in the language of human rights. At the same time, rights-based arguments have been cited as potential barriers to recovery, particularly to efforts to obtain or regain illicit wealth through cooperative confiscation. Confiscation clearly interferes with the peaceful enjoyment of possessions and is historically associated with notions of the guilt of physical things and the discriminatory and oppressive policies of absolutist monarchs and totalitarian dictatorships.[1] Further, in its contemporary form, confiscation is often achieved with the aid of procedural devices and evidentiary rules that help the state demonstrate that an offense has been committed and that the things are connected to the offense. Even principles of mutual trust and efficiency encourage cooperating states to treat each other's substantive and procedural laws on confiscation as domestic matters.

In this chapter and the next, I consider the compatibility of cooperative confiscations, as foreseen by the anti-corruption treaties and related MLATs, with guarantees under regional human rights conventions. Specifically, I ask whether states are likely to violate treaty-based regional human rights to property, and associated protections, when they directly enforce foreign confiscation orders issued with respect to former PEPs, their family members, and associates. I focus on the direct enforcement of foreign confiscation orders, which is more common, and which supposes greater trust and a stricter division of labor between the cooperating jurisdictions.[2] I apply Art. 1 ECHR-P1, as interpreted by the ECtHR, the European Commission of Human Rights (ECmHR), and, to a lesser extent, the EU's General Court and Court of Justice (EGC and ECJ). As all these bodies read Art. 1 ECHR-P1 to

[1] Dean, *Robbing the Jews*, Introduction, Ch. 1; Finkelstein, "The Goring Ox," 169–290; Gallant, *Money Laundering and the Proceeds*, pp. 58–63; Gornig, "Eigentum und Enteignung im Völkerrecht," pp. 19–76; Pieth, "Recovering Stolen Assets," p. 6.

[2] Stephenson et al., *Barriers to Asset Recovery*, p. 76; Stessens, *Money Laundering*, pp. 394, 403–404.

include procedural and lawfulness requirements, I also consider Arts. 5, 6, 7, and 18 ECHR, as well as Art. 14 ECHR on equality. I do not consider whether complaints by PEPs in asset recovery cases would be admissible under Art. 34 ECHR or whether victims of violations in such cases could obtain just satisfaction under Art. 41 ECHR. After a brief survey of European human rights to property, I ask whether a requested haven state is likely to act within the scope of Art. 1 ECHR-P1 when it enforces a foreign confiscation order for the purposes of asset recovery; if so, whether and how it is likely to interfere with property; and whether such an interference is likely to be justified as lawful and proportionate to a general interest. I conclude by considering whether cooperative confiscations or special-purpose asset recovery laws could be discriminatory under the ECHR.

5.1 Human rights to property in Europe

5.1.1 Three European human rights to property

As concluded on November 4, 1950, between the COE's original ten member states,[3] the ECHR omitted a right to property. The institution of private property was considered essential to the liberal democratic political order that the COE states were attempting to resurrect and protect;[4] but several negotiating parties feared a treaty-based guarantee could be used to oppose their efforts to nationalize heavy industries and execute wealth redistribution policies.[5] As a compromise,[6] the right to property was included in the first protocol:

> Article 1 – Protection of property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[3] Harris et al., *Law of the European Convention on Human Rights*, pp. 1–2; Karl and Handl, "Menschenrechtsschutz des Europarats," p. 11.

[4] Forrest Martin and Rights International, *International Human Rights Law*, vol. I, p. 869.

[5] Harris et al., *Law of the European Convention on Human Rights*, p. 655; Janis, Kay, and Bradley, *European Human Rights Law*, p. 519; Mowbray, "The European Convention on Human Rights," p. 273.

[6] Çoban, *Property Rights within the European Convention on Human Rights*, pp. 132–134; Janis, Kay, and Bradley, *European Human Rights Law*, pp. 519–520; Malzahn, *Eigentumsschutz in der EMRK*, pp. 173–174.

The substantive provisions of ECHR-P1 are regarded as additional to the main convention: "[A]ll the provisions of the Convention shall apply accordingly."[7]

Article 1 ECHR-P1 is not the only treaty-based right to property to bind states on and just off the European continent, however. Since the 1970s, the EU courts have held that the general principles of Union law include a qualified right to property.[8] This right is common to the constitutional traditions of member states and the ECHR, which the EU member states signed and helped create.[9] Further, with the entry into force of the Treaty of Lisbon, they have recognized an express right to property in Art. 17 of the Charter of Fundamental Rights of the European Union (EUCFR):

> Right to property
>
> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
> 2. Intellectual property shall be protected.

Further, after the collapse of the Soviet Union, the Commonwealth of Independent States (CIS) promulgated its own Convention on Human Rights and Fundamental Freedoms (CISCHR).[10] Article 26 CISCHR states:

> 1. Every natural and legal person shall have the right to own property. No one shall be deprived of his property except in the public interest, under a judicial procedure and in accordance with the conditions laid down in national legislation and the generally recognised principles of international law.
> 2. However, the foregoing provisions shall in no way affect the right of the Contracting Parties to adopt such laws as they deem necessary to control the use of items withdrawn from general circulation in the national or public interest.

[7] ECHR-P1, Art. 5. See also White and Ovey, *The European Convention on Human Rights*, p. 477.

[8] Case 44/79, *Hauer* v. *Rheinland Pfalz* [1979] ECR 3727, para. 17. See further Craig and de Búrca, *EU Law*, pp. 386–387. See further Bernsdorff, "Article 17," paras. 1–2; Calliess, "Eigentumgrundsrecht"; Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.71; Heselhaus, "Eigentumsrecht," para. 11; Rengeling and Szczekalla, *Grundrechte in der Europäische Union*, p. 632.

[9] *Hauer* [1979] ECR 3727, para. 17. On fundamental rights as EU general principles, see further Craig and de Búrca, *EU Law*, pp. 364–372; Ehlers, "Unionsgrundrechte," paras. 5–8; Nicolaysen, "Historische Entwicklungslinien," p. 20.

[10] Minsk, May 26, 1995, in force August 11, 1998, reprinted *HRLJ*, 17 (1996), 159 (unofficial translation). On the CIS and its system for human rights protection generally, see Karl and Handl, "Menschenrechtsschutz der GUS"; Shaw, *International Law*, pp. 378–379.

5.1.2 The relevance of Art. 1 ECHR-P1

Article 1 ECHR-P1 is the starting point for assessing enforcement orders that have been sought for the purposes of asset recovery. First, the general principle on property in EU law corresponds with the right to property in Art. 1 ECHR-P1. As the ECJ stated in *Hauer* v. *Rheinland Pfalz*, "[t]he right to property is guaranteed in the Community legal order in accordance with the general ideas common to the Constitutions of the Member States, which are also reflected in the first Protocol to the European Convention on Human Rights."[11] Second, the EUCFR neither replaces the rights that were found to be general principles of law nor does it undercut the standard of protection in the ECHR. Article 52(3) EUCFR provides that charter rights have the same "meaning and scope" as they are given in the ECHR; Art. 53 EUCFR preserves rights and freedoms already "recognised . . . by Union law and international law and international agreements to which the Union, the Community or all the Member States are party, including [the ECHR]." Commentators also consider the scope of Art. 17 EUCFR to be commensurate with that of Art. 1 ECHR-P1, some differences in wording notwithstanding.[12] The ECtHR, for its part, will obtain power to directly review the actions of EU institutions when the EU accedes to the ECHR, as is foreseen by Art. 59(2) ECHR and Art. 6(2) of the Treaty on European Union (TEU).[13] Third, though there are important differences between the two articles,[14] Art. 26 CISCHR clearly draws on Art. 1 ECHR-P1. Should the CIS ever establish its human rights commission to "monito[r] the execution of the convention,"[15] Strasbourg's case law on Art. 1 ECHR-P1 would (or should) influence its interpretations. The ECHR and its protocols meanwhile continue to bind parties that are also CIS member states.[16]

[11] *Hauer* [1979] ECR 3727, para. 17. See further Craig and de Búrca, *EU Law*, pp. 386–387.

[12] Bernsdorff, "Article 17," paras. 1–2; Heselhaus, "Eigentumsrecht," para. 35; Rengeling and Szczekalla, *Grundrechte in der Europäische Union*, p. 632.

[13] OJ 2010 No. C83, March 30, 2010, p. 13. See further Chalmers, Davies, and Monti, *European Union Law*, p. 259; Craig and de Búrca, *EU Law*, pp. 399–400; Ehlers, "Unionsgrundrechte," para. 11; O'Mara, "A More Secure Europe of Rights?" 1813–1832.

[14] The first sentence of Art. 26 CISCHR is an entitlement to participate in the institution of ownership rather than peacefully to enjoy possessions and the second and third sentences of Art. 26 CISCHR word the justifications for interferences differently and perhaps more narrowly. In particular, if a "judicial procedure" is one that accords with Art. 6 CISCHR, it may be less "fair" than a trial under Art. 6 ECHR. On the differences between Art. 6 ECHR and Art. 6 CISCHR, see Frowein, "Analysis of Legal Implications," 183.

[15] CISCHR, Art. 34. See also Charter of the Commonwealth of Independent States, Minsk, January 22, 1993, in force January 22, 1994, ILM, 34 (1995), 1279 (unofficial translation), Art. 33; Karl and Handl, "Menschenrechtsschutz der GUS," p. 605.

[16] See also COE Parliamentary Assembly Res. 1249 (2001) on the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights, paras. 4, 6(ii).

5.2 The scope of the right under Art. 1 ECHR-P1

As the ECtHR has done in analogous matters, I begin by asking whether the impugned act or omission is within the scope of Art. 1 ECHR-P1. The scope of a right is the "circumscribed part of reality . . . which [it protects]."[17] In the ECHR and its protocols, reality is circumscribed personally, temporally, territorially, and substantively[18] by virtue of the general rules of public international law, the obligation to respect human rights in Art. 1 ECHR, and the provisions that formulate particular rights and freedoms, such as Art. 1 ECHR-P1.

5.2.1 Temporal scope

The convention and its protocols only regulate events that occur after their entry into force for each state party.[19] As the Grand Chamber reaffirmed in *Varnava and Others* v. *Turkey*, "in accordance with the general rules of international law . . . the provisions of the Convention do not bind a State party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party."[20] Thus, an act or omission may only constitute an interference with the right to property if it occurred after the deposition of the respondent state's instrument of ratification of the protocol or occurred before that date and constitutes a "continuing situation" (or a "continuing violation").[21] At the time of writing, all signatory states to the ECHR were party to the protocol except for Switzerland and Monaco.[22]

If Switzerland or Monaco ratifies the protocol, Art. 1 ECHR-P1 may apply to some restraints and confiscation that began before its entry into force (EIF). In *Karamitrov and Others* v. *Bulgaria*,[23] the Fifth Section of the ECtHR held

17 Ehlers, "ECHR General Principles," para. 40.

18 Ehlers, "ECHR General Principles," paras. 22–36, 49; White and Ovey, *The European Convention on Human Rights*, Ch. 5.

19 *Malhous* v. *Czech Republic*, App. No. 33701/96 (ECtHR, December 13, 1996), para. B(c). See also *Loizidou* v. *Turkey*, App. No. 15318/89 (1997) 23 EHRR 513, paras. 46–47; *Sovtransavto Holding* v. *Ukraine*, App. No. 48553/99 (2004) 38 EHRR 44, para. 58. See White and Ovey, *The European Convention on Human Rights*, p. 87.

20 App. Nos. 16064/90 et al. (ECtHR, September 18, 2009), para. 130. See also *Sovtransavto Holding* (2004) 38 EHRR 44, para. 56; *Blecic* v. *Croatia*, App. No. 59532/00 (2006) 43 EHRR 48, paras. 70, 81. See further Peukert, "Artikel 1 ZP1," para. 17.

21 See generally Kaiser, "Art. 1 ZPI," para. 26; Loukaidēs, *ECHR: Collected Essays*, pp. 17–33; van Pachtenbeke and Haeck, "From De Becker to Varnava," 49; White and Ovey, *The European Convention on Human Rights*, pp. 87–88.

22 On the reasons for Switzerland's failure to ratify the convention, see further Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.1. On the inapplicability of Art. 1 ECHR-P1 to non-party states, see, e.g., *M, E, and B* v. *Switzerland*, App. No. 16712/90 (ECmHR, February 13, 1992), "The Law," para. 3.

23 App. No. 53321/99 (ECtHR, January 10, 2008).

that the prolonged retention of items after the date of EIF of the protocol for Bulgaria was subject to the protocol, even though the items had been seized before.[24] Given the length of cooperative confiscation proceedings, such arguments may be possible with respect to restraining orders as well. Alternatively, persons aggrieved by pre-EIF cooperative confiscation orders may argue that the orders aiming at asset recovery were unlawful and, hence, *de facto* deprivations of property and continuing violations of Art. 1 ECHR-P1.[25]

5.2.2 Personal scope

As I showed in Chapters 2 and 4, confiscation orders that aim at asset recovery may affect a range of legal and natural persons, from current and former foreign heads of state and their family members to their political or business associates and corporate entities under their influence or control. Some of these people will be obvious targets of the confiscation proceedings, being named as defendants in the foreign criminal proceedings or as respondents to the foreign confiscation or local enforcement order. Others will be incidentally affected by the execution of an order due to their competing personal or proprietary interest in the forfeitable things.

The ECHR and its right to property appear to benefit all human beings and (private law) legal entities regardless of their nationality. First, Art. 1 ECHR requires ECHR state parties to secure convention rights and freedoms to "*everyone* within their jurisdiction" and Art. 1 ECHR-P1 protects the peaceful enjoyment of possessions of "every legal or natural person."[26] Second, the ECtHR has applied the ECHR and its protocols to nationals of

[24] *Karamitrov* (ECtHR, January 10, 2008), paras. 71–74. See also *OAO Neftyanaya Kompaniya Yukos* v. *Russia*, App. No. 14902/04 (2012) 54 EHRR 19, para. 646.

[25] *Papamichalopoulos* v. *Greece*, App. No. A/260-B (1993) 16 EHRR 440, paras. 38–40; *Loizidou* (1997) 23 EHRR 513, paras. 40–47; *Doğan and Others* v. *Turkey*, App. Nos. 8803–8811/02 et al. (2005) 41 EHRR 15, paras. 112–114; *Sargsyan* v. *Azerbaijan*, App. No. 40167/06 (ECtHR, December 14, 2011), paras. 84–92. Cf. *Seidlová* v. *Slovak Republic*, App. No. 25461/94 (ECmHR, September 6, 1995), "The Law," para. 2; *Brezny* v. *Slovak Republic*, App. No. 23131/93 (ECmHR, March 4, 1996), "The Law," para. 1; *Malhous* (ECtHR, December 13, 1996), para. B(c); *Tímár* v. *Hungary*, App. Nos. 23209/94 and 27313/95 (ECmHR, January 13, 1997), "The Law," para. 2; *Blecic* (2006) 43 EHRR 48, para. 86; *Kopecky* v. *Slovakia*, App. No. 44912/98 (2004) 41 EHRR 43, para. 35; *Von Maltzan and Others* v. *Germany*, App. Nos. 71916/01, 71917/01, and 10260/02 (2005) 42 EHRR SE11, paras. 74, 81–83; *Beshiri* (2006) 46 EHRR 17, paras. 76, 85. On the distinction between *de jure* and *de facto* deprivations of possessions, see Loukaidēs, *ECHR: Collected Essays*, pp. 27–30; van Pachtenbeke and Haeck, "From De Becker to Varnava," 51. On unlawful confiscations as deprivations of property, see further p. 194 and following below.

[26] See Emberland, *Human Rights of Companies*, pp. 65–109; Harris et al., *Law of the European Convention on Human Rights*, p. 655.

non-contracting states, former heads of government and state, and relatives of those high office holders.[27] In *Honecker and Others* v. *Germany*, for example, it applied Art. 1 ECHR-P1 to funds claimed by the widow of the ex-President of the German Democratic Republic (GDR), Erich Honecker, and the widow and daughters of a senior East German socialist party official and *Politbüro* member, Hermann Axen.[28] Third, to the extent that some public law legal persons are excluded from the scope of the guarantee,[29] they are not the legal persons that are most likely to be affected by requests for cooperative confiscation. If such corporations hold illicit wealth abroad, the victim state may use its control of the entity's decision-making organs to repatriate those assets. Whether the victim state could complain of unilateral asset freezes imposed on such entities is an interesting possibility but not one I consider further here.

5.2.3 Territorial scope

In cooperative confiscation cases, the persons affected by the confiscation order may not be physically present in the territory of the enforcing state. From the alleged criminal's perspective, there are incentives to place illicit wealth in multiple jurisdictions both to lessen the risks of detection and to manage the risks of investment, as the case studies showed. As for the cooperating states, direct enforcement obviates the need for the requested jurisdiction to convict the offender of a predicate offense to confiscation or to obtain a new local confiscation order on the basis of the foreign conviction and/or confiscation order.[30] Typically, after determining that the conditions for enforcement are met, the requested state will give effect to the foreign order as if it were an order

[27] *The Former King of Greece and Others* v. *Greece*, App. No. 25701/94 (2001) 33 EHRR 21; *Craxi* v. *Italy*, App. No. 25337/94 (2004) 38 EHRR 47; *Paksas* v. *Lithuania*, App. No. 34932/04 (ECtHR, January 6, 2011); *Tymoshenko* v. *Ukraine*, App. No. 49872/11 (ECtHR, April 30, 2013). See also *Crociani, Palmioti, Tanassi and Lefebvre d'Ovidio* v. *Italy*, App. Nos. 8603/79 et al. (ECmHR, December 18, 1980); *Milošević* v. *Netherlands*, App. No. 77631/01 (ECtHR, March 19, 2002); *Saddam Hussein* v. *Albania and Others*, App. No. 23276/04 (2006) 42 EHRR SE16, pp. 224–226. See further Kaiser, "Art. 1 ZPI," para. 24; Milanovic, *Extraterritorial Application*, pp. 155–157.

[28] App. Nos. 54999/00 and 53991/00 (ECtHR, November 15, 2001), "The Facts." See also *Islamische Religionsgemeinschaft e.V.* v. *Germany*, App. No. 53871/00 (ECtHR, December 5, 2002).

[29] Cremer, "Eigentumsschutz," paras. 58, 60; Rengeling and Szczekalla, *Grundrechte in der Europäische Union*, pp. 204–206; White and Ovey, *The European Convention on Human Rights*, p. 31. See, e.g., *Islamic Republic of Iran Shipping Lines* v. *Turkey*, App. No. 40998/98 (2008) 47 EHRR 24, paras. 78–82. Cf. Joined Cases T-35/10 and T-7/11, *Bank Melli Iran* v. *Council of the European Union and Others* (September 6, 2013), paras. 64–75.

[30] Stessens, *Money Laundering*, pp. 385–387.

of its courts.[31] Whether states act within the scope of the ECHR and its protocols when enforcing foreign confiscation orders thus depends on whether jurisdiction in Art. 1 ECHR is synonymous with territory and, if not, on the ECtHR's concept of extraterritorial jurisdiction.

5.2.3.1 The concept of jurisdiction in Art. 1 ECHR

The ECtHR has repeatedly held that jurisdiction is "primarily territorial."[32] In *Banković* v. *Belgium*, it equated territory with a contracting state's national territory as determined by the general rules of public international law.[33] State parties may extend the convention, by declaration under Art. 56(1) ECHR, to "territories for the international relations of which [they] are responsible"; they have used an equivalent power in Art. 4 ECHR-P1 to apply the first protocol to several offshore financial centers.[34] Further, in "exceptional cases,"[35] the ECtHR has accepted that the convention and its protocols apply extraterritorially.[36] In *Loizidou* v. *Turkey*, for example, the ECtHR held Turkey responsible for continuously depriving the applicant of a house

[31] Stessens, *Money Laundering*, p. 387. See also Bantekas, *International Criminal Law*, pp. 362–363; Cryer et al., *International Criminal Law and Procedure*, p. 105. On enforcement orders in Switzerland and the UK, see Donatsch, Heimgartner, and Simonek, *Internationale Rechtshilfe*, p. 48 (commenting on IMAC, art. 94); Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, paras. 25.50–25.62.

[32] See, e.g., *Soering* v. *UK*, App. No. 27021/08 (1989) 11 EHRR 439, paras. 86; *Öcalan* v. *Turkey*, App. No. 55721/07 (2003) 37 EHRR 10, para. 93; *Ilaşcu and Others* v. *Moldova and Russia*, App. No. 48787/99 (2005) 40 EHRR 46, para. 312; *Issa* v. *Turkey*, App. No. 31821/96 (2005) 41 EHRR 27, para. 67; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* v. *Ireland*, App. No. 45036/98 (2006) 42 EHRR 1, para. 136; *Al-Saadoon and Mufdhi* v. *UK*, App. No. 27021/08 (2009) 49 EHRR SE11, paras. 84–85; *Rantsev* v. *Cyprus and Russia*, App. No. 25965/04 (2010) 51 EHRR 1, para. 206; *Al-Skeini* v. *UK*, App. No. 55721/07 (2011) 53 EHRR 18, para. 131; *Hirsi Jamaa and Others* v. *Italy*, App. No. 27765/09 (2012) 55 EHRR 21, para. 71. Cf. *Cyprus* v. *Turkey*, App. Nos. 6780/74 and 6950/75 (ECmHR, May 26, 1975); *Stocké* v. *Germany*, App. No. 11755/85 (1991) 13 EHRR CD126.

[33] *Banković and Others* v. *Belgium*, App. No. 52207/99 (2007) 44 EHRR SE5, paras. 57–69. Cf. *Loizidou* v. *Turkey*, App. No. 15318/89 (1995) 20 EHRR 99, para. 62; *Cyprus* v. *Turkey*, App. No. 25781/94 (2002) 35 EHRR 30, para. 77.

[34] ECHR-P1, Art. 4, first paragraph. See Council of Europe, "List of Declarations Made with Respect to Treaty No. 009"; International Monetary Fund, "Offshore Financial Centers." See further Ehlers, "Unionsgrundrechte," para. 35; Milanovic, *Extraterritorial Application*, pp. 13–15; White and Ovey, *The European Convention on Human Rights*, pp. 98–99; OECD-WGB, United Kingdom III, paras. 176–186.

[35] *Banković* (2007) 44 EHRR SE5, paras. 65, 69–71.

[36] Milanovic, *Extraterritorial Application*, p. 8 ("Extraterritorial application simply means that at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title").

and land she owned in the northern part of Cyprus.[37] It was "obvious from the large number of troops engaged in active duties in northern Cyprus that [Turkey's] army exercise[d] effective overall control over that part of the island."[38] In *Al-Skeini and Others* v. *UK*, the Grand Chamber clarified that jurisdiction also arises "whenever the State through its agents exercises control and authority over an individual," at least where this takes the form of "physical power and control over the person in question."[39] This is another exception to the territoriality principle.[40]

5.2.3.2 The adverse consequences of extradition

Accordingly, state parties may violate the ECHR and its protocols by cooperating with other states in extradition matters – even though the "adverse consequences" of assistance occurred or may occur in another state. In *Soering* v. *UK*,[41] the ECtHR found that the UK would have violated Art. 3 ECHR if it had extradited the applicant to the US, where he was to be executed for murder:

> [H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.[42]

In the court's view, any requested state party would incur liability under Art. 3 if it were to extradite an individual to a state where there were "substantial grounds . . . for believing that [he/she] . . . faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."[43] The importance of apprehending and prosecuting fugitive offenders is offset by the convention's absolute prohibition against these forms of maltreatment.[44] For Prof. Aukje van Hoek and Dr. Michiel Luchtman, state parties therefore have a duty of care to safeguard convention rights within their territory when "enter[ing] into different forms of (judicial) cooperation with other states."[45]

[37] (1997) 23 EHRR 513, para. 57 read with *Al-Skeini* (2011) 53 EHRR 18, para. 138 (recharacterizing *Loizidou* as an exception to the territoriality principle). See further Milanovic, "*Al-Skeini* and *Al-Jedda* in Strasbourg," para. 66.

[38] *Loizidou* (1997) 23 EHRR 513, para. 56.

[39] *Al-Skeini* (2011) 53 EHRR 18, paras. 136–137.

[40] *Al-Skeini* (2011) 53 EHRR 18, paras. 132–140.

[41] (1989) 11 EHRR 439, paras. 81–91. See Dugard and van den Wyngaert, "Reconciling Extradition"; Gilbert, *International Crime*, pp. 149–155.

[42] *Soering* (1989) 11 EHRR 439, para. 111.

[43] *Soering* (1989) 11 EHRR 439, para. 91.

[44] *Soering* (1989) 11 EHRR 439, paras. 86–91, 111. See further Dugard and van den Wyngaert, "Reconciling Extradition," 206–212.

[45] Van Hoek and Luchtman, "Transnational Cooperation and Human Rights," 5–6.

5.2.3.3 The right to a fair trial and international cooperation

The court in *Soering* also remarked (in *obiter*) that an extraditing state party might exceptionally violate Art. 6 ECHR if "the fugitive has suffered or risks suffering a flagrant denial of the fair trial right in the requesting country."[46] Article 6 provides for the right to a fair trial:

> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> (3) Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The concepts of "civil rights and obligations" and "criminal charges" are interpreted autonomously of definitions in domestic law. The civil limb of Art. 6 ECHR applies to some disputes between public law bodies and private persons

[46] *Soering* (1989) 11 EHRR 439, para. 113. Several parts of this sub-section were originally published in R. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases," *Utrecht Law Review*, 9 (2013), 147–164, available at www.utrechtlawreview.org, accessed November 8, 2013. This work is licensed under a Creative Commons Attribution 3.0 Unported License (http://creativecommons.org/licenses/by/3.0/), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

"whose result is decisive for private rights and obligations."[47] The criminal limb is triggered by an "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[48] As set forth in *Engel and Others* v. *Netherlands* and *Öztürk* v. *Germany*, offenses are criminal when they are deemed as such by state parties, or the nature of the offense and/or the nature and severity of the sanction places them within the "criminal sphere."[49] The classification of a matter as civil or criminal then determines the intensity of the guarantees under Art. 6 ECHR. The specific requirements of Art. 6(2) and (3) ECHR (the presumption of innocence and the rights of defense) are only directly applicable in criminal proceedings. They apply in modified form in civil matters but this is part of the general fair hearing requirement under Art. 6(1) ECHR. A hearing is fair *inter alia* when:

- a person's civil rights and obligations or criminal charge is determined within a reasonable time by an independent and impartial tribunal established by law;
- the authorities refrain from compelling the person to incriminate him/herself (or itself) and the tribunal assumes the person's innocence until the contrary is proven according to law; and
- the person has been afforded the opportunity to participate effectively in the hearing on substantially equal terms to his/her opponent (equality of arms).[50]

It follows that Art. 6(1) ECHR also implies a right to access the courts.[51]

5.2.3.4 The flagrant denial of justice through the enforcement of foreign penalties

In *Drozd and Janousek* v. *France and Spain*, the ECtHR applied *Soering's* fair trial *obiter* to the enforcement of a foreign criminal sentence by a contracting

[47] See, e.g., *Ringeisen* v. *Austria*, App. No. 2614/65 (1979–80) 1 EHRR 455, para. 94. See further Council of Europe and European Court of Human Rights, "Practical Guide on Admissibility," para. 230; Peters and Altwicker, *Europäische Menschenrechtskonvention*, paras. 19.7–19.9.

[48] See, e.g., *Deweer* v. *Belgium*, App. No. 6903/75 (ECtHR, February 27, 1980), para. 46; *Kondratishko and Others* v. *Russia*, App. No. 3937/03 (ECtHR, July 19, 2011), para. 120.

[49] *Engel and Others* v. *Netherlands*, App. Nos. 5100/71 et al. (1979–80) 1 EHRR 647 (A/22), paras. 80–82; *Öztürk* v. *Germany*, App. No. 8544/79 (1984) 6 EHRR 409, paras. 49–50. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 11.360; Harris et al., *Law of the European Convention on Human Rights*, pp. 205–206; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 19.16.

[50] Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 11.423–11.425; Janis, Kay, and Bradley, *European Human Rights Law*, Chs. 8–9. See further Summers, *Fair Trials*, Chs. 4–5.

[51] *Golder* v. *UK*, App. No. 4451/70 (1979–1989) 1 EHRR 524, paras. 35–36. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 11.372–11.373.

state.[52] The majority found that France would have been obliged to refuse to execute the Andorran prison sentences under Art. 5(1) ECHR, had it emerged that the Andorran convictions were "the result of a flagrant denial of justice"; however, this "[was not] shown . . . in the circumstances of the case." Furthermore, as France was not required to "impose [the convention's] standards" on the (then) non-party, Andorra, it was under no duty to "verify whether proceedings which resulted in the conviction were compatible with all the requirements of [Art. 6 ECHR]."[53] To hold otherwise would have "thwart[ed] the current trend towards strengthening international co-operation in the administration of justice."[54]

A little less than a decade later, the court found a violation of Art. 6(1) ECHR in international cooperation proceedings without mentioning the flagrant denial of justice standard. In *Pellegrini* v. *Italy*, Italian judges had confirmed and enforced a Vatican order that annulled the applicant's marriage and defeated her claim to maintenance.[55] In the Vatican courts, the applicant had not had access to the file and had not been informed of her right to counsel.[56] Strasbourg noted that the Vatican was not a party to the convention. With regard to Italy's responsibility, it described its task as being "to enquire not into whether the proceedings before the ecclesiastical courts complied with [Art. 6 ECHR], but into whether the Italian courts, before granting confirmation and execution of the said annulment, duly checked that the proceedings relating thereto satisfied the guarantees contained in Article 6."[57] Unconvinced of Italy's reasons for dismissing the applicant's complaints in the enforcement proceedings,[58] the ECtHR found a violation of the right to equal hearing under Art. 6(1) ECHR.[59]

In *Pellegrini*, Prof. Theodor Schilling sees a stricter "yardstick" for assessing the compatibility of private law enforcement orders with Art. 6 ECHR: The court, he argues, required no less than "full compliance" of the Vatican order with the fair trial guarantees and not simply "the absence of a flagrant denial of justice."[60] Here, he is joined by Prof. James Fawcett[61] and van Hoek and Luchtman.[62] The court, however, has reinterpreted *Pellegrini* in line with *Drozd*.[63] It has dismissed the "real risk of unfairness" test for arrest warrants

[52] App. No. 12747/87 (1992) 14 EHRR 745. See further Dugard and van den Wyngaert, "Reconciling Extradition," 203–204.

[53] *Drozd* (1992) 14 EHRR 745, para. 110.

[54] *Drozd* (1992) 14 EHRR 745, para. 110.

[55] App. No. 30882/96 (2002) 35 EHRR 2, paras. 21, 26–30.

[56] *Pellegrini* (2002) 35 EHRR 2, paras. 44–46.

[57] *Pellegrini* (2002) 35 EHRR 2, para. 40.

[58] *Pellegrini* (2002) 35 EHRR 2, paras. 44–46.

[59] *Pellegrini* (2002) 35 EHRR 2, paras. 21, 26–30, 41.

[60] Schilling, "Enforcement of Foreign Judgments," p. 28.

[61] Fawcett, "Impact of Art. 6(1)," 5, 23–24, 35, 43.

[62] Van Hoek and Luchtman, "Transnational Cooperation and Human Rights," 8–9.

[63] *Lindberg* v. *Sweden*, App. No. 48198/99 (2004) 38 EHRR CD239, "The Law," para. 1.

executed between member states of the EU.[64] And it has repeatedly applied the flagrant denial test in cases on extradition and expulsion;[65] the transfer of prisoners;[66] the enforcement of foreign child custody orders;[67] and domestic criminal proceedings and penalties.[68] Moreover, in *Saccoccia* v. *Austria*, it referred to the "flagrant denial" standard when rejecting a complaint against the enforcement of a foreign confiscation order.[69]

5.2.3.5 The responsibility of the requested state for foreign confiscation orders

In *Saccoccia*, the applicant US citizen had been convicted of "large-scale money laundering" and sentenced to imprisonment by the US District Court. The US court had ordered the forfeiture of some USD 136 million in proceeds and substitute assets. The order covered cash, bonds, and other financial instruments found in an Austrian apartment that had been leased in the applicant's name.[70] The Austrian Ministry of Justice had admitted the US request for enforcement of the final forfeiture order and the Vienna Regional Criminal Court had approved the execution of the order.[71] The Vienna Court of Appeal rejected the applicant's challenges to the orders under Arts. 6 and 7 ECHR and Art. 1 ECHR-P1. Before the ECtHR, he sought to show, amongst other things, that the Austrian courts had failed sufficiently to consider deficiencies in the US criminal and confiscation proceedings.[72] Adapting the language in *Pellegrini* to express the test in *Soering* and *Drozd*:

[64] *Stapleton* v. *Ireland*, App. No. 56588/07 (2010) 51 EHRR SE4, paras. 27–30.

[65] See, e.g., *Cruz Varas and Others* v. *Sweden*, App. No. 15576/89 (1992) 14 EHRR 1, paras. 69–70, 82; *Vilvarajah and Others* v. *UK*, App. Nos. 13163/87 et al. (1992) 14 EHRR 248, para. 103; *Chahal* v. *UK*, App. No. 22414/93 (1997) 23 EHRR 413, para. 80; *Einhorn* v. *France*, App. No. 71555/01 (ECtHR, October 16, 2001), paras. 32–34; *Mamatkulov and Askarov* v. *Turkey*, App. No. 46827/99 (2005) 41 EHRR 25, paras. 88–91. See further Gilbert, *International Crime*, pp. 152–167.

[66] *Iribarne Pérez* v. *France*, App. No. 16462/90 (1996) 22 EHRR 153, para. 29; *Naletilić* v. *Croatia*, App. No. 51891/99 (ECtHR, May 4, 2000), "The Law," para. 1(b); *Willcox* v. *UK* and *Hurford* v. *UK*, App. Nos. 43759/10 and 43771/12 (2013) 57 EHRR SE16, para. 95.

[67] *Eskinazi and Chelouche* v. *Turkey*, App. No. 14600/05 (ECtHR, December 14, 2005), paras. C(2); *Maumousseau and Washington* v. *France*, App. No. 39388/05 (2010) 51 EHRR 35, paras. 95–99.

[68] *Sejdovic* v. *Italy* App. No. 56581/00 (2006) 42 EHRR 17 (Art. 6 ECHR), para. 84, 105; *Stoichkov* v. *Bulgaria*, App. No. 9808/02 (2007) 44 EHRR 14 (Art. 5 ECHR), paras. 51–56; *Insanov* v. *Azerbaijan* App. No. 161333/08 (ECtHR, March 14, 2013) (Art. 1 ECHR-P1), para. 184.

[69] App. No. 69917/01 (ECtHR, July 5, 2007); (2010) 50 EHRR 11.

[70] *Saccoccia* (ECtHR, July 5, 2007), "The Facts," para. A(1).

[71] *Saccoccia* (ECtHR, July 5, 2007), "The Facts," para. A(2).

[72] *Saccoccia* (ECtHR, July 5, 2007), "The Facts," paras. A(2), 1–4.

> The Court observe[d] at the outset that its task [did] not consist in examining whether the proceedings before the United States courts complied with Article 6 of the Convention, but whether the Austrian courts, before authorising the enforcement of the forfeiture order, duly satisfied themselves that the decision at issue was not the result of a flagrant denial of justice.[73]

The First Section acknowledged *Pellegrini's* potentially stricter standard but found, on the facts of the case, that it "was not called upon to decide in the abstract which level of review was required from a Convention point of view": Compliance with the principles of Art. 6 ECHR had been a condition for enforcing the US order under the Austrian MLA law.[74] The ECtHR noted the detail with which the Vienna Court of Appeal had dealt with the applicant's allegations and the reasons for which it dismissed them.[75] Though they had "followed in essence the reasons given by the United States Court of Appeals," "the Austrian courts [had] duly satisf[ied] themselves, before authorising the enforcement of the forfeiture order, that the applicant had had a fair trial under United States law."[76] The ECtHR cited *Saccoccia* to dismiss a second US drug money launderer's complaint in *Duboc* v. *Austria*.[77] Perhaps in view of the decision in *Saccoccia*, Mr. Duboc only complained about the fairness of the Austrian *exequatur* proceedings under Art. 6 ECHR.[78]

5.2.3.6 The responsibility of the requested state in cases of asset recovery

Saccoccia and *Duboc* verify my assumption that persons affected by enforcement orders may allege deficiencies in the foreign criminal trial and/or confiscation proceeding, in addition to deficiencies in the *exequatur* proceeding in the haven state. They also show that the ECtHR is prepared to consider whether state parties have exposed or may expose such individuals to unfair criminal or confiscation proceedings by executing foreign orders. The court did not decide on an "abstract" standard in *Saccoccia*; nonetheless, the decision favors the view that ECHR state parties will only incur convention responsibility if they fail to consider whether a foreign confiscation order resulted from a flagrant denial of justice.[79] Accordingly, the ECtHR's own role in such cases will be limited to ascertaining whether the requested state party has correctly applied the flagrant denial test. The issue is thus how the ECtHR

[73] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 2.
[74] *Saccoccia* (ECtHR, July 5, 2007), "The Facts," paras. B(1), 2.
[75] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 2.
[76] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 2.
[77] App. No. 8154/04 (ECtHR, June 5, 2012). [78] (ECtHR, June 5, 2012), para. 30.
[79] See further Ivory, "Fair Trial and International Cooperation." See also *Stapleton* (2010) 51 EHRR SE4, para. 27–32 (rejecting the standard of a "real risk of unfairness").

will apply the flagrant denial standard to cooperative confiscation proceedings that aim at asset recovery. A further question is what the peculiarities of asset recovery cases are likely to tell us about the (territorial) scope of the convention and its protocols more generally.

Cooperative confiscations and the ECHR's concept of jurisdiction Do cooperative confiscations involve territorial or extraterritorial applications of the ECHR? Messrs. Saccoccia and Duboc were both imprisoned in the US at the time of the execution of the requests and so not in Austria's national territory nor in a territory under its effective control. If the location of the individual determines the application of the convention and its protocols, as commentary on *Soering* and *Drozd* suggests,[80] did the court apply the correct set of principles in *Saccoccia*? Or is it always correct to characterize extradition and expulsion cases as territorial exercises of jurisdiction under Art. 1 ECHR?

In *Hirsi Jamaa and Others* v. *Italy*, a case on the expulsion of Somali and Eritrean migrants on the high seas,[81] the court appeared to answer the second question in the negative. Though it ostensibly decided *Hirsi Jamaa* on the basis of the flagship principle, it implicitly acknowledged an extraterritorial notion of jurisdiction in expulsion cases that is based on a contracting state's authority, through its agents, over persons:

> Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Court has now accepted that Convention rights can be "divided and tailored" (see Al-Skeini, cited above, § 136 and 137; compare Banković, cited above, § 75).[82]

Hirsi Jamaa does not provide a complete explanation for the application of the convention to cooperative confiscations, however. For one thing, it is expressly limited to situations in which a state's agents operate extraterritorially; for another, its personal model of jurisdiction would seem to depend on "physical power and control over the person in question."[83] In both respects,

[80] Lawson, "Life After *Bankovic*," p. 84; Milanovic, *Extraterritorial Application*, p. 9; O'Boyle, "Comment on 'Life after *Bankovic*,'" pp. 126–127. See also Gilbert, *International Crime*, p. 141 (noting that the court has opted to characterize extradition as a prospective violation in the contracting party's territory, rather than to find that convention obligations apply extraterritorially).

[81] *Hirsi Jamaa* (2012) 55 EHRR 21, paras. 9–10, 76.

[82] *Hirsi Jamaa* (2012) 55 EHRR 21, para. 74.

[83] *Al-Skeini* (2011) 53 EHRR 18, paras. 136–137.

it contrasts with another recent case, *Nada* v. *Switzerland*,[84] in which the Grand Chamber found that Switzerland violated Art. 8 ECHR when it enforced a UN-mandated travel ban in its territory against an elderly man resident in Campione d'Italia, an Italian municipality surrounded by Switzerland.[85] Likewise, in cooperative confiscation cases, it is the person as rights-holder who is vulnerable to exercises of the contracting party's power.[86] This is quite obvious in *Saccoccia* and *Duboc* where the only "parts" of the applicants in Austrian territory were their alleged possessions – and these were tangible and intangible things.[87] Had the applicants in *Saccoccia* and *Duboc* been legal entities,[88] the contrast to cases like *Hirsi Jamaa* would have been even more apparent.

Grappling with these problems, Dr. Marko Milanovic considers that the ECHR's jurisdiction in "extraterritorial law enforcement" cases could be explained by the contracting state's "*legal* power or authority" over the alleged victim.[89] However, he finds this explanation unsatisfactory, for it would logically enable states to avoid their human duties by acting unlawfully: That outcome would be incompatible with the principle of the rule of law protected by the convention.[90] His own solution is to limit extraterritorial jurisdiction to negative human rights obligations, which states are better able to observe beyond their borders;[91] nonetheless, as Milanovic himself admits, this approach finds little direct support in the wording of Art. 1 ECHR or the ECtHR's jurisprudence.[92] An alternative is to reframe the court's existing case law so as not to present territoriality and extraterritoriality as (strict) rule and (narrow) exceptions. *Both* the rule *and* the exceptions would seem to depend on a relationship of control between the respondent state and the alleged violation. The court assesses the degree of control having regard to a *range* of personal and spatial factors, the relevance of which is determined by the nature of the right/duty in question. The fact that the alleged victim was physically located in the respondent state at the time of the alleged violation will be conclusive for many rights and in

[84] App. No. 10593/08 (ECtHR, September 12, 2012).

[85] *Nada* (2013) 56 EHRR 18, para. 11. See also Milanovic, "*Nada* v. *Switzerland*." See also *Likvidējamā p/s "Selga"* v. *Latvia and Lūcija Vasiļevska* v. *Latvia*, App. Nos. 17126/02 and 24991/02 (ECtHR, October 1, 2013), para. 100 (finding Latvia not responsible for account freezes imposed by a Russian entity operating in Russia).

[86] See further Milanovic, *Extraterritorial Application*, pp. 127–209 (proposing and discussing the concepts of "spatial" and "personal" models of jurisdiction under the ECHR, Art. 1).

[87] See further p. 174 and following below.

[88] As was the case in *Dassa Foundation* v. *Liechtenstein*, App. No. 695/05 (ECtHR, July 10, 2007).

[89] Milanovic, *Extraterritorial Application*, p. 207 (emphasis added); see also p. 126.

[90] Milanovic, *Extraterritorial Application*, pp. 199–209.

[91] Milanovic, *Extraterritorial Application*, pp. 119, 209–222.

[92] Milanovic, *Extraterritorial Application*, pp. 119, 221.

many cases. The respondent state's *de facto* or *de jure* control over other spaces, over its agents, and over the (physical) things that are the object of the interference – alone or together – may be sufficient in other cases. The "threshold" for Art. 1 ECHR is the policy of giving "effective and practical application" to the convention and its protocols. To say as much is to concede that there is no neat or clear limit to the ECHR's concept of jurisdiction; however, it is also to openly identify the issue at stake in a discussion about where the borders to the convention should be.

The degree of injustice: The flagrant denial of rights under Art. 6 ECHR Next, presuming that cooperative confiscations are within the convention's jurisdiction, how would the flagrant denial of justice test be applied to the foreign proceedings that culminate in the confiscation order? In other words, what procedural flaws would render a haven state responsible for irregularities in a victim state's asset recovery proceedings? The court does not set down its criteria for distinguishing "flagrant" from "ordinary" denials of justice in *Saccoccia*. However, in *Ahorugeze* v. *Sweden*, it describes a flagrant denial as "go[ing] beyond mere irregularities or lack of safeguards in the trial procedures."[93] It results in "a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein," and which "breach[es] . . . the principles of fair trial guaranteed by Article 6 . . . so fundamental[ly] as to amount to a nullification, or destruction of the very essence, of the right."[94]

Applying these principles in *Othman (Abu Qatada)* v. *UK*,[95] the ECtHR found the UK in breach of Art. 6 ECHR due to a real risk that the applicant would be retried on the basis of "torture evidence."[96] A Jordanian national, Mr. Othman had been granted temporary asylum in the UK.[97] Following his convictions *in absentia* in Jordan for participating in terrorist conspiracies, the UK Secretary of State ordered his deportation "in the interests of national security."[98] He lost an initial challenge before the UK Special Immigration Appeals Commission and, after a victory before the Court of Appeal, failed again before the House of Lords.[99] The Special Immigration Appeals Commission had found "at least a very real risk" that Jordanian intelligence officials had obtained the decisive witness statement through torture, inhuman, or degrading treatment.[100] It also found it very probable that the Jordanian State Security Court would admit those statements in

[93] App. No. 37075/09 (2012) 55 EHRR 2, para. 115.
[94] *Ahorugeze* (2012) 55 EHRR 2, paras. 114–115.
[95] App. No. 8139/09 (2012) 55 EHRR 1, paras. 259–260. See also *El Haski* v. *Belgium*, App. No. 649/08 (2013) 56 EHRR 31. See further Ivory, "Fair Trial and International Cooperation," 155; Smet, "*El Haski* v. *Belgium*."
[96] (2012) 55 EHRR 1, para. 282.
[97] *Othman* (2012) 55 EHRR 1, paras. 1, 7.
[98] *Othman* (2012) 55 EHRR 1, para. 25.
[99] *Othman* (2012) 55 EHRR 1, paras. 26–66.
[100] *Othman* (2012) 55 EHRR 1, paras. 45, 269.

a rehearing.[101] Nonetheless, having regard to the safeguards in such proceedings, the Special Immigration Appeals Commission considered retrial as a whole would be fair.[102]

For Strasbourg, by contrast, the admission of torture evidence at a foreign criminal trial would (automatically) amount to a flagrant denial of justice.[103] Moreover, it was sufficient for the applicant to show a real risk that torture evidence would be heard by institutions like the Jordanian State Security Courts. These it described as a "criminal justice system which is complicit in the very practices which it exists to prevent."[104] Citing UN and NGO reports, it found they could not be trusted to maintain their "independen[ce] of the executive," to "prosecut[e] [cases] impartially," and to "conscientiously investigat[e]" allegations of torture;[105] their defense guarantees were of no "real practical value."[106] As Mr. Othman's co-defendants' "detailed, . . . clear and specific" reports of the torture were corroborated by general accounts of the use of torture and torture evidence in Jordan, there was at least a real risk that torture evidence would be admitted against the applicant in a retrial.[107] The UK deportation decision violated Art. 6 ECHR.[108]

Whilst it is certainly possible that foreign confiscation orders would be tainted by torture evidence,[109] it is more likely that such cases would raise less egregious allegations.[110] Here *Othman* is again instructive, for the applicant had also alleged that other procedural flaws would render his Jordanian retrial flagrantly unfair. Amongst other things, "a notorious civilian terrorist suspect," such as himself, could not expect to receive a fair trial before a "military court, aided by a military prosecutor."[111] The Fourth Section declined to examine these arguments on their merits[112] but signaled, in *obiter*, that a flagrant denial of justice could arise due to:

> – conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge (*Einhorn*, cited above, § 33; *Sejdovic*, cited above, § 84; *Stoichkov*, cited above, § 56);

[101] *Othman* (2012) 55 EHRR 1, paras. 25, 45. [102] *Othman* (2012) 55 EHRR 1, para. 46.
[103] *Othman* (2012) 55 EHRR 1, para. 267. [104] *Othman* (2012) 55 EHRR 1, para. 267.
[105] *Othman* (2012) 55 EHRR 1, para. 276.
[106] *Othman* (2012) 55 EHRR 1, paras. 276–278.
[107] *Othman* (2012) 55 EHRR 1, paras. 269–271.
[108] *Othman* (2012) 55 EHRR 1, para. 289.
[109] *Admissibility Decision (Gaddafi)* (ICC, May 31, 2013), para. 209.
[110] E.g., restrictions on access to counsel and other rights to a defense, presumptions of illicit acquisition in confiscation proceedings, trials *in absentia*, and retrospective asset restraint and confiscation laws and rule of criminal procedure. See the case studies, p. 38 and following above.
[111] *Othman* (2012) 55 EHRR 1, paras. 248, 268.
[112] *Othman* (2012) 55 EHRR 1, paras. 268, 286.

- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (*Bader and Kanbor*, cited above, § 47);
- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed (*Al-Moayad*, cited above, § 101);
- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (*ibid.*).[113]

The flagrant denial of justice remains a strict standard when applied to international cooperation cases under Art. 6 ECHR, however. So much is apparent from the authorities cited in this passage. The court found violations of Art. 6 ECHR only when the respondent state had itself convicted the applicant *in absentia*.[114] Of the extradition or expulsions cases, it found violations only of Arts. 2 and 3 ECHR, and when the deporting state had ordered the expulsion of applicants to a country where they had already been convicted *in absentia* and sentenced to death and there was no assurance of a retrial, let alone a retrial that would not result in yet another death sentence.[115] In *Tsonyo Tsonev* v. *Bulgaria (No. 3)*, the court appeared to recognize a fifth, non-torture-related form of flagrant denial: "proceedings amounting to a mockery of basic fair trial principles."[116] However, its example was *Ilaşcu and Others* v. *Moldova and Russia*, in which Russia's extraterritorial responsibility was derived not from its decision to cooperate in criminal matters but from its transfer of the applicants to, and its ongoing support for, a regime that was illegal under international law.[117] It was the illegitimacy of the Moldavian Republic of Transdniestria and its courts, together with the "functioning" of the alleged republic's judicial system and the circumstances of the applicants' trial, that led to the violations of Arts. 3 and 5 ECHR.[118] Similarly, in *El-Masri*, the Grand Chamber affirmed that "extraordinary rendition" flagrantly denies the rights in Art. 5 ECHR and it *defined* that practice as "extra-judicial transfer" to a situation in which there was a "real risk" of treatment contrary to Art. 3 ECHR.[119]

[113] *Ahorugeze* (2012) 55 EHRR 2, para. 115; *Othman* (2012) 55 EHRR 1, para. 258.
[114] *Sejdovic* (2006) 42 EHRR 17. See also *Stoichkov* (2007) 44 EHRR 14 (violation of Art. 5). Cf. *Einhorn* (ECtHR, October 16, 2001); *Al-Moayad* v. *Germany*, App. No. 35865/03 (2007) 44 EHRR SE22.
[115] *Bader and Kanbor* v. *Sweden*, App. No. 13284/04 (ECtHR, November 8, 2005).
[116] App. No. 21124/04 (ECtHR, October 16, 2012), para. 59.
[117] App. No. 48787/99 (2005) 40 EHRR 46, paras. 385, 393.
[118] (2005) 40 EHRR 46, paras. 212–216, 286, 436, 461–463 (noting severe restrictions on public attendance; the appearance of the applicants in a metal cage; the presence of protesters and armed soldiers and police in the court room; the limitations on contact between the applicants and their lawyers; the presence of the police during those conversations; and the youth and inexperience of the judges).
[119] *El-Masri* v. *"the Former Yugoslav Republic of Macedonia,"* App. No. 39630/09 (2013) 57 EHRR 25, paras. 221, 239.

The strictness of the flagrant denial standard may be illustrated with two other cases. In *Babar Ahmad and Others* v. *UK*, the court refused to admit complaints under Art. 6 ECHR that had been brought by four alleged Islamic terrorists who were due to be extradited to the US.[120] The court accepted that the men would be subject to "Special Administrative Measures" in pre-trial detention;[121] it acknowledged that the Special Administrative Measures would include extreme restrictions on contact and movement.[122] Pre-trial, the measures were not a form of solitary confinement, however,[123] and they were not such as to expose the applicants to a flagrant denial of their fair trial guarantees: They would not coerce the applicants into settlement; unduly restrict their right to attorney-client privilege; or flagrantly impede the conduct of their defense.[124] In making this finding, the Fourth Section (implicitly) disregarded expert testimony on the effect of Special Administrative Measures on defendants,[125] and (explicitly) emphasized the strength of US constitutional guarantees as supervised by the US trial courts.[126] Along with US assurances, these "rule of law" factors were also instrumental in convincing Strasbourg that there was no real risk of the admission of torture evidence.[127] In addition, the court was sufficiently assured that the men would not be designated enemy combatants, sentenced to death, or transferred extra-judicially to other jurisdictions contrary to Art. 6 ECHR.[128] Several other arguments on prosecutorial delay and jury prejudice, which related to adverse media coverage, US government "rhetoric," anti-terrorist designations, and the history of the forum (New York), were manifestly ill-founded.[129] The likely conditions and length of the applicants' detention post-trial were also not such as to coerce the applicants into accepting a plea bargain on the facts of the case.[130] The real risk that the applicants would be spending the rest or most of the rest of their natural lives subject to Special Administrative Measures in ultra-high-security ("Supermax") prisons did raise serious questions under Art. 3 ECHR,[131] but these were not substantiated on the merits.[132]

[120] App. Nos. 24027/07, 11949/08, and 36742/08 (2010) 51 EHRR SE6, paras. 125–135, 159–160, 163–166.
[121] *Babar Ahmad* (2010) 51 EHRR SE6, para. 125.
[122] *Babar Ahmad* (2010) 51 EHRR SE6, para. 131.
[123] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 126–131.
[124] *Babar Ahmad* (2010) 51 EHRR SE6, para. 133.
[125] *Babar Ahmad* (2010) 51 EHRR SE6, para. 85.
[126] *Babar Ahmad* (2010) 51 EHRR SE6, para. 133.
[127] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 66, 159–160.
[128] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 105–119.
[129] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 163, 166, 171.
[130] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 168–169.
[131] *Babar Ahmad* (2010) 51 EHRR SE6, para. 146.
[132] *Babar Ahmad and Others* v. *UK*, App. Nos. 24027/07 et al. (2013) 56 EHRR 1.

If *Babar Ahmad* illustrates how the court responds when requests emanate from states with "a long history of respect of democracy, human rights and the rule of law,"[133] *Ahorugeze* indicates how it deals with requests from a state that has been the scene of major human rights violations and a political transition. In *Ahorugeze*, the applicant was a Rwandan citizen and ethnic Hutu who had been head of the Rwandan Civil Aviation Authority in the period before the 1994 genocide.[134] Resident in Denmark and apprehended in Sweden, the applicant was ordered to be extradited to Rwanda to stand trial for genocide and related offenses.[135] He complained to the ECtHR that Sweden had thereby exposed him to a flagrant denial of his rights under Art. 6 ECHR.[136] The Fifth Section acknowledged that several jurisdictions had previously refused the transfer or extradition of genocide suspects to Rwanda on fair trial grounds.[137] However, it emphasized that the International Criminal Tribunal for Rwanda had recently found conditions in Rwanda much improved.[138] The Rwandan legislature had taken steps to ensure that witnesses would not be subject to reprisals and the Dutch and Norwegian authorities had attested to the effectiveness of those measures.[139] Information from those same authorities, as well as the International Criminal Tribunal for Rwanda, showed that Rwanda's judiciary was sufficiently experienced, independent, and impartial to hear and determine the charges against the applicant.[140] The applicant would also be entitled to free legal representation from Rwanda's well-qualified bar.[141] Other claims – that the applicant would be prejudiced by his previous position, his testimony for other defendants, and his record of unsuccessful litigation in the Rwandan *gacaca* courts – were not made out.[142] Thus, the ECtHR found for the government.[143]

Although they involved very different factual scenarios, *Othman*, *Babar Ahmad*, and *Ahorugeze* all demonstrate the reticence of the ECtHR to find violations of Art. 6 ECHR in cooperation cases. As I have argued elsewhere, the court effectively creates a third category of proceeding under Art. 6 ECHR to which an even more attenuated fair trial standard applies.[144] Whether a flagrant denial would be made out in cases on asset recovery would depend,

[133] *Babar Ahmad* (2013) 56 EHRR 1, para. 179.
[134] *Ahorugeze* (2012) 55 EHRR 2, paras. 9–11.
[135] *Ahorugeze* (2012) 55 EHRR 2, para. 12. [136] *Ahorugeze* (2012) 55 EHRR 2, para. 96.
[137] *Ahorugeze* (2012) 55 EHRR 2, para. 117.
[138] *Ahorugeze* (2012) 55 EHRR 2, paras. 117, 127.
[139] *Ahorugeze* (2012) 55 EHRR 2, paras. 118–123.
[140] *Ahorugeze* (2012) 55 EHRR 2, para. 125.
[141] *Ahorugeze* (2012) 55 EHRR 2, para. 124.
[142] *Ahorugeze* (2012) 55 EHRR 2, para. 126.
[143] *Ahorugeze* (2012) 55 EHRR 2, para. 128.
[144] Ivory, "Fair Trial and International Cooperation," 158.

in my view, on at least four further issues. The first is how the ECtHR would conceptualize flagrant (un)fairness in a victim state that has recently undergone or is undergoing a major political transition. To what extent would it permit consideration of the previous position of the applicant or the requesting state's decision to use new or exceptional rules to respond to past human wrongs?[145] To what extent would it adapt the standard to accommodate conditions "on the ground" in the victim country? The court construes the ECHR and its protocols in the light of other international conventions, particularly those that are protective of human rights,[146] and has already recognized the need to apply procedural duties "realistically" in post-conflict environments.[147] That said, *Othman* suggests a "hard core" of procedural guarantees that cannot be departed from in any political or security situation.

Second, what standard of proof would the court use to determine that justice has been (or will be) flagrantly denied in the requesting state? Executing its stringent flagrant denial test in *Ahorugeze*, the court found that "the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3." It described the applicant's task as being "to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice."[148] However, in *Othman* (and *El Haski*), the rationale for employing the real risk standard was closely linked to the difficulty of proving torture, especially in legal systems that do not operate according to the principles of the rule of law.[149] Secrecy and official complicity are also associated with corruption offenses; but they are typically cited to justify departures from standard criminal procedure and not to increase the level of scrutiny.

Third, presuming (as is likely) that the real risk test applies, it is not yet clear how the court establishes non-torture-related "flagrant denials" and how it will respond to the type of evidence that is likely to be brought in asset recovery cases. In *Babar Ahmad*, the ECtHR used its knowledge of the constitutional guarantees and the legal and political culture in the US, supported by a statement from a US government witnesses, to conclude that the US could be trusted to observe the fundamental requirements of Art. 6 ECHR.[150] In *Othman*, the opinions of non-governmental and international organizations were plainly crucial to the court's assessment of the actual or potential

[145] Teitel, *Transitional Justice*, Ch. 4. See also Dugard and van den Wyngaert, "Reconciling Extradition," 202–204 (on difficulties in comparing notions and practices of justice in different legal systems).

[146] *Neulinger* (2012) 54 EHRR 31, paras. 132–138; *Nada* (2013) 56 EHRR 18, para. 169.

[147] *Al-Skeini* (2011) 53 EHRR 18, para. 168 (on Art. 2 ECHR).

[148] *Ahorugeze* (2012) 55 EHRR 2, para. 116.

[149] *Othman* (2012) 55 EHRR 1, para. 276.

[150] See, in particular, *Babar Ahmad* (2010) 51 EHRR SE6, paras. 29, 133.

conditions in Jordan.[151] In asset recovery cases, reports on corruption in the requesting state may well be brought by the government or intervening third parties to show the importance of cooperation for the purposes of asset recovery.[152] However, precisely that evidence may disclose reasons for "distrusting" the judicial system of the requesting state, at least as it was run under the old regime. If the requesting state has had time to institute reforms, *Ahorugeze* suggests that the ECtHR will seek to verify their effectiveness with reports from other states or international bodies. More than fifteen years after the genocide, it was satisfied of Rwanda's progress. If the transition is more recent or still in process, however, the impact of justice sector reforms may be more difficult to assess, especially if the return of assets is requested before the conviction or final confiscation order.[153]

Fourth, which aspect of the foreign asset recovery proceedings would have to have been flagrantly unfair and would the standard of (un)fairness be the same for all of those processes? I showed in the last chapter that several processes in the victim state may lead to the issuing of the confiscation order, not least the trial for the predicate offense and the proceeding that results in the imposition of the confiscation order (if separate). The ECtHR typically characterizes the latter as akin to the determination of sentence or as civil matters under Art. 6(1) ECHR, though its case law on this point is quite confusing.[154] In my submission, the court would encounter a particular challenge if it attempted to apply these principles, such as they are, to *foreign* confiscation laws. The court will avoid these issues if it continues to apply the same flagrant denial test to acts of cooperation in civil and criminal matters.[155] In any event, the case of *Insanov* v. *Azerbaijan* suggests that the court will only find a confiscation order that is part of a sentence procedurally disproportionate under Art. 1 ECHR-P1 if the criminal proceeding amounted to a flagrant denial of justice.[156]

The standard of diligence and the trustworthiness of the requesting state A more general issue is how far the requested state party is expected to go in determining whether the requesting state has committed or may commit a flagrant denial of justice in its domestic criminal or confiscation proceedings. In other words, what standard of diligence is expected of the haven state? Does it have a duty to actively inquire into the fairness of the proceedings in the

151 See also *Yefimova* v. *Russia*, App. No. 39786/09 (ECtHR, February 19, 2013), para. 192.
152 See, e.g., C-2528/2011 (FAC, September 24, 2013), para. 5.4.3.1.
153 Stessens, *Money Laundering*, p. 414; *Babar Ahmad* (2013) 56 EHRR 1, para. 170. See also *Admissibility Decision (Gaddafi)* (ICC, May 31, 2013), para. 204–205.
154 See further p. 230 and following below.
155 *Maumousseau* (2010) 51 EHRR 35, para. 99. Cf. *Othman* (2012) 55 EHRR 1, para. 262.
156 (ECtHR, March 14, 2013), para. 154.

victim country or need it only consider the issue when it is raised?[157] In *Drozd*, the ECtHR required the "emergence" of a flagrant injustice. However, in *Saccoccia*, it referred to domestic courts having "duly satisfied themselves" that the foreign proceedings complied with the convention standard.[158] In so doing, it appears to have relied on *Pellegrini*.[159] In other cases on cooperation, the court has looked at what the requested state "knew or should have known" about the other state's proceedings at the time it granted the request.[160]

Further, if there is a duty of active inquiry, does it apply to all requests or only to requests from some states? In *Saccoccia*, the court appears to limit the need for review to requests that "emanate from the courts of a country that does not apply the convention."[161] It made similar comments in *Pellegrini*[162] and in *Stapleton* v. *Ireland*,[163] a case which involved the execution of an European Arrest Warrant by Ireland almost thirty years after the applicant's alleged offenses in the UK. There, the fact that the UK was a party to the ECHR was the court's primary justification for finding *no* flagrant denial of the right to a hearing within reasonable time.[164] Commenting on *Stapleton*, Prof. André Klip concludes that contracting parties are *presumed* to abide by Art. 6 ECHR when cooperating with each other in criminal matters.[165] This interpretation is broadly in line with the ECtHR's approach to cooperation under the auspices of the EU in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi* v. *Ireland*, specifically, its readiness to apply a "rebuttable presumption of equivalent protection" to interferences that flow from state parties' "strict international legal obligations" towards the Union.[166] However, as both EU member states and ECHR state parties systematically violate fundamental rights and freedoms,[167] membership in those legal spaces would not appear to be a reliable risk-based criterion for assigning responsibility under the ECHR.[168]

[157] See further Stessens, *Money Laundering*, pp. 403–404.
[158] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 2.
[159] *Saccoccia* (ECtHR, July 5, 2007), para. 1(1)(a). See also *Maumousseau* (2010) 51 EHRR 35, para. 96.
[160] *Mamatkulov* (2005) 41 EHRR 25, para. 90; *Eskinazi* (ECtHR, December 14, 2005), para. C(2); *Hirsi Jamaa* (2012) 55 EHRR 21, para. 131.
[161] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 2.
[162] *Pellegrini* (2002) 35 EHRR 2, para. 40.
[163] *Stapleton* (2010) 51 EHRR SE4, paras. 26, 30.
[164] *Stapleton* (2010) 51 EHRR SE4, para. 26.
[165] Klip, *European Criminal Law*, pp. 426–427.
[166] (2006) 42 EHRR 1, paras. 52, 155–156, 159–166.
[167] See, e.g., *Ananyev and Others* v. *Russia*, App. Nos. 42525/07 and 60800/08 (ECtHR, January 10, 2012).
[168] See also Mole, "The Complex and Evolving Relationship," 364; van Hoek and Luchtman, "Transnational Cooperation and Human Rights," 10.

The Grand Chamber recognized as much in *MSS* v. *Belgium and Greece*,[169] when it found Belgium liable for Greek violations of an Afghan asylum seeker's rights under Art. 3 ECHR.[170] Relying on the EU's Dublin Regulation,[171] Belgium had expelled the applicant to Greece,[172] where he had been subject to inhumane and degrading treatment[173] and denied an asylum procedure that would ensure substantive consideration of his claim.[174] According to the Grand Chamber, the "sovereignty clause" in the Dublin Regulation had empowered Belgium to refuse the transfer "if [it] considered that . . . Greece, was not fulfilling its obligations under the Convention." Hence, the matter "did not strictly fall within Belgium's international legal obligations [and] the presumption of equivalent protection [did] not apply."[175] To the extent that there was an additional presumption that a state party, like Greece, would "respect its international obligations in asylum matters,"[176] this was rebutted by ample "proof to the contrary" in that case:[177] reports from international and non-governmental organizations, diplomatic communications, and EU reform proposals describing the treatment of asylum seekers in Greece.[178]

For measures that flow (or are alleged to flow) directly from binding SC resolutions, the court has a presumption with the converse implications. In *Al-Jedda* v. *UK*, it established that the SC is presumed to comply with human rights obligations, such as in the ECHR, when it makes decisions under Ch. VII UNC: "In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[179] As SC Res. 1546 did not refer to internment, much less to "indefinite detention without charge," "there was no conflict between the [UK's] obligations under the [UNC] and its obligations under Article 5 § 1 of the Convention";[180] the article was breached.[181] The Grand Chamber purported to distinguish *Al-Jedda* in *Nada* on the basis that SC Res. 1390 "expressly required States to prevent the individuals on the

[169] App. No. 30696/09 (2011) 53 EHRR 2.
[170] And Art. 13 due to the lack of remedies against such violations in its own legal system: *MSS* (2011) 53 EHRR 2, paras. 353–354, 369–396.
[171] Council Regulation (EC) no. 343/2003 of February 18, 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 No. L 50, February 25, 2003, p. 1.
[172] *MSS* (2011) 53 EHRR 2, paras. 14, 17–19, 33.
[173] *MSS* (2011) 53 EHRR 2, paras. 205–234, 235–264.
[174] *MSS* (2011) 53 EHRR 2, paras. 265–322.
[175] *MSS* (2011) 53 EHRR 2, para. 340.
[176] *MSS* (2011) 53 EHRR 2, paras. 343, 345.
[177] *MSS* (2011) 53 EHRR 2, paras. 342–352.
[178] *MSS* (2011) 53 EHRR 2, paras. 344–352.
[179] *Al-Jedda* (2011) 53 EHRR 23, para. 102.
[180] *Al-Jedda* (2011) 53 EHRR 23, para. 109.
[181] *Al-Jedda* (2011) 53 EHRR 23, paras. 109–110.

United Nations list from entering or transiting through their territory," and to "take measures capable of breaching human rights."[182] However, it found Switzerland to have had some latitude to ameliorate the impact of the travel ban on the applicant.[183] In fact, Switzerland's failure to do so gave rise to the violation of Art. 8 ECHR and dispensed with the need for the court to determine the hierarchy of the ECHR and resolutions under Ch. VII UNC.[184]

What emerges from these cases is an incomplete and unstable set of presumptions about the trustworthiness of requesting states and international organizations.[185] The strongest presumption is of equivalent protection. However, it is limited to state parties' "strict international legal obligations" towards supranational organizations that provide a system for human rights protection at least commensurable to that established by the convention.[186] It is also unlikely to find direct application to cooperative confiscations within the EU, since decisions on mutual recognition give member states discretion in implementation and several grounds for refusal.[187] Next, is a presumption of compliance by state parties to the ECHR; also rebuttable, it is unavailable when there is reason to believe that the requesting state is unable to observe its obligations under the convention.[188] Effectively, it requires state parties to monitor reports about political, economic, and legal developments within each other's jurisdictions so as to ascertain whether reliance on the presumption is warranted in a given case. After that is the presumption of compliance by which binding SC resolutions are read as compatible with the ECHR. It may be rebutted by "clear and explicit language, imposing an obligation to take measures capable of breaching human rights";[189] but, even then, the court has been willing to imply a discretion to implement the obligations in accordance with human rights standards. Finally, for requests from third states, strictly no presumption applies; at least if the issue is raised, state parties must ensure that justice will not be flagrantly denied. However, the court would seem to be more willing to trust (or allow state parties to trust) countries with "long histor[ies] of respect of democracy, human rights and the rule of law."[190]

[182] *Nada* (2013) 56 EHRR 18, para. 172.
[183] *Nada* (2013) 56 EHRR 18, paras. 172–176. See further Henderson, "When the UN Breach Human Rights . . . Who Wins?"
[184] *Nada* (2013) 56 EHRR 18, para. 197.
[185] See further Ivory, "Fair Trial and International Cooperation," 161–162.
[186] *Bosphorus* (2006) 42 EHRR 1, para. 155.
[187] See Craig and de Búrca, *EU Law*, p. 403 citing *Cantoni* v. *France*, App. No. 17862/91 (ECtHR, November 15, 1996); van Hoek and Luchtman, "Transnational Cooperation and Human Rights," 12–13. Those framework decisions expressly preserve the effect of convention human rights: de Schutter, "The Two Europes of Human Rights," 543–544. See, in particular, EU Dec. 2006/783, Art. 8(2)(d).
[188] *MSS* (2011) 53 EHRR 2, para. 347.
[189] *Nada* (2013) 56 EHRR 18, paras, 130, 166.
[190] *Babar Ahmad* (2013) 56 EHRR 1, para. 179.

This raises the question of how the court distinguishes one type of third state from another and underlines the broader issue of whether the court should use less – or more – care in assessing proceedings that take place outside the legal space of the convention.

Flagrant denials and qualified rights Quite aside from the challenges of identifying and proving flagrant denials, it is not clear whether and, if so, how that test applies to qualified rights; in other words, whether deficiencies in a requesting state's laws or proceedings give rise to violations by a requested state of rights such as the right to property. Commentators have indicated that ECHR state parties may infringe qualified rights when they cooperate in criminal (or civil) matters; however, they take the view that few foreign orders or proceedings will be so disproportionate (or unjust or unlawful) as to flagrantly deny those entitlements.[191] Their conclusions are borne out in the court's practice. In *Babar Ahmad*, the court refused to admit the applicants' complaints under Art. 8 ECHR, considering that there was "no separate issue" under that article.[192] In *Lindberg* v. *Sweden*, the applicant had failed to persuade the Swedish Supreme Court that a Norwegian damages and costs order could not be enforced in Sweden because it amounted to a flagrant denial of his rights to freedom of expression and a remedy under Arts. 10 and 13 ECHR.[193] The ECtHR did not find it necessary to consider the standard for imputing Sweden with Norway's acts. It was sufficient, in the court's view, that the Swedish courts had "reviewed the substance of the applicant's complaint" and found that "the requested enforcement was neither prevented by Swedish public order or any other obstacles under Swedish law."[194] It also dismissed Mr. Lindberg's complaints on Art. 10 ECHR taken on its own.[195] Mr. Saccoccia did not plead defects in the US criminal or forfeiture laws or proceedings when he alleged a violation of Art. 1 ECHR-P1 – and the court did not consider the lawfulness or proportionality of the foreign confiscation order on its own motion.[196]

The effect of assurances If there are substantial grounds for believing that a person would be exposed to a flagrant denial of justice abroad, the requested state party may nonetheless attempt to enable cooperation by obtaining assurances. How relevant are a requesting state's assurances that it will respect

[191] Dugard and van den Wyngaert, "Reconciling Extradition," 204–205; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, paras. 7.73–7.81. See also Fawcett, "Impact of Art. 6(1)," 4.
[192] *Babar Ahmad* (2010) 51 EHRR SE6, paras. 134, 148.
[193] App. No. 48198/99 (2004) 38 EHRR CD239, "The Facts," para. C.
[194] *Lindberg* (2004) 38 EHRR CD239, "The Law," para. 1.
[195] *Lindberg* (2004) 38 EHRR CD239, "The Law," para. 2.
[196] *Saccoccia* (ECtHR, July 5, 2007), para. 3; *Saccoccia* (2010) 50 EHRR 11, paras. 82–92.

the fair trial or property rights of the applicant? In *Mamatkulov and Askarov* v. *Turkey*, the majority of the Grand Chamber gave substantial weight to statements by the Uzbek Public Prosecutor that "[t]he applicants' property will not be liable to general confiscation, and the applicants will not be subjected to acts of torture or sentenced to capital punishment" and to its "reaffirm[ation of] its obligation to comply with the requirements of the provisions of [the UN Convention against Torture[197]] as regards both Turkey and the international community as a whole."[198] In *Al-Saadoon and Mufdhi* v. *UK*, it implied that state parties may have an obligation to seek assurances that a prisoner's rights will be respected before surrendering him/her to a requesting state.[199] However, in *Saadi* v. *Italy*, as in *Chahal* v. *UK*, it found that the provision of assurances from Tunisia "would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention."[200] Applying *Saadi* in *Othman*, the Fourth Section found Jordan had provided adequate assurances against torture.[201] It listed the factors that were relevant to its assessment:

> (i) whether the terms of the assurances have been disclosed to the Court . . .;
> (ii) whether the assurances are specific or are general and vague . . .;
> (iii) who has given the assurances and whether that person can bind the receiving State . . .;
> (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;
> (v) whether the assurances concerns treatment which is legal or illegal in the receiving State . . .;
> (vi) whether they have been given by a Contracting State . . .;
> (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances . . .;
> (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers . . .;

[197] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984, in force June 26, 1987, 1465 UNTS 85.

[198] (2005) 41 EHRR 25, para. 76. Cf. *Mamatkulov* (2005) 41 EHRR 25, OIII 10, Joint Partly Dissenting Opinion of Judges Bratza, Bonello, and Hedigan.

[199] App. No. 61498/08 (ECtHR, March 2, 2010); (2009) 49 EHRR SE11, paras. 164–165.

[200] *Saadi* v. *Italy*, App. No. 37201/06 (2009) 49 EHRR 30, para. 148 citing *Chahal* (1997) 23 EHRR 413, para. 105.

[201] (2012) 55 EHRR 1, paras. 186–207.

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible . . .;

(x) whether the applicant has previously been ill-treated in the receiving State . . .; and

(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.[202]

Specifically addressed to the risk of torture, these factors would seem to guide the court in considering the effect of assurances more generally. Finding sufficient US assurances that the applicants would not be considered "enemy combatants" in potential violation of Arts. 3, 5, 6, and 8 ECHR,[203] the ECtHR took into account the fact that UK courts had "carefully considered" "the meaning and likely effect of the [US] assurances . . . in the light of a substantial body of material concerning the current situation in the United States of America."[204] It was also significant that the US had not previously breached an assurance to the UK in an extradition matter and that a future breach would not be in the American "long-term interest" in cooperation, particularly with the UK.[205]

Applied to cases on asset recovery, I submit that points (viii) and (ix) will be particularly important. International organizations already supervise aspects of asset recovery processes.[206] And, when assistance is requested by a state in transition and/or without a long history of respect for the rule of law, the court would seem to regard monitoring as a supplement to (or substitute for) reliable supervision by the courts.[207] In *Othman*, the "very fact of monitoring visits" lessened the risk of a violation under Art. 3 ECHR.[208] The court's confidence in this non-judicial, non-state procedure is striking when one considers the seriousness of torture as a violation of the ECHR; the court's findings on the degree of risk of torture in Jordan and the inadequacy of Jordanian judicial guarantees; and the relative dependence of the NGO in that case on the two cooperating parties.[209] In *Ahorugeze*, the Fourth Section also noted with approval that the International Criminal Tribunal for Rwanda had ordered monitoring of another transferred Rwandan proceedings and

[202] *Othman* (ECtHR, January 17, 2012); (2012) 55 EHRR 1, para. 189.
[203] *Babar Ahmad* (2013) 56 EHRR 1, paras. 98, 110.
[204] *Babar Ahmad* (2013) 56 EHRR 1, para. 106.
[205] *Babar Ahmad* (2013) 56 EHRR 1, paras. 107–108.
[206] See further p. 38 and following above.
[207] *Ahorugeze* (2012) 55 EHRR 2, para. 127.
[208] (2012) 55 EHRR 1, paras. 24, 80–82, 203–204.
[209] *Othman* (2012) 55 EHRR 1, paras. 191–192, 203–204, 278.

that "Sweden ha[d] declared itself prepared to monitor" the Rwandan proceedings against the applicant, as well as his conditions in detention.[210]

Asset recovery and norm conflicts in public international law Finally, in neither *Saccoccia* nor *Duboc* did the ECtHR consider whether Austria's duty to enforce the forfeiture orders under its MLAT with the US conflicted with its duty to secure the applicants' fundamental rights and freedoms under the ECHR and ECHR-P1. The applicants did claim that Austria had exceeded its powers under its MLAT, but they did not argue that Austria lacked responsibility under the ECHR because it had a duty to cooperate for the purposes of confiscation.

It is nonetheless possible to characterize such cases on international cooperation in criminal matters as unavoidable and irresolvable norm conflicts in public international law.[211] Milanovic argues, for example, that the UK was required to surrender Soering, as *non-refoulement* was not an exception to the duty to cooperate in its bilateral agreement with the US.[212] In finding that the ECHR and its protocols prohibited surrender, the ECtHR, in his view, chose to ignore the UK's competing obligation and to resolve the case on policy grounds.[213] Similarly, in *Al-Saadoon*, Strasbourg found that the UK had violated Art. 3 ECHR by transferring Iraqi nationals in Iraq to the Iraqi courts pursuant to a bilateral MOU.[214] Britain had argued that it was effectively forced to transfer the prisoners out of respect for Iraqi sovereignty.[215] The ECtHR acknowledged the importance of cooperation in criminal matters but insisted that the UK remained subject to the ECHR and protocols.[216] Its example was *Soering*:

> It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*Bosphorus*, cited above, § 153). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Bosphorus*, cited

210 (2012) 55 EHRR 2, para. 127.
211 Milanovic, *Extraterritorial Application*, pp. 243–248. See also Milanovic, "Norm Conflict," 74.
212 Milanovic, *Extraterritorial Application*, pp. 243–252. See also *Al-Saadoon* (ECtHR, March 2, 2010), para. 128.
213 Milanovic, *Extraterritorial Application*, p. 243.
214 *Al-Saadoon* (ECtHR, March 2, 2010), paras. 11–41, 145.
215 *Al-Saadoon* (ECtHR, March 2, 2010), para. 138.
216 *Al-Saadoon* (ECtHR, March 2, 2010), para. 126.

> above, § 154 and the cases cited therein). For example, in Soering, cited above, the obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the United Kingdom's obligations under the Extradition Treaty it had concluded with the United States in 1972.[217]

This restatement of the principle in *Soering* is matched by other bold comments in *Al-Saadoon* on the relationship between the ECHR and state parties' other international treaty obligations.[218] But, as far as the principle of *lex posterior* is concerned, there is authority in *Bosphorus* that state parties are "considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention."[219]

In my submission, the enforcement of flagrantly unjust foreign confiscation orders may also be classified as an "unavoidable and irresolvable" norm conflict – if one accepts Milanovic's definition of that term. Borrowing from Prof. Joost Pauwelyn, Milanovic defines a conflict of norms as a situation in which "one norm constitutes, has led to, or may lead to, a breach of the other."[220] Applying his definition, the fact that anti-corruption treaties and related MLATs typically contain broad grounds for refusal would not change the fact that the ECHR and protocols "force" the requested state "to refrain" from performing its MLA obligation.[221] Relying on *Bosphorus* and *Al-Saadoon*, the court could hold that the convention and its protocols prevail because they are first in time or (perhaps) because they are covered by a conflict clause in the anti-corruption treaties and related MLATs.[222] This would resolve the conflict in favor of the ECHR and its protocols in that case, even if it would not change the fact that "[t]here was . . . a norm conflict between the ECHR and the [anti-corruption or MLAT], and that was that."[223]

The incompatibility would disappear if the court were to limit its concept of norm conflict to competing obligations;[224] likewise, if it were to interpret

[217] *Al-Saadoon* (ECtHR, March 2, 2010), para. 128.

[218] E.g., that "it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention": *Al-Saadoon* (ECtHR, March 2, 2010), para. 138. See also Milanovic, *Extraterritorial Application*, pp. 247–249.

[219] *Bosphorus* (2006) 42 EHRR 1, para. 154.

[220] Milanovic, *Extraterritorial Application*, p. 236 citing Pauwelyn, *Conflict of Norms in Public International Law*, p. 176. See also Milanovic, "Norm Conflict," 72–73.

[221] Milanovic, "Norm Conflict," 73.

[222] See, e.g., COECrimCC, Art. 35(1); COEMLC 1990, Art. 39(1); COEMLC 2005, Art. 52(1); UNCAC, Art. 46(6); UNTOC, Art. 18(6).

[223] Milanovic, *Extraterritorial Application*, p. 243.

[224] Milanovic, "Norm Conflict," 73, citing Jenks, "Conflict of Law-Making Treaties."

the apparently conflicting obligations harmoniously,[225] as other cases on cooperation suggest it may do.[226] Using the provisions and concepts of the Convention on the Civil Aspects of International Child Abduction (Hague Convention)[227] to interpret Art. 8 ECHR, the court in *Eskinazi and Chelouche* v. *Turkey* concluded that "[n]o issue of hierarchy needs to be addressed."[228] Likewise, in *MSS*, it read the Dublin Regulation as permitting state parties to refuse to transfer migrants to EU member states that were not fulfilling their obligations under the convention – though the sovereignty clause made no reference at all to human rights and freedoms. Then, having referred to the principle of "harmonious" interpretation in *Nada*, the Grand Chamber read the words, "necessary" and "where appropriate," as implying a discretion to reduce the impact of the travel bans in an individual case.[229] Notions of "fundamental principles" and "public order" in the cooperation provisions of the anti-corruption and related MLATs are open to similar interpretations.[230] Further, if EU or UN targeted financial sanctions were at issue, the court may be able to employ a presumption of equivalent protection or compliance to read the apparently conflicting obligations as if they are – or were intended to be – compatible.[231]

In my view, the court's willingness to acknowledge conflicts is by no means clear. In each of the cases discussed above, the court has, in fact, stepped back from finding that there was an incompatibility between the ECHR and its protocols and the international cooperation obligations. So, in *Al-Saadoon*, the court decided that the UK had breached Art. 3 ECHR by failing to seek assurances from Iraq or to negotiate a transfer of jurisdiction to its courts.[232] The *ratio* seems to be that state parties have positive duties under the convention to avoid being in a position in which their international obligations are in conflict – rather than that there was a conflict and that the ECHR prevailed.[233] Similarly, it decided *Bosphorus* using the presumption of equivalent protection rather than the principle that the convention prevailed because it was first in time. Recently, in *Hirsi Jamaa*, the court affirmed that:

[225] On "systemic integration" interpretative techniques, see further p. 285 and following below.
[226] Milanovic, "Norm Conflict," 73.
[227] The Hague, October 25, 1980, in force December 1, 1983, 1343 UNTS 89.
[228] *Eskinazi* (ECtHR, December 14, 2005), para. B(2). See also *Neulinger* (2012) 54 EHRR 31, paras. 131–139.
[229] *Nada* (2013) 56 EHRR 18, para. 168, 196.
[230] VCLT, Art. 31(3)(c). For related arguments, see also Stessens, *Money Laundering*, pp. 400–407.
[231] Milanovic, "Norm Conflict," 73. See also Milanovic, *Extraterritorial Application*, p. 236.
[232] *Al-Saadoon* (ECtHR, March 2, 2010), paras. 141–143, 145.
[233] Milanovic, "Norm Conflict," 73, citing Jenks, "Conflict of Law-Making Treaties," 401–453.

> Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States.[234]

The court's eagerness to avoid norm conflicts is more apparent in *Nada*, where the Grand Chamber seemed both to identify and deny a conflict between the UNC and the ECHR.[235] Discussing Art. 13 ECHR, the chamber did not stop at saying that Switzerland had a duty to provide Mr. Nada a remedy for his uniquely problematic situation; rather, citing the ECJ and the UK Supreme Court,[236] it found Mr. Nada had a right to have the Swiss courts review his listing for compliance with Art. 8 ECHR and to order his name be removed from the domestic version of the UN sanctions list. With these comments, the Grand Chamber seemed to be saying that ECHR state parties have obligations to secure convention rights and freedoms – Art. 103 UNC notwithstanding – because the ECHR and its protocols are an autonomous legal order.[237] Yet, this controversial conclusion is apparently foreclosed by the court's earlier remark, that it need not consider issues of hierarchy because Switzerland had failed to use its discretion under the resolution.[238]

This is not the place to theorize the ECtHR's approach to norm conflict in public international law. Considering the norm conflict issue through the prism of asset recovery does lead me to agree with Milanovic that the court's approach is not so much dogmatically legal as political, however. In my view, the court appears to employ a dual strategy of signaling that the ECHR and protocols prevail whilst avoiding, wherever possible, a finding that norms conflict. Its conflict avoidance techniques are not entirely convincing. They elide legal and practical considerations and ignore apparently clear language in the ECHR and other treaties. But ambiguity – "having a bet each way" – would seem to give the court the ability to supervise state parties' international undertakings for compliance with human rights without confronting the challenge of determining normative hierarchy in international law.

5.2.4 Substantive scope

If a confiscation order executed by a haven state is personally, territorially, and temporally within the scope of the convention, will it affect property within the

[234] (ECtHR February 23, 2012), para. 129.
[235] *Nada* (2013) 56 EHRR 18, paras. 212, 214.
[236] The ECJ's terrorist financing cases are discussed at p. 245 and following below.
[237] Milanovic, "*Nada* v. *Switzerland*"; Thienel, "*Nada* v. *Switzerland*."
[238] *Nada* (2013) 56 EHRR 18, para. 197.

meaning of Art. 1 ECHR-P1? I showed in Chapter 4 that the anti-corruption and related MLATs refer to property in their definitions of proceeds and instrumentalities of corruption, but that persons who obtain those things (or substitute assets) may not become or remain their owners in private law.[239]

5.2.4.1 The concept of property under Art. 1 ECHR-P1

Article 1 ECHR-P1 protects "possessions" and "property." The ECtHR defines those terms synonymously[240] as all acquired rights and interests of economic value,[241] including rights against the world at large (*in rem*) with respect to movable and immovable things[242] and rights against particular persons or groups (*in personam*) in public and private law.[243] Article 1 ECHR-P1 is not a right to acquire property.[244] However, it does protect some rights and interests that have not yet been recognized by the courts of the respondent

[239] See further p. 112 and following above.

[240] See, e.g., *Marckx* v. *Belgium*, App. No. 6833/74 (1979–80) 2 EHRR 330, para. 63; *Lithgow and Others* v. *UK*, App. Nos. 9006/80 et al. (1986) 8 EHRR 39, para. 106; *James* v. *UK*, App. No. 8793/79 (1986) 8 EHRR 123, para. 37 ("Article 1 [P1–1] in substance guarantees the right of property"). See further Çoban, *Property Rights within the European Convention on Human Rights*, p. 144; Cremer, "Eigentumsschutz," para. 29; Fischborn, *Enteignung ohne Entschädigung*, p. 6; Harris et al., *Law of the European Convention on Human Rights*, p. 656; Janis, Kay, and Bradley, *European Human Rights Law*, p. 525; Kaiser, "Art. 1 ZPI," para. 12; Meyer-Ladewig, *Handkommentar-EMRK*, para. 5.

[241] Bernsdorff, "Article 17," para. 15; Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.87; Çoban, *Property Rights within the European Convention on Human Rights*, p. 145; Cremer, "Eigentumsschutz," paras. 41–42; Gelinsky, *Schutz des Eigentums*, pp. 20–23; Harris et al., *Law of the European Convention on Human Rights*, pp. 656–657; Kaiser, "Art. 1 ZPI," para. 12; Meyer-Ladewig, *Handkommentar-EMRK*, para. 8; Peukert, "Artikel 1 ZP1," para. 2; Wegener, "Wirtschaftsgrundrechte," para. 8.

[242] See, e.g., *Sporrong and Lönnroth* v. *Sweden*, App. Nos. 7151/75 and 7152/75 (1983) 5 EHRR 35, para. 60; *Beyeler* v. *Italy*, App. No. 33202/96 (2001) 33 EHRR 52, para. 105; *Urbárska Obec Trenčianske Biskupice* v. *Slovakia*, App. No. 74258/01 (2009) 48 EHRR 49, para. 116. See further Bernsdorff, "Article 17," para. 15; Çoban, *Property Rights within the European Convention on Human Rights*, pp. 145–149; Cremer, "Eigentumsschutz," paras. 43, 45; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.7; Wegener, "Wirtschaftsgrundrechte," para. 8.

[243] See, e.g., *X* v. *Germany*, App. No. 8410/78 (ECmHR, December 13, 1979), para. 2(b); *Rosenzweig* v. *Poland*, App. No. 51728/99 (2006) 43 EHRR 43 (cancellation of permits), para. 49. See further Çoban, *Property Rights within the European Convention on Human Rights*, pp. 150–161; Gelinsky, *Schutz des Eigentums*, p. 26; Harris et al., *Law of the European Convention on Human Rights*, pp. 657–658; Janis, Kay, and Bradley, *European Human Rights Law*, p. 526; Peters and Altwicker, *Europäische Menschenrechtskonvention*, paras. 32.8–32.9; Wildhaber and Wildhaber, "Property in the European Convention on Human Rights," pp. 661–662.

[244] See, e.g., *Marckx* (1979–80) 2 EHRR 330, para. 50. See further Çoban, *Property Rights within the European Convention on Human Rights*, p. 146; Gelinsky, *Schutz des Eigentums*, p. 23; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.8; Peukert, "Artikel 1 ZP1," para. 3.

state.[245] As the court confirmed in *Kopecky* v. *Slovakia*, "'[p]ossessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right."[246] Thus, the notion of property in Art. 1 ECHR-P1 is autonomous from – and considerably broader than – the contracting parties' concepts of ownership and property in private law.[247]

5.2.4.2 Illicit wealth as property

Saccoccia and *Duboc* together suggest that the ECtHR will apply the concept of property generously in cooperative confiscation cases. Admitting the applicant's complaint under Art. 6(1) ECHR in *Saccoccia*, the court disclaimed its competence to examine ownership issues. The government had argued that the applicant had no civil rights or obligations as he held the assets as a mere trustee for a drug cartel.[248] The applicant "claim[ed] that the assets stemmed from [his] lawful business activities."[249] In the court's view, it was "sufficient to note that the competent United States court had considered the assets to be the applicant's gains from money-laundering and that no other person had raised any claims to them."[250] Similarly, on the merits of the applicant's complaint under Art. 1 ECHR-P1, the ECtHR dismissed the government's argument that Mr. Saccoccia lacked possessions.[251] Observing that the term had an autonomous meaning, it recalled that:

- "the applicant had rented the safe in which the assets were found";
- "Rhode Island District Court's final forfeiture order was directed against him"; and
- but for Austria's decision to enforce the US order, "he would have been able to dispose of the cash amounts, the bank account and the bearer bonds deposited in the safe."[252]

[245] See further Cremer, "Eigentumsschutz," para. 43; Kaiser, "Art. 1 ZPI," paras. 18–20; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.8; Peukert, "Artikel 1 ZP1," paras. 14–17.

[246] App. No. 44912/98 (2005) 41 EHRR 43, para. 35. See also *Öneryıldız* v. *Turkey*, App. No. 48939/99 (2005) 41 EHRR 20, para. 124; *Centro Europa 7 SRL and Di Stefano* v. *Italy*, App. No. 38433/09 (ECtHR, June 7, 2012), paras. 172–173.

[247] Çoban, *Property Rights within the European Convention on Human Rights*, p. 148; Cremer, "Eigentumsschutz," para. 41; Fischborn, *Enteignung ohne Entschädigung*, p. 6; Frowein, "The Protection of Property," p. 517; Gelinsky, *Schutz des Eigentums*, p. 22; Harris et al., *Law of the European Convention on Human Rights*, p. 658; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.6; Peukert, "Artikel 1 ZP1," para. 2.

[248] *Saccoccia* (ECtHR, July 5, 2007), "The Law," paras. 1, 4.

[249] *Saccoccia* (2010) 50 EHRR 11, para. 8.

[250] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1.

[251] *Saccoccia* (2010) 50 EHRR 11, paras. 83, 85–86.

[252] *Saccoccia* (2010) 50 EHRR 11, para. 85.

Hence, it found an "interference with [the applicant's] right to peaceful enjoyment of his possessions."[253] In *Duboc*, the parties disputed whether the applicant had transferred the assets to his former wife under their divorce settlement. The ECtHR simply confirmed that Art. 6(1) ECHR, civil limb, applied to the *exequatur* proceedings and avoided the issue of ownership by holding the complaint under Art. 1 ECHR-P1 manifestly ill-founded: The interference with possessions, were there one, was justified per its judgment in *Saccoccia*.[254]

In *Saccoccia* and *Duboc*, two factors could have contributed to the court's reluctance to inquire into the nature of the applicants' interests. First, on my submission, the court faces a difficult choice whenever it is asked to apply Art. 1 ECHR-P1 to thing-based relationships that have subsisted in fact but have been found to have no basis in domestic law. In determining whether such interests are possessions, it balances the need to effectively protect individuals from the arbitrary exercise of state power and the risk that it will create new forms of "constitutional" property by extending Art. 1 ECHR-P1 to interests that state parties have chosen not to recognize. The ECtHR may have been reluctant to acknowledge the tentative nature of the interest it was protecting in those cases, given that the Austrian courts had found (in *Saccoccia*) "good reasons to assume that the applicant's Austrian assets were monies received for or derived from the commission of a crime . . . or directly obtained through drug dealing."[255] Second, given the international and illicit nature of the underlying transactions, the court may have encountered several practical difficulties in determining the strength of the applicants' alleged legal entitlements. Using the rules on conflict of laws, it would have had to determine the law that governed the acquisition of the assets; perhaps to apply the property laws of a third state; and, finally, to assess how those interests would have been recognized in Austria.[256] The scope and nature of the inquiry could have come close to that of the original confiscation proceedings.

5.2.4.3 Rights *in rem* as property

The court's failure to compare the applicants' interests to its concept of property is therefore understandable. The question is whether its approach is consistent with its pronouncements in other cases, particularly those on confiscations that have been imposed by state parties as penalties or measures for breaches of local criminal or administrative laws. On any number of

[253] *Saccoccia* (2010) 50 EHRR 11, para. 85.

[254] (ECtHR, June 5, 2012), paras. 38, 49–51 quoting *Saccoccia* (2010) 50 EHRR 11, paras. 87–89.

[255] *Saccoccia* (2010) 50 EHRR 11, para. 26. See also *Duboc* (ECtHR, June 5, 2012), paras. 16, 19.

[256] See generally Stessens, *Money Laundering*, p. 415.

occasions, Strasbourg has found owners of restrained or confiscated things to have possessions under Art. 1 ECHR-P1.[257] In *Phillips* v. *UK*, for example, the applicant had been ordered to pay a sum corresponding to his realizable benefit from drug trafficking under a British value-based confiscation law.[258] The ECtHR began its assessments of the applicant's complaint under Art. 1 ECHR-P1 with the observation that:

> the "possession" which forms the object of this complaint is the sum of money, namely GBP 91,400, which the applicant has been ordered by the Crown Court to pay, in default of which payment he is liable to be imprisoned for two years. It considers that this measure amounts to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable.[259]

Similarly, in *Air Canada* v. *UK*, there was no question that the applicant's aircraft was a possession under Art. 1 ECHR-P1, though it had been forfeited as a "thing used for the carriage" of cannabis resin.[260] Earlier, in *Allgemeine Gold- und Silberscheideanstalt AG (AGOSI)* v. *UK*, the court had held Art. 1 ECHR-P1 to apply to the smuggled items themselves, namely, gold coins that were subject to a retention of title clause in favor of an innocent unpaid vendor.[261] Before that, in *Handyside* v. *UK*,[262] it had held the seizure and destruction of obscene books, which were produced, owned, and sold by the applicant, to be within the scope of Art. 1 ECHR-P1. More recent cash smuggling cases confirm that it makes no difference to the characterization of instrumentalities or objects of offenses as

[257] See, e.g., *Handyside* v. *UK*, App. No. 5493/72 (1979–80) 1 EHRR 737, paras. 60–62; *Allgemeine Gold- und Silberscheideanstalt AG (AGOSI)* v. *UK*, App. No. 9118/80 (1987) 9 EHRR 1, para. 49; *Air Canada* v. *UK*, App. No. 18465/91 (1995) 20 EHRR 150; *JP* v. *Denmark*, App. No. 28540/95 (ECmHR, October 22, 1997), "The Law"; *Phillips* v. *UK*, App. No. 41087/98 (2000) 30 EHRR CD170; *Viktor Konovalov* v. *Russia*, App. No. 43626/02 (ECtHR, May 24, 2007), para. 39; *Khuzhin and Others* v. *Russia*, App. No. 13470/02 (ECtHR, October 23, 2008), para. 124; *Islamic Republic of Iran Shipping Lines* (2008) 47 EHRR 24, para. 97; *Ismayilov* v. *Russia*, App. No. 30352/03 (ECtHR, November 6, 2008), para. 29; *Gabrić* v. *Croatia*, App. No. 9702/04 (ECtHR, February 5, 2009); *Sun* v. *Russia*, App. No. 31004/02 (ECtHR, February 5, 2009); *Plakhteyev and Plakhteyev* v. *Ukraine*, App. No. 20347/03 (ECtHR, March 12, 2009), para. 51; *Tas* v. *Belgium*, App. No. 44614/06 (ECtHR, May 12, 2009), "En Droit," para. 1; *Bowler International Unit* v. *France*, App. No. 1946/06 (ECtHR, July 23, 2009), para. 36; *Adzhigovich* v. *Russia*, App. No. 23202/05 (ECtHR, October 8, 2009), paras. 26, 32; *Smirnov* v. *Russia*, App. No. 71362/01 (2010) 51 EHRR 19; *Rafig Aliyev* v. *Azerbaijan*, App. No. 45875/06 (ECtHR, December 6, 2011), para. 117; *Vasilyev and Kovtun* v. *Russia*, App. No. 13703/04 (ECtHR, December 13, 2011), para. 67. Cf. *Vayser* v. *Estonia*, App. No. 7157/05 (ECtHR, January 5, 2010), "The Law," para. 2. See further Cremer, "Eigentumsschutz," para. 41.

[258] (2000) 30 EHRR CD170, paras. 9–20.

[259] *Phillips* (2000) 30 EHRR CD170, para. 50.

[260] (1995) 20 EHRR 150, para. 33. See also *Plakhteyev* (ECtHR, March 12, 2009); *Islamic Republic of Iran Shipping Lines* (2008) 47 EHRR 24.

[261] App. No. 9118/80 (1987) 9 EHRR 1, para. 49.

[262] (1979–80) 1 EHRR 737, paras. 60–62.

possessions that the owner was him/herself the perpetrator.[263] Other cases indirectly confirm that trustees have possessions in trust property.[264]

5.2.4.4 Rights *in personam* as property

To the extent that the court treated the Austrian bank account as the applicants' possession, its judgment in *Saccoccia* and decision in *Duboc* are also consistent with past decisions. Though the court refuses to protect mere hopes of acquisition or restitution,[265] it considers claims to be assets once they have "a sufficient basis in national law."[266] In *Benet Czech, spol. s r.o.* v. *Czech Republic*,[267] the ECtHR found that a three-and-a-half-year seizure of the applicant company's bank accounts interfered with its possessions, even though the deposited funds were the suspected proceeds of its manager's tax evasion.[268]

The ECtHR may also find personal rights against public institutions – the typical objects of bribery transactions – to be possessions under Art. 1 ECHR-P1.[269] Hence, if an ECHR state party assists in a proceeding to remove those rights, e.g., by providing information or evidence, it could possibly incur liability under Art. 1 ECHR-P1. I do not consider this argument further here; however, I do note that the UNCAC requires state parties to "provid[e] information [and] evidentiary items" and to "consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action."[270]

263 *Ismayilov* (ECtHR, November 6, 2008), para. 29; *Gabrić* (ECtHR, February 5, 2009), para. 32; *Sun* (ECtHR, February 5, 2009), para. 24.

264 *James* (1986) 8 EHRR 123, para. 38. Cf. Çoban, *Property Rights within the European Convention on Human Rights*, p. 151.

265 *Malhous* (ECtHR, December 13, 1996), para. B(d); *Prince Hans-Adam II of Liechtenstein* v. *Germany*, App. No. 42527/98 (ECtHR, July 12, 2001), para. 83; *Polacek and Polackova* v. *Czech Republic*, App. No. 38645/97 (ECtHR, July 10, 2002), paras. 62–70; *Gratzinger and Gratzingerova* v. *Czech Republic*, App. No. 39794/98 (2002) 35 EHRR CD202, paras. 72–74. See further Gelinsky, *Schutz des Eigentums*, pp. 21–22; Peukert, "Artikel 1 ZP1," para. 2.

266 *Kopecký* (2005) 41 EHRR 43, para. 52. See also *A, B, C, and D*, v. *UK*, App. No. 3039/67 (ECmHR, May 29, 1967); *X* (ECmHR, December 13, 1979), para. 2(b).

267 (ECtHR, October 21, 2010) para. 46.

268 App. No. 31555/05 (ECtHR, October 21, 2010), para. 46. See also *Benet Praha, spol. s r.o.* v. *Czech Republic*, App. Nos. 33908/04 et al. (ECtHR, February 24, 2011).

269 *Tre Traktörer Aktienbolag* v. *Sweden* (1991) 13 EHRR 309, para. 53; *Ruvolo and Others* v. *Italy*, App. Nos. 27581/95, 27582/95, and 27583/95 (ECmHR, October 16, 1996), "En Droit," para. 1; *Gerakopoulos* v. *Greece*, App. No. 27418/95 (ECmHR, February 26, 1997), "The Law," para. 1; *Zlínsat, spol. s r.o.* v. *Bulgaria*, App. No. 57785/00 (ECtHR, June 15, 2006); *Capital Bank AD* v. *Bulgaria*, App. No. 49429/99 (2007) 44 EHRR 48, para. 130; *Megadat.com SRL* v. *Moldova*, App. No. 21151/04 (ECtHR, April 8, 2008), paras. 43, 55, 62–63.

270 UNCAC, Arts. 34, 46(3)(c). See also UNCAC, Art. 43(1).

5.2.4.5 (Bare) possession as property

The judgment in *Saccoccia* is also just one of several cases in which the court has found the use and/or physical control of tangible things to be within the scope of Art. 1 ECHR-P1, even though the applicant had no entitlement with respect to those things in domestic law.[271]

Beyeler v. *Italy* concerned the compulsory acquisition of an artwork under Italian cultural heritage legislation.[272] The applicant's Italian agent had waited some five-and-a-half years to notify the Italian government of the applicant's beneficial interest.[273] Some five years after that, Italy purported to exercise its right of pre-emption on the basis of the original purchase price.[274] The ECtHR rejected the government's contention that the applicant had no possessions under Art. 1 ECHR-P1 because the transfer was void for breach of the disclosure requirement.[275] For the European court, the length of time for which the applicant had been in possession; the authorities' repeated acknowledgements that the applicant was the owner; and an Italian appeal court's finding that the applicant was the painting's "real owner," all "prove[d] that the applicant had a proprietary interest recognized under Italian law – even if it was revocable in certain circumstances – from the time the work was purchased until the right of pre-emption was exercised and he was paid compensation."[276] Thus, it found that the applicant had a substantive interest that was protected by Art. 1 ECHR-P1.[277] The court made similar observations when applying Art. 1 ECHR to a void lease and license,[278] an illegally erected dwelling,[279] and unregistered village lands.[280]

5.2.4.6 Proceeds as property

Further, the court has recognized possessions in things that state parties' courts have determined to be the proceeds of crime. *Raimondo* v. *Italy* concerned the "seizure . . . of sixteen items of real property and six vehicles, and the confiscation of several of these assets" under Italian anti-mafia laws.[281] These

[271] *Matos e Silva, Lda., and Others* v. *Portugal*, App. No. 15777/89 (1997) 24 EHRR 573; *Iatridis* v. *Greece*, App. No. 31107/96 (2000) 30 EHRR 97; *Beyeler* (2001) 33 EHRR 52; *Öneryıldız* (2004) 39 EHRR 12; *Doğan* (2005) 41 EHRR 15; *Saghinadze and Others* v. *Georgia*, App. No. 18768/05 (ECtHR, May 27, 2010). See also *Gashi* v. *Croatia*, App. No. 32457/05 (ECtHR, December 13, 2007), para. 22; *Depalle* v. *France*, App. No. 34044/02 (ECtHR, March 23, 2010), paras. 62–68; *Brosset-Triboulet and Others* v. *France*, App. No. 34078/02 (ECtHR, March 29, 2010), paras. 64–71. For a comparative definition of the concept of "possession," see Mattei, *Basic Principles*, pp. 79–80.

[272] (2001) 33 EHRR 52. [273] (2001) 33 EHRR 52, paras. 9–12.

[274] (2001) 33 EHRR 52, para. 36. [275] (2001) 33 EHRR 52, para. 86.

[276] (2001) 33 EHRR 52, para. 105. [277] (2001) 33 EHRR 52, para. 105.

[278] *Iatridis* (2000) 30 EHRR 97, para. 54; *Saghinadze* (ECtHR, May 27, 2010), paras. 104–106.

[279] *Öneryıldız* (2004) 39 EHRR 12, paras. 105–106, 127.

[280] *Doğan* (2005) 41 EHRR 15, para. 139. [281] (1994) 18 EHRR 237, para. 24.

provided for the imposition of preventative measures on "persons presenting a danger for security and public morality,"[282] including persons suspected of belonging to "'mafia-type' groups." The acts together allowed the Catanzaro District Court to seize and confiscate items that, with the aid of a rebuttable presumption of illicit acquisition, it had found to be the "proceeds of unlawful activities or their reinvestment." The relevant act provided that:

> [T]he District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.
>
> Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired.[283]

Though the Catanzaro Court of Appeal acquitted the applicant of belonging to a mafia-type organization and canceled the associated orders, the government authorities took some "seven months . . . and four years and eight months" to remove the notations of the orders from their property registers.[284] The applicant complained to Strasbourg of a violation of Art. 1 ECHR-P1; both the government and the ECtHR accepted that he had possessions.[285]

In *Honecker*, the court found that some 485,000 GDR marks held by banks for senior East German officials were subject to the property guarantee.[286] Messrs. Honecker and Axen had requested the conversion of the monies into West German marks (DEM); but, in the week before reunification, an East German parliamentary committee had ordered the confiscation of the monies, deeming them to have been unlawfully acquired.[287] After reunification, the Berlin Administrative Court confirmed that the bulk of the funds were savings obtained from abuses of public office. Nonetheless, the ECtHR accepted that the funds were the possessions of the men's widows and children under Art. 1 ECHR-P1. Without considering the applicants' entitlements in private law, the court found it indisputable "that the confiscation of the applicants' money constituted an interference with their right to peaceful enjoyment of their possessions."[288]

[282] *Raimondo* (1994) 18 EHRR 237, para. 16.
[283] *Raimondo* (1994) 18 EHRR 237, para. 18.
[284] *Raimondo* (1994) 18 EHRR 237, para. 36.
[285] *Raimondo* (1994) 18 EHRR 237, paras. 7–11, 14, 36.
[286] (ECtHR, November 15, 2001).
[287] *Honecker* (ECtHR, November 15, 2001), "The Facts."
[288] (ECtHR, December 14, 1999), "The Law," para. 1.

In *Frizen* v. *Russia*, the ECtHR applied Art 1 ECHR-P1 to a confiscation of a car that had been purchased with the proceeds of crime.[289] The applicant had obtained the funds on loan from her employer, a company established by her husband and an accomplice to defraud the state-owned telecommunications firm of which they were managers.[290] In the course of its decision to convict the two men, the Russian District Court found "that the salary of the . . . employees, loans and dividends were paid out of money that had been taken from the [state-owned firm]"; it ordered the forfeiture of the applicant's car as "compensation for the damage" caused by the offense, in addition to the imprisonment of the two offenders and the confiscation of their property.[291] The ECtHR found the complaint within the scope of Art. 1 ECHR-P1 *ratione materiae*. Though this issue was not in dispute[292] and the car was not alleged to represent criminal proceeds,[293] the court made a point of describing the "'possession' at issue" as "the applicant's car, of which she was the sole legal and registered owner and in respect of which the domestic courts issued a forfeiture order."[294]

These comments, albeit *obiter*, are reminiscent of those in *Saccoccia*.[295] They were recalled furthermore in *Insanov* in which a former government minister who had been convicted *inter alia* of embezzlement and sentenced with confiscation complained to the ECHR under Art. 6 ECHR and Art. 1 ECHR-P1.[296] Having rejected a part of the property complaint that related to his family members' alleged possessions, the court observed that:

> at least part of that property constituted his "possessions" forming the object of his complaint and comprising various sums of cash in different currencies, various precious metals and items of jewellery, a number of residential properties, and a car. The Court considers that confiscation of that property amounts to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable.[297]

Khodorkovskiy and Lebedev v. *Russia* provides a clearer indication still that the ECtHR will not dismiss a complaint under Art. 1 ECHR-P1 merely because domestic authorities have found an applicant not to have lawfully obtained or retained alleged possessions.[298] The dispute between the government and first applicant concerned, in essence, the man's personal liability for unpaid

[289] App. No. 58254/00 (2006) 42 EHRR 19.
[290] *Frizen* (2006) 42 EHRR 19, paras. 9, 13.
[291] *Frizen* (2006) 42 EHRR 19, paras. 13–15.
[292] *Frizen* (2006) 42 EHRR 19, para. 28.
[293] *Frizen* (2006) 42 EHRR 19, paras. 14, 33–36.
[294] *Frizen* (2006) 42 EHRR 19, para. 28.
[295] *Saccoccia* (2010) 50 EHRR 11, para. 85.
[296] *Insanov* (ECtHR, March 14, 2013), paras. 4–37.
[297] *Insanov* (ECtHR, March 14, 2013), paras. 178–179. See also *Radu* v. *Romania*, App. No. 484/08 (ECtHR, September 3, 2013), para. 22
[298] App. Nos. 11082/06 and 13772/05 (ECtHR, July 25, 2013).

corporate taxes and, hence, his entitlement to those amounts in Russian law. The fact that the Russian courts had accepted the government's interpretation of the Tax Code could not, of itself, "remove from the amounts recovered . . . the protection guaranteed by [Art. 1 ECHR-P1]."[299]

5.2.4.7 Property as *legitimate* expectations

However, if *Raimondo*, *Frizen*, and the other recent judgments support the conclusion that confiscated proceeds are possessions, another group of cases suggests that alleged illicit wealth is only protected under Art. 1 ECHR-P1 if the aggrieved party has a "legitimate expectation" of enjoying it once again. *The Former King of Greece and Others* v. *Greece* concerned the nationalization ("confiscation") of real and personal property ostensibly owned by the deposed Greek king and members of his family.[300] The government contended that the royal family lacked any private property in Greek law.[301] Noting the "autonomous meaning" of the concept of possessions "from the formal classification in domestic law," it asked "whether the circumstances of the case, considered as a whole, conferred on the applicants title to a substantive interest protected by Article 1 of Protocol No. 1."[302] Answering in the affirmative, it considered the facts that:

- the "applicants' ancestors [had] purchased" the properties using "their private funds";
- later royal family members had then repeatedly transferred the properties to each other and to third parties "in accordance with the requirements of Greek civil law"; and
- that the Greek state had treated the royals as owners of the estates in accepting tax payments and entering into agreements with them with respect to the lands.[303]

Finding that the applicants owned the estates "as private persons rather than in their capacity as members of the royal family," the court took the view that the applicants had possessions under Art. 1 ECHR-P1.[304]

In two cases against the Russian Federation, the court again used the notion of legitimate expectations to determine whether disputed interests in restrained and confiscated assets were within the scope of Art. 1 ECHR-P1. The applicant in *Novikov* v. *Russia* had complained to the ECtHR of Russia's refusal to compensate him for the loss of a large quantity of fuel that police had

[299] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), para. 872.
[300] (2001) 33 EHRR 21, paras. 20–27.
[301] *Former King of Greece* (2001) 33 EHRR 21, para. 61.
[302] *Former King of Greece* (2001) 33 EHRR 21, para. 60.
[303] *Former King of Greece* (2001) 33 EHRR 21, paras. 60–66.
[304] *Former King of Greece* (2001) 33 EHRR 21, para. 66.

seized as the suspected object of crime and that had been stolen by a third party from the police.[305] The government relied on the Blagoveshchensk Town Court decision to deny that the applicant had obtained title to the fuel from its previous corporate owner.[306] Noting inconsistencies in the reasoning of the town court judgment, the ECtHR found that the applicant had a claim that was "sufficiently established to be enforceable" under Russian law.[307] Therefore, he was a victim under Art. 34 ECHR and had possessions under Art. 1 ECHR-P1.

Denisova and Moiseyeva v. *Russia* concerned contested third party interests in confiscated things.[308] The applicants were the wife and daughter of a man who had been convicted of treason[309] and punished with a prison term and a confiscation order in relation to "his property."[310] The Russian courts repeatedly refused to vacate charging orders with respect to cash and a computer that the wife and daughter claimed to (partially) own.[311] The ECtHR read the Russian civil, family, and criminal law codes in light of the associated case law to mean that charging orders could only extend to an innocent spouse's half-share of marital property when the property had been "criminally acquired but registered in other persons' names with a view to concealing it from confiscation."[312] Implying that there was no such evidence in this case, the majority found:[313]

> [T]he first applicant's claim to the spousal portion and the second applicant's claim to the computer had a basis in the statutory law, such as provisions of the Russian Civil and Family Codes, and the case-law codified by the Supreme Court. They could reasonably and legitimately argue that the confiscation order of 14 August 2001 amounted to an interference with their right to peaceful enjoyment of possessions.[314]

5.2.4.8 Property in cases of asset recovery?

Thus, the court appears to shift between recognizing possessions as the factual enjoyment of incidents of ownership, and entitlements to those incidents under domestic law. In *Saccoccia*, *Raimondo*, and, to a lesser extent, *Duboc*, *Frizen*, and *Insanov*, the court was apparently satisfied by the fact

[305] App. No. 35989/02 (ECtHR, June 18, 2009). See also *Vasilyev* (ECtHR, December 13, 2011), paras. 65–68.
[306] *Novikov* (ECtHR, June 18, 2009), paras. 18, 31.
[307] *Novikov* (ECtHR, June 18, 2009), paras. 31–39, esp. 38.
[308] App. No. 16903/03 (ECtHR, April 1, 2010).
[309] (ECtHR, April 1, 2010), paras. 5–16. See further *Moiseyev* v. *Russia*, App. No. 62936/00 (2011) 53 EHRR 9.
[310] *Denisova* (ECtHR, April 1, 2010), para. 14; *Moiseyev* (2011) 53 EHRR 9, paras. 1, 51.
[311] *Denisova* (ECtHR, April 1, 2010), paras. 25–30.
[312] *Denisova* (ECtHR, April 1, 2010), para. 52.
[313] Cf. *Denisova* (ECtHR, April 1, 2010), Dissenting Opinion of Judge Vajić.
[314] *Denisova* (ECtHR, April 1, 2010), para. 54.

that the applicants had had possession of the confiscated objects and were the apparent beneficiaries of legal rights (*in personam* or *in rem*) with respect to them. In none of these cases did the court inquire into the nature of the applicants' interests in domestic law, expressly rejecting the need for such an inquiry in *Saccoccia*. By contrast, in *The Former King of Greece*, *Denisova*, and *Novikov* the court analyzed the strength of the applicants' claims to own the things and the legitimacy of their expectations of successfully defending their interests. In *Beyeler* and the associated cases it took an intermediate position, acknowledging the lack of entitlement under local law but protecting the rights nonetheless due to:

- the length of the applicants' *de facto* interests;
- the states' toleration of the applicants' interests;
- the states' acknowledgements of the applicants as "owners" through the payment of compensation or the acceptance of taxes; and
- the applicants' usage of the things to create other economic values or in a "socio-economic and family environment."[315]

How could – or should – the court assess contested ownership claims when states are seeking to achieve asset recovery? *Novikov* and *Denisova* are also more consistent with the court's case law on other types of interferences under Art. 1 ECHR-P1. The concept of legitimate expectations also allows the court to protect thing-based relationships that the domestic courts have found lacking without imposing entirely new categories of public law entitlement on contracting states. That said, *Saccoccia* is likely to be much closer to the facts of a case in which the respondent state is assisting with asset recovery. As in *Saccoccia*, the court is likely to encounter difficulties in determining whether the applicant has a legitimate expectation of (re)gaining enjoyment of the confiscated thing under the law of the respondent state. A concept of property that depends on *de facto* possession or control also finds support in the ECtHR's anti-mafia jurisprudence and in the principle of "practical and effective" interpretations of the convention rights and freedoms. After all, as the court seemed to recognize in *Khodorkovskiy and Lebedev*, governments determine the thing-based relationships that are protected by law and so, in practice, exercise control over the scope of the property guarantee.

5.2.5 Preliminary conclusions

The right to property in Art. 1 ECHR-P1 may be described in terms of the times and places in which it applies and persons and things that it protects. *Temporally*, it covers all instantaneous acts that occur after its entry into force

[315] *Öneryıldız* (2004) 39 EHRR 12, paras. 127–129; *Doğan* (2005) 41 EHRR 15, para. 138–139; *Saghinadze* (ECtHR, May 27, 2010), paras. 104–106.

for each state party, as well as to continuing violations that bridge the ratification date. Should Switzerland or Monaco ratify the protocol, I speculated that they could be liable for some restraints and confiscations that were ordered before the protocol's EIF. *Personally*, the right to property would appear to apply to former foreign PEPs, their relatives and human associates, and related private law legal entities. *Territorially*, the right to property is likely to cover the execution of confiscation orders. Whether the requested state party is under a duty to actively inquire into the foreign proceedings is unclear, however, as are the circumstances in which the ECtHR will find a flagrant denial of Art. 1 ECHR-P1 due to the laws, decisions, or procedures of the requesting state. *Materially*, the court has interpreted the concept of possession to apply to confiscated things that a person owns, as well as to rights *in personam* that are interfered with as a consequence of the execution of the foreign order. If domestic courts have determined that a person has no interest in things under the relevant domestic law, the ECtHR may attempt to assess the legitimacy of the applicant's claim or it may protect his/her (or its) position because he/she (or it) has factual possession or control.

5.3 The nature of the interference

In all, it is likely that state parties will affect a part of reality protected by Art. 1 ECHR-P1 when they enforce foreign confiscation orders that aim at asset recovery. The question is whether they interfere with the peaceful enjoyment of possessions in a manner that is regulated by Art. 1 ECHR-P1.

5.3.1 The nature of an interference and the ECtHR's three rules

An interference with the right to property occurs when "*die* Rechtsstellung *des Inhabers einer Eigentumsposition – durch ein Verhalten der öffentlichen Gewalt* – gemindert *wird und sich dadurch verschlechtert*."[316] The ECtHR has read three forms of interference into the three sentences of ECHR-P1:

- interferences with the peaceful enjoyment of possessions (first sentence, first rule);
- deprivations of possessions (second sentence, second rule); and
- controls of the use of possessions "in accordance with the general interest" or "to secure the payment of taxes or other contributions or penalties" (third sentence, third rule).[317]

[316] Cremer, "Eigentumsschutz," para. 76 (emphasis original). See also Kriebaum, *Eigentumsschutz im Völkerrecht*, p. 181.

[317] See, e.g., *Sporrong* (1983) 5 EHRR 35, para. 61; *James* (1986) 8 EHRR 123, para. 37; *Gasus Dosier- und Fördertechnik GmbH* v. *Netherlands*, App. No. 15375/89 (1993) 15 EHRR

The court has not enunciated criteria for distinguishing the interferences from each other.[318] However, implicitly, it distinguishes interferences by reference to their purpose, intensity, and duration:[319]

- the first rule applies when a state party limits a person's "peaceful enjoyment" of possessions but there is no clear deprivation or control of use;[320]
- the second rule applies when a state party permanently removes title to a thing;[321] and
- the third rule applies – with relevant exceptions – when a state party indefinitely restricts some or temporarily restricts all incidents of ownership associated with the possession.[322]

CD14, paras. 51–53; *Bosphorus* (2006) 42 EHRR 1, para. 141; *Yukos* (2012) 54 EHRR 19, para. 557. See further Cremer, "Eigentumsschutz," para. 65; Çoban, *Property Rights within the European Convention on Human Rights*, pp. 175–176; Gelinsky, *Schutz des Eigentums*, pp. 42, 73; Harris et al., *Law of the European Convention on Human Rights*, pp. 666–667; Janis, Kay, and Bradley, *European Human Rights Law*, p. 528; Malzahn, *Eigentumsschutz in der EMRK*, pp. 176–178; Meyer-Ladewig, *Handkommentar-EMRK*, paras. 2–3; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.13; Peukert, "Artikel 1 ZP1," para. 19; White and Ovey, *The European Convention on Human Rights*, p. 501.

[318] Çoban, *Property Rights within the European Convention on Human Rights*, pp. 171–172; Kriebaum, *Eigentumsschutz im Völkerrecht*, p. 186. See also Cremer, "Eigentumsschutz," para. 67.

[319] Kaiser, "Art. 1 ZPI," para. 28; Malzahn, *Eigentumsschutz in der EMRK*, pp. 230, 247–248; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.14. Cf. Wegener, "Wirtschaftsgrundrechte," para. 21.

[320] See, e.g., *Sporrong* (1983) 5 EHRR 35, paras. 62–65; *Beyeler* (2001) 33 EHRR 52, para. 106; *Hoare* v. *UK*, App. No. 16261/08 (2011) 53 EHRR SE1, paras. 50–51 (order to pay costs). See further Çoban, *Property Rights within the European Convention on Human Rights*, pp. 186–189; Cremer, "Eigentumsschutz," paras. 66, 68, 103; Harris et al., *Law of the European Convention on Human Rights*, pp. 672–673; Meyer-Ladewig, *Handkommentar-EMRK*, para. 4; Peukert, "Artikel 1 ZP1," para. 20. Cf. Kaiser, "Art. 1 ZPI," para. 31.

[321] See, e.g., *Lithgow* (1986) 8 EHRR 39, para. 107; *James* (1986) 8 EHRR 123, para. 38; *The Holy Monasteries* v. *Greece*, App. Nos. 13092/87 et al. (1995) 20 EHRR 1, paras. 65–66; *Pressos Compania Naviera S.A. and Others* v. *Belgium*, App. No. 17849/91 (1996) 21 EHRR 301, para. 34; *Carbonara and Ventura v. Italy*, App. No. 24638/94 (ECtHR, May 30, 2000), para. 61; *Jahn* v. *Germany*, App. Nos. 46720/99 et al. (2006) 42 EHRR 49, paras. 78–80. See further Çoban, *Property Rights within the European Convention on Human Rights*, pp. 180–186; Cremer, "Eigentumsschutz," para. 87; Gelinsky, *Schutz des Eigentums*, pp. 42–43; Harris et al., *Law of the European Convention on Human Rights*, p. 677; Malzahn, *Eigentumsschutz in der EMRK*, p. 230; White and Ovey, *The European Convention on Human Rights*, p. 488.

[322] See, e.g., *Pine Valley Developments Limited and Others* v. *Ireland*, App. No. 12742/87 (1992) 14 EHRR 319, paras. 54–56; *Venditelli* v. *Italy*, App. No. 148004/89 (ECtHR, July 18, 1994), para. 38; *Paeffgen GmbH* v. *Germany*, App. Nos. 25379/04 et al. (ECtHR, September 18, 2007), "The Law," para. 1; *Centro Europa 7 SRL* (ECtHR, June 7, 2012), para. 186; *Lindheim and Others* v. *Norway*, App. Nos. 13221/08 and 2139/10 (ECtHR, June 12, 2012), para. 76. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.108; Cremer, "Eigentumsschutz," para. 100; Gelinsky, *Schutz des Eigentums*,

5.3.2 *The three rules applied to (cooperative) confiscations*

How are the interferences involved in cooperative confiscations, particularly the execution of foreign confiscation orders, likely to be classified under Art. 1 ECHR-P1? Since the mid-1970s the Strasbourg organs have treated lawful confiscation and restraining orders as interferences under the third rule.[323] *Handyside*, *AGOSI*, and *Air Canada* are the leading cases on the classification of restraints and confiscations of the objects and instrumentalities of crime; *Phillips*, *Raimondo*, and *Saccoccia* are the leading cases on (foreign) criminal proceeds.

5.3.2.1 Measures with respect to the objects and instrumentalities of local offenses

Handyside, as mentioned above, concerned the seizure, forfeiture, and destruction of books after the publisher's conviction under censorship laws.[324] The seizure was found to be a control of the books because it only temporarily inhibited their use and enjoyment and would have been removed had the applicant been acquitted or had succeeded on appeal.[325] The forfeiture and destruction orders were likewise controls of use because the books themselves were "dangerous items." The majority reached this conclusion by interpreting the second sentence of Art. 1 ECHR-P1 "in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction."[326]

In *AGOSI*, the applicant metal smelter and trader had agreed to sell some 1,500 Kruegerrands to a third party who then attempted to smuggle them into the UK.[327] The coins were seized by UK customs and declared forfeit by the English High Court.[328] The ECtHR, again by majority, found that the prohibition on the importation was a control of the use of the coins, and that the seizure and forfeiture were measures to enforce that prohibition. Citing *Handyside*, it stated:

p. 52; Kriebaum, *Eigentumsschutz im Völkerrecht*, pp. 191, 197; White and Ovey, *The European Convention on Human Rights*, pp. 503–504.

[323] Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 18.140–18.141; Çoban, *Property Rights within the European Convention on Human Rights*, pp. 185–186; Cremer, "Eigentumsschutz," paras. 90–91; Gelinsky, *Schutz des Eigentums*, pp. 47–48, 54; Harris et al., *Law of the European Convention on Human Rights*, pp. 690–692, 694; Kriebaum, *Eigentumsschutz im Völkerrecht*, p. 202; White and Ovey, *The European Convention on Human Rights*, p. 501.

[324] (1979–80) 1 EHRR 737, paras. 16–17.

[325] *Handyside* (1979–80) 1 EHRR 737, para. 62.

[326] *Handyside* (1979–80) 1 EHRR 737, para. 63.

[327] (1987) 9 EHRR 1, paras. 11–19.

[328] *AGOSI* (1987) 9 EHRR 1, paras. 14, 20, 26, 30, 33.

> The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Kruegerrands. It is therefore, the second paragraph of [Art. 1 ECHR-P1] which [applies].[329]

Finally, in *Air Canada*, UK customs authorities demanded GBP 50,000 for the return of a seized aircraft; they subsequently obtained an order for its forfeiture.[330] By majority, the ECtHR found that the measures were controls of use under Art. 1 ECHR-P1, third sentence.[331] The seizure was temporary and the forfeiture had not resulted in the transfer of ownership of the plane to the state, the carrier having paid the fee for its release.[332] The purpose of the measure was crucial, however, to the court's characterization of the seizure and conditional release as "a measure taken in furtherance of a policy of seeking to prevent carriers from bringing, *inter alia*, prohibited drugs into the UK."[333] The court has applied the principle, amongst other things, in *Handyside*, *AGOSI*, and *Air Canada*,[334] to:

- seized and confiscated cash "intended . . . for use in drug trafficking";[335]
- cash that had been the object of smuggling offenses;[336]
- an eviction that was ordered "to forestall the divestiture of State assets under allegedly grossly disadvantageous conditions";[337]
- vehicles that had been used to breach economic and immigration controls;[338] and
- an aircraft detained as "a measure to enforce" an EU sanctions regime.[339]

5.3.2.2 Measures with respect to the proceeds of local offenses

When state parties have restrained or confiscated the alleged *proceeds* of offenses, the court has also established that they interfere with possessions

[329] *AGOSI* (1987) 9 EHRR 1, para. 51. [330] (1995) 20 EHRR 150, paras. 8–11, 15.
[331] *Air Canada* (1995) 20 EHRR 150, paras. 32–33.
[332] *Air Canada* (1995) 20 EHRR 150, para. 33.
[333] *Air Canada* (1995) 20 EHRR 150, para. 34.
[334] See also *CM* v. *France*, App. No. 28078/95 (ECtHR, June 26, 2001), "The Law," para. 1; *Adamczyk* v. *Poland*, App. No. 28551/04 (ECtHR, November 7, 2006), "The Law"; *Simonjan-Heikinheimo* v. *Finland*, App. No. 6321/03 (ECtHR, September 2, 2008), "The Law"; *Borzhonov* v. *Russia*, App. No. 18274/04 (ECtHR, January 22, 2009), para. 57; *Bowler International* (ECtHR, July 23, 2009), paras. 36–41; *Smirnov* (2010) 51 EHRR 19, para. 54.
[335] *Butler* v. *UK*, App. No. 41661/98 (ECtHR, June 27, 2002), "The Facts," para. B, "The Law," para. C.
[336] *Ismayilov* (ECtHR, November 6, 2008), para. 30; *Sun* (ECtHR, February 5, 2009), para. 25; *Adzhigovich* (ECtHR, October 8, 2009), para. 27.
[337] *Zlínsat* (ECtHR, June 15, 2006), para. 96.
[338] *Yildirim* v. *Italy*, App. No. 3860/98 (ECtHR, April 10, 2003); *Plakhteyev and Plakhteyev* (ECtHR, March 12, 2009), para. 53.
[339] *Bosphorus* (2006) 42 EHRR 1, para. 142.

under the third rule of Art. 1 ECHR-P1. In addition, it has distinguished between confiscations that control the use of proceeds in accordance with the general interest and confiscations of proceeds that "secure the payment of . . . penalties."[340] The "preventative" confiscation of proceeds in *Raimondo* was assigned to the first category of controls. Not only were the particular orders against Mr. Raimondo revoked and so never final under Italian law,[341] but they also had the aim of preventing him, as a suspected member of a criminal organization, from accumulating illicit wealth and reinvesting it in the licit economy.[342] As the court went on to note in *Arcuri and Others* v. *Italy*:

> [T]he confiscation affected assets which had been deemed by the courts to have been unlawfully acquired and was intended to prevent the first applicant, who, according to the Italian courts, could directly or indirectly dispose of the assets, from using them to make a profit for himself or for the criminal organisation to which he is suspected of belonging, to the detriment of the community. Accordingly, even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, which gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest".[343]

The ECmHR had reached a like conclusion in *M* v. *Italy*, some ten years earlier,[344] and both the ECmHR and ECtHR have repeatedly applied this reasoning in Italian anti-mafia confiscation cases.[345] As for the seizures in *Raimondo*, they "only prevent[ed] [the applicant] from using [his possessions],"

340 *Frizen* (2006) 42 EHRR 19, para. 31.
341 *Raimondo* v. *Italy*, App. No. 12954/87 (1994) 18 EHRR 237, para. 29.
342 *Raimondo* (1994) 18 EHRR 237, para. 30.
343 (ECtHR, July 5, 2001), "The Law," para. 1.
344 App. No. 12386/86 (ECmHR, April 15, 1991), "The Law," paras. 1–2.
345 See, e.g., *BM* v. *Italy*, App. No. 15103/89 (ECmHR, January 19, 1995), "En Droit," para. 2; *De Rosa* v. *Italy*, App. No. 15355/89 (ECmHR, February 20, 1995), "En Droit," para. 2; *AD* v. *Italy*, App. No. 26774/95 (ECmHR, October 28, 1997), para. D; *La Rosa* v. *Italy*, App. No. 32188/96 (ECmHR, December 3, 1997); *PT and GM* v. *Italy*, App. No. 31128/96 (ECmHR, March 4, 1998); *Prisco* v. *Italy*, App. No. 38662/97 (ECmHR, June 15, 1999), "En Droit," para. 1; *Madonia* v. *Italy*, App. No. 55927/00 (ECtHR, March 25, 2003), "En Droit," para. 1; *Bocellari and Rizza* v. *Italy*, App. No. 399/02 (ECtHR, October 28, 2004), "En Droit," para. 1; *Morabito and Others* v. *Italy*, App. No. 58572/00 (ECtHR, June 7, 2005), "En Droit"; *Perre and Others* v. *Italy*, App. No. 1905/05 (ECtHR, April 12, 2007), "En Droit," para. 1; *Bongiorno and Others* v. *Italy*, App. No. 4515/07 (ECtHR, January 5, 2010), para. 42; *Capitan and Campanella* v. *Italy*, App. No. 24920/07 (ECtHR, August 17, 2011), para. 32.

and "did not purport to deprive" him of them; so, they were interferences under Art. 1 ECHR-P1, third sentence, in any case.[346]

By contrast, confiscations of proceeds that "follo[w] on from the applicant's prosecution, trial and ultimate conviction"[347] are typically regarded as controls of use of possession to "secure the payment of . . . penalties." In *Welch* v. *UK*, the ECtHR considered whether a value- and conviction-based confiscation order that had been imposed on the applicant under the Drug Trafficking Offences Act 1986 c. 32 (UK) was a penalty under Art. 7 ECHR.[348] Article 7(1) provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." The court found "several aspects" of the confiscation proceeding to be penal and preventative. Aside from the requirement of a conviction:[349]

> The sweeping statutory assumptions . . . that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise . . .; the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit . . .; the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused . . .; and the possibility of imprisonment in default of payment by the offender . . . are all elements which, when considered together, provide a strong indication of, *inter alia*, a regime of punishment.[350]

Considering a later version of the UK drug trafficking law in *Phillips*, the ECtHR restated that "the confiscation order constituted a 'penalty' within the meaning of the Convention."[351] For that reason, it was held to "fal[l] within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties."[352]

5.3.2.3 Measures with respect to the proceeds of (foreign) corruption offenses

Thus, it comes as no surprise that the ECtHR classified the execution of the US final forfeiture order in *Saccoccia* under the third rule of Art. 1 ECHR-P1.

346 *Raimondo* (1994) 18 EHRR 237, para. 27. See also *Benet Praha* (ECtHR, February 24, 2011), para. 92; *Károly Hegedűs* v. *Hungary*, App. No. 11849/07 (ECtHR, November 3, 2011), para. 23; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 118.

347 *Frizen* (2006) 42 EHRR 19, para. 31; *Plakhteyev and Plakhteyev* (ECtHR, March 12, 2009), para. 53. See also *Yukos* (2012) 54 EHRR 19, para. 646.

348 (1995) 20 EHRR 247, para. 35.

349 *Welch* (1995) 20 EHRR 247, para. 29.

350 *Welch* (1995) 20 EHRR 247, para. 33.

351 (2000) 30 EHRR CD170, para. 51.

352 *Phillips* (2000) 30 EHRR CD170, para. 51. See also *Varvara* (ECtHR, October 29, 2013) (not final), para. 72 (confiscation after acquittal as a punishment without law).

Rehearsing statements from other judgments and decisions, the ECtHR acknowledged that the applicant would be factually deprived of his possessions but found, nonetheless, that the measures merely controlled their use.[353] Aligning itself with *AGOSI*, *Air Canada*, and *Butler*, it held that:

> [T]he execution of the forfeiture order, though depriving the applicant permanently of the assets at issue, falls to be considered under the so-called third rule, relating to the State's right "to enforce such laws as it deems necessary to control of the use of property in accordance with the general interest" set out in the second paragraph of Article 1 of Protocol No. 1.[354]

The court did not explain why the enforcement of the foreign order was a control of use in the general interest rather than a measure to secure the payment of a (foreign) penalty. However, in refusing to admit Mr. Saccoccia's complaint under Art. 7 ECHR, the court had made clear that it regarded the Austrian *exequatur* order separately from the US forfeiture order, which it enforced. Therefore, even though money laundering was only criminalized in Austria after the applicant's alleged acts and omissions, he had not been subjected to a retrospective penalty.[355] If viewed in this way, execution orders are closer to the administrative forfeiture orders in *AGOSI* and *Air Canada* since they may be imposed in the absence of a local criminal proceeding or conviction.

5.3.3 Criticisms of the three rules and a new approach

The court's classification of confiscations as (mere) controls of the use of possessions is controversial. Already in *Handyside*, Judge Zekia argued that the most natural reading of Art. 1 ECHR-P1 would see confiscations dealt with as deprivations of possessions under the second sentence and their protective or preventative objectives as matters of "public purpose."[356] Then, in *Air Canada*, three of four dissenting judges refused to accept the majority's characterization of confiscations as incidents to prohibitions on the use of possessions,[357] especially when those things were lawful items that happened to have been used by a third party to commit a crime.[358] Criticizing *AGOSI*, Judges Martens and Russo held that "confiscations – whether of an *objectum*

[353] *Saccoccia* (2010) 50 EHRR 11, para. 86. See also *Honecker* (ECtHR, November 15, 2001), "The Law," para. 1.

[354] (2010) 50 EHRR 11, para. 86. See also *Duboc* (ECtHR, June 5, 2012), para. 52 (citing the *Saccoccia* judgment, paras. 87–89, with approval).

[355] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(3).

[356] (1979–80) 1 EHRR 737, Separate Opinion of Judge Zekia, 766.

[357] (1995) 20 EHRR 150, Dissenting Opinion of Judge Walsh, 179; Dissenting Opinion of Judge Martens joined by Judge Russo, 180–182.

[358] *Air Canada* (1995) 20 EHRR 150, 180–182.

or of *instrumentum sceleris* – are to be considered 'penalties' within the meaning of the second paragraph of [Art. 1 ECHR-P1]." As Judge Martens then set forth:

> The AGOSI case concerned a confiscation of the *objectum sceleris* (forfeiture of gold coins concerning which an attempt had been made to smuggle them into the UK). The Court considered this to be confiscation as an instance of "control of use". It reasoned: (1) the prohibition on the importation of gold coins into the UK is "control of use" of such coins; (2) the forfeiture of the smuggled gold coins forms a constituent element of that "control of use"; (3) ergo the forfeiture of the (smuggled) gold coins is an instance of "control of use" of gold coins.
>
> Obviously, this reasoning cannot be followed with respect to a confiscation of the *instrumentum sceleris*. The present case makes that clear: the prohibition involved is the prohibition of importation of a controlled drug (cannabis resin); but the forfeiture of an aircraft cannot be said to be an instance of "control of use" of cannabis resin.[359]

Judge Martens elaborated that any confiscation of instrumentalities that presupposes the commission of an offense is punitive in nature, whether or not it is prefigured by the owner's conviction or the conviction of a third party.[360] In his view and that of Judge Russo, such confiscations must be compensated or accompanied by an innocent ownership defense.[361]

The dissenting judgments in *Handyside* and *Air Canada* failed to persuade the court to change its course; but the majority view and the three rules have come in for academic criticism.[362] Soon after *AGOSI*, Dr. Wolfgang Peukert took the view that a confiscation of instrumentalities could only be a measure in pursuit of a restriction on the use of possessions if the things were *per se* dangerous or socially harmful.[363] More recently, Prof. Ali Riza Çoban has suggested that the three rules do little to help the court determine whether there has been a breach of Art. 1 ECHR-P1: The criteria for distinguishing interferences are unclear and the criteria for establishing a violation are the same under each rule.[364] To the contrary, Çoban submits that the "three rule approach" prevents the court from perceiving and giving

359 *Air Canada* (1995) 20 EHRR 150, 181–182.
360 *Air Canada* (1995) 20 EHRR 150, 182–183.
361 *Air Canada* (1995) 20 EHRR 150, 183–184.
362 Çoban, *Property Rights within the European Convention on Human Rights*, pp. 189–190; Gelinsky, *Schutz des Eigentums*, pp. 49–50; Stessens, *Money Laundering*, pp. 60–66.
363 Peukert, "Anmerkung zur AGOSI-Entscheidung," 510. Cf. Gelinsky, *Schutz des Eigentums*, p. 51.
364 See, e.g., *Jokela* v. *Finland*, App. No. 28856/95 (2003) 37 EHRR 26, paras. 46–49, 53. See further Çoban, *Property Rights within the European Convention on Human Rights*, pp. 189–190. See also Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 18.78, 18.99.

adequate weight to the factual impairment of the incidents of ownership: It implies that some forms of interference are more serious than others and takes into account the government's objectives in making that assessment.[365] He goes on to argue that the (real) purpose of the three rule structure is to distinguish between compensable and non-compensable takings,[366] a function that would be better served by differentiating the (real) "purpose of the state's action": to "tak[e] of property by the power of eminent domain for public interest purpose," to tax, and to "control . . . the use of property by police power regulations."[367]

Çoban's critique of the three rules has merit. Though the court applies the same test for determining whether interferences are justified under each of the three rules,[368] it construes the margin of appreciation more narrowly under the second rule,[369] treating compensation as a condition for proportionality in all but exceptional cases.[370] As Çoban implies, the reasoning is circular. The court assumes that deprivations are permanent transfers of ownership of things that are compensable and, therefore, that a permanent transfer of title is a deprivation unless it is non-compensable. Çoban avoids this logical flaw by distinguishing interferences according to an external criterion. However, in proposing governmental motives as that criterion, he perpetuates what is, in my view, the real flaw in the three rules. Like the original dissenting judge in *Handyside*, I believe that the state party's reasons for interfering with possessions should generally be considered when assessing the justification for the interference. At the classification stage of the inquiry, they may be used, at most, to consider whether the measure was a tax or penalty. Otherwise, classifying the interference according to the government's real or ostensible motives confuses means and ends of the interfering measure and

365 Çoban, *Property Rights within the European Convention on Human Rights*, pp. 172, 190.

366 Çoban, *Property Rights within the European Convention on Human Rights*, pp. 189–190.

367 Çoban, *Property Rights within the European Convention on Human Rights*, p. 191.

368 On the merger of the criteria for justified interferences, see further Harris et al., *Law of the European Convention on Human Rights*, pp. 667–668; Janis, Kay, and Bradley, *European Human Rights Law*, pp. 528, 539–540; Kaiser, "Art. 1 ZPI," para. 31; Kriebaum, *Eigentumsschutz im Völkerrecht*, p. 226; White and Ovey, *The European Convention on Human Rights*, p. 503. Cf. Merrills and Robertson, *Human Rights in Europe*, pp. 239–240; Peters and Altwicker, *Europäische Menschenrechtskonvention*, paras. 32.24, 32.28.

369 Harris et al., *Law of the European Convention on Human Rights*, p. 667. See, e.g., *Yukos* (2012) 54 EHRR 19, paras. 559, 566, 648.

370 See, e.g., *Jahn* (2006) 42 EHRR 49, paras. 111–117; *Mago and Others* v. *Bosnia and Herzegovina*, App. Nos. 12959/05 et al. (ECtHR, May 3, 2012), para. 104; *Grainger and Others* v. *UK*, App. No. 34940/10 (ECtHR, July 10, 2012), para. 42. Cf. *Holy Monasteries* (1995) 20 EHRR 1, paras. 66, 71–74; *NA and Others* v. *Turkey*, App. No. 37451/97 (ECtHR, October 11, 2005), para. 41; *Vistiņš and Perepjolkins* v. *Latvia*, App. No. 71243/01 (ECtHR, October 25, 2012), para. 127. See further Kaiser, "Art. 1 ZPI," paras. 39–41; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.25.

risks obscuring the actual severity of the interference because of its alleged social expediency.[371]

Support for this conclusion can be drawn from the EU courts' sanctions case law. When applying a potential *jus cogens* right in *Kadi* v. *Council of the European Union and Commission of the European Communities* (*Kadi No. 1*), the EGC argued that the asset freezes had not arbitrarily deprived the applicant of his possessions as, amongst other things, it was an aspect of the UN regime for protecting international peace and security against terrorism.[372] It added that the freezes were "temporary precautionary measure[s] which, unlike confiscation, [did] not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[373] By contrast, when applying the general principles of EU law in *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* (*Kadi No. 2*), the ECJ referred to Art. 1 ECHR-P1 but took into account the scope and the duration of the orders and used this as the basis for applying its proportionality requirement.[374] In its preliminary observations in *Yassin Abdullah Kadi* v. *European Commission* (*Kadi No. 3*), the EGC was even prepared to ask:

> whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding of this Court, at paragraph 248 of its judgment in *Kadi*, and reiterated in substance by the Court of Justice at paragraph 358 of its own judgment in *Kadi*, according to which the freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. The same is true of the statement of the Security Council, repeated on a number of occasions, in particular in Resolution 1822 (2008), that the measures in question "are preventative in nature and are not reliant upon criminal standards set out under national law". In the scale of a human life, 10 years in fact represent a

[371] See also Gallant, *Money Laundering and the Proceeds*, p. 38; Peukert, "Anmerkung zur AGOSI-Entscheidung," 510.

[372] Case T-315/01, *Kadi* v. *Council of the European Union and Commission of the European Communities* [2005] ECR II–3353, paras. 244–247. See also Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* [2005] ECR II-03533; Case T-49/04, *Faraj Hasan* v. *Council of the European Union and Commission of the European Communities* [2006] ECR II-00052; Case T-253/02, *Chafiq Ayadi* v. *Council of the European Union* [2006] ECR II-02139.

[373] *Kadi No. 1* [2005] ECR II-03649, para. 248.

[374] Case C-402/05, P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, paras. 357–358.

> substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one.[375]

In *Commission, Council, United Kingdom* v. *Yassin Abdullah Kadi* (*Kadi No. 4*), the ECJ distanced itself from this statement.[376] The applicants had claimed that the EGC had erred in law by tentatively equating the freezing orders with "criminal penalties."[377] The ECJ did not directly respond to this submission; however, it described the measures as preventative in nature and cited a paragraph of *Kadi No. 2* that the EGC had called into question in *Kadi No. 3*.[378] Other paragraphs of *Kadi No. 2*, to which the ECJ referred, emphasize the need for balance between the individual rights to property and the public interest in security.[379] In this way, the ECJ seems to employ a similar logic to the ECtHR in its three rules. That said, the ECJ clearly acknowledged that "the restrictive measures at issue have . . . a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application."[380] The judgment in *Kadi No. 4* thus suggests an approach to the categorization of interferences that takes into account the public objective of the interference but permits greater cognizance to be taken of its factual impact on the incidences of ownership.

In a similar way, the ECtHR has refused to apply its traditional approach to classification in several unlawful confiscation cases and one case of disproportionate confiscation.[381] In *Konovalov* v. *Russia*, it found that the sale of the applicant's car pursuant to an unfinalized court order deprived him of possessions under the second rule, though the original charging order and the transfer of the car to the court bailiff for sale were controls of use.[382] In *Frizen*, it

[375] Case T-85/09, *Yassin Abdullah Kadi* v. *European Commission* [2010] ECR II-05177, para. 150.

[376] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council, United Kingdom* v. *Yassin Abdullah Kadi* (ECJ, July 18, 2013).

[377] *Kadi No. 4* (ECJ, July 18, 2013), para. 75.

[378] [2008] ECR I-06351, para. 358.

[379] *Kadi No. 4* (ECJ, July 18, 2013), para. 132, referring to *Kadi No. 2* [2008] ECR I-06351, paras. 369, 375.

[380] *Kadi No. 4* (ECJ, July 18, 2013), para. 132.

[381] See also Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.99; Harris et al., *Law of the European Convention on Human Rights*, p. 668. See also the series of cases on the almost total taxation of Hungarian civil servants' severance payments, e.g., *Gáll* v. *Hungary*, App. No. 49570/11 (ECtHR, June 25, 2013) (not final), paras. 32–33; *R.Sz.* v. *Hungary*, App. No. 41383/11 (ECtHR, July 2, 2013) (not final), paras. 42–43.

[382] App. No. 43626/02 (ECtHR, May 24, 2007), para. 41. See also *Vasilyev* (ECtHR, December 13, 2011), paras. 80–84. Cf. *Schmelzer* v. *Germany*, App. No. 45176/99 (ECtHR, December 12, 2000), "The Law," para. 2.

found it unnecessary to determine which part of the third paragraph applied.[383] In *Denisova*, the court dispensed with the classification process altogether, considering that "the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance."[384] It had implicitly reached the same conclusion in *Balkan* v. *Russia* with respect to a baseless confiscation of cash,[385] and in *Patricia* v. *Bulgaria* with respect to a prolonged and baseless retention of a wholesaler's alcohol and tobacco products.[386] It also recognized but refused to take its traditional approach in *Waldemar Nowakowski* v. *Poland*, which involved the discretionary confiscation of antique arms and weapons that were alleged to be the object of a firearms offense.[387] The court noted that the criminal proceedings had been discontinued; that the applicant had acted in good faith and without criminal intent; and that some of the objects no longer "qualified as weapons." It then distinguished *Phillips*, *Arcuri*, *Raimondo*, and *Butler*:

> The circumstances of the case were therefore fundamentally different from cases where confiscation orders were made in the context of criminal proceedings concerning charges of serious or organised crime and where there was a strong suspicion or certainty confirmed by a judicial decision that the confiscated assets were the proceeds of an offence . . ., which were deemed to have been unlawfully acquired . . . or were intended for use in illegal activities . . . [I]n these circumstances the confiscation order covering the entire collection should be regarded as a deprivation of property.[388]

5.3.4 Preliminary conclusions

The ECtHR, like the ECmHR, EGC, and ECJ, has read Art. 1 ECHR-P1 as regulating three types of interferences, which it implicitly distinguishes according to their purpose, duration, and intensity. In classifying restraints and confiscations, the court has distinguished between measures that target the instrumentalities, objects, and proceeds of crime and, in classifying confiscations of proceeds, between penalties or other forms of control in the general interest.[389] It has generally dealt with all such measures under the third rule: confiscations because they enforce restrictions on the use of things

[383] (2006) 42 EHRR 19, para. 29. See also *Sud Fondi SRL and Others* v. *Italy*, App. No. 75909/01 (ECtHR, January 20, 2009), paras. 128–129; *Varvara* (ECtHR, October 29, 2013) (not final), para. 129.

[384] (ECtHR, April 1, 2010), para. 55.

[385] App. No. 68443/01 (ECtHR, June 9, 2005), paras. 26, 38.

[386] App. No. 71835/01 (ECtHR, March 4, 2010), paras. 90–99.

[387] App. No. 55167/11 (ECtHR, July 24, 2012), paras. 13–19 (not final).

[388] *Waldemar Nowakowski* (ECtHR, July 24, 2012), para. 46.

[389] *Frizen* (2006) 42 EHRR 19, para. 31.

in the general interest or to secure the payment of penalties; restraints because they enable confiscation and do not involve a transfer of title to the state. This reasoning is vulnerable to several criticisms, not the least of which is the importance it gives to governmental purpose as a criterion for distinguishing (compensable) deprivations from (non-compensable) controls of use that result in the permanent transfer of title to the state. It was therefore of note that the court took a different tack in cases on unlawful confiscations and seizures in *Waldemar Nowakowski*. I welcome these developments, though I note that the court has still not enunciated its criteria for distinguishing the interferences from each other. If and when it does, I submit that the court should pay most attention to the severity and duration of the government measures. In the meantime, *Saccoccia* suggests that the ECtHR will treat confiscations executed pursuant to requests for assistance in asset recovery cases as controls of use under the third rule.

5.4 The lawfulness of the interference

If the applicant establishes that the respondent state has interfered with his/her (or its) possessions, the burden shifts to the government to show that its actions were justified.[390] The "first and most important" justification is lawfulness.[391] An inherent requirement of the ECHR,[392] lawfulness is an express requirement of Art. 1 ECHR-P1. The second sentence provides that deprivations are to be "subject to the conditions provided by law and by the general principles of international law," whilst the third says that controls of use may be imposed "[t]o enforce such laws as [the state party] deems necessary."[393] Throughout Art. 1 ECHR-P1 and the convention as a

[390] Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 6.214; Janis, Kay, and Bradley, *European Human Rights Law*, p. 539; White and Ovey, *The European Convention on Human Rights*, pp. 9–10.

[391] *Iatridis* (2000) 30 EHRR 97, para. 58; *Former King of Greece* (2001) 33 EHRR 21, para. 79; *Beyeler* (2001) 33 EHRR 52, para. 108; *Frizen* (2006) 42 EHRR 19, para. 33; *Capital Bank* (2007) 44 EHRR 48, para. 133; *Ismayilov* (ECtHR, November 6, 2008), para. 31; *Sun* (ECtHR, February 5, 2009), para. 26; *Patrikova* v. *Bulgaria*, App. No. 71835/01 (ECtHR, March 4, 2010), para. 82; *Hoare* (2011) 53 EHRR SE1, para. 52; *Yukos* (2012) 54 EHRR 19, para. 559; *Adzhigovich* (ECtHR, October 8, 2009), para. 28; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 119; *Grudić* v. *Serbia*, App. No. 31925/08 (ECtHR, April 17, 2012), para. 73. See generally Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 18.114–18.115; Çoban, *Property Rights within the European Convention on Human Rights*, pp. 196–197; Cremer, "Eigentumsschutz," para. 117; Gelinsky, *Schutz des Eigentums*, pp. 96–102; Harris et al., *Law of the European Convention on Human Rights*, pp. 669–672; Kaiser, "Art. 1 ZPI," para. 35; Kriebaum, *Eigentumsschutz im Völkerrecht*, pp. 437–445; Janis, Kay, and Bradley, *European Human Rights Law*, pp. 540–541.

[392] *Iatridis* (2000) 30 EHRR 97, para. 58; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 119. See generally Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," paras. 21–35.

[393] See also *Vasilyev* (ECtHR, December 13, 2011), para. 80.

whole, lawfulness encompasses two interrelated requirements: first, that the interferences have a basis in the law of the respondent state,[394] and, second, that those laws themselves be compatible with the rule of law.[395] A finding of unlawfulness in either sense renders the interference a violation of the convention.[396]

Lawfulness will, I submit, be an important legal battle ground in challenges to cooperative confiscations that aim at asset recovery. First, as I pointed out in Chapter 2, the success of efforts to recover illicit wealth through international cooperation in criminal matters is frequently attributed to post-transition – even post-request – law reforms. Second, the anti-corruption treaties and the related MLATs say very little about the quality of the laws that criminalize corruption or enable confiscation or cooperation, their references to domestic laws and fundamental principles notwithstanding. Third, as I will explore further below, the treaties restrict traditional grounds for refusing assistance that indirectly ensure the lawfulness of acts of international cooperation in criminal matters. In my submission, the ECtHR may be asked to consider whether the requested state acted in accordance with its laws in executing the foreign confiscation order; if so, whether those laws were compatible with the rule of law; and/or whether the legal basis for the foreign confiscation orders was so weak – or the underlying criminal or confiscation laws so arbitrary – that it was a flagrant denial of the right under Art. 1 ECHR-P1.

[394] On Art. 1 ECHR-P1, see *Špaček, s.r.o.* v. *Czech Republic*, App. No. 26449/95 (2000) 30 EHRR 1010, para. 54; *Baklanov* v. *Russia*, App. No. 68443/01 (ECtHR, June 9, 2005), para. 40; *Zlínsat* (ECtHR, June 15, 2006), para. 98; *Hoare* (2011) 53 EHRR SE1, para. 55; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 120. See also *Sunday Times* v. *UK*, App. No. 6538/74 (1979–1980) 2 EHRR 245, para. 47 (Art. 10 ECHR); *Silver* v. *UK*, App. Nos. 5947/72 et al. (1983) 5 EHRR 347, para. 85 (Art. 8 ECHR); *Malone* v. *UK*, App. No. 8691/79 (1985) 7 EHRR 14 (Art. 8 ECHR); *Cantoni* (ECtHR, November 15, 1996) (Art. 7 ECHR); *Kopp* v. *Switzerland*, App. No. 23224/94 (1999) 27 EHRR 91, paras. 55–61 (Art. 8 ECHR). See generally Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," paras. 21–26.

[395] *James* (1986) 8 EHRR 123, para. 67; *Former King of Greece* (2001) 33 EHRR 21, para. 79; *Zlínsat* (ECtHR, June 15, 2006), para. 98; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 120. See generally Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," paras. 27–35.

[396] *Iatridis* (2000) 30 EHRR 97, paras. 58–62; *Frizen* (2006) 42 EHRR 19, para. 33; *Zlínsat* (ECtHR, June 15, 2006), para. 100; *Konovalov* (ECtHR, May 24, 2007), para. 47; *Sun* (ECtHR, February 5, 2009), para. 33. Cf. *Doğan* (2005) 41 EHRR 15, para. 149; *Megadat.com* (ECtHR, April 8, 2008), para. 67; *Novikov* (ECtHR, June 18, 2009), para. 44; *Rafig Aliyev* (ECtHR, December 6, 2011), para. 127; *Vasilyev* (ECtHR, December 13, 2011), para. 85. See further Harris et al., *Law of the European Convention on Human Rights*, pp. 669–670. Cf. Fischborn, *Enteignung ohne Entschädigung*, pp. 65–66.

5.4.1 The legal basis for enforcement orders

A state party may only impair the peaceful enjoyment of possessions if it acts in accordance with its own binding legislative acts, judge-made rules, and subordinate executive regulations.[397] However, the ECtHR is not a "fourth instance" for judicial (or administrative) review of decisions made at the national level.[398] As the Former First Section was at pains to say in *OAO Neftyanaya Kompaniya Yukos* v. *Russia*:

> according to its well-established case-law it is not [the court's] task to take the place of the domestic courts, which are in the best position to assess the evidence before them and establish the facts. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable . . . or if the court decisions have been issued in "flagrant denial of justice".[399]

Therefore, both the satisfaction of requirements of local law and the scope of the ECtHR's powers of review are likely to be issues in asset recovery cases brought before the ECtHR under Art. 1 ECHR-P1.[400]

In *Saccoccia* and *Duboc*, the applicants sought to show that the Viennese criminal courts had exceeded their authority by enforcing final forfeiture orders without assurances of reciprocity from the US; by ignoring the Austrian statute of limitations for forfeiture; and by agreeing to confiscate substitute assets rather than the actual "fruits and instrumentalities" of their crimes.[401] The ECtHR found the Austrian *exequatur* order indeed "had a basis in Austrian law." Section 64 of the Austrian Extradition and Legal Assistance Act (*Auslieferungs- und Rechtshilfegesetz*) set out the conditions for enforcement of foreign pecuniary measures and penalties,[402] whereas Art. 17 of the US/Austrian MLAT provided that "[t]he Contracting Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the fruits and instrumentalities of offences, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions."[403] Noting that "[its] power to review compliance with domestic law [was] limited," the First Section held

[397] Peters and Altwicker, *Europäische Menschenrechtskonvention*, paras. 32.24, 32.28, 32.29. See, e.g., *Iatridis* (2000) 30 EHRR 97, para. 58; *Špaček* (2000) 30 EHRR 1010, para. 54; *Baklanov* (ECtHR, June 9, 2005), para. 41.

[398] Harris et al., *Law of the European Convention on Human Rights*, p. 14.

[399] (2012) 54 EHRR 19, para. 589; see also paras. 534, 559, 598, 604.

[400] See, e.g., *Benet Praha* (ECtHR, February 24, 2011), paras. 93–98.

[401] *Saccoccia* (2010) 50 EHRR 11, paras. 15–25, 82; *Duboc* (ECtHR, June 5, 2012), para. 50. See also *Saccoccia* (ECtHR, July 5, 2007), para. 4.

[402] *Saccoccia* (2010) 50 EHRR 11, para. 87; *Duboc* (ECtHR, June 5, 2012), para. 52.

[403] Treaty between the Government of the Republic of Austria and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, Vienna,

that "the Austrian courts dealt in detail with the applicant's arguments and gave extensive reasons for their finding that the above-mentioned provisions provided a legal basis for executing the final forfeiture order. There [was] nothing to show that their application of the law went beyond the reasonable limits of interpretation."[404] Thus, the ECtHR rejected all three of the applicant's contentions.

The court's reasoning in *Saccoccia* and *Duboc* is consistent with its case law on Art. 5(1)(f) ECHR – arrest or detention with a view to deportation or extradition.[405] Already in *Bozano* v. *Switzerland*, the ECmHR took the view that the words "lawful" and "procedure prescribed by law" required compliance with local law as interpreted and applied by local courts.[406] It reviewed the steps taken by the French and Swiss police and a decision of the Swiss Federal Court, which found that Swiss officials had acted in compliance with the COE's European Convention on Extradition[407] when they arrested the applicant on French soil:

> The fact that the Swiss policemen entered French territory to take charge of the applicant assuming this to be admitted, was held by the Federal Court not to be a breach either of Swiss law or of the rules governing relations between Switzerland and France. Given that there is no hint of arbitrariness in that decision, it is not for the Commission to substitute its own interpretation of national law for that of the Swiss supreme court.[408]

Later, in *Quinn* v. *France*, the ECtHR affirmed that national courts were not only better placed to assess compliance with domestic law, but also entitled, in making that assessment, to give weight to the state's international commitments on MLA:

> That provision (art. 5–1) requires in the first place that the detention be "lawful", which includes the condition of compliance with a procedure prescribed by law. The Convention here refers back essentially to national

February 23, 1995, in force August 1, 1998 (Austria/US MLAT), Art. 17(2) cited *Saccoccia* (2010) 50 EHRR 11, para. 54; *Duboc* (ECtHR, June 5, 2012), para. 29.

404 *Saccoccia* (2010) 50 EHRR 11, para. 87.

405 See, e.g., *Bozano* v. *Switzerland*, App. No. 9009/80 (ECmHR, July 12, 1984), "The Law," para. 1(a); *Bozano* v. *France*, App. No. 9990/82 (ECtHR, December 18, 1986), para. 55; *Quinn* v. *France*, App. No. 36887/97 (1996) 21 EHRR 529, para. 47; *Amuur* v. *France*, App. No. 19776/92 (1996) 22 EHRR 533, para. 50; *Shamayev and Others* v. *Georgia and Russia*, App. No. 36378/02 (ECtHR, April 12, 2005), para. 396; *Garabayev* v. *Russia*, App. No. 38411/02 (2009) 49 EHRR 12, para. 87; *Saadi* v. *UK*, App. No. 13229/03 (2007) 44 EHRR 50, para. 35; *Saadi* v. *UK*, App. No. 13229/03 (2008) 47 EHRR 17, para. 69; *Ismoilov and Others* v. *Russia*, App. No. 2947/06 (2009) 49 EHRR 42, para. 136; *Soldatenko* v. *Ukraine*, App. No. 2440/07 (ECtHR, October 23, 2008), para. 110; *Khodzhayev* v. *Russia*, App. No. 52466/08 (May 12, 2010), paras. 139–140.

406 (ECmHR, July 12, 1984), "The Law," para. 1(a).

407 Paris, December 13, 1957, in force April 18, 1960, 24 ETS.

408 *Bozano* (ECmHR, July 12, 1984), "The Law," para. 1(a).

> law, but it also requires that any deprivation of liberty be in conformity with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness . . . The national courts, which are in a better position than the Convention institutions to determine whether domestic law has been complied with, found that the contested detention was lawful in its initial stage and as regards its purpose. They could legitimately take account of the requirements of international mutual assistance in the judicial field.[409]

The court, unlike the commission, found no evidence that the government had abused the extradition process to detain the applicant; in this respect, it agreed with the French courts that the detention was lawful.[410]

The court has restated the need for conformity with "substantive and procedural rules of national law" in subsequent cases on detention for the purposes of extradition and expulsion.[411] Some judgments have distinguished, however, between detention orders that are vitiated by "gross and obvious" irregularities and orders that are flawed but *prima facie* valid.[412] A relevant example is *Garabayev* v. *Russia*.[413] A former accountant at the Turkmen Central Bank had complained to the ECtHR of his unlawful detention and extradition to Turkmenistan to face a charge of "large-scale embezzlement of state property."[414] In finding for the applicant, the court relied primarily on a Moscow City Court judgment in which it was established that the applicant's dual Russian nationality had always made him immune from extradition under Russian law.[415] Later, in *Kreydich* v. *Ukraine*, it found detention unlawful once the applicant had been granted refugee status and so became exempt from extradition under Ukrainian law.[416]

When decisions to enforce foreign civil orders are alleged to violate qualified rights and freedoms, the court would appear to take a similar view of its powers to second-guess interpretations by domestic courts. In assessing the applicant's complaints under Arts. 10 and 13 ECHR in *Lindberg*, the court found it sufficient to note that the Swedish Supreme Court had been satisfied that the recognition and enforcement of the Norwegian civil order would not threaten Swedish public order.[417] The ECtHR also "s[aw] no reasons

[409] (1996) 21 EHRR 529, "Judgment," para. 47.

[410] *Quinn* (1996) 21 EHRR 529, "Judgment," para. 47. Cf. "Proceedings Before the Commission," paras. 53–61.

[411] See, e.g., *Amuur* (1996) 22 EHRR 533, para. 50; *Soldatenko* (ECtHR, October 23, 2008), para. 110; *Saadi* (2009) 49 EHRR 30, para. 67; *Nasrulloyev* v. *Russia*, App. No. 656/06 (2010) 50 EHRR 18, para. 70.

[412] *Khudoyorov* v. *Russia*, App. No. 6847/02 (2007) 45 EHRR 5, para. 129; *Liu* v. *Russia*, App. No. 42086/05 (2008) 47 EHRR 33, para. 79: *Mooren* v. *Germany*, App. No. 11364/03 (2010) 50 EHRR 23, para. 75.

[413] (2009) 49 EHRR 12.

[414] *Garabayev* (2009) 49 EHRR 12, paras. 8–9.

[415] *Garabayev* (2009) 49 EHRR 12, paras. 22, 88–91.

[416] App. No. 48495/07 (ECtHR, December 10, 2009), para. 40.

[417] (2004) 38 EHRR CD239, "The Law," para. 1.

to doubt" that Sweden had acted as prescribed by law in interfering with the applicant's freedom of expression under Art. 10 ECHR read alone.[418] More recently, considering the compatibility with Art. 8 ECHR of orders to return children under the Hague Convention,[419] the court has affirmed:

> [I]t is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or to international agreements. The Court's role is confined to ascertaining whether those rules are applicable and whether their interpretation is compatible with the Convention.[420]

In *Neulinger and Shuruk* v. *Switzerland*, the ECtHR did, however, reach a different conclusion on the permissibility of a child's return than the Swiss Federal Supreme Court.[421]

The court's approach to assessing the legal basis of acts of cooperation under Arts. 5, 8, and 10 ECHR accords with its approach to assessing the lawfulness of confiscation orders under Art. 1 ECHR-P1.[422] On the one hand, the court has found that restraints and confiscations in criminal or administrative proceedings must be referable to an identified provision of domestic law. In *Baklanov*, the applicant had commissioned a third party to transport USD 250,000 of his funds from Latvia to Russia.[423] The courier failed to declare the cash and it was seized by customs and subsequently confiscated by the Golovinskiy District Court as the object of smuggling,[424] the Moscow City Court refusing leave to appeal.[425] ECtHR found the confiscation without a basis in Russian law because confiscation was no longer a penalty for smuggling under the Russian Criminal Code; because the Russian Code of Criminal Procedure provided for the return of the objects of crime to innocent owners; and because the Russian courts had not determined, in the alternative, that the funds were the proceeds of crime.[426] Similarly, in *Frizen*,

418 *Lindberg* (2004) 38 EHRR CD239, "The Law," para. 2.

419 The Hague, October 25, 1980, in force December 1, 1983, 1343 UNTS 89.

420 *Neulinger* (2012) 54 EHRR 31, para. 100; *Lipkowsky and McCormack* v. *Germany*, App. No. 26755/10 (ECtHR, February 18, 2011), "The Law," para. 1.

421 (2012) 54 EHRR 31, paras. 141–151.

422 *Baklanov* (ECtHR, June 9, 2005), paras. 42–43; *Frizen* (2006) 42 EHRR 19, paras. 13–15, 34–36; *Konovalov* (ECtHR, May 24, 2007), paras. 45–46; *Karamitrov* (ECtHR, January 10, 2008), paras. 25–26, 74; *Khuzhin* (ECtHR, October 23, 2008), para. 128. See also *Saghinadze* (ECtHR, May 27, 2010), para. 112; *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), paras. 877–884.

423 (ECtHR, June 9, 2005), paras. 9–10.

424 *Baklanov* (ECtHR, June 9, 2005), paras. 11–12.

425 *Baklanov* (ECtHR, June 9, 2005), paras. 13–16.

426 *Baklanov* (ECtHR, June 9, 2005), paras. 42–44. Cf. *Ismayilov* (ECtHR, November 6, 2008), para. 32.

Russia's "consistent failure to indicate a legal provision that could be construed as the basis for the forfeiture," either before the ECtHR or at the national level, rendered the "compensatory" confiscation unlawful.[427] In reaching this decision, the court "recalled" the limitations of its own "power to review compliance with domestic law."[428] But it also disregarded the fact that the car represented the proceeds of embezzlement and that there was a public interest in combating corruption and addressing its harmful consequences.[429] Conversely, in *Karamitrov* and *Patrikova*, in which the Bulgarian executive had simply failed to obey judicial orders to return unlawfully seized goods, the court based its finding of unlawfulness on the domestic courts' decisions.[430]

On the other hand, if a legal basis for restraint and confiscation exists, its substantive and procedural conditions must have been fulfilled in the applicant's case. In *Konovalova*, Russian customs officials failed to inform the bailiff of the applicant's pending appeal.[431] The bailiff, for his part, failed to look for alternative assets to satisfy the applicant's debt before selling the applicant's car. He also omitted to inform the applicant about the enforcement proceedings and so deprived him of the opportunity to buy back his vehicle, even when another purchaser could not be found.[432] In *Khuzhin*, the procedural and substantive conditions for the confiscation of assets were not met since the applicant had not been charged with a predicate offense to confiscation and no one had initiated civil party proceedings within the criminal trial.[433] In *Raimondo*, the interference *became* unlawful once the conditions for confiscation ceased to exist.[434] By contrast, in *Yukos*, the ECtHR agreed with the domestic courts that "abundant witness statements and documentary evidence" showed the applicant's use of transfer pricing and letterbox companies to reduce its apparent tax burden.[435] In *Butler*, it found the preventative confiscation of cash destined for drug trafficking to be lawful simply by commenting that a confiscation order

[427] (2006) 42 EHRR 19, para. 36. See also *Adzhigovich* (ECtHR, October 8, 2009), paras. 31–34.

[428] *Frizen* (2006) 42 EHRR 19, para. 36. See also *Rafig Aliyev* (ECtHR, December 6, 2011), paras. 125–126.

[429] *Frizen* (2006) 42 EHRR 19, paras. 13–15, 34–36. See also *Adzhigovich* (ECtHR, October 8, 2009), para. 32; *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), para. 884. Cf. *Denisova* (ECtHR, April 1, 2010), para. 57.

[430] *Patrikova* (ECtHR, March 4, 2010), paras. 10, 83–87, 98; *Karamitrov* (ECtHR, January 10, 2008), paras. 25–26, 74.

[431] (ECtHR, May 24, 2007). [432] *Konovalova* (ECtHR, May 24, 2007), paras. 45–46.

[433] (ECtHR, October 23, 2008), para. 128. See also *Rafig Aliyev* (ECtHR, December 6, 2011), paras. 116, 121–124.

[434] (1994) 18 EHRR 237, para. 36. See also *Venditelli* (ECtHR, July 18, 1994), para. 38; *Plakhteyev and Plakhteyev* (ECtHR, March 12, 2009), paras. 60, 62.

[435] (2012) 54 EHRR 19, paras. 590–591.

"was effected pursuant to and in compliance with the provisions of the relevant sections of the [relevant act]."[436]

So it would seem that decisions to execute foreign confiscation and restraining orders must be referable to an identified rule of local law in the requested state. The conditions for execution of the request must have been satisfied when the orders were issued and must remain satisfied as long as the order is in effect. In determining whether the legal basis existed, the ECtHR generally defers to the courts of the respondent state; its deference ends, however, when the domestic court's interpretation was arbitrary or manifestly erroneous.[437] It is most likely to reach such a conclusion when the executive ignores a conflicting local (judicial) decision or the judiciary has not cited a provision of domestic law that supports its decision to impose or maintain the measure.[438]

5.4.2 The compatibility of assistance powers with the rule of law

If the respondent state demonstrates that its decision to execute the foreign order had a basis in local law, can it show that those domestic rules uphold the rule of law? A norm authorizing an interference with possessions will be arbitrary (legally uncertain) if it is insufficiently accessible, precise, and foreseeable,[439] or if it is not accompanied by appropriate procedural safeguards.[440] As there is no "global definition" of arbitrariness in the ECHR,[441] however, I deduce possible arbitrariness arguments from the decision in *Saccoccia* (as affirmed in *Duboc*), Strasbourg's jurisprudence on confiscation and extradition, as well as academic commentary on conditions for international cooperation in criminal matters. Procedural safeguards also being relevant to proportionality, I consider them below.[442]

[436] (ECtHR, June 27, 2002), "The Law," para. C.

[437] *Beyeler* (2001) 33 EHRR 52, para. 108. See further Harris et al., *Law of the European Convention on Human Rights*, p. 670; Kriebaum, *Eigentumsschutz im Völkerrecht*, pp. 439–440.

[438] See also Fischborn, *Enteignung ohne Entschädigung*, p. 66.

[439] See, e.g., *Lithgow* (1986) 8 EHRR 39, para. 110; *Špaček* (2000) 30 EHRR 1010, para. 54; *Beyeler* (2001) 33 EHRR 52, para. 110; *Carbonara* (ECtHR, May 30, 2000), para. 64; *Baklanov* (ECtHR, June 9, 2005), para. 41; *Zlínsat* (ECtHR, June 15, 2006), para. 98; *Sildedzis* v. *Poland*, App. No. 45214/99 (2007) 44 EHRR 13, para. 48; *Yukos* (2012) 54 EHRR 19, para. 568; *Centro Europa 7 SRL* (ECtHR, June 7, 2012), paras. 140–143, 188.

[440] See, e.g., *Hentrich* v. *France*, App. No. 13616/88 (1994) 18 EHRR 440, paras. 40–42; *Zlínsat* (ECtHR, June 15, 2006), para. 98; *Capital Bank* (2007) 44 EHRR 48, para. 134.

[441] On Art. 5(1), see *Saadi* (2008) 47 EHRR 17, para. 68, applied *Mooren* (2010) 50 EHRR 23, para. 77.

[442] See p. 228 and following below.

5.4.2.1 The accessibility, precision, and foreseeability of cooperative confiscations laws

Beginning with cases on detention for the purposes of extradition under Art. 5 (1)(f) ECHR, I submit that the requirements of accessibility, precision, and foreseeability remain part of the lawfulness test notwithstanding the international motivations for the interference.[443] So, in *Nasrulloyev* v. *Russia*, the ECtHR found the applicant's detention unlawful because the competent Russian courts and prosecutors had adopted "inconsistent and mutually exclusive" interpretations of the procedures regulating his detention as an alleged fugitive offender.[444] In *Soldatenko* v. *Ukraine*, furthermore, the court confirmed that the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention)[445] could provide a legal basis for extradition as it had been incorporated into Ukrainian law.[446] However, it was drafted in such broad terms that it should have been supplemented by domestic provisions on the procedures for ordering detention.[447] As there were no such procedures in the Ukrainian Code of Criminal Procedure and the Supreme Court's supplementary resolutions were merely advisory, the applicant's detention was arbitrary.[448]

Cases on Art. 5(1)(f) ECHR may guide the court in applying the legal certainty requirement of Art. 1 ECHR-P1 to enforcement orders since they deal with the lawfulness of acts of international cooperation in criminal matters. That said, the court may apply the lawfulness requirement more strictly in cases on Art. 5(1)(f) ECHR given its particular importance to individual autonomy.[449] It is significant, therefore, that the ECtHR has found domestic laws that enable restraints and confiscations in connection

[443] See also Lagondy, "Allgemeine justizielle Zusammenarbeit," para. 22.

[444] (2010) 50 EHRR 18, paras. 72–77, applied *Ismoilov* (2009) 49 EHRR 42, para. 137.

[445] Minsk, January 22, 1993, in force May 19, 1994, reprinted Office of the UNHCR, *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR* (Geneva: UNHCR, 2007), pp. 1860–1879.

[446] (ECtHR, October 23, 2008), para. 112.

[447] *Soldatenko* (ECtHR, October 23, 2008), para. 112. See also *Svetlorusov* v. *Ukraine*, App. No. 2929/05 (March 12, 2009), paras. 47–48; *Dubovik* v. *Ukraine*, App. Nos. 33210/07 and 41866/08 (ECtHR, October 15, 2009), paras. 55–57; *Kreydich* (ECtHR, December 10, 2009), paras. 39–40; *Kaboulov* v. *Ukraine*, App. No. 41015/04 (2010) 50 EHRR 39, paras. 36–37; *Puzan* v. *Ukraine*, App. No. 51243/08 (ECtHR, February 18, 2010), paras. 44–46; *Molotchko* v. *Ukraine*, App. No. 12275/10 (ECtHR, April 26, 2012), paras. 150–175.

[448] *Soldatenko* (ECtHR, October 23, 2008), paras. 113–114. See also *Ademovic* v. *Turkey*, App. No. 28523/03 (ECtHR, June 5, 2012), para. 38.

[449] E.g., *Nasrulloyev* (2010) 50 EHRR 18, para. 71; *Medvedyev and Others* v. *France*, App. No. 3394/03 (2010) 51 EHRR 39, para. 117. On the notion of qualified and absolute rights and a possible "hierarchy" of convention rights, see generally White and Ovey, *The European Convention on Human Rights*, pp. 8–10.

with domestic criminal and administrative offenses to be arbitrary on several occasions, including in cases with a subtext of corruption.

In *Zlínsat* v. *Bulgaria*, the court considered the precision and foreseeability of executive orders "suspend[ing] the performance of a privatization contract" and "evict[ing] the [applicant] company from the hotel it had acquired thereby."[450] The Sofia City Prosecutor's Office had made the orders under sections of the Code of Criminal Procedure and Judicial Power Act. The former obliged "the [criminal investigation authorities] ... to take the necessary measures to prevent a criminal offence, ... which there is reason to believe ... will be committed." These measures could have included "the temporary impounding of the means which could be used for committing the offence."[451] The latter empowered them "to take all measures provided for by law, if they have information that a publicly prosecutable criminal offence or other illegal act may be committed."[452] The ECtHR implied that it was not sufficiently clear from these provisions that they would apply to the immaterial objects of (corruption) offenses at issue in that case. In any event, they were too broadly drafted to be compatible with the rule of law: "The above-mentioned statutory provisions used particularly vague terms . . ., which made it almost impossible to foresee under what conditions the competent prosecutors will choose to act and what measures they will take in the event they considered, without independent control, that an offence might be committed." As they were not accompanied by procedures for judicial review, the rules gave the prosecutor "unfettered discretion to act in any manner it sees fit," even when this would have "serious and far reaching consequences for the rights of private individuals and entities."[453] As a result, the interference was unlawful under Art. 1 ECHR-P1.

By contrast, in *Honecker*, the ECtHR found a broad confiscation power, which had been vested in the East German legislature, compatible with Art. 1 ECHR-P1.[454] Section 5(1) of the Act of June 29, 1990, on proof of the lawful provenance of convertible funds (*Gesetz über den Nachweis der Rechtmässigkeit des Erwerbs von Umstellungsguthaben vom 29. Juni 1990*) established a twenty-one-member East German parliamentary committee with power to inquire into the origins of funds that had been declared for conversion into West German marks. Under s. 5(2), the committee was to find

[450] (ECtHR, June 15, 2006), para. 93. See also *Sildedzis* (2007) 44 EHRR 13, para. 48; *Sun* (ECtHR, February 5, 2009), para. 32.

[451] *Zlínsat* (ECtHR, June 15, 2006), para. 37. See also *Yukos* (2012) 54 EHRR 19, paras. 572–573 (imposition of financial penalties unlawful under Art. 1 ECHR-P1 because the applicant's criminal liability resulted from an unforeseeable reading of the statute of limitations in the Russian Tax Code).

[452] *Zlínsat* (ECtHR, June 15, 2006), para. 38.

[453] *Zlínsat* (ECtHR, June 15, 2006), para. 99.

[454] (ECtHR, November 15, 2001), "The Law," para. 1.

money had been unlawfully acquired "where all or some of it was obtained through criminally reprehensible, irregular (*ordnungswidrig*) or flagrantly immoral acts, acts constituting an abuse of state prerogatives or public office, or activities contrary to the public interest," amongst other things.[455] Without mentioning the need for conformity with the rule of law, the ECtHR found this section to be a lawful basis for confiscation under Art. 1 ECHR-P1. It noted that:

- the act had "[become] federal law" following reunification;
- the Federal Administrative Court had found the parliamentary committee competent to make the orders; and
- the Federal Constitutional Court had found the act compatible with the German Basic Law in a reasoned and predictable decision.[456]

It was also significant, in my view, that the Federal Administrative Court had found the District Court competent to review committee decisions under s. 5(2).

Forminster Enterprises Limited v. *Czech Republic* is an authority on the accessibility of norms authorizing an interference.[457] The court considered whether the applicant could have foreseen that its book-entry shares would be liable to restraint under the Czech Code of Criminal Procedure, which provided for the seizure of "items" of importance to criminal proceedings.[458] At the time of the seizure, prosecutorial guidelines on the interpretation of the code were not publicly available. The Czech courts had not yet defined the word "item" and legal experts had reached different conclusions on its scope. Nonetheless, as a company conducting business in an unsettled commercial environment, the applicant had "a reasonable opportunity to foresee" seizure as a consequence of the acquisition of securities.[459] On general principles, foreseeability was assessed from the perspective of a reasonable person in the applicant's position, rather than from the perspective of any reasonable person who could be subject to the law.[460]

From the foregoing I would surmise that cooperative confiscation orders are not immune from the general requirements of lawfulness in Art. 1 ECHR-P1 merely because they involve acts of international cooperation in criminal matters. However, the qualities of accessibility, precision, and foreseeability will be assessed by the court from the perspective of a person in the position of the aggrieved party who has been properly advised. Hence, the complexity

[455] *Honecker* (ECtHR, November 15, 2001), "The Facts," para. B.
[456] *Honecker* (ECtHR, November 15, 2001), "The Law," para. 1.
[457] App. No. 38238/04 (ECtHR, October 9, 2008), para. 32.
[458] *Forminster Enterprises* (ECtHR, October 9, 2008), para. 66.
[459] *Forminster Enterprises* (ECtHR, October 9, 2008), para. 67. See also *Cantoni* (ECtHR, November 15, 1996), para. 35.
[460] See also Harris et al., *Law of the European Convention on Human Rights*, p. 670.

of a haven state's cooperative confiscation laws or the breadth of their operative terms will not automatically render them uncertain. Nonetheless, state parties should use caution in incorporating broad or ill-defined concepts into their laws on asset recovery, as Switzerland has arguably done. Terms like "national interest" and, to a lesser extent, "corruption"[461] are only weakly reviewable by the courts due to their scope and the doctrine of the separation of powers, which places matters of foreign affairs in the exclusive purview of the executive branch.

5.4.2.2 Grounds for refusing assistance and the lawfulness of cooperative confiscations

Other "arbitrariness arguments" can be surmised from the literature on international cooperation in criminal matters, particularly from the commentary on traditional grounds for refusing assistance: dual criminality, double jeopardy, political offenses, and discriminatory prosecutions.[462]

***Nulla poena sin lege* and the requirement of dual criminality** Dual criminality is a traditional condition for extradition,[463] which dictates that states should only cooperate with respect to conduct that is criminal or was criminal in the requesting and requested states at the time of the offense.[464] Applied *in concreto*, it restricts cooperation to offenses with the same elements (and names) in both states; applied *in abstracto* it requires that the conduct, described in the request, would have given rise to criminal liability in the requested state, sometimes taking into account defenses or excuses that

[461] Cf. *Al Matri* (May 28, 2013), para. 94; *Chiboub* (May 28, 2013), para. 55; *Trabelsi* (May 28, 2013), para. 48, in which the EGC read the term, "misappropriation of State funds," in EU freezing decisions as referring to a concept in Tunisian criminal law. The EU violated the right to property because it had not established that the applicants were responsible for such an act or associated with persons who were.

[462] See generally Schomburg et al., "Einleitung," paras. 25–34 (summarizing grounds for refusal and their rationales).

[463] It may also be a condition for assuming substantive jurisdiction: see Gilbert, *International Crime*, pp. 109–111; Stessens, *Money Laundering*, p. 287; Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on November 21, 1997, ILM (1998) 37, 8, para. 26.

[464] Bassiouni, *International Extradition*, p. 494; Capus, *Strafrecht und Souveränität*, pp. 1, 341; Cryer et al., *International Criminal Law and Procedure*, p. 89; Gilbert, *International Crime*, p. 101; Jones and Doobay, *Extradition and Mutual Assistance*, para. 2.001; Klip, *European Criminal Law*, p. 345; Lagondy, "Allgemeine justizielle Zusammenarbeit," para. 33; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 2.33; Shearer, *Extradition*, p. 137; van Sliedregt and Stoichkova, "International Criminal Law," p. 245. On the temporal aspect of dual criminality, see Bassiouni, *International Extradition*, p. 497; Gilbert, *International Crime*, p. 101.

would have been available in that jurisdiction.[465] In either form, it is criticized as an unnecessary and outmoded barrier to cooperation;[466] it is increasingly omitted from or curtailed in domestic and international instruments on international cooperation in criminal matters.[467] To its defenders, however, dual criminality indirectly protects the individual who is the "object" of the proceeding. It ensures *inter alia* that he/she (or it) is only penalized for conduct that was an offense in the jurisdiction that imposes the penalty.[468] It would seem to reflect the principle of *nulla poena sin lege* by allowing private parties to better predict when they may be the object of a state's coercive powers as a consequence of their acts and omissions abroad.

One could be excused for thinking that the dual criminal requirement would normally be fulfilled in cooperative confiscation cases that aim at asset recovery. The anti-corruption treaties are supposed to ensure their state parties criminalize (functionally) equivalent corrupt conduct. Since the entry into force of the UNCAC, most states are party to at least one of these treaties. However, as I concluded in Chapter 3, the anti-corruption treaties define offenses broadly.[469] Their catalogs of offenses and their descriptions of particular offenses do not neatly overlap and, under most of the treaties, criminalization of only a portion of those offenses is mandatory. Some requests may also relate to conduct that predates domestic criminalizations of corruption. For all these reasons, state parties to anti-corruption treaties may be asked to enforce confiscation orders that pertain to conduct that is or was lawful in their jurisdictions at the time of the foreign offense. The question is whether those states will unlawfully interfere with possessions if they nonetheless grant assistance.

[465] Cryer et al., *International Criminal Law and Procedure*, p. 89; Gilbert, *International Crime*, pp. 103–108; Jones and Doobay, *Extradition and Mutual Assistance*, paras. 2.002, 2.018–2.031; Stessens, *Money Laundering*, p. 290.

[466] Stessens, *Money Laundering*, pp. 295–298. See also Murphy, "The European Arrest Warrant," pp. 232–233; Stephenson et al., *Barriers to Asset Recovery*, pp. 81–84. Cf. Cryer et al., *International Criminal Law and Procedure*, p. 89; Klip, *European Criminal Law*, p. 346. For a summary of criticisms and justifications, see Capus, *Strafrecht und Souveränität*, pp. 387–403, 406–434.

[467] Capus, *Strafrecht und Souveränität*, pp. 351–386; Nanda, "Extradition and Mutual Legal Assistance," pp. 336–338; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 2.33; Schomburg et al., "Einleitung," para. 31; Stessens, *Money Laundering*, pp. 288–290. See, e.g., COEMLC 1990, Art. 18(1)(f); COEMLC 2005, Art. 28(1)(g); OECD-ABC, Art. 9(2); UN Model MLAT, Art. 4(1), footnote; UNCAC, Arts. 43(2); 46(9). Stephenson et al., *Barriers to Asset Recovery*, p. 82; Stessens, *Money Laundering*, p. 289.

[468] Gilbert, *International Crime*, pp. 103–109; Obokata, *Transnational Organised Crime*, p. 58; Shearer, *Extradition*, p. 137. See generally Capus, *Strafrecht und Souveränität*, pp. 423–428.

[469] On the OECD-ABC, Harari and Julen Berthod, "Articles 9, 10, and 11," p. 429.

The relationship between lawfulness and dual criminality was an issue in *Saccoccia* and, to a lesser extent, *Duboc*. The applicants complained that they had been subject to retrospective penalties contrary to Art. 7(1) ECHR.[470] At the time of their offenses, money laundering was not a crime in Austria and, as argued by Mr. Saccoccia, the MLAT was not then in force between Austria and the US. The ECtHR dismissed the Art. 7 complaints in both cases,[471] explaining in *Saccoccia* that the *exequatur* order was a measure to enforce a penalty and not a penalty in its own right, as I have already mentioned.[472] However, it also implied that the penalty was foreseeable because the applicant's acts of money laundering were punishable with forfeiture under US law at the time of the offense. It did not mention the conclusion of the Austrian courts that the dual criminality requirement was met *in abstracto* because Mr. Saccoccia could have been convicted of receiving stolen property under Austrian law at the time of his offense and ordered to disgorge his enrichments.[473] On the merits, the court mentioned neither the retrospective criminalization of the applicant's conduct in Austria nor the retrospective conclusion and application of the bilateral MLAT between Austria and the US.

The ECtHR would thus seem to regard the enforcement of foreign confiscation orders in the absence of dual criminality as lawful under the ECHR and its protocols – if the crime and punishment were foreseeable in the requesting state at the time of the offense. This conclusion accords with that of *Advocaten voor de Wereld VZW* v. *Leden van de Minsterraad*,[474] in which the ECJ upheld the framework decision that removed dual criminality as a requirement for extradition between EU member states in European Arrest Warrants.[475] It also accords with the ECtHR's willingness to find retrospective interferences with possessions lawful and proportionate under Art. 1 ECHR-P1.[476] The question is whether the requested state party will be

[470] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(3); *Duboc* (ECtHR, June 5, 2012), para. 55.

[471] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(3); *Duboc* (ECtHR, June 5, 2012), para. 56.

[472] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(3). See also *Müller* v. *Czech Republic*, App. No. 48058/09 (ECtHR, September 6, 2011), "The Law." See further p. 189 and following above.

[473] *Saccoccia* (ECtHR, July 5, 2007), "The Facts," para. 2, "The Law," para. 1(3); *Saccoccia* (2010) 50 EHRR 11, paras. 28, 43.

[474] Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Minsterraad* [2007] ECR I-03622, paras. 48–54.

[475] Council Framework Decision 2002/584/JHA of June 13, 2002, on the European arrest warrant and the surrender procedures between Member States, OJ 2002 No. L190, July 18, 2002, p. 1, Art. 2. See further Capus, *Strafrecht und Souveränität*, pp. 425–428.

[476] See, e.g., *Pressos Compania Naviera* (1996) 21 EHRR 301, para. 43; *Saliba* v. *Malta*, App. No. 4251/02 (ECtHR, November 8, 2006), paras. 37–42.

held to violate the lawfulness requirement of Art. 1 ECHR-P1 or to flagrantly deny Art. 7(1) ECHR if it enforces a confiscation order that relates to conduct that was lawful in the requesting state at the time of the offense or was not then a predicate offense to confiscation. The court has stated that both articles may apply to a single set of facts.[477] In practice, its approach to the relationship between Art. 1 ECHR-P1 and other convention rights and freedoms has been inconsistent, as the later discussion on procedural proportionality shows.[478]

Double jeopardy and legal certainty The fact that corruption and corruption-related conduct is criminal in more than one state may also make it difficult to enforce confiscation orders in a manner that is consistent with Art. 1 ECHR-P1. The related principles of *ne bis in idem* and *ne bis poena in idem*[479] prohibit governments from repeatedly trying or punishing (putting in jeopardy) a person for the same offense.[480] Variously justified as a means of protecting the individual from multiple prosecutions or penalties, exhausting the state's criminal law claims against a person, and enhancing public confidence in past judicial decisions,[481] the principle can, in my submission, be connected to the principle of legal certainty.[482] It is not, however, a mandatory ground for refusing requests in any of the anti-corruption treaties or related MLATs discussed above.[483] When it does figure among their discretionary grounds, it is generally as a bar on multiple *prosecutions* or acts of cooperation in respect of conduct that the *requested* state has itself sought to repress.[484] Recalling the (then) EC Convention between the Member States of the European Communities on Double Jeopardy and the Schengen Implementing Convention, only the EUCPFI and

[477] *Sud Fondi SRL* (ECtHR, January 20, 2009), para. 124 ("*Les deux droits en question ont un objet different*.")

[478] See further p. 228 and following below.

[479] See generally Bassiouni, *International Extradition*, pp. 749–763; Conway, "*Ne Bis in Idem* in International Law," 217–244; Cryer et al., *International Criminal Law and Procedure*, pp. 80–82, 90–91; Stessens, *Money Laundering*, pp. 79–81, 407–411; van den Wyngaert and Stessens, "International *Non Bis In Idem*," 779–804; Vervaele, "Transnational *Ne Bis In Idem*."

[480] Bassiouni, *International Extradition*, p. 749; Conway, "*Ne Bis in Idem* in International Law," 217, 226; Cryer et al., *International Criminal Law and Procedure*, p. 80; Stessens, *Money Laundering*, p. 79.

[481] Conway, "*Ne Bis in Idem* in International Law," 222–224; van den Wyngaert and Stessens, "International *Non Bis In Idem*," 780–781.

[482] See also Conway, "*Ne Bis in Idem* in International Law," 223–224.

[483] See pp. 99 and 123 and following above.

[484] COEMLC 1990, Art. 18(1)(e); COEMLC 2005, Art. 28(1)(f); GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(d). Cf. EUCPFI, Art. 7; EUOCC, Art. 10; IACMACM, Art. 9(a). See further Stessens, *Money Laundering*, p. 409 (arguing that, in the absence of a treaty-based definition of *non bis in idem*, the COEMLC 1990 and 2005 refer back to the definitions in domestic law).

EUOCC provide a transnationalized principle of *ne bis in idem* among EU member states.[485]

In asset recovery cases, PEPs, their family members, and associates may face proceedings in multiple jurisdictions. As well as being charged with general property or corruption offenses in the victim state, they may be prosecuted for money laundering in the haven state; extraterritorial corruption offenses in a third state; and core international crimes before a national or international criminal tribunal. In any of these jurisdictions, the person may be able to negotiate a settlement with the competent authorities. Alternatively, he/she (or it) may be charged, convicted, and made the subject of a confiscation order. Freezes may have previously been imposed on those assets pursuant to resolutions of national executives or supranational or international organizations. The question is whether an ECHR state party that enforces a confiscation order in such circumstances will violate individual rights under the ECHR, in particular, the lawfulness requirement of Art. 1 ECHR-P1.

In my submission, arguments of *ne bis poena in idem* have poor prospects of success. On the one hand, the PEP or related party will be unable to rely on the express prohibition on double jeopardy in Art. 4(1) of Protocol No. 7 to the ECHR (ECHR-P7),[486] which provides that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State." Article 4 ECHR-P7 is limited to "criminal proceedings under the jurisdiction of the same state."[487] In any case, the enforcement of a foreign penalty is not a new punishment or criminal charge.[488] On the other hand, he/she (or it) will have difficulty convincing the ECtHR that an internationalized (or transnationalized) principle of *ne bis in idem* is part of the lawfulness requirement of the ECHR, especially Art. 1 ECHR-P1. The reception of *ne bis in idem* into the general principles or customs of international law is academically contested,[489] not least because it seems to conflict with the notion that sovereign states are equally empowered to prescribe, adjudge, and punish conduct

[485] Convention implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 No. L239, September 22, 2000, p. 19, Art. 54; EUCPFI, Art. 7(1); EUOCC, Art. 10(1). See also EUCFR, Art. 50. See further Vervaele, "Transnational *Ne Bis In Idem*," 107–109, 115, and p. 99 and following above.

[486] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, November 22, 1984, in force November 1, 1998, 117 ETS.

[487] For an overview of the scope of ECHR-P7, Art. 4(1), as well as its case law, see *Sergey Zolotukhin* v. *Russia*, App. No. 14939/03 (ECtHR, February 10, 2009).

[488] *Saccoccia* (ECtHR, July 5, 2007), "The Law," paras. 1(1), 3.

[489] Conway, "*Ne Bis in Idem* in International Law," 217–218, 229–230, 237–238; Vervaele, "Transnational *Ne Bis In Idem*," 102. Cf. Cryer et al., *International Criminal Law and*

within their jurisdictions.[490] It would also seem to conflict with the law enforcement strategy envisaged by the suppression conventions, with their broad money laundering offenses and grounds for assuming jurisdiction. In any case, such a principle may not avail persons:

- whose assets are affected by domestic NCB confiscation orders or civil judgments;[491]
- who have disgorged assets as part of pre-trial diversion agreements;[492] and/or
- whom the ICC has punished with forfeiture.[493]

In my submission, the existence of competing foreign civil, criminal, or administrative claims with respect to the PEP will not *of itself* render the enforcement of the foreign confiscation order unlawful under Art. 1 ECHR-P1, unless one of the express European guarantees applies and has not been respected. In my view, the applicant has the best prospects of arguing that "double punishment" or "double payments" are unlawful if he/she (or it) can show that the requested state's rules for determining the hierarchy of competing international public and private claims were inaccessible, imprecise, or unforeseeable. Given the novelty and complexity of the processes that may contribute to a "return of wealth," this possibility is not completely fanciful. In addition, an applicant could challenge the legal basis for the order by arguing that there was no provision for double recovery in the laws that enabled the cooperative confiscation.[494] Such arguments succeeded in *Khodorkovskiy and Lebedev*,[495] but would be more difficult to make out in the cooperative context insofar as they attack aspects of the victim state's decision and, so, become subject to the flagrant denial test.

Abuses of process, political offenses and political prosecution exceptions Other problems are likely to arise if the criminal, confiscation, or cooperation proceedings are alleged to be an abuse of process.[496] The

Procedure, p. 81; Stessens, *Money Laundering*, p. 408; van den Wyngaert and Stessens, "International *Non Bis In Idem*," 785.

[490] Cryer et al., *International Criminal Law and Procedure*, p. 80; van den Wyngaert and Stessens, "International *Non Bis In Idem*," 782; Vervaele, "Transnational *Ne Bis In Idem*," 101.

[491] See generally van den Wyngaert and Stessens, "International *Non Bis In Idem*," 797–798.

[492] See generally van den Wyngaert and Stessens, "International *Non Bis In Idem*," 799–802; Vervaele, "Transnational *Ne Bis In Idem*," 114.

[493] ICC Statute, Arts. 5(1), 77(2)(b). On "corruption" as a possible crime against humanity, see further p. 13 and following above.

[494] *Khodorkovskiy No. 2* (ECtHR, November 6, 2011), "The Law," para. 15.

[495] (ECtHR, July 25, 2013), paras. 877–884.

[496] See generally Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 5.120; Transparency International UK, "Laundering and Looted Gains," paras. 177–178.

concepts of corruption (and asset recovery) in the anti-corruption treaties are neutral *vis-à-vis* the states' motives for "going after" particular persons or their assets.[497] Governments may have or appear to have several reasons for cooperating with respect to the confiscation of alleged illicit wealth, the incoming government in the requesting state to discredit the predecessor regime and/or reduce its (financial) capacity to reclaim power, the requested state to gain favor with a new regime and/or to divert attention from its offshore banking laws or policies.

The instruments that allow the haven state to assist may allow it to consider the political dimensions of the foreign proceeding or offense. Political offense exceptions entitle states to refuse requests for extradition or MLA when the foreign offense is a political or related crime.[498] Another exception allows or requires requested states to refuse assistance when the foreign proceeding discriminated against a person on the basis of his/her (or its) political opinions or exacerbated such discrimination.[499] Both grounds for refusal are defended as means of ensuring that persons are not punished for their political opinions or legitimate acts of political expression and are not exposed to unfair and retaliatory legal proceedings.[500] However, like the dual criminality requirement, the political offense exception has been identified as a potential barrier to cooperation with respect to international and transnational crimes.[501] The question is whether a state that agrees to execute a confiscation order that has been rendered in a politically controversial

[497] See p. 22 and following above.

[498] See, e.g., COEMLC 1990, Art. 18(1)(d); COEMLC 2005, Art. 28(1)(d) and (e); IMAC, Art. 2(b); EU Dec. 2006/783/JHA, Preamble, para. 13; European Convention on Extradition, Art. 3(1); GA Res. 54/117 Art. 4(1)(b)–(c); IACMACM, Art. 15; SADC-MLAP, Art. 6. See further Bassiouni, *International Extradition*, pp. 656–666; Donatsch, Heimgartner, and Simonek, *Internationale Rechtshilfe*, pp. 59–60; Gilbert, *International Crime*, pp. 200–205, 228–248; Nanda, "Extradition and Mutual Legal Assistance," p. 339; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 5.38; van den Wyngaert, *The Political Offence Exception*, pp. 1–23, 80–83, Ch. III.

[499] See, e.g., IMAC, Art. 2(b); EU Dec. 2006/783/JHA, Preamble, para. 13; European Convention on Extradition, Art. 3(2); GA Res. 54/117, Annex, as amended by GA Res. 53/112, Art. 4(1)(c). See further Donatsch, Heimgartner, and Simonek, *Internationale Rechtshilfe*, pp. 59–60; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 5.39; van den Wyngaert, *The Political Offence Exception*, pp. 2, 80–83.

[500] Bassiouni, *International Extradition*, pp. 654–658; van den Wyngaert, *The Political Offence Exception*, pp. 2–4.

[501] Bassiouni, *International Extradition*, pp. 709–711, 714–728; Gilbert, *International Crime*, pp. 228–248; Jones and Doobay, *Extradition and Mutual Assistance*, para. 10.005; Nicholls, Montgomery, and Knowles, *Extradition and Mutual Assistance*, para. 5.40; Stephenson et al., *Barriers to Asset Recovery*, p. 98; Transparency International UK, "Laundering and Looted Gains," para. 177; van den Wyngaert, *The Political Offence Exception*, pp. 18–23, esp. 21.

and possibly politically motivated foreign proceeding violates the principle of lawfulness in Art. 1 ECHR-P1.

Good faith has been recognized as an element of lawfulness in several cases on detention for the purposes of extradition or deportation under Art. 5(1)(f) ECHR.[502] As the ECtHR stated in *Saadi* v. *UK*, "detention will be 'arbitrary' where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities."[503] It applied the principle to a "disguised extradition" that had been designed to avoid a French court order prohibiting the applicant's surrender,[504] and to an arrest and expulsion secured through the state's deceptive conduct.[505]

The Former First Chamber's judgment in *Yukos* indicates, however, that the court is more likely to consider allegations of abuse of process under Art. 18 ECHR read with Art. 1 ECHR-P1.[506] Article 18 ECHR prohibits state parties from applying "[t]he restrictions permitted under this Convention to the said rights and freedoms . . . for any purpose other than those for which they have been prescribed." It enunciates the principle "that where the real purposes of the authorities in imposing a restriction is outside the purpose specified, one of the specified purposes cannot be used as a pretext for imposing that restriction."[507] The burden of proving an improper purpose is on the applicant and the standard for showing state impropriety very high. Consequently, the ECtHR seldom holds Art. 18 ECHR to have been breached, as the court acknowledged in *Khodorkovskiy* v. *Russia (Khodorkovskiy No. 1)*,[508] one of the sister cases to *Yukos*.[509]

The applicant, Mr. Khodorkovskiy, was Yukos' majority shareholder and, at one time, among Russia's richest individuals.[510] Arrested, detained, and convicted of tax evasion, corporate misappropriations, fraud, and forgery,[511] he complained to the ECtHR that his prosecution (and the prosecutions of other Yukos managers) was motivated by the political and economic aspirations of the Russian federal government.[512] He submitted to the court that:

[502] *Bozano* (ECtHR, December 18, 1986), paras. 54–60; *Čonka* v. *Belgium*, App. No. 51564/99 (2002) 34 EHRR 34, paras. 39–41; *Saadi* (2008) 47 EHRR 17, paras. 69, 74.
[503] *Saadi* (2008) 47 EHRR 17, para. 69.
[504] *Bozano* (ECtHR, December 18, 1986), paras. 59–60.
[505] *Čonka* (2002) 34 EHRR 34, paras. 39–41.
[506] *Yukos* (2012) 54 EHRR 19, paras. 659–666.
[507] White and Ovey, *The European Convention on Human Rights*, p. 127.
[508] App. No. 5829/04 (ECtHR, May 31, 2011).
[509] See also *Lebedev* v. *Russia*, App. No. 4493/04 (2008) 47 EHRR 34; *Aleksanyan* v. *Russia*, App. No. 46468/06 (2011) 52 EHRR 18.
[510] *Khodorkovskiy No. 1* (2011) 53 EHRR 32, para. 7.
[511] *Khodorkovskiy No. 1* (2011) 53 EHRR 32, paras. 18, 26, 36, 69.
[512] *Khodorkovskiy No. 1* (2011) 53 EHRR 32, paras. 249, 251–252, 254.

> his arrest and consequent detention on 25 October, just a few weeks before the Duma elections on 7 December 2003 and shortly before the completion of the Sibneft/Yukos merger, had been orchestrated by the State to take action against an opposition which it considered "dangerous", contrary to Article 18.
>
> The applicant asserted that those activities had been perceived by the leadership of the country as a breach of loyalty and a threat to national economic security. As a counter-measure the authorities had undertaken a massive attack on the applicant and his company, colleagues and friends.[513]

In support of his submissions, the applicant cited media commentary, reports of international organizations and NGOs, resolutions of the US senate, and decisions of several European domestic courts on the permissibility of extradition and other forms of cooperation with Russia in related matters.[514] The ECtHR noted these materials,[515] as well as the political and economic circumstances of the case:

> In particular, the Court acknowledges that the applicant had political ambitions which admittedly went counter to the mainstream line of the administration, that the applicant, as a rich and influential man, could become a serious political player and was already supporting opposition parties, and that it was a State-owned company which benefited most from the dismantlement of the applicant's industrial empire.[516]

However, it did not find "incontrovertible" or "direct" evidence to conclude that "the whole legal machinery of the respondent State . . . was *ab initio* misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention."[517] It distinguished *Cebotari* v. *Moldova*,[518] in which the "applicant's arrest was visibly linked to an application pending before the [ECtHR]," and *Gusinskiy* v. *Russia*,[519] in which the senior investigating officer had admitted to ceasing his investigation once the applicant had agreed to transfer control of his media company to a government-owned corporation.[520] In *Gusinskiy*, the Acting Minister for Press and Mass Communications countersigned the agreement between the applicant and the company, which made the termination of criminal

513 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, paras. 251–252.
514 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, para. 252.
515 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, paras. 259–260.
516 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, para. 257.
517 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, para. 260.
518 App. No. 35615/06 (November 13, 2007).
519 App. No. 70276/01 (2005) 41 EHRR 17.
520 *Khodorkovskiy No. 1* (2011) 53 EHRR 32, para. 256; *Cebotari* (November 13, 2007), esp. para. 51, citing *Oferta Plus Srl* v. *Moldova*, App. No. 14385/04 (2010) 50 EHRR 30, paras. 138–143; *Gusinskiy* (2005) 41 EHRR 17, paras. 75–76.

proceedings against the applicant and the guaranteeing of his safety and freedom of movement the *quid pro quo* for the transfer.[521]

Since *Khodorkovskiy No. 1*, the court has had further opportunities to consider Art. 18 ECHR. In *Lutsenko* v. *Ukraine*, a case brought by the former Ukrainian Minister for the Interior and opposition leader,[522] the Fifth Section found violations of Arts. 5 and 18 ECHR on the basis that the prosecutor had detained the applicant for exercising his rights to review the case file and contest his guilt in the media.[523] It similarly reasoned that the pre-trial detention of opposition leader and former Ukrainian Prime Minister, Yuliya Tymoshenko, was contrary to Arts. 5 and 18 ECHR: "[T]he actual purpose of this measure was to punish the applicant for a lack of respect towards the court" and not, as the government alleged, to prevent her from "absconding or hindering the investigation."[524] Further, in a second challenge to prosecutions and punishments for tax evasion and misappropriation, Mr. Khodorkovskiy and his former business partner, Lebedev, pleaded Art. 18 with Arts. 5, 6, 7, and 8 ECHR.[525] As in *Khodorkovskiy No. 1*, they claimed "a clear global consensus" that the interferences with their rights were politically motivated;[526] the ECtHR again found no violation. The circumstantial evidence of political and economic motivations was not sufficient to discharge the high standard of proof and substantiate applicants' broad claims of governmental bad faith.[527] Public profile alone was not proof of improper motives, especially as the applicants were not "opposition leaders or public officials" and the government's allegations did not relate to their actual political activities.[528] Even if some state officials "had a 'hidden agenda'," "[the] whole case was not a travesty of justice."[529]

Read with the earlier cases on Art. 5(1)(f) ECHR, the Yukos and Ukrainian judgments do not bode well for those PEPs who hope to raise abuse of process arguments in challenges to enforcement orders before the ECtHR. First, the cases indicate that the court is likely to consider complaints of governmental bad faith under Art. 18 ECHR rather than under the generic lawfulness requirement of Art. 1 ECHR-P1. This raises the further question of whether Art. 18 ECHR can apply extraterritorially through acts of cooperation in criminal matters. Second, the judgments confirm that the standard for

[521] (2005) 41 EHRR 17, para. 28. [522] App. No. 6492/11 (ECtHR, July 3, 2012).
[523] *Lutsenko* (ECtHR, July 3, 2012), paras. 66–73, 108.
[524] *Tymoshenko* (ECtHR, April 30, 2013), paras. 258, 269–270, 269–301.
[525] (ECtHR, July 25, 2013), para. 886.
[526] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), para. 890. See also *Khodorkovskiy* v. *Russia (Khodorkovskiy No. 2)* App. No. 11082/06 (ECtHR, November 8, 2011), "The Law," para. 16.
[527] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), paras. 901–906.
[528] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), paras. 903, 906.
[529] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), paras. 906–908.

proving bad faith is extremely high under Art. 18 ECHR. The earlier cases, like *Gusinskiy*, suggest that the ECtHR may require admissions from the government, perhaps even from senior members of the executive. In *Lutsenko* and *Tymoshenko*, it was willing to accept narrowly framed allegations by professional politicians that were supported by a combination of circumstantial and direct evidence (statements by local prosecutors and courts). Conversely, in *Khodorkovskiy and Lebedev*, the court rejected arguments of a broad conspiracy against prominent "private sector" figures that were based on media articles, NGO reports, and other national court decisions. Third, insofar as the court refused to be guided by the judicial decisions of ECHR state parties, the Yukos cases indicate that Art. 18 ECHR is more exacting than the traditional treaty-based grounds for refusing cooperation. Fourth, and as something of a postscript, I note that the court rejected an extraterritorial claim of improper motives under Art. 6 ECHR in February 2013.[530] Russia was to extradite the Kazakh woman to face charges of misappropriating assets from a private bank of which she had been an executive.[531] According to NGO reports, the bank's chairman and his supporters were being targeted in a political "vendetta."[532] Accepting that those prosecutions "had a political overtone," the ECtHR still refused to find defects amounting to a flagrant denial of justice.[533]

5.4.2.3 Democratic legitimacy as a condition of lawful cooperation?

As cooperation for the purposes of asset recovery may be undertaken by caretaker governments during or immediately after political transitions, a further question is whether state parties may lawfully enforce "undemocratic" confiscation orders. The concept of "democratic society" is central to the convention[534] and would seem to entail some notion of the separation of powers, judicial independence, equality, non-discrimination, and popular sovereignty.[535] In my view, deficiencies in the lawmaking processes or the rule of law in a requesting state should be capable of rendering the enforcement of a confiscation order flagrantly unlawful under the convention. Whether the ECtHR would be prepared to inquire so closely into the legislative processes of another state is open to doubt, however. In any case, the applicant would have to show that such deficiencies result in a denial of the particular rights under Art. 1 ECHR-P1.[536]

[530] *Yefimova* (February 19, 2013).
[531] *Yefimova* (February 19, 2013), paras. 8, 15–16, 55.
[532] *Yefimova* (February 19, 2013), para. 170.
[533] *Yefimova* (February 19, 2013), paras. 222, 226.
[534] Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 6.525.
[535] Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," para. 26.
[536] *Mamatkulov* (2005) 41 EHRR 25, para. 71.

5.4.3 General principles of international law

The last express element of lawfulness under ECHR-P1 is compliance with "the conditions provided for by . . . the general principles of international law." This provision is typically interpreted as incorporating the principle (or rule) of public international law that alien property-holders may not be arbitrarily deprived of their possessions and that they must be compensated at least appropriately, if not promptly, adequately, and effectively, for takings.[537] Former PEPs and their relatives and associates will typically be within the scope of these principles *ratione personae*. However, the interference with their possessions will generally be a control of use under the third rule of Art. 1 ECHR-P1. Moreover, even if the confiscation was an unlawful deprivation of possessions, the applicant will have little reason to plead the international principles: The ECtHR may require compensation as for proportionate deprivations under Art. 1 ECHR-P1, second sentence, and the procedural requirements of Art. 1 ECHR-P1 are extensive under all three rules. The general principles of international law were not discussed in *Saccoccia* or *Duboc*.

5.4.4 Preliminary conclusions

To satisfy the lawfulness requirement of Art. 1 ECHR-P1, an interference must be authorized by a domestic legal norm that is itself legally certain. Judging by the ECtHR's cases on domestic criminal and administrative confiscations under Art. 1 ECHR-P1 and detention for the purposes of expulsion or extradition under Art. 5(1)(f) ECHR, the legal basis for a cooperative confiscation will be present when the requested state has empowered its competent authorities to restrain and confiscate illicit wealth pursuant to requests for assistance from the requesting state. The legal basis will differ depending on the states in question and the offense at issue but is likely to comprise norms created by the organs of the requested state, as well as treaties, legislative instruments, and/or non-binding arrangements on international cooperation and corruption that have taken or have been given effect in domestic law. The conditions of those domestic and international rules must be and remain satisfied until the foreign confiscation is executed.

Like any other interference with property, the laws authorizing cooperation in criminal matters must be precise, accessible, and certain, and accompanied by procedural safeguards. Having regard to Strasbourg's extradition and

[537] *Lithgow* (1986) 8 EHRR 39, paras. 111–119; *James* (1986) 8 EHRR 123, paras. 58–66. See further Gelinsky, *Schutz des Eigentums*, p. 102; Harris et al., *Law of the European Convention on Human Rights*, pp. 679–680; Janis, Kay, and Bradley, *European Human Rights Law*, p. 540; Merrills and Robertson, *Human Rights in Europe*, pp. 237–238. Cf. Çoban, *Property Rights within the European Convention on Human Rights*, pp. 198–199; Peukert, "Artikel 1 ZP1," para. 50; see also p. 33 and following above.

domestic confiscation case law, I submitted that even complex laws that authorize the execution of foreign confiscation orders could be certain if their application to the aggrieved party was foreseeable to a reasonable person in his/her (or its) position with appropriate legal advice. That said, concepts like "corruption" and "national interest" have potential to create uncertainty. Having regard to the literature on international cooperation in criminal matters, I concluded that dual criminality, double jeopardy, and the political nature of the prosecution or the offense could contribute to arguments on the legal certainty of cooperative confiscation orders under Art. 1 ECHR-P1. However, a state party will not (normally) violate the lawfulness requirement of Art. 1 ECHR-P1 when it grants a request that it could have refused, even if Art. 1 ECHR-P1 is read with Arts. 7 and 18 ECHR and Art. 4 ECHR-P7.

5.5 The proportionality of the interference to the general interest

Even lawful interferences must strike a fair balance between the pursuit of legitimate objectives and the protection of fundamental rights and freedoms.[538] A lawful interference with property is only compatible with Art. 1 ECHR-P1 if there is "a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[539]

5.5.1 The general interest

Article 1 ECHR-P1 prohibits deprivations of possessions except to further a "public interest" and only permits controls of the use of property "in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The concepts of "taxes," "contributions," and "penalties" would appear to be autonomous.[540] But, in identifying the need for such measures and the existence of other "problems of public concern," the court affords state parties a wide margin of appreciation (discretion).[541] Local authorities in democratic societies are better placed, in its view, to

[538] Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," paras. 36–40.

[539] *James* (1986) 8 EHRR 123, para. 50. For recent statements of principle, see *Herrmann* v. *Germany*, App. No. 9300/07 (ECtHR, June 26, 2012), para. 74; *Lindheim and Others* (ECtHR, June 12, 2012), para. 119.

[540] *Welch* (1995) 20 EHRR 247; *Gasus Dosier- und Fördertechnik GmbH* (1995) 20 EHRR 403, para. 59; *National & Provincial Building Society* v. *UK*, App. Nos. 21319/93, 21449/93, and 21675/93 (1998) 25 EHRR 127, para. 79; *Dassa Foundation* (ECtHR, July 10, 2007), "The Law," para. C; *Yukos* (2012) 54 EHRR 19, para. 557.

[541] See, e.g., *James* (1986) 8 EHRR 123, paras. 45–46; *Mellacher* (1990) 12 EHRR 391, para. 45; *Schneider Austria GmbH* v. *Austria*, App. No. 21354/93 (ECmHR, November 30, 1994), "The Law," para. 1; *Former King of Greece* (2001) 33 EHRR 21, para. 87; *Forminster*

assess social needs and harmonize conflicting social, political, and economic interests.[542] The court will only reject a respondent state's assessment of the public interests if it is "manifestly unreasonable" having regard to the facts before the court[543] or if it is incompatible with the convention (e.g., because it is discriminatory).[544] The fact that certain individuals or political groups stand to gain from the interference does not, of itself, make the government's objective impermissible under Art. 1 ECHR-P1 or, for that matter, Art. 18 ECHR.[545]

When a state party executes another state's confiscation order, the general interest would seem to be the repression of the predicate offenses and the associated acts of money laundering. It ensures national confiscation orders are not merely issued but enforced, despite the ease with which persons may move assets to different states.[546] The court stated in *Saccoccia* (and repeated in *Duboc*):

> that the execution of the forfeiture order had a legitimate aim, namely enhancing international co-operation to ensure that monies derived from drug dealing were actually forfeited. The Court is fully aware of the difficulties encountered by States in the fight against drug-trafficking. It has already held that measures, which are designed to block movements of suspect capital, are an effective and necessary weapon in that fight . . . Thus the execution of the forfeiture order served the general interest of combating drug trafficking.[547]

The characterization of the general interest in *Saccoccia* and *Duboc* is consistent with the court's pronouncements on the importance of international cooperation and with its characterization of the general interest in restraining and confiscating the proceeds, instrumentalities, and objects of domestic offenses. Commenting on the convention's "[inherent] search for the fair balance" in *Soering*, the court noted:

Enterprises (ECtHR, October 9, 2008), para. 75; *Yukos* (2012) 54 EHRR 19, para. 66; *Lindheim and Others* (ECtHR, June 12, 2012), paras. 96–100. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.116; Cremer, "Eigentumsschutz," paras. 120, 123–125; Fischborn, *Enteignung ohne Entschädigung*, pp. 156–162; Gelinsky, *Schutz des Eigentums*, pp. 174–175; Harris et al., *Law of the European Convention on Human Rights*, p. 668; Peukert, "Artikel 1 ZP1," para. 47. On the margin of appreciation generally, see Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," paras. 56–57; Harris et al., *Law of the European Convention on Human Rights*, pp. 11–15.

542 *James* (1986) 8 EHRR 123, para. 46; *Former King of Greece* (2001) 33 EHRR 21, para. 87.

543 *James* (1986) 8 EHRR 123, paras. 46–49; *Mellacher* (1990) 12 EHRR 391, paras. 45–46; *Former King of Greece* (2001) 33 EHRR 21, paras. 87–88; *Forminster Enterprises* (ECtHR October 9, 2008), para. 75. See, e.g., *Tkachevy* v. *Russia*, App. No. 35430/05 (ECtHR, February 14, 2012), paras. 38–50.

544 Grabenwarter and Marauhn, "Grundrechtseingriff und -schranken," para. 38; Harris et al., *Law of the European Convention on Human Rights*, pp. 686–687.

545 *James* (1986) 8 EHRR 123, paras. 46–48; *Mellacher* (1990) 12 EHRR 391, paras. 45–46.

546 *Saccoccia* (2010) 50 EHRR 11, para. 88.

547 *Saccoccia* (2010) 50 EHRR 11, para. 88; *Duboc* (ECtHR, June 5, 2012), para. 52.

> As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.[548]

Similarly, when state parties have frozen, seized, and confiscated assets pursuant to breaches of domestic law, the ECtHR has accepted the need to ensure that "crime does not pay"; that criminal proceeds are not reinvested in the licit economy; that society is compensated for the damage caused by crime; and that people are less willing and able to perpetrate economically motivated offenses.[549] States may also remove things to prevent criminal activity, even when the things are not *per se* unlawful or dangerous and the offense is complete.[550] After a transition to democracy, they may seek to identify and to confiscate assets that were illegitimately acquired under the old regime.[551] The court may also accept the return of illicit wealth as a measure to promote financial stability in the requested state.[552]

When the cooperating parties are working towards asset recovery, a further question is whether Strasbourg would accept the promotion of economic and social development or the rule of law in the requesting state as an acceptable motivation for coercive action. In *James* v. *UK*, the court did establish that interferences without a direct benefit to the community as a whole may still be in the public or general interest.[553] Further, in *Loukanvo* v. *Bulgaria*, it found that the detention of the former deputy prime minister on charges of misappropriation violated Art. 5(1) ECHR because members of the government could lawfully participate in decisions to grant financial aid and loans to developing states.[554] Bulgaria had alleged that the financial aid was actually for the benefit of a third party but failed to substantiate

[548] (1989) 11 EHRR 439, para. 79. See also *Öcalan* (2003) 37 EHRR 10, para. 88; *Bosphorus* (2006) 42 EHRR 1, para. 150; *Michaud* v. *France*, App. No. 12323/11 (ECtHR, December 6, 2012), para. 100.

[549] *Handyside* (1979–80) 1 EHRR 737, para. 62; *Raimondo* (1994) 18 EHRR 237, para. 39; *Phillips* (2000) 30 EHRR CD170, para. 52; *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 1; *Dassa Foundation* (ECtHR, July 10, 2007), "The Law," para. C; *Forminster Enterprises* (ECtHR, October 9, 2008), paras. 62, 76; *Denisova* (ECtHR, April 1, 2010), para. 58; *Benet Czech* (ECtHR, October 21, 2010), para. 34. See also *Michaud* (ECtHR, December 6, 2012), para. 99.

[550] *AGOSI* (1987) 9 EHRR 1, para. 52; *Air Canada* (1995) 20 EHRR 150, para. 42; *Butler* (ECtHR, June 27, 2002), "The Law," para. C; *Yildirim* (ECtHR, April 10, 2003), "The Law," para. 1. See also *Frizen* (2006) 42 EHRR 19, para. 34.

[551] *Honecker* (ECtHR, November 15, 2001), para. 1.

[552] *Capital Bank* (2007) 44 EHRR 48, para. 135. See also *Raimondo* (1994) 18 EHRR 237, para. 39.

[553] *James* (1986) 8 EHRR 123, paras. 40–45.

[554] (1997) 24 EHRR 121, paras. 42–43.

its allegations before the commission or the court.[555] These cases give some indication that the ECtHR would be willing to support state parties in cosmopolitan constructions of their interests. It is to be encouraged to do so. Construed in the main as an individual right,[556] Art. 1 ECHR-P1 does not clearly protect group entitlements to or through things, quite less permanent sovereignty over national wealth and resources. A broad construction of the general interest would allow the ECtHR to recognize a foreign peoples' stake in asset recovery as part of its decision on the proportionality of the confiscation order. Admittedly, this approach subsumes consideration of the collective into consideration of the individual interest. In a cosmopolitan twist on the concept of diplomatic protection, it also forces the victim people to rely on the haven state to assert its entitlement. That said, indirect protection of the collective interests avoids jurisprudential debates about the scope and extent of peoples' rights. It also aligns with the developing jurisprudence of the pan-African tribunal, discussed in the next chapter.[557]

5.5.2 The proportionality of the interference

In all, it is likely that the respondent state will be found to have acted for the "right reasons" in enforcing a foreign confiscation order that aims at asset recovery.[558] The decisive issue will be whether the interference is proportionate to the general interest, having regard to its substantive scope and corresponding procedural safeguards.[559] The individual substantive and procedural elements of proportionality emerge from the ECtHR's judgment in *Saccoccia* and decision in *Duboc*; from its other cases on restraints and

[555] *Loukanvo* (1997) 24 EHRR 121, para. 45.

[556] In cases on indigenous land claims, the court has hinted at the recognition of collective or communal interests derived from customary usage: *Könkämä and 38 Other Saami Villages* v. *Sweden*, App. No. 27033/95 (ECmHR, November 23, 1996), "The Law," para. 1; *Hingitaq 53 and Others* v. *Denmark*, App. No. 18584/04 (ECtHR, January 12, 2006), "The Law," para. A. But, in social security disputes, it has refused to equally protect customary marriages if the government has not encouraged the victim to assume that the informal relationship will be recognized (legitimate expectations): *Şerife Yiğit* v. *Turkey*, App. No. 3976/05 (2011) 53 EHRR 25, para. 85. Cf. *Muñoz Díaz* v. *Spain*, App. No. 49151/07 (2010) 50 EHRR 49. See further Gilbert, *Indigenous Peoples' Land Rights*, pp. 99–100, citing and discussing Thornberry, *Indigenous Peoples and Human Rights*, pp. 305–306; Pentassuglia, *Minority Groups and Judicial Discourse*, pp. 54–55, 158–159. Cf. the approach of the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (AfCtHPR), discussed at pp. 275 and 281 and following below.

[557] See further p. 281 and following below.

[558] Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.140.

[559] Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.142.

confiscation pursuant to breaches of local law; and, for reasons that will become apparent, from its cases on Art. 6 ECHR.

5.5.2.1 The value of the foreign confiscation order

As confiscation orders in asset recovery cases are likely to be valued in the tens (if not hundreds) of millions of euros, the magnitude (scope or value) of the victim state's confiscation order is an obvious point to begin assessing the proportionality of the haven state's enforcement order.

When contracting parties have confiscated the instrumentalities and objects of local offenses, the ECtHR has considered the size of the pool of assets that is subject to the order relative to the severity of the predicate offense,[560] the evidence of the owner's bad faith or guilt,[561] and his/her total wealth.[562] In *Air Canada*, it "[took] into account the large quantity of cannabis that was found in the container, its street value . . . as well as the value of the aircraft that had been seized," in concluding that the GBP 50,000 penalty was proportionate to the prevention of drug trafficking.[563] It also noted that the airline had a history of security lapses and that it had been warned that future incidents could be punished with forfeiture.[564] Conversely, in *Ismayilov* v. *Russia* and *Gabrić* v. *Croatia*, orders to confiscate USD 21,348 and DEM 20,000 in cash (respectively) were disproportionate because the applicants lost ownership of large sums relative to their net wealth and the offenses posed minor risks to the respondent states.[565] The sums were not the proceeds or the intended instrumentalities of crime and neither of the applicants had past convictions;[566] indeed, Ms. Gabrić's only criminal offense was avoiding customs controls for the importation of cigarettes.[567] Similarly, in *Milosavljev* v. *Serbia*, the ECtHR

[560] See, e.g., *K* v. *Denmark*, App. No. 10378/83 (ECmHR, December 7, 1983); *Schneider Austria Gmbh* (ECmHR, November 30, 1994), "The Law," para. 1; *Air Canada* (1995) 20 EHRR 150, para. 48; *Lindkvist* v. *Denmark*, App. No. 25737/94 (ECmHR, September 9, 1998), "The Law," para. 6; *Ismayilov* (ECtHR, November 6, 2008), para. 37; *Gabrić* (ECtHR, February 5, 2009), para. 36. Cf. *Valico SRL* v. *Italy*, App. No. 70074/01 (ECtHR, March 21, 2006), "The Law," para. 1. See also *Porter* v. *UK*, App. No. 15814/02 (ECtHR, April 8, 2003), "The Law," paras. 1, 4 (non-criminal "surcharge" for official misconduct).

[561] *Air Canada* (1995) 20 EHRR 150, paras. 6, 44; *Ismayilov* (ECtHR, November 6, 2008), para. 37; *Gabrić* (ECtHR, February 5, 2009), para. 38.

[562] *Ismayilov* (ECtHR, November 6, 2008), paras. 33–39; *Gabrić* (ECtHR, February 5, 2009), paras. 35–39. See also *JK* v. *Slovakia*, App. No. 40442/98 (ECtHR, May 25, 1999), "The Law," para. 2; *Drosopolous* v. *Greece*, App. No. 29021/95 (ECtHR, December 7, 2000), "The Law," para. 3.

[563] (1995) 20 EHRR 150, para. 48.

[564] *Air Canada* (1995) 20 EHRR 150, para. 44.

[565] *Ismayilov* (ECtHR, November 6, 2008), paras. 33–39; *Gabrić* (ECtHR, February 5, 2009), paras. 35–39. See also *Grifhorst* v. *France*, App. No. 28336/02 (ECtHR, February 26, 2009), paras. 98, 100.

[566] *Ismayilov* (ECtHR, November 6, 2008), paras. 35–37; *Gabrić* (ECtHR, February 5, 2009), para. 38.

[567] *Gabrić* (ECtHR, February 5, 2009), para. 38.

expressly distinguished its cases on the confiscation of proceeds and instrumentalities from that case – the administrative confiscation of a lawfully acquired taxi in discontinued misdemeanor proceedings.[568] Shortly after it decided *Milosavljev*, however, the ECtHR found that "a 77-year-old war veteran, [who] had fought in the Warsaw Uprising, was a retired professional officer of the Polish Army and . . . a law-abiding citizen with no criminal record," should not have been deprived of his antique arms and weapons collection.[569] Of considerable worth to the applicant, the collection in *Waldemar Nowakowski* was the object of a *de minimis* offense that posed no risk to the community and was not part of a professional criminal enterprise.[570] The fair balance depended, amongst other things, on "the applicant's degree of fault or care," his "personal situation and characteristics," and the economic and sentimental value of the items.[571]

The relative severity of coercive measures was an important factor in cases on the confiscation or curtailment of disgraced public servants' retirement benefits.[572] It was proportionate in *Banfield* v. *UK* for the government to reduce a police officer's pension by two-thirds after he had been convicted of raping and sexually assaulting detained women suspects, and burglarizing and raping a woman complainant.[573] The ECtHR acknowledged the severity of the measures. It found them proportionate, however, given the seriousness of the offenses, the safeguards in the forfeiture procedure, and the partial scope of the final order: The applicant retained his personal contribution to the fund.[574] Conversely, in *Azinas* v. *Cyprus*, the automatic "forfeiture" of the applicant's retirement benefits was a disproportionate consequence of his acts of embezzlement, in its view.[575] The applicant had been Governor of the Cypriot Department of Co-operative Development of the Public Service until he was

[568] App. No. 15112/07 (ECtHR, June 12, 2012), para. 61.
[569] *Waldemar Nowakowski* (ECtHR, July 24, 2012), para. 52. See also the Concurring Opinion of Judge De Gaetano, para. 2 ("[A] discontinuation of the proceedings coupled with a *judicial acknowledgement* that the offense was of a 'negligible' nature . . . suffices for a finding of disproportionality" [emphasis original]).
[570] *Waldemar Nowakowski* (ECtHR, July 24, 2012), paras. 52–56.
[571] *Waldemar Nowakowski* (ECtHR, July 24, 2012), paras. 50, 53.
[572] *Azinas* v. *Cyprus*, App. No. 56679/00 (ECtHR, June 20, 2002), para. 44; *Banfield* v. *UK*, App. No. 6223/04 (ECtHR, October 18, 2005), "The Law"; *Apostolakis* v. *Greece*, App. No. 39574/07 (ECtHR, October 22, 2009), paras. 39–42. See also *Klein* v. *Austria*, App. No. 57028/00 (ECtHR, March 3, 2011). See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.141. See also *Gáll* (ECtHR, June 25, 2013) (not final), paras. 64–75; *R.Sz* (ECtHR, July 2, 2013) (not final), paras. 56–61.
[573] (ECtHR, October 18, 2005), "The Law."
[574] *Banfield* (ECtHR, October 18, 2005), "The Law."
[575] *Azinas* (ECtHR, June 20, 2002), para. 44. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.141.

convicted of stealing, breaching trust, and abusing authority.[576] Whilst his crimes were "very serious" and the government was entitled to discipline its officers, the forfeiture deprived "the applicant and his family . . . of any means of subsistence," when combined with his imprisonment and dismissal.[577] It reached the same conclusion in *Apostolakis* v. *Greece*, where the director of a statutory pension scheme was automatically denied his entire pension for books and records offenses.[578] His wife and daughters retained most of their benefits, but the sixty-nine-year-old applicant was left without a livelihood independent of them.[579] Early EU cases on counter-terrorist financial sanctions likewise suggest that exemptions for the "target's" reasonable living and legal expenses may affect the proportionality of restraining order under any *jus cogens* right to property.[580]

The scope of the measure is likely to be particularly important to the proportionality inquiry when the applicant is a legal person. As discussed in more detail elsewhere,[581] states face a dilemma in sanctioning corporate offenders: Whilst financial penalties may be treated as a cost of doing business, large orders or particularly restrictive measures may prevent an entity from carrying on its money-making activities and/or severely restrict its cash flow. This may endanger the viability of the corporation and, with it, the economic interests of "innocent" corporate stakeholders. Considering the proportionality of a "fatal" tax enforcement action in *Yukos*, the court set out several mandatory considerations:

> the character and the amount of the existing debt as well as of the pending and probable claims against the applicant company, the nature of the company's business and the relative weight of the company in the domestic economy, the company's current and probable economic situation and the assessment of its capacity to survive the enforcement proceedings, . . . the economic and social implications of various enforcement options on the company and the various categories of stakeholders, the attitude of the company's management and owners and the actual conduct of the applicant company during the enforcement proceedings, including the merits of the offers that the applicant company may have made in connection with the enforcement.[582]

Applying these criteria, the court found the forced sale of the company's main production unit and the imposition of a 7 percent enforcement fee were

[576] *Azinas* (ECtHR, June 20, 2002), para. 8.
[577] Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.141.
[578] (ECtHR, October 22, 2009), paras. 6–8, 39–43.
[579] *Apostolakis* (ECtHR, October 22, 2009), paras. 40–41.
[580] *Kadi No. 1* [2005] ECR II-03649, para. 239; *Yusuf* [2005] ECR II-03533, para. 290. See also *Kadi No. 2* [2008] ECR I-06351, paras. 369–372.
[581] See generally Pieth and Ivory, "Corporate Criminal Liability," pp. 38–48.
[582] (2012) 54 EHRR 19, para. 651.

disproportionate to the need to secure payment of 11 billion euros in corporate taxes. The government had rapidly sought to auction the company's most valuable subsidiary without considering whether the debt could be met through the sale of other assets it had seized.[583] In *Khodorkovskiy No. 2*, the possibility that a damages award against a Yukos shareholder and executive "overlapped with the claim for back payment of taxes brought against Yukos" was held to raise a serious issue under Art. 1 ECHR-P1.[584] However, the ECtHR did not decide the issue on the merits as there was no basis for the Russian court's decision to pierce the corporate veil in the first place.[585] The scope of that order (500 million euros) was considered to increase the need for clarity in the domestic court's explanation of its powers and calculations.[586]

Judging by the ECtHR's approach to proportionality in *Saccoccia* and *Duboc*, however, the magnitude of the foreign confiscation order is unlikely to render the enforcement order disproportionate to the general interest in most cooperative confiscation matters. Although the foreign orders in those cases were worth some USD 9 million and 17 million euros (respectively), the ECtHR omitted any mention of their value under Art. 1 ECHR-P1. Having found in *Saccoccia* that "[the applicant] was . . . in a position to effectively challenge the measures," it had only this to say: "Moreover, bearing in mind the respondent State's wide margin of appreciation in this area, the Court finds that the execution of the forfeiture order does not disclose a failure to strike a fair balance between respect for the applicant's rights under Article 1 of Protocol No. 1 and the general interest of the community."[587] In my submission, this statement and a like pronouncement in *Duboc* imply that the US final forfeiture orders were not so wide-ranging as to give rise or contribute to a "flagrant denial" of Art. 1 ECHR-P1, given the blameworthiness of the applicants' conduct.

Likewise, in most cooperative confiscation cases aiming at asset recovery, the size of the victim state's confiscation order is unlikely to render the haven state's execution order disproportionate. Acts "incompatible with [public] functions and . . . dut[ies] of loyalty" are serious, especially when the offender has been entrusted with considerable public power.[588] The case law strongly suggests that domestic orders that merely remove an illicit gain so

[583] *Yukos* (2012) 54 EHRR 19, paras. 652–653.
[584] (ECtHR, November 6, 2011), "The Law," para. 15.
[585] (ECtHR, July 25, 2013), paras. 874–884.
[586] *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), para. 884.
[587] *Saccoccia* (2010) 50 EHRR 11, para. 90; *Duboc* (ECtHR, June 5, 2012), para. 53.
[588] *Azinas* (ECtHR, June 20, 2002), para. 44. See also *Cihan Öztürk* v. *Turkey*, App. No. 17095/03 (2003) 37 EHRR 5, para. 32 (an allegation of corruption is a legitimate act of expression in democratic society under Art. 10); *Parti nationaliste basque – Organisation régionale d'Iparralde* v. *France*, App. No. 71251/01 (2008) 47 EHRR 47, para. 47

as to remediate past wrongdoing or prevent future offenses are substantively proportionate to the interest of crime control.[589] The same would appear to be true of confiscation orders that punish offenders by removing the proceeds rather than the profits of crime to prevent or repress the predicate offense.[590] Even if the "proceeds-not-profit" doctrine is a harsh penalty for active bribery,[591] it is unlikely that PEPs or associated individuals and entities will face that charge. The court could distinguish the position of a senior public figure who has profited by illicitly investing proceeds from that of an individual or corporation who profited by legitimately investing in a business opportunity obtained through bribery. For similar reasons, the *Yukos* criteria are unlikely to assist a legal entity that was established and used solely to invest or hide illicit wealth. In my submission, they would only help a corporate property-holder that has a significant legitimate business and a significant number of innocent stakeholders.

There may be exceptional cases, however. On the one hand, I would argue that a confiscation order imposed with respect to a person's entire asset base would flagrantly deny the right to property, especially if it applied merely because the person (or another party) was found to have committed an offense.[592] Thus, in my submission, the economic consequences of the offense must be broadly reflected in the amount of the confiscation order, whether it is issued within the legal space of the convention or externally. On the other hand, the proportionality of "double recovery" has not been decided by the European court.[593] It is arguable that state parties should not enforce confiscation orders for amounts that have already been recovered or repaid in other jurisdictions, at least if the confiscation order is ostensibly preventative or restitutory in purpose.[594] That said, it would be open to a haven state to submit that Art. 1 ECHR-P1 should be read as subsidiary to Art. 4 ECHR-P7,

(restrictions on foreign funding of political parties in the general interest of combating corruption).

589 *Raimondo* (1994) 18 EHRR 237, para. 39; *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 1; *Dassa Foundation* (ECtHR, July 10, 2007), "The Law," para. C; *Denisova* (ECtHR, April 1, 2010), paras. 58–65 (lack of proportionality on procedural grounds). See also *Milosavljev* v. *Serbia*, App. No. 15112/07 (ECtHR, June 12, 2012), para. 61; *Waldemar Nowakowski* (ECtHR, July 24, 2012), para. 46.

590 *Welch* (1995) 20 EHRR 247, para. 33; *Phillips* (2000) 30 EHRR CD170, paras. 10–17, 53. See also *van Offeren* (ECtHR, July 5, 2005); *Grayson* (2009) 48 EHRR 30; *Woolley* (2013) 56 EHRR 15, paras. 83, 89.

591 See further p. 111.

592 For similar criticism of blanket confiscation as a sanction, see OECD-WGB, Slovak Republic III, para. 78.

593 See, e.g., *Allen* v. *UK*, App. No. 76574/01 (ECtHR, September 10, 2002), "The Law," para. 2; *Khodorkovskiy and Lebedev* (ECtHR, July 25, 2013), paras. 863, 874–875.

594 On the *Anrechnungsprinzip* in the international double jeopardy rule, see Stessens, *Money Laundering*, p. 409; van den Wyngaert and Stessens, "International *Non Bis In Idem*," 793–794.

in other words, that the applicant should not be able to internationalize the ECHR's *ne bis in idem* principle through the proportionality requirement of the right to property.

5.5.2.2 The fairness of the enforcement proceeding and Art. 6 ECHR

Though the scope of confiscation orders is unlikely to render the enforcement order disproportionate in asset recovery cases, there may well be concerns about the procedures for confiscating illicit wealth and enforcing such orders abroad. If the requesting-*cum*-victim state is emerging from a civil conflict or political transition, public criticism of former officials is likely to have been fierce and media reporting of the transition, along with any large unexplained accumulations of PEP wealth, extensive. The incoming government may be seen to benefit politically from its predecessors' political and financial disgrace.[595] It may have used special procedures or tribunals to investigate or adjudicate the criminal charges or confiscation claims. If the person accused of corruption has fled abroad or died, the criminal trial may have been conducted *in absentia* and/or the confiscation ordered without a conviction. As for the requested-*cum*-haven state, it may have adapted its procedures to enhance the chances of "successful" recovery.[596]

When states allege that the things are connected to an offense, the ECtHR routinely considers whether the property-holders had sufficient opportunity to effectively challenge the interference under Art. 1 ECHR-P1.[597] In so doing, the ECtHR borrows from Art. 6 ECHR. The challenge is thus to determine how Art. 6 ECHR is likely to apply to enforcement orders that aim at asset recovery and how it is likely to inform the proportionality requirement of Art. 1 ECHR-P1.

Procedural proportionality in the ECtHR's cooperative confiscation case law In *Saccoccia* and in *Duboc*, the question of fair balance turned entirely on the adequacy of the Austrian procedures for executing the US final forfeiture order. The ECtHR restated the principle that:

[595] See, e.g., GRECO, Georgia II, para. 31 (suggesting that anti-corruption confiscation laws may allow incoming regimes to target their former rivals).

[596] Stephenson et al., *Barriers to Asset Recovery*, pp. 21–23, 83–84; Transparency International UK, "Laundering and Looted Gains," p. 39.

[597] See generally *AGOSI* (1987) 9 EHRR 1, para. 55; *Air Canada* (1995) 20 EHRR 150, paras. 36–46; *Jokela* (2003) 37 EHRR 26, para. 45; *Phillips* (2000) 30 EHRR CD170, para. 53; *Yildirim* (ECtHR, April 10, 2003), "The Law"; *Megadat.com* (ECtHR, April 8, 2008), paras. 73–74; *Forminster Enterprises* (ECtHR, October 9, 2008), para. 59; *Saccoccia* (2010) 50 EHRR 11, para. 89; *Denisova* (ECtHR, April 1, 2010), para. 59; *Zehentner* v. *Austria*, App. No. 20082/02 (2011) 52 EHRR 22, para. 73; *Radu* (ECtHR, September 3, 2013), para. 21. See further Clayton and Tomlinson, *Law of Human Rights*, vol. I, para. 18.119; Cremer, "Eigentumsschutz," para. 121; Kaiser, "Art. 1 ZPI," para. 51; Peters and Altwicker, *Europäische Menschenrechtskonvention*, para. 32.28.

> Article 1 of Protocol No. 1 contains no explicit procedural requirements. It follows that they are not necessarily the same as under Article 6. However, the Court has held that the proceedings at issue must afford the individual a reasonable opportunity of putting his or her case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, the Court takes a comprehensive view.[598]

It found that Austria had complied with Art. 1 ECHR-P1 because it had allowed the applicants to participate, through their legal representatives, in the judicial proceedings that had culminated in the issuing of the provisional and final execution orders.[599] The applicants had made "ample" submissions, which the Viennese courts had considered in detailed written decisions.[600] In *Saccoccia*, the ECtHR also rejected the applicant's submission under Art. 6(1) ECHR that the enforcement proceedings involved the determination of a criminal charge.[601] In the court's view, Austria had only determined the applicant's guilt in the abstract when it ascertained that the dual criminality requirement was fulfilled and that it could execute the US penalty.[602] Moreover, because it was merely executing the American order and had no discretion to determine its amount, Austria did not participate in the sentencing process.[603] The *exequatur* proceedings were nevertheless within the scope of the civil limb of Art. 6(1) ECHR, for they effectuated a decision that determined the applicant's civil rights and obligations:

> The Court observes that the present case concerned a dispute between the applicant and the Austrian authorities as to whether or not the conditions for enforcing the United States court's final forfeiture order were met. The outcome of the dispute was decisive for whether or not the applicant could exercise his rights as regards the assets at issue. It was through the Austrian courts' decisions that the forfeiture order became effective and that the applicant was permanently deprived of those assets.[604]

On the facts of both *Saccoccia* and *Duboc*, Austria had complied with the "public oral hearing" requirement of Art. 6(1) ECHR, even though it had

598 *Saccoccia* (2010) 50 EHRR 11, para. 89, quoted *Duboc* (ECtHR, June 5, 2012), para. 52.
599 *Saccoccia* (2010) 50 EHRR 11, paras. 90–91; *Duboc* (ECtHR, June 5, 2012), para. 53.
600 *Saccoccia* (2010) 50 EHRR 11, paras. 87, 89–90; *Duboc* (ECtHR, June 5, 2012), para. 53.
601 *Saccoccia* (ECtHR, July 5, 2007), "Complaints," para. 1.
602 *Saccoccia* (ECtHR July 5, 2007), "The Law," para. 1(1)(a). In any case, a confiscation order that is "penal" is not necessarily a "criminal charge": *Phillips* (2000) 30 EHRR CD170, paras. 41–43, 53, discussed at p. 230 and following below.
603 *Saccoccia* (ECtHR July 5, 2007), "The Law," para. 1(1)(a).
604 *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(1)(a).

decided the prosecutors' applications in chambers and on the papers.[605] The decisions "concerned rather technical issues of inter-State cooperation in combating money-laundering through the enforcement of a foreign forfeiture order"; they could be determined without a public hearing and without taking the applicants' submissions in person.[606] Other complaints relating to the length of proceedings, the Austrian courts' refusal to admit expert testimony, and lack of service of an MLA request were manifestly ill-founded or inadmissible for non-exhaustion of domestic remedies.[607] "Consequently, there ha[d] been no violation of Article 6 § 1."[608]

Procedural proportionality in the ECtHR's domestic confiscation case law The ECtHR's reasoning in *Saccoccia* and *Duboc* is consistent with its reasoning in cases on confiscations that prevent, punish, or remediate breaches of local law. In *Honecker*, it was decisive that "the Berlin Administrative Court [had] examined the applicants' arguments in detail and thoroughly analysed the nature of the acts charged against Mr. Honecker and Mr. Axen and the provenance of the money in the applicants' bank accounts, which they had inherited."[609] This, together with the "exceptional circumstances of German reunification," persuaded the court that confiscation was proportionate to the general interest of preventing the conversion of unlawfully acquired East German Marks "in the interests of public morality."[610] The length of the proceedings did raise an issue under the civil limb of Art. 6(1) ECHR,[611] but allegations about prejudicial press coverage and the partiality of West German tribunals were dismissed as unsubstantiated and vague.[612]

The value-based, post-conviction confiscation order at issue in *Phillips* was supposed to deprive the applicant of the benefit of his offense and to deter him

605 *Saccoccia* (2010) 50 EHRR 11, paras. 70–80. See also *Duboc* (ECtHR, June 5, 2012), para. 38.

606 *Saccoccia* (2010) 50 EHRR 11, paras. 78–79, quoted and applied in *Duboc* (ECtHR, June 5, 2012), paras. 39–40.

607 *Saccoccia* (ECtHR July 5, 2007), "The Law," para. 1(2)(a)–(b); *Duboc* (ECtHR, June 5, 2012), paras. 42–47.

608 *Saccoccia* (2010) 50 EHRR 11, para. 80. See also *Duboc* (ECtHR, June 5, 2012), paras. 41, 47.

609 (ECtHR, November 15, 2001), "The Law," para. 1.

610 *Honecker* (ECtHR, November 15, 2001), "The Law," para. 1.

611 *Honecker* (ECtHR, November 15, 2001), "The Law," para. 3; *Honecker and Others* v. *Germany*, App. No. 54999/00 (ECtHR, February 27, 2003); Resolution ResDH(2003)163 concerning the judgment of the European Court of Human Rights of February 27, 2003 (Friendly settlement) in the case of Axen, Teubner and Jossifov against Germany, Committee of Ministers, October 20, 2003.

612 *Honecker* (ECtHR, November 15, 2001), "The Law," para. 3.

(and others) from drug trafficking.[613] Though "considerable," the confiscation order was proportionate to the general interest under Art. 1 ECHR-P1 since the English court had calculated the applicant's benefit from offending in a fair procedure that "respected the rights of the defence" under Art. 6 ECHR.[614] Under Art. 6(2) ECHR, the Fourth Section set forth "three criteria" for identifying a criminal charge: "namely, the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring."[615] In so doing, it adjusted the language of *Engel* and *Öztürk*, replacing the reference to the essential nature of the offense with a reference to the essential nature of the proceedings.[616] The court then found the confiscation order against Mr. Phillips to be outside the scope of Art. 6(2) ECHR. The order was "substantial" and it had been calculated using a mandatory, if rebuttable, presumption that the applicant had committed other drug-related crimes than those for which he had been convicted; in default of payment, the applicant was liable to a further term in prison.[617] However, the confiscation procedure did not involve a "new charge or offence" under English criminal law; it had no impact on the applicant's criminal record; and it was not intended to "convic[t] or acqui[t] the applicant for any other drug-related offense [but] to enable the national court to assess the amount at which the confiscation order should be fixed."[618] In this way, it was analogous to a procedure for calculating a sentence and subject to the more general supervision of the criminal limb of Art. 6(1).[619]

Furthermore, to the extent that the fair hearing requirement in Art. 6(1) ECHR also obliged the state to presume innocence and to prove its allegations, this qualified right had been appropriately restricted with respect to Mr. Phillips. Again, the court stressed that the confiscation procedure was not intended to facilitate a conviction but to enable the quantification of a benefit.[620] When calculating the benefit, the Crown Court had not merely relied on the statutory presumptions but had assessed the evidence and determined the applicant had held each item of property and that its source was drug trafficking.[621] Likewise, when calculating the assets available to meet the

[613] (2000) 30 EHRR CD170, paras. 41–43, 53.
[614] *Phillips* (2000) 30 EHRR CD170, para. 53.
[615] *Phillips* (2000) 30 EHRR CD170, para. 31.
[616] The court cited *AP, MP, and TP* v. *Switzerland*, App. No. 19958/92 (1998) 26 EHRR 541, para. 39, which applied the test in *Öztürk* (1984) 6 EHRR 409, para. 50. On the *Engel* and *Öztürk* test, see p. 149 and following above.
[617] (2000) 30 EHRR CD170, para. 33.
[618] *Phillips* (2000) 30 EHRR CD170, paras. 32, 34.
[619] *Phillips* (2000) 30 EHRR CD170, paras. 34, 39.
[620] *Phillips* (2000) 30 EHRR CD170, para. 42.
[621] *Phillips* (2000) 30 EHRR CD170, para. 44.

order, the judge had only considered items that the applicant still owned.[622] Perhaps most significantly, the presumptions were applied with procedural safeguards:

> [T]he assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice.[623]

The European court found that the applicant could have easily rebutted the assumptions "had [his] account of his financial dealings been true."[624] Therefore, even though the English court had been required to assume a benefit from other criminal acts, the applicant's confiscation hearing as a whole was fair.[625]

The ECtHR applied *Phillips* in later challenges to the British proceeds of crime regime. In *Crowther* v. *UK*, the Fourth Section confirmed that the "setting and enforcement of a confiscation order does not involve the bringing of any new criminal charges against the convicted person"; rather, it is akin "to the determination by a court of the amount of a fine or the length of a period of imprisonment."[626] At eight years and five months, the total length of that criminal proceeding just happened to be unreasonable under Art. 6(1) ECHR.[627] In *Grayson and Barnham* v. *UK*, the court verified *Phillips*' construction of the procedures for calculating benefit. Additionally, it affirmed that a rebuttable presumption that an offender has sufficient property to meet a confiscation order is compatible with Art. 6(1) ECHR, including when the prosecution has factored in so-called "hidden assets."[628] The Fourth Section again noted the safeguards in the UK proceedings,

[622] *Phillips* (2000) 30 EHRR CD170, para. 46.
[623] *Phillips* (2000) 30 EHRR CD170, para. 43.
[624] *Phillips* (2000) 30 EHRR CD170, para. 45.
[625] *Phillips* (2000) 30 EHRR CD170, para. 47.
[626] *Crowther* (ECtHR, February 1, 2005), para. 25, applied in *Woolley* v. *United Kingdom*, App. No. 28019/10 (2013) 56 EHRR 15, paras. 82–83.
[627] *Crowther* (ECtHR, February 1, 2005), paras. 26–30.
[628] *Grayson* (2009) 48 EHRR 30, paras. 47–49. See further Ulph, "Confiscation Orders, Human Rights," 273 ("[R]elying upon evidence of past receipts, the prosecution alleges that the defendant has far more property than he says that he has and a confiscation order is made to reflect the assumption that money has been secretly hidden away").

the seriousness of the proven offenses, and the strength of the evidence before the English courts that the applicants had held illicit benefits and unreported wealth.[629] Under Art. 1 ECHR-P1, the facts were indistinguishable from those in *Phillips*; hence, the order was a proportionate interference with property.[630]

The Fourth Section also referred to *Phillips* in a challenge to a British NCB confiscation order.[631] The Proceeds of Crime Act 2002 allowed the British courts to remove proceeds of "unlawful conduct," which it defined as "[c]onduct occurring in any part of the United Kingdom." After Mr. Walsh was acquitted of fraud, the Asset Recovery Agency sought some GBP 70,000 held on his behalf. The High Court granted the order, finding it more probable than not that the funds were criminal proceeds. It considered, in so doing, the applicant's prior convictions for similar property crimes; his close associations with people with similar criminal records; his arrest in connection with a robbery; and his inability to explain the origins of the funds.[632] The ECtHR considered but dismissed the application under Art. 6(2) and (3)(d) ECHR. First, the "recovery proceedings [were] regarded as civil, not criminal" under domestic law: "The proceedings may have followed an acquittal for specific criminal offences but were separate and distinct in timing, procedure and content (cf. *Phillips* v. *the United Kingdom* . . .)."[633] Second, the proceedings were intended to remove an unlawful advantage rather than punish or deter specific or potential offenders.[634] Third, the British court had imposed the orders without making any pronouncements of guilt and without "tak[ing] into account conduct in respect of which the applicant had been acquitted." Fourth, whilst the order was "hefty," it was not substantively punitive.[635] As there was no criminal charge under Art. 6 ECHR, there was also no penalty under Art. 7 ECHR; the complaint under Art. 1 ECHR-P1 was inadmissible for non-exhaustion of domestic remedies.[636]

The court has used *Phillips* to analyze – and generally uphold – conviction-based confiscation orders outside the British isles. Two cases concerned Art. 36e of the Dutch Criminal Code, which enabled the removal of advantages of the proven offense and "similar" offenses ("illegally obtained advantage[s]"). In *van Offeren* v. *Netherlands*, the ECtHR refused to characterize such a confiscation order as a criminal charge under Art. 6(2) ECHR, even though it had been imposed after a partial acquittal. The Third Section found that the confiscation was "part of the sentencing process" under Dutch law and

[629] *Grayson* (2009) 48 EHRR 30, paras. 43–49.
[630] *Grayson* (2009) 48 EHRR 30, paras. 52–53.
[631] *Walsh* v. *UK*, App. No. 43384/05 (ECtHR, November 21, 2006), "The Facts," para. A.
[632] *Walsh* (ECtHR, November 21, 2006), "The Facts."
[633] *Walsh* (ECtHR, November 21, 2006), "The Law," para. 1.
[634] *Walsh* (ECtHR, November 21, 2006), "The Law," para. 1.
[635] *Walsh* (ECtHR, November 21, 2006), "The Law," para. 1.
[636] *Walsh* (ECtHR, November 21, 2006), "The Law," para. 2.

intended to enable an assessment of the illicit advantage – not to determine innocence or guilt.[637] Hence, it was immaterial that the confiscation order had been issued in a separate proceeding to the criminal trial; calculated using a presumption that the accused had engaged in other criminal conduct; and enforced with a threat of further jail term. The Dutch court had employed a "property analysis" to determine the alleged illicit benefit and considered but rejected the applicant's alternative explanations of the origins of the wealth.[638] By contrast, in *Geerings* v. *Netherlands*, the applicant had been acquitted of the very offenses that were presumed to be similar and had not been shown with sufficient evidence to have obtained an unexplained benefit; hence, the Third Section held that the confiscation order could only be a statement of guilt contrary to Art. 6(2) ECHR.[639] Though *Geerings* is exceptional, the ECtHR has recently heard arguments that a Bulgarian presumption of illicit acquisition, which applied to assets acquired up to twenty-five years before the forfeiture order, violated Art. 6(1) and (2) ECHR.[640] In September 2013, the court declined to determine the issue as only freezing orders were impugned.[641] However, it also indicated that the freezing orders themselves could fall foul of Art. 6(1) ECHR and Art. 1 ECHR-P1 due to their broad application, their lack of time-limits, and their limited judicial supervision.[642] Further, in late October 2013, the majority of the Second Section referred to *Geerings* in finding that the post-acquittal forfeiture of items of real estate violated Art. 7 ECHR and the lawfulness requirement of Art. 1 ECHR-P1.[643] The court read Art. 7 with Art. 6(2) ECHR but declined to consider the latter on its own.[644]

AGOSI and *Air Canada* dealt with the confiscation of the objects or instrumentalities of third parties' offenses. In *AGOSI* and *Air Canada*, the ECtHR first considered whether the British courts had sufficient supervisory powers with respect to decisions by customs to retain goods subject to forfeiture under Art. 1 ECHR-P1.[645] The (reformed) British system of judicial review created a "right to reasons" and allowed the local courts to assess the

[637] *Van Offeren* (ECtHR, July 5, 2005), "The Law."
[638] *Van Offeren* (ECtHR, July 5, 2005), "The Law."
[639] *Geerings* (ECtHR, March 1, 2007), paras. 46–50. See further 6 King's Bench Walk, "Proceeds of Crime and the European Convention on Human Rights."
[640] *Nedyalkov and Others* v. *Bulgaria*, App. No. 663/11 (ECtHR, September 10, 2013), paras. 103–105, 112.
[641] *Nedyalkov* (ECtHR, September 10, 2013), paras. 104, 112.
[642] *Nedyalkov* (ECtHR, September 10, 2013), para. 111 (inadmissible for procedural reasons).
[643] *Varvara* (ECtHR, October 29, 2013) (not final), paras. 72, 85.
[644] *Varvara* (ECtHR, October 29, 2013) (not final), paras. 64–69.
[645] *AGOSI* (1987) 9 EHRR 1, paras. 55–62; *Air Canada* (1995) 20 EHRR 150, paras. 44–46.

legality of administrative decisions.[646] Where one of the grounds for review was made out, the UK courts could quash the decision or remit it to the authorities for reconsideration "in accordance with the findings of the court."[647] As grounds for review included "illegality, irrationality, or procedural impropriety," and the reformed procedures had enabled successful challenges in like cases, the ECtHR found the confiscations proportionate to the general interest under Art. 1 ECHR-P1.[648] In both cases, it also rejected arguments under the criminal limb of Art. 6 ECHR: The applicants themselves had never been charged with offenses under UK law[649] and "there was no threat of any criminal proceeding in the event of non-compliance."[650] The adverse effect on their private property rights and the connection to a third party's offense did not render the orders criminal.[651] In *Air Canada*, the court also found the civil limb of Art. 6(1) ECHR applicable to the proceedings but unnecessary to consider.[652] The First Section repeated these reasons when it dismissed the application in *Yildirim* v. *Italy*. In confiscating a bus that had been used by a third party to commit an immigration offense, it found Italy had complied with the civil limb of Art. 6(1) ECHR.[653] Not only was the applicant aware of the seizure, but he had been able to challenge the confiscation in adversarial proceedings before two levels of court.[654] On the proportionality requirement of Art. 1 ECHR-P1, the court reaffirmed that:

> where possessions that have been used unlawfully are confiscated, such a balance depends on many factors, which include the owner's behaviour. It must therefore determine whether the Italian authorities had regard to the applicant's degree of fault or care or, at least, the relationship between his conduct and the offence which had been committed. In addition, it must be ascertained whether the procedure in the domestic legal system afforded the applicant, in the light of the severity of the measure to which he was liable, an adequate opportunity to put his case to the responsible authorities, pleading, as the case might be, illegality or arbitrary and unreasonable conduct.[655]

[646] *AGOSI* (1987) 9 EHRR 1, paras. 36, 40, 58; *Air Canada* (1995) 20 EHRR 150, paras. 20–22, 44.
[647] *AGOSI* (1987) 9 EHRR 1, para. 38. See also *Air Canada* (1995) 20 EHRR 150, para. 21.
[648] *AGOSI* (1987) 9 EHRR 1, paras. 55, 58–60; *Air Canada* (1995) 20 EHRR 150, paras. 44–46.
[649] *AGOSI* (1987) 9 EHRR 1, para. 65; *Air Canada* (1995) 20 EHRR 150, paras. 51–52.
[650] *Air Canada* (1995) 20 EHRR 150, para. 52.
[651] *AGOSI* (1987) 9 EHRR 1, para. 65; *Air Canada* (1995) 20 EHRR 150, para. 53.
[652] *Air Canada* (1995) 20 EHRR 150, paras. 56, 62.
[653] *Yildirim* (ECtHR, April 10, 2003), "The Law," para. 2.
[654] *Yildirim* (ECtHR, April 10, 2003), "The Law," para. 2.
[655] *Yildirim* (ECtHR, April 10, 2003), "The Law," para. 1.

Raimondo and *Arcuri* dealt with the proportionality and fairness of NCB measures imposed on the assets of suspected organized criminals. Italian law created a rebuttable presumption that "property at the direct or indirect disposal" of such persons was "the proceeds from unlawful activities or their reinvestment."[656] In *Raimondo*, the reluctance of Italian agencies to remove the orders from their registers meant that the interferences *became* disproportionate and unlawful once the applicant was acquitted.[657] Before then, however, the court found the confiscation was compatible with Art. 1 ECHR-P1.[658] In *Arcuri*, the Second Section asked "whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities" under Art. 1 ECHR-P1.[659] The court noted that the suspected mafia member and his relatives had been present during the Italian hearings; that they had enjoyed rights of the defense; and that the Italian courts had objectively ascertained and analyzed the evidence of the man's alleged criminal associations and the criminal origins of his wealth.[660] Therefore, it found that the measures were proportionate to the general interest of preventing and suppressing crime under Art. 1 ECHR-P1.

Applying the civil limb of Art. 6 ECHR, the court held the confiscation proceedings to be preventative, pecuniary, and fair.[661] Dismissing arguments under Art. 6(1) and (3) ECHR in *Arcuri*, the ECtHR referred to *M*, where the ECmHR had established that such orders were not "in substance" criminal.[662] The commission had listed three factors to support its conclusion, aside from the fact that the applicant, *M*, was never "formally . . . charged [or] convicted of a criminal offense."[663] First, it was "well established" under Italian law that the measures were preventative and, as such, autonomous of criminal proceedings.[664] Second, the measures were subsidiary under Italian law, since they applied only to property that was in possession of "dangerous" persons "suspected of belonging to a mafia-type organisation" and already subject to other preventative measures.[665] Third, the particular confiscation order was based upon "sufficient circumstantial evidence" and not "mere suspicions or

656 *Raimondo* (1994) 18 EHRR 237, paras. 17–18; *Arcuri* (ECtHR, July 5, 2001), "The Facts," para. B.
657 (1994) 18 EHRR 237, para. 36. 658 *Raimondo* (1994) 18 EHRR 237, para. 30.
659 (ECtHR, July 5, 2001), "The Law," para. 1.
660 *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 1.
661 *Raimondo* (1994) 18 EHRR 237, paras. 43–44; *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 2.
662 *M* (ECmRH, April 15, 1991), "The Law," para. 1.
663 *M* (ECmRH, April 15, 1991), "The Law," para. 1.
664 *M* (ECmRH, April 15, 1991), "The Law," para. 1.
665 *M* (ECmRH, April 15, 1991), "The Law," para. 1.

subjective speculation."[666] Concluding that the orders were akin to other forms of confiscation already accepted by COE member states, the commission noted the "unlawful origins" of the confiscated property and the aim of the confiscation measure: "to strike a blow against mafia-type organisations and the very considerable resources they have at their disposal."[667] The commissioners returned to the purpose of the measures when rejecting further contentions under Art. 1 ECHR-P1. Italy enjoyed a wide margin of appreciation in implementing a "major crime" control policy; by affording the applicant *inter alia* an opportunity to rebut the presumption and challenge the measures in an adversarial, judicial procedure, it had maintained the fair balance.[668]

The ECtHR reached similar conclusions with respect to the preventative confiscations of GBP 240,000 in cash "intended . . . for . . . drug trafficking" in *Butler*,[669] and an apartment and shares that were transformed (and transferred) proceeds in *Silickienė* v. *Lithuania*.[670] *Silickienė* has particular relevance to the issue of asset recovery since the applicant, Mrs. Silickienė, was the widow of a high-ranking police officer who had been charged with various serious offenses, such as fraud, organized criminality, and smuggling.[671] After the man's suicide on remand, the Kaunas Regional Court discontinued the prosecution against him. However, it "found sufficient evidence to prove that [he], being a state official, had indeed organised and led a criminal association for smuggling."[672] In addition, it convicted three of his alleged co-offenders and ordered the confiscation of "certain items of property . . . acquired as a result of [the police officer's] criminal activities."[673] Among the items were the apartment and shares belonging to the applicant.[674] She and her mother-in-law had been convicted separately of related offenses (misappropriation and falsification of documents). The applicant had not, however, been a party to the criminal proceedings against her husband or the other men.[675]

Before the ECtHR, Mrs. Silickienė alleged violations of Art. 6(1) and (2) ECHR and Art. 1 ECHR-P1. Dismissing her arguments under Art. 6(2) ECHR, the court held that the confiscation order was not a statement of her late husband's guilt as it was based on the finding that the proceeds derived

[666] *M* (ECmRH, April 15, 1991), "The Law," para. 1.
[667] *M* (ECmRH, April 15, 1991), "The Law," para. 1.
[668] *M* (ECmRH, April 15, 1991), "The Law," para. 2.
[669] *Butler* (ECtHR, June 27, 2002). See also *Webb* v. *UK*, App. No. 56054/00 (ECtHR, February 10, 2004); *Radu* (ECtHR, September 3, 2013).
[670] App. No. 20496/02 (ECtHR, April 10, 2012).
[671] *Silickienė* (ECtHR, April 10, 2012), paras. 7–10.
[672] *Silickienė* (ECtHR, April 10, 2012), paras. 13, 16.
[673] *Silickienė* (ECtHR, April 10, 2012), paras. 16–17.
[674] *Silickienė* (ECtHR, April 10, 2012), paras. 11, 17.
[675] *Silickienė* (ECtHR, April 10, 2012), paras. 28–30, 39, 48.

from "the activities of the entire criminal organisation."[676] Applying the civil limb of Art. 6(1) ECHR ("property rights being civil rights"), it found that the confiscation procedure was fair.[677] On the one hand, the applicant had had standing to challenge the original seizure order, which she "could [have] reasonably foresee[n] . . . could result in confiscation of the property at a later stage of the proceedings."[678] This "occasion . . . to present . . . arguments" had enabled her mother to secure the lifting of similar orders from her lawfully acquired belongings.[679] Further, had the applicant testified as a witness in the criminal proceedings, she would have had "one more occasion . . . to put forward any evidence in support of her claims."[680] On the other hand, the applicant was able, through her husband's private attorney, to contest the factual conclusions that were the basis for the confiscation order on appeal. The attorney had been hired by the family in the appeal proceedings and had, in fact, represented her interests. At two levels of review, he had "explicitly raised the matter of confiscation, arguing that the property belonged to third persons whose fault had not been established [and in] particular . . . challeng[ing] the confiscation in respect of each item of property."[681] So, in this particular case, the court could accept that the "Lithuania authorities had *de facto* afforded the applicant a reasonable and sufficient opportunity to protect her interests adequately."[682]

As for the right to property, the ECtHR acknowledged there was a legitimate need to prevent "the illicit acquisition of property through criminal activities,"[683] and found that Lithuania had responded proportionately. The Lithuanian courts had rightly considered the applicant's involvement in the illicit transfers, as well as her constructive knowledge of the underlying criminal enterprise, evidenced, in particular, by her own convictions.[684] Three courts had been involved in the confiscation decision and, "in respect of each item to be confiscated . . . [they had been] satisfied . . . that the confiscated asset had been purchased by virtue of reinvestment of the criminal organisation's unlawful profits." They were "debarred," in the language of *M*, "from basing their decisions on mere suspicions."[685] Citing *Raimondo* and noting the exceptional features of the case – particularly, the "scale, systematic nature and organisational level of the criminal activity" – the court hinted that third

[676] *Silickienė* (ECtHR, April 10, 2012), paras. 24, 53.
[677] *Silickienė* (ECtHR, April 10, 2012), paras. 46, 50.
[678] *Silickienė* (ECtHR, April 10, 2012), para. 48.
[679] *Silickienė* (ECtHR, April 10, 2012), para. 48.
[680] *Silickienė* (ECtHR, April 10, 2012), para. 48.
[681] *Silickienė* (ECtHR, April 10, 2012), para. 49.
[682] *Silickienė* (ECtHR, April 10, 2012), para. 50.
[683] *Silickienė* (ECtHR, April 10, 2012), para. 65.
[684] *Silickienė* (ECtHR, April 10, 2012), para. 67.
[685] *Silickienė* (ECtHR, April 10, 2012), para. 68.

party confiscation could even be regarded as essential to combating organized crime.[686]

In *Silickienè*, the court distinguished *Vulakh and Others* v. *Russia*, a complaint that was brought by successors to the estate of a suspected gang leader who had been ordered to compensate the man's alleged victims.[687] For the ECtHR, the compensation order violated the deceased's right under Art. 6(2) ECHR to a presumption of innocence for it was based on unsubstantiated statements of guilt in criminal proceedings against the co-accused.[688] Under Art. 1 ECHR-P1, the court reiterated that acquittals or procedural terminations of criminal cases do not preclude related compensation claims based on "less strict standard[s] of proof."[689] However, on the facts of the case, neither the deceased nor his heirs had had an opportunity to contest the finding of fault. At first instance and on appeal, the Russian courts had based their decision solely on "declarations of guilt" that were made in proceedings to which the applicants were not party.[690] Interestingly, the First Section did not mention *Blake* v. *UK*, in which another section had refused to characterize a judgment for the recovery of so-called "literary proceeds" from a British double agent as a criminal charge under Arts. 6(1) and 3(c) or a statement of guilt under Art. 6(2) ECHR.[691] It did distinguish *Phillips*, *Raimondo*, and *Denisova*, however, on the basis that these cases "concerned the confiscation of money or assets obtained through illegal activities or paid for with the proceeds of crime."[692]

Denisova illustrates how the court may find confiscations incompatible with Art. 1 ECHR-P1 because the applicant was denied a reasonable opportunity to effectively challenge the decision to impose the measure. There, Russian courts violated the procedural requirement of Art. 1 ECHR-P1 by ordering the confiscation of alleged proceeds without adequately considering the applicants' ownership claims. The confiscations of the cash and personal computer had been ordered in the criminal proceedings against Mr. Moiseyev, who was the first applicant's husband and the second applicant's father.[693] However, neither applicant had been entitled to participate in the criminal proceedings and the civil courts, which were competent to hear alleged third party owners, had consistently failed to "take cognizance of the

[686] *Silickienè* (ECtHR, April 10, 2012), para. 69.
[687] App. No. 33468/03 (ECtHR, January 10, 2012). See *Silickienè* (ECtHR, April 10, 2012), para. 68.
[688] (ECtHR, 10 January 2012), paras. 32–37.
[689] *Vulakh* (ECtHR, January 10, 2012), para. 47.
[690] *Vulakh* (ECtHR, January 10, 2012), para. 49.
[691] App. No. 68890/01 (ECtHR, October 25, 2005), paras. 97–100, 122–124.
[692] *Vulakh* (ECtHR, January 10, 2012), para. 46.
[693] *Denisova* (ECtHR, April 1, 2010), paras. 5–31.

merits of [their] claim[s] for vindication."[694] For this reason, the ECtHR found that the Russian courts had acted at "variance with the requirements of the Russian law" and without supporting their conclusions with detailed reasons on the facts or the law.[695] It concluded that the applicants had borne an "individual and excessive burden," which had upset the fair balance mandated by Art. 1 ECHR-P1.[696] It considered Art. 6(1) ECHR, under its civil limb, but only to dismiss the applicants' alternative submission that the proceedings had been unreasonable.[697] Conversely, in *Zlínsat* the ECtHR first found that Bulgaria had violated Art. 6(1) ECHR by failing to subject decisions of the Sofia City Prosecutor's Office to "review by a judicial body having full jurisdiction";[698] it then concluded that Bulgaria had violated the lawfulness requirement of Art. 1 ECHR-P1.[699] In *Dimitar Krastev* v. *Bulgaria*, the court dispensed with the need to apply Art. 1 ECHR-P1 once it had found a violation of Art. 6(1) ECHR due to insufficient judicial supervision of a prosecutor's forfeiture decision.[700] By contrast, in *Insanov*, the ECtHR refused to find a conviction-based confiscation order contrary to Art. 1 ECHR merely because the predicate criminal proceedings violated aspects of Art. 6(1) and (3) ECHR. In the court's view, "the flaws that the Court found . . . [were] not of such a nature as to render the entire trial so fundamentally unfair as to amount to a flagrant denial of justice."[701] Furthermore, when the domestic courts had imposed the sentence, they had afforded "the applicant . . . an opportunity, of which he appear[ed] to have made use, to advance his arguments against the confiscation."[702] Any miscalculations in the original confiscation order would be corrected when the domestic courts reopened the criminal case after the ECtHR's decision.[703]

Procedural proportionality and the hearing in the requesting state A further question is the extent to which perceived deficiencies in the requesting state's criminal and/or confiscation proceedings could give rise to a violation by a requested state of the convention or its protocols. Of particular concern are confiscation orders that follow from convictions for illicit enrichment. As noted in Chapter 3, illicit enrichment prosecutions touch upon several fair

[694] *Denisova* (ECtHR, April 1, 2010), paras. 61–63.
[695] *Denisova* (ECtHR, April 1, 2010), paras. 61–63.
[696] *Denisova* (ECtHR, April 1, 2010), para. 64.
[697] *Denisova* (ECtHR, April 1, 2010), paras. 66, 68.
[698] (ECtHR, June 15, 2006), paras. 75–85. See also *Hentrich* (1994) 18 EHRR 440, paras. 45–49, 56; *Capital Bank* (2007) 44 EHRR 48; *Grifhorst* (ECtHR, February 26, 2009), paras. 97–104.
[699] *Zlínsat* (ECtHR, June 15, 2006), paras. 97–99.
[700] App. No. 26524/04 (February 12, 2013), para. 67.
[701] *Insanov* (ECtHR, March 14, 2013), para. 184.
[702] *Insanov* (ECtHR, March 14, 2013), para. 185.
[703] *Insanov* (ECtHR, March 14, 2013), paras. 186, 195.

trial rights.[704] If a haven state opts to enforce such an order, will it violate Art. 1 ECHR-P1 or Art. 6 ECHR? The answer will depend on the ECtHR's willingness to countenance presumptions in criminal proceedings and to assess the fairness of procedures in a victim country.

Salabiaku v. *France* is cited as authority for the proposition that proportionate presumptions of illicit enrichment are compatible with the individual right to a presumption of innocence under Art. 6(2) ECHR.[705] The case concerned provisions of the French Customs Code that deemed "a person in possession [of prohibited goods] … liable for the offence [of smuggling prohibited goods]."[706] The applicant had been convicted under the provision despite his assertion that he had mistakenly taken possession of the trunk that contained narcotic drugs.[707] Affirming the decision of the French court, the ECtHR found that "[p]resumptions of fact and law operate[d] in every legal systems" and were not "in principle" disallowed by the convention. Equally, they were not matters of indifference under Art. 6(2) ECHR: "States [were required] to confine [presumptions of fact and law in criminal cases] within reasonable limits which take into account the importance of what is at stake and [of] maintain[ing] the rights of the defence."[708] When it applied that test, it noted that Mr. Salabiaku was undisputedly in possession of the trunk at the relevant point in time; hence, the prosecution had proved the facts that triggered the presumption. Further, the presumption was subject to two defenses under French case law, one of which allowed the courts to consider the applicant's fault.[709] Finally, the French courts did not "resor[t] automatically" to the presumption but cited other evidence that tended to show that the applicant had intended to take possession of the trunk, even that the applicant was guilty of the underlying offense.[710]

If *Salabiaku* indicates that ECHR state parties may presume a material element of an offense within their territories, *Willcox* v. *UK* and *Hurford*

[704] See Chapter 3, n. 206 and accompanying text.

[705] A/HRC/19/42, para. 46; ICHRP and TI, "Integrating Human Rights," pp. 65–66; Jayawickrama, Pope, and Stolpe, "Easing the Burden of Proof," 27–28; Kofele-Kale, "Presumed Guilty," 914–915; *Combating Economic Crimes*, pp. 63–67; Lewis, "Presuming Innocence"; Muzila et al., *On the Take*, p. 31; Wilsher, "Inexplicable Wealth," 40–42. Cf. Low, Bjorklund, and Cameron Atkinson, "The Inter-American Convention against Corruption," 281–285.

[706] App. No. 10519/83 (1991) 13 EHRR 379 (A/141-A), para. 19. See also *Pham Hoang* v. *France*, App. No. 13191/87 (1993) 16 EHRR 53, para. 33; *Janosevic* v. *Sweden*, App. No. 34519/97 (2004) 38 EHRR 22, para. 101; *Klouvi* v. *France*, App. No. 3070754 (ECtHR, June 30, 2011), para. 41.

[707] *Salabiaku* (1991) 13 EHRR 379, paras. 9–11.

[708] *Salabiaku* (1991) 13 EHRR 379, para. 28.

[709] *Salabiaku* (1991) 13 EHRR 379, para. 29.

[710] *Salabiaku* (1991) 13 EHRR 379, paras. 29–30.

v. *UK* signal that ECHR state parties may cooperate with third states that have made such presumptions part of their legal systems.[711] A UK citizen, Mr. Willcox, had been convicted and imprisoned in Thailand for offenses related to drug trafficking. Under Thai law, possession of more than three grams of certain illicit substances was deemed possession for the purposes of distribution;[712] the presumption was irrebuttable.[713] Returned to Britain under a bilateral prisoner transfer agreement, the applicant challenged his detention under Art. 5 ECHR. He argued that his trial was a flagrant denial of justice and his sentence arbitrary because he had not been able to challenge the finding about his plans for the drugs.[714] The ECtHR could not exclude the possibility "that there may be circumstances in which a provision of the nature of section 15(3) of the Thai Act would be capable of giving rise to an issue under [Art. 6(2) ECHR]."[715] Nonetheless, it refused to find that the applicant's defense rights had been restricted so severely as to give rise to a flagrant denial. It reasoned that the very purpose of the Thai presumption was to enable the imposition of an increased penalty for possession of certain quantities of narcotic drugs.[716] The Thai prosecutor had retained the burden of proving possession, which was the crux of the Thai offense, and the Thai court had imposed the sentence lawfully and within the framework of an otherwise fair procedure:

> In the present case, the first applicant had the benefit of a number of procedural guarantees in the Thai proceedings. He was tried in public before two independent judges; he was present throughout the proceedings and was legally represented; he was acquitted of some of the charges in accordance with the presumption of innocence and, despite the fact that possession of heroin and ecstasy was not contested, evidence was led to demonstrate that the drugs were in his possession; and he was sentenced in accordance with the applicable law and was given a significant reduction for his guilty plea.[717]

For reasons unexplained, it was also significant that the applicant had not previously raised his concerns with the British diplomatic mission.[718] Concluding that there was no violation of Art. 5(1) ECHR, the Fourth Section dismissed the application as manifestly ill-founded.[719]

[711] (2013) 57 EHRR SE16, para. 3. See also Ivory, "Fair Trial and International Cooperation," 157–158.
[712] *Willcox* (2013) 57 EHRR SE16, paras. 40, 41.
[713] *Willcox* (2013) 57 EHRR SE16, para. 13.
[714] *Willcox* (2013) 57 EHRR SE16, paras. 8, 93.
[715] *Willcox* (2013) 57 EHRR SE16, para. 97.
[716] *Willcox* (2013) 57 EHRR SE16, para. 97.
[717] *Willcox* (2013) 57 EHRR SE16, para. 97.
[718] *Willcox* (2013) 57 EHRR SE16, para. 97.
[719] *Willcox* (2013) 57 EHRR SE16, para. 98.

In *Willcox*, as in *Salabiaku* and *Phillips*, the legislative purpose and overall fairness of the criminal process were decisive under Art. 6 ECHR. In assessing the purpose of the presumption, the court deferred to the requesting state, its assessment of the social need and the appropriateness, in general terms, of its policy response. In assessing the fairness of the procedure, the court emphasized the burden on the foreign prosecutor; the foreign court's assessment of evidence; and the public and judicial nature of the foreign proceedings, including the possibilities for legal and diplomatic representation. However, it did not take issue with the irrebuttable nature of the presumption, despite its serious consequences for the accused. The court may have been influenced by the fact that the act of cooperation benefited the applicant (he could serve his sentence in England) and the fact that the term of imprisonment was not "grossly disproportionate" under Art. 3 ECHR.[720] Nonetheless, *Willcox* does suggest that debates about the proportionality of legal or evidentiary presumptions in illicit enrichment offenses are irrelevant in the cooperative context for ECHR state parties. More fundamentally and perhaps problematically, it signals that a *substantive* presumption of innocence is not an aspect of the flagrant denial of justice doctrine and, by extension, not essential to the concept of a right to a fair trial.

In challenges to acts of cooperation under more clearly qualified rights, the ECtHR has been at least as reluctant to consider the substance of foreign orders or the fairness of foreign proceedings as part of the justification for the interference.[721] In *Eskinazi*, which concerned the execution of an order for the return of a child under the Hague Convention,[722] the court stated that complaints about the fairness of the foreign proceedings, though they were "undeniab[ly] relevan[t]" to the procedural inquiry of Art. 8 ECHR, were best considered under Art. 6(1) ECHR using the flagrant denial test.[723] Though the court has since become more willing to find orders for the return of children incompatible with Art. 8 ECHR,[724] the substantive and procedural proportionality of the foreign decision would not seem to be an aspect of its reasoning.[725] By contrast, *Nada* concerned a travel ban that Switzerland had imposed on a dual Italian–Egyptian national pursuant to SC

[720] Van Hoek and Luchtman, "Transnational Cooperation and Human Rights," 8.
[721] *Lindberg* (2004) 38 EHRR CD239, "The Law." [722] (ECtHR, December 14, 2005).
[723] *Eskinazi* (ECtHR, December 14, 2005), "The Law," para. B(2). *Maumousseau* (2010) 51 EHRR 35, paras. 62–81, 87.
[724] See further Kuipers, "Certificate for the Return of a Child," 403–405.
[725] See, e.g., *Neulinger and Shuruk* v. *Switzerland*, App. No. 41615/07 (2012) 54 EHRR 31, paras. 139, 141–152; *Lipkowsky* (ECtHR, February 18, 2011), "The Law," para. 1; *X* v. *Latvia*, App. No. 27853/09 (ECtHR, December 13, 2011) (referred to the Grand Chamber), paras. 65–79.

Resolutions 1267, 1333, and 1390.[726] The SC Sanctions Committee had listed the applicant and organizations related to him as associates of Usama bin Laden, Al-Qaida, and the Taliban.[727] Switzerland had, accordingly, frozen the applicant's Swiss funds and economic resources; prohibited such assets from being made available to him; and banned him from entering or transiting through its territory.[728] It maintained these restrictions until Mr. Nada was removed from the Sanctions Committee's list, even though its Federal Prosecutor had discontinued a related criminal investigation several years earlier.[729] For at least six years, the Swiss travel ban had effectively prevented Mr. Nada from leaving his 1.6 sq. km place of residence.[730] His ability to seek medical treatment, to work, and to participate in family events was consequently limited.[731]

The Grand Chamber admitted Mr. Nada's application under Arts. 8 and 13 ECHR.[732] The principle issue under Art. 8 ECHR was whether the interference was proportionate with the general interest (countering terrorism, protecting public safety and security, and preventing crime).[733] The majority of the court found that Switzerland could have used its discretion in implementing SC Res. 1390 to respond to the "realities of [Mr. Nada's] case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health."[734] This, along with the fact that Switzerland had failed to promptly inform the Sanctions Committee of the outcome of its investigation and to use its knowledge of the allegations against Mr. Nada to encourage or support an Italian delisting application, rendered the measures disproportionate.[735] The Grand Chamber did not mention the inadequacy of the Sanctions Committee's delisting procedures as relevant to the proportionality of the Swiss travel ban under Art. 8 ECHR. In fact, it only mentioned the UN procedures under Art. 13 ECHR when it found that the applicant lacked an effective remedy for challenging the violation of his right to a private and family life.[736] The Grand Chamber's silence on the "foreign" procedures is remarkable given the deficiencies in the Sanctions Committee's

[726] *Nada* (2013) 56 EHRR 18, para. 22. See further p. 46 and following above.
[727] *Nada* (2013) 56 EHRR 18, paras. 17, 21.
[728] BGE 133 II 450 (November 14, 2007), para. 2.2, partially discussed *Nada* (2013) 56 EHRR 18, para. 22.
[729] *Nada* (2013) 56 EHRR 18, paras. 19, 22.
[730] *Nada* (2013) 56 EHRR 18, paras. 130, 166.
[731] *Nada* (2013) 56 EHRR 18, paras. 38, 154, 165.
[732] *Nada* (2013) 56 EHRR 18, paras. 149, 201.
[733] *Nada* (2013) 56 EHRR 18, para. 174.
[734] *Nada* (2013) 56 EHRR 18, para. 195. See also Joint Concurring Opinion of Judges Bratza, Nicolaou, and Yudkivska, para. 11.
[735] *Nada* (2013) 56 EHRR 18, paras. 187–190. See also Joint Concurring Opinion of Judges Bratza, Nicolaou, and Yudkivska, para. 12.
[736] *Nada* (2013) 56 EHRR 18, para. 211.

delisting process and the ECJ's judgment in *Kadi No. 2*, which the majority cited elsewhere in the judgment with approval.[737]

Procedural proportionality in the targeted financial sanctions case law of the EU In the line of cases beginning with *Kadi No. 1*,[738] the EU judiciary considered the procedures for challenging targeted financial sanctions ordered by the SC against Usama bin Laden, Al-Qaida, the Taliban, and associated individuals and entities. The applicants alleged that the EU had violated their fundamental rights to reasons, judicial review, a hearing, and property by giving effect to the UN's sanctions without imposing sufficient procedural safeguards.[739] Initially, the EGC refused to entertain the applicants' complaints. It held that the underlying SC resolutions "clearly" prevailed over obligations in domestic and international treaty law as they were made under Ch. VII UNC and did not leave any discretion in implementation to UN member states;[740] therefore, the EGC found its powers of judicial review to be limited to checking:

> whether the superior rules of international law falling within the ambit of *jus cogens* [had] been observed, [and] in particular, the mandatory provisions concerning the universal protection of human rights from which neither the Member States nor the bodies of the United Nations may derogate because they constitute "intransgressible principles of international customary law".[741]

As to the substantive impact of the asset freezes on the applicants, the court considered both whether they could be a form of inhuman and degrading treatment,[742] and whether they would violate any *jus cogens* right to property,[743] as expressed in Art. 17(2) UDHR. It rejected the second argument on the basis that there had been no arbitrary deprivation of property. It "stress[ed] the importance of the campaign against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations."[744] It found that the "freezing of funds . . .

737 *Nada* (2013) 56 EHRR 18, para. 212.
738 [2005] ECR II-3353. See further p. 46 and following above.
739 *Kadi No. 1* [2005] ECR II-03649, paras. 59, 139–152; *Yusuf* [2005] ECR II-03533, paras. 190–204.
740 *Kadi No. 1* [2005] ECR II-03649, paras. 181–208; *Yusuf* [2005] ECR II-03533, paras. 231–259.
741 *Kadi No. 1* [2005] ECR II-03649, para. 231; *Yusuf* [2005] ECR II-03533, para. 282. See also *Hasan* [2006] ECR II-00052, para. 116; *Ayadi* [2006] ECR II-02139, paras. 107–112.
742 *Kadi No. 1* [2005] ECR II-03649, paras. 236–240; *Yusuf* [2005] ECR II-03533, paras. 290–291.
743 *Kadi No. 1* [2005] ECR II-03649, paras. 240–252; *Yusuf* [2005] ECR II-03533, paras. 292–303. See also *Kadi No. 2* [2008] ECR I-06351, para. 92.
744 *Kadi No. 1* [2005] ECR II-03649, para. 245; *Yusuf* [2005] ECR II-03533, para. 296.

[was] a temporary precautionary measure which, unlike confiscation, [did] not affect the very substance of the right."[745] The SC had also established a "means of reviewing, after certain periods, the overall *system* of sanctions."[746] Finally, referring to its findings on compatibility with the right to be heard and effective judicial review, the EGC considered that there were adequate procedures for imposing and challenging the listing decision before the SC and the EU judiciary. In the circumstances, the SC had appropriately restricted the applicant's rights to be heard "directly and in person," to access the evidence against him, and to a judicial remedy.[747]

The applicants appealed. In *Kadi No. 2*, the ECJ accepted the opinion of Advocate General Maduro that member states and community (Union) institutions were required under community (Union) law to implement the SC resolution in accordance with general principles of community law, including fundamental rights.[748] It confirmed, moreover, that a qualified right to property is a general principle as "enshrined" in Art. 1 ECHR-P1.[749] Thus, having characterized the interference as temporary and precautionary but considerable, the court asked whether the interference could be justified as proportionate and tolerable.[750] It found – "in principle" – that "threats to international peace and security posed by acts of terrorism" could justify the freezing of assets on the basis of a SC list, especially when qualified by humanitarian derogations, exceptions, and procedures for administrative review by the SC itself.[751] However, as implemented in that case, the freezes did not strike a fair balance between the public and individual interests.[752] In violation of the applicant's rights to a defense and to effective judicial review, the community had provided him with neither the evidence on which his listing was based nor the right to receive that information nor a hearing before the EU courts in connection with that material.[753] Then, in violation of the procedural requirement of Art. 1 ECHR-P1, it adopted "[t]he contested regulation, . . . without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his

745 *Kadi No. 1* [2005] ECR II-03649, para. 248; *Yusuf* [2005] ECR II-03533, para. 299.
746 *Kadi No. 1* [2005] ECR II-03649, para. 249 (emphasis added); *Yusuf* [2005] ECR II-03533, para. 300.
747 *Kadi No. 1* [2005] ECR II-03649, paras. 250, 253–275, 283–285; *Yusuf* [2005] ECR II-03533, paras. 300, 304–346. In *Yusuf*, it confirmed that there was no duty to hear persons or entities before their inclusion on the list: [2005] ECR II-03533, paras. 322–329.
748 Opinion of Advocate General Poiares Maduro, Case C-402/05 P, *Yassim Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities*, January 16, 2008, paras. 30–40; *Kadi No. 2* [2008] ECR I-06351, paras. 281–282, 286–288.
749 *Kadi No. 2* [2008] ECR I-06351, paras. 355–356.
750 *Kadi No. 2* [2008] ECR I-06351, paras. 357–360.
751 *Kadi No. 2* [2008] ECR I-06351, paras. 359–366.
752 *Kadi No. 2* [2008] ECR I-06351, paras. 360, 371.
753 *Kadi No. 2* [2008] ECR I-06351, paras. 345–353.

property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him."[754]

The ECJ stayed the effect of its decision to allow the institutions and member states to reconsider their positions.[755] When the council retained Mr. Kadi and the Al Barakaat International Foundation on its list,[756] however, the EGC found for the listed parties.[757] It expressed reservations about its power to review the legality of Union acts that give effect to mandatory SC resolutions in *Kadi No. 3*.[758] But it determined that the applicant's rights to an effective defense, judicial protection, and proportionate interferences with property had been breached.[759] The community institutions had failed to carry out an independent assessment of the SC's listing decision, which was – despite reforms – still rendered through wholly administrative procedures.[760] Hence, they had failed to provide Mr. Kadi with evidence linking his frozen funds to acts of terrorism or to balance the public interest in maintaining the confidentiality of sources and enabling him to effectively challenge his listing before the community courts.[761] In the absence of effective mechanisms for review and given the duration and scope of the order, the interference with property was disproportionate.[762] Accordingly, with respect to the applicant, the court annulled the community regulation that had imposed the freeze.[763]

In *Kadi No. 4*, the ECJ criticized the EGC's reasoning but upheld the annulment as far as it concerned Mr. Kadi.[764] The higher court confirmed that the regulation was not immune from jurisdiction[765] and that the EU courts had a duty to "ensure the review, in principle the full review" of such acts, including for their compatibility with fundamental rights.[766] However, there was no violation of fundamental rights in the authorities' failure to disclose information and evidence that had been withheld from them by

[754] *Kadi No. 2* [2008] ECR I-06351, para. 369.
[755] *Kadi No. 2* [2008] ECR I-06351, paras. 373–376.
[756] Commission Regulation (EC) No. 1190/2008 of November 28, 2008, amending for the 101st time Council Regulation (EC) No. 881/2002 imposing certain restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al-Qaida network and the Taliban, OJ 2008 No. L322, November 28, 2008.
[757] *Kadi No. 3* [2010] ECR II-05177.
[758] *Kadi No. 3* [2010] ECR II-05177, paras. 120–123.
[759] *Kadi No. 3* [2010] ECR II-05177, paras. 153–195.
[760] *Kadi No. 3* [2010] ECR II-05177, paras. 171–172; see also para. 128.
[761] *Kadi No. 3* [2010] ECR II-05177, paras. 173–186.
[762] *Kadi No. 3* [2010] ECR II-05177, paras. 192–194.
[763] *Kadi No. 3* [2010] ECR II-05177, para. 195.
[764] *Kadi No. 4* (ECJ, July 18, 2013), para. 164.
[765] *Kadi No. 4* (ECJ, July 18, 2013), paras. 65–69.
[766] *Kadi No. 4* (ECJ, July 18, 2013), paras. 97–98.

the SC and UN member states.[767] The EGC had also erred in law by concluding that the SC reasons were "vague and lacking in detail" since it had not examined each reason separately on its merits.[768] For the ECJ, the rights to judicial protection and a defense placed EU authorities under a three-fold duty to share the SC's summary of reasons with the listed party; to enable the listed party to submit observations; and to consider whether those reasons were "well founded, in the light of [those] observations . . . and any exculpatory evidence."[769] If called upon, the EU courts were required to review the SC's reasons for their detail, specificity, and accuracy "in light of the information and evidence which have been disclosed."[770] Applying this reformulated standard, the ECJ found that the reasons, information, and/or evidence did not justify the substantially restrictive measures.[771]

Procedure as decisive of proportionality in asset recovery cases Procedural fairness would thus appear to be a crucial – if not determinative – factor in the assessment of the proportionality of cooperative confiscation orders under the European right to property. This aspect of Art. 1 ECHR-P1 is developed by reference to Art. 6(1) ECHR. No matter how important the goal of preventing, deterring, and remediating corruption through international cooperation in criminal matters, state parties should be prepared to afford aggrieved parties reasonable opportunities to effectively challenge enforcement orders before judicial tribunals.

Under Art. 6 ECHR, the ECtHR typically finds confiscation orders subject to, and compatible with, the fair hearing requirement of paragraph 1. Since *Phillips*, it has classified post-conviction, value-based confiscation orders as analogous to, or part of, an offender's sentence. These may be issued in separate proceedings, enforced with imprisonment, and calculated on the basis of an assumption that the offender has committed further crimes and/or has hidden assets; however, they do not appear on the offender's criminal record and they are not imposed in a process that aims to assign him/her criminal responsibility. They are not therefore separate "criminal charges" within the meaning of Art. 6(2) or (3) ECHR. Further, to the extent that a presumption of innocence is part of a fair hearing, confiscation orders that are calculated using presumptions of illicit acquisition may be compatible with Art. 6(1) ECHR. They must be issued by a judge who has independently considered the (accounting and conduct) evidence in a proceeding with adequate "safeguards." As a rule, the offender must be entitled to contest the

767 *Kadi No. 4* (ECJ, July 18, 2013), paras. 138–139.
768 *Kadi No. 4* (ECJ, July 18, 2013), para. 140.
769 *Kadi No. 4* (ECJ, July 18, 2013), para. 135.
770 *Kadi No. 4* (ECJ, July 18, 2013), para. 136.
771 *Kadi No. 4* (ECJ, July 18, 2013), paras. 140–163.

order (and rebut the presumption) in a public and oral hearing before which he/she was informed of the government's case and in which he/she was entitled to legal representation and the submission of further evidence. If these conditions were met, the court finds confiscation proceedings fair. A discretion *not* to order confiscation is an additional guarantee.

Strasbourg assesses the fairness of the hearing in "civil" confiscation cases according to the same criteria. And, with *AGOSI*, *Air Canada*, *Walsh*, and *M*, the court has considered a variety of NCB confiscation orders to be "non-criminal." Like the order that enforced the foreign penalty in *Saccoccia*, it deems these decisions to be "pecuniary" in nature. Here, it would not seem to matter that the applicant's private law interest is disputed or tenuous. In concluding that such confiscation orders do not amount to a criminal charge, the court considers the following factors:

- the *classification* of the measure under domestic law, particularly the determination of the matter by the *civil courts* and the preventative and restitutory *purposes* of the measures in their local legal-political context;
- the presence or absence of *formal charges* against the applicant property-holder and the potential for such charges to be brought in connection with the order;
- the presence or absence of *judicial findings of guilt* in the confiscation process, particularly, the calculation of the order so as to assume the commission of offenses for which an investigation or prosecution was *discontinued* or of which the applicant (or third party) was *acquitted*;
- the appearance of the confiscation order on the property-holder's *official criminal record*;
- the *autonomy* of the confiscation proceedings from any criminal proceedings and/or the *subsidiarity* of the confiscation proceedings to any administrative processes in national law;
- the *nature and scope* of the measure, especially its impact on property, rather than liberty, and on illicit, rather than licit, wealth; and
- the *strength of the evidence* that the applicant has obtained an illicit advantage, including the absence of a successful *rebuttal*.

By comparison, the fact that the confiscation was imposed as a consequence of a third party's offense or that it impairs the enjoyment of the incidences of ownership are not decisive factors. Whether and, if so, when confiscation orders may follow the death or acquittal of the offender is also unclear: The ECtHR avoided the former issue in *Silickienè* and rendered conflicting judgments on the latter in *van Offeren*, *Geerings*, and *Walsh*.

The court's willingness to remove confiscation orders from the scope of Art. 6(2) and (3) has afforded ECHR state parties considerable latitude in legislating on confiscation at the national, supranational, and international levels; so much is apparent from the European instruments reviewed in

Chapter 4 and Swiss cases on confiscation mentioned in Chapter 2.[772] However, the rationale *behind* the ECtHR's classification scheme is obscure, if not incoherent and inconsistent.[773] First, the ECtHR creates a seemingly artificial distinction between the concept of "criminal charges" and "penalties": A confiscation order may be "punitive" for the purposes of the prohibition on retroactivity under Art. 7 ECHR but not "criminal" for the full swathe of fair trial guarantees under Art. 6 ECHR.[774] The court aligns *Welch* and *Phillips* by treating post-conviction confiscation orders as part of the predicate criminal process. This argumentation is not possible with respect to NCB confiscation orders, however; there the contradiction in the case law remains. Second, the ECtHR downplays the severity of confiscation orders and the contested nature of confiscation proceedings.[775] In my view, the court betrays the logic of *Engel* and *Öztürk* by giving such weight to the governmental purpose.[776] It also exposes its classification of confiscation orders under Art. 6 to the above criticisms of its taxonomy of interferences under Art. 1 ECHR-P1.[777] The ECtHR also subtly reformulates the second *Engel* criterion in the *Phillips* line of cases, replacing "the nature of the *offence*" with "the essential nature of the *proceedings*." This amendment diverts attention away from the connection between the thing and the (serious) unlawful conduct for which confiscation orders are, by definition, imposed.[778] Third, the ECtHR applies factors not on the original *Engel* list. Sometimes they are used to show that confiscation is a civil matter; sometimes that the confiscation is part of the predicate criminal proceeding; sometimes that the hearing (with its presumption) as a whole was fair. Some of the factors are also counterintuitive. The rigour and formality ("evidence" and "safeguards") of conviction-based confiscation proceedings, for example, could also indicate their autonomy from the predicate criminal matter. Similarly, a finding that

[772] See in particular C-2528/2011 (FAC, September 24, 2103), paras. 6.4–6.6, 10, discussed at p. 45. The Federal Administrative Court held that the RIAA confiscation order was not a criminal charge under Art. 6(2) ECHR and, alternatively, that Art. 6(2) ECHR was not breached. It did not consider whether the order was "pecuniary" in nature and dismissed arguments under the property guarantee, observing that the applicants had not been able to demonstrate their entitlement during the confiscation proceedings. A detailed discussion of the Swiss decision is beyond the scope of this work.

[773] *Varvara* (ECtHR, October 29, 2013) (not final), Partly Dissenting Opinion of Judge Pinto de Albuquerque.

[774] Gallant, *Money Laundering and the Proceeds*, pp. 34–38; Stessens, *Money Laundering*, pp. 64–65, 68.

[775] *Phillips* (2000) 30 EHRR CD170, Partly Dissenting Opinion of Judge Sir Nicolas Bratza joined by Judge Vajić.

[776] See also Stessens, *Money Laundering*, pp. 60–65. Cf. Gallant, *Money Laundering and the Proceeds*, pp. 121–128.

[777] See further p. 190. [778] See further p. 108.

confiscation orders affect pecuniary obligations would seem to conflict with the rationale for imposing confiscation in the organized crime cases. None of this conduces to legal certainty in confiscation matters or to the sense that the ECtHR interprets the ECHR and its protocols "according to law." If there is a golden thread running through the cases, it is that the court is committed to enabling state parties to pursue this criminal justice policy – without ceding entirely its capacity for supervision. Invariably, states are required to provide the affected party a fair and equal hearing; sometimes they will be chastised for failing to afford more extensive guarantees.

Also, the ECtHR has failed to formulate a rule for determining when Art. 1 ECHR-P1 will be applied in addition to or instead of Art. 6 ECHR. Clearly the two rules interrelate. The ECtHR has drawn on its analysis of Art. 6 ECHR to formulate the procedural requirement from Art. 1 ECHR-P1. The court has found that domestic courts must have had the power to consider the lawfulness, reasonableness, and fairness of the decision to confiscate and to remit the decision back to the decision-maker. Equally, the property-holder must have been able to participate fully and effectively in an adversarial proceeding through a legal representative, if desired, and by making submissions to the court on the basis of the evidence. The domestic court should, in turn, have been required to follow predetermined procedures and evidentiary rules and should have given equal consideration to the parties' arguments in a written judgment that connects findings of fact with the relevant law. When these conditions were met, however, the European courts were prepared to find a wide variety of orders compatible with Art. 1 ECHR-P1, accepting as proportionate those made with the aid of evidentiary devices and without proof of the offense to the criminal standard. The ECtHR appeared to draw the line at confiscation proceedings that themselves involved a violation of Art. 6 ECHR. However, in *Insanov*, it held that predicate criminal proceedings must amount to a flagrant denial of justice before they will result in a finding that the order is procedurally disproportionate under Art. 1 ECHR-P1.

Whether and, if so, when the *requesting* state's procedures will be relevant to the proportionality of the requested state party's execution order is less certain. In neither *Saccoccia* nor *Duboc* did the ECtHR mention the US order or the US criminal or confiscation proceedings in its discussion of proportionality under Art. 1 ECHR-P1. In *Saccoccia*, it may have implicitly relied on its earlier finding that Austria had adequately assessed the foreign proceedings for compliance with Art. 6(1) ECHR – or it may have concluded that there was no evidence of a flagrant denial of the procedural proportionality requirement of Art. 1 ECHR-P1. In *Eskinazi*, there is authority that the fairness of the foreign proceedings is not part of the proportionality test for qualified rights. This conclusion finds support in *Nada* but sits uneasily with the EU courts' later *Kadi* cases where the EGC and ECJ considered EU

authorities to be under an obligation to review the reasons for a SC listing in the absence of judicial review procedures at the UN level. For now, *Saccoccia* and *Duboc* indicate that the court is unlikely to find a procedural violation of Art. 1 ECHR-P1 if it has not already found a flagrant denial of justice under Art. 6 ECHR. And that, as *Willcox* confirms, it will do in rare cases indeed.[779]

5.5.2.3 The protection of *bona fide* third parties

The judgments and decisions on procedural proportionality also contain important statements on the protection of aggrieved non-offenders in cooperative confiscation proceedings, in particular persons who claim to own illicit wealth and not to have known or to have had reason to suspect its connection to the offense.[780] Provisions on innocent third parties appear in several of the anti-corruption treaties and related MLATs but – with the exception of the proposed EU directive[781] – none prohibits the enforcement of foreign confiscation orders at the expense of a third party's competing claim. The issue is thus whether and, if so, how states are required to take into account the third party's claims under Art. 1 ECHR-P1.

The property-holder's culpability – criminal or otherwise – has been relevant to the proportionality of interferences under Art. 1 ECHR-P1, including in cases on confiscation.[782] But *Saccoccia* and *Duboc* provide little guidance on whether state parties would violate Art. 1 ECHR-P1 by failing to consider or give priority to competing claims in enforcement proceedings. Disagreeing with the government's assertion in *Saccoccia* that the applicant lacked possessions, the ECtHR "note[d] that the competent United States court had considered the assets to be the applicant's gains from money-laundering and that no other person had raised any claims to them."[783] In *Duboc*, it likewise refused to enter into the ownership issue, ignoring claims that that applicant had transferred assets to his ex-wife by dismissing the complaint under Art. 1 ECHR-P1 on the strength of *Saccoccia*.[784] Clearly, the court had no cause to consider protections for third parties in the Austrian *exequatur* proceedings.

[779] See further p. 156 and following above. [780] See further p. 116 and following above.

[781] COM(2012) 85 final, Preamble, para. 13, Art. 6(2)(b). See also COM(2012) 85 final Explanatory Memorandum, p. 12.

[782] See, e.g., *Beyeler* (2001) 33 EHRR 52, paras. 115–116; *Air Canada* (1995) 20 EHRR 150, paras. 6, 41, 44; *Phillips* (2000) 30 EHRR CD170, para. 53; *"Bulves" AD* v. *Bulgaria*, App. No. 3991/03 (ECtHR, January 22, 2009), paras. 69–70; *Waldemar Nowakowski* (ECtHR, July 24, 2012), para. 50.

[783] *Saccoccia* (ECtHR, July 5, 2007), "The Law," para. 1(1)(b). On the assets in that case as "possessions," see further p. 174 and following above.

[784] (ECtHR, June 5, 2012), para. 51.

The ECtHR's cases on confiscation pursuant breaches of local law indicate that state parties must ensure that affected persons are able to raise their claims in the enforcement proceedings and have those claims considered by a court. All the same, they may subordinate those private interests to the public interest in confiscation. As the majority stated in *AGOSI*:

> the court must consider whether the applicable procedures . . . were such as to enable . . . reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company's conduct and the breach of the law which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures.[785]

In that case and in *Air Canada*, the owner's behavior was relevant to the Customs and Excise Commissioner's decision to restore or seek the condemnation of the gold coins and the airplane.[786] Those decisions were also subject to judicial review. As judicial review had been an effective remedy in like cases, the forfeiture was proportionate, notwithstanding its severe economic impact on innocent persons.[787] Citing *AGOSI* in *S* v. *Austria*, the ECmHR required "reasonable account to be taken as to the [owner's] degree of fault or care, or at least the relationship between the owner's conduct and the breach of the law."[788]

Dissenting opinion and academic criticism notwithstanding,[789] the Strasbourg organs went on to adopt[790] – and even expand – the majority view. In *Honecker*, the ECtHR found a fair balance in the Berlin court's "detailed" and "thorough" analysis of "the applicants' arguments[,] . . . the nature of the acts charged . . . and the provenance of the money in the applicants' bank accounts, which they had inherited," as well as "the exceptional circumstances of German reunification."[791] In *Arcuri*, the wife, son, and stepdaughter of the first applicant had not been convicted or suspected

785 (1987) 9 EHRR 1, para. 55. See also Gelinsky, *Schutz des Eigentums*, p. 182.
786 *AGOSI* (1987) 9 EHRR 1, para. 56; *Air Canada* (1995) 20 EHRR 150, para. 46.
787 *AGOSI* (1987) 9 EHRR 1, paras. 57–61; *Air Canada* (1995) 20 EHRR 150, paras. 42–48.
788 (ECmHR, December 1, 1993), "The Facts."
789 *AGOSI* (1987) 9 EHRR 1, Dissenting Opinion of Judge Pettiti; *Air Canada* (1995) 20 EHRR 150, Dissenting Opinion of Judge Martens joined by Judge Russo, 183–184; Gelinsky, *Schutz des Eigentums*, p. 185.
790 Harris et al., *Law of the European Convention on Human Rights*, pp. 691–692.
791 (ECtHR, November 15, 2001), "The Law," para. 1. See also *Islamische Religionsgemeinschaft e.V.* (ECtHR, December 5, 2002), "The Law," para. 1.

of membership of a mafia-like organization.[792] Nonetheless, it was sufficient that they had been afforded a "reasonable opportunity of putting their case to the responsible authorities," and that the Italian courts were satisfied, on the evidence, that the confiscated assets were the proceeds of crime.[793] Similarly, in *Butler* the confiscation was proportionate because the applicant had failed to rebut the presumptions that his cash, which a third party had transported to Spain and concealed from customs officials, was intended for use in drug trafficking.[794] The court went further still in *Silickienè*, finding an *indirect* hearing for a third party was sufficient under Art. 6(1) ECHR and Art. 1 ECHR-P1 given the seriousness of the predicate offenses, the applicant's involvement in and knowledge of those crimes, and the strength of the evidence connecting the things to the offenses.[795] Exceptionally, in *Azinas*, the impact of a discretionary disciplinary forfeiture order on innocent third parties was held to contribute to its lack of proportionality under Art. 1 ECHR-P1; however, the court had already found "the retrospective forfeiture of the individual's pension [not to] serve any commensurate purpose."[796]

In short, parties to ECHR-P1 would seem to be at liberty to confiscate the proceeds, objects, and instrumentalities of offenses or substitute assets from innocent third parties; however, in so doing, they must ensure that third parties have had an opportunity to contest the connection between the thing and the offense, if not their degree of fault, in fair judicial proceedings and have their arguments taken into account by a court with power to remove the order. The ECtHR did not have the opportunity to apply these principles to the enforcement order in *Saccoccia* or *Duboc*. Nonetheless, on my submission, it could find a violation of Art. 1 ECHR-P1 in a future case, if the requested state failed to afford the third party sufficient opportunity to challenge the enforcement order. Whether it would also require the requested state to consider the extent to which the *requesting state* afforded the innocent third party an opportunity to challenge the underlying confiscation order remains to be seen, as does the extent to which it would itself assess the scope, forum, and actual conduct of those proceedings. Based on Strasbourg's case law, neither of the cooperating states need recognize an innocent ownership defense to enforcement or confiscation, however.

[792] (ECtHR, July 5, 2001), "The Law," para. 1. See also *Riela* v. *Italy*, App. No. 52439/99 (ECtHR, September 4, 2001), "En Droit," para. 1; *Butler* (ECtHR, June 27, 2002), "The Law," para. C; *Yildirim* (ECtHR, April 10, 2003), "The Law," para. 1. See also *Bowler International* (ECtHR, July 23, 2009), paras. 44–47 (inadequate procedures); *Denisova* (ECtHR, April 1, 2010), paras. 59–64 (procedures adequate but not applied).

[793] *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 1.

[794] (ECtHR, June 27, 2002), "The Law," para. C.

[795] *Silickienè* (ECtHR, April 10, 2012), para. 67. Cf. *Radu* (ECtHR, September 3, 2013), para. 27.

[796] (ECtHR, June 20, 2002), paras. 8, 21–22, 44.

5.5.2.4 The temporal element

The case studies also demonstrated that years may go by before a victim state's confiscation order is finally executed by the haven jurisdiction. In the meantime, a restraining order of uncertain justification will have restricted the applicant's enjoyment of possessions. Under Art. 6(1) ECHR, contracting states are required to determine criminal and civil matters within a "reasonable time," what is reasonable being ascertained having regard to "the circumstances . . . and . . . the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute."[797] In assessing the length of proceedings involving allegations of corruption or economic criminality, the court has considered *inter alia*:

- the identity of the defendant, including his/her political position;
- the number of co-defendants;
- the trial procedures;
- the volume of evidence, particularly documentary evidence and witness testimony;
- the need for special expertise in interpreting the evidence, particularly financial and bank records; and
- any "international aspects" of the case, particularly the need to solicit evidence from abroad.[798]

The court has also considered the length of restraining orders as part of the proportionality requirement of Art. 1 ECHR-P1. However, under Art. 1 ECHR-P1, it is not concerned with the total length of the *proceeding*, but with the total length of the *interference*. It has regard to:

- the reasons why the order was imposed and maintained;
- the existence of adequate objection procedures and other procedural safeguards;
- the subsistence of a legal basis for the decision; and
- the alternatives to prolonged restraint.[799]

[797] See generally Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 11.452–11.455; Merrills and Roberston, *Human Rights in Europe*, pp. 108–109. See, e.g., *Frydlender* v. *France*, App. No. 30979/96 (2001) 31 EHRR, para. 43 (civil limb); *van Maltzan* (2006) 42 EHRR SE 11, para. 128.

[798] *Crociani* (ECtHR, December 18, 1980); *Agga* v. *Greece (No. 1)*, App. No. 37439/97 (ECtHR, January 25, 2000), para. 26; *Coëme* (ECtHR, June 22, 2000), paras. 136–141; *Kuvikas* v. *Lithuania*, App. No. 21837/02 (ECtHR, June 27, 2006), para. 50; *MAT* v. *Turkey*, App. No. 63964/00 (ECtHR, October 19, 2006), para. 40; *Holomiov* v. *Moldova*, App. No. 30649/05 (November 7, 2006), paras. 137–147; *Er* v. *Turkey*, App. No. 21377/04 (ECtHR, October 27, 2009), para. 22.

[799] *Raimondo* (1994) 18 EHRR 237, paras. 14–15; *Atanasov and Ovcharov* v. *Bulgaria*, App. No. 61596/00 (ECtHR, January 17, 2008), para. 73; *Borzhonov* (ECtHR, January 22, 2009).

For example, in *Forminster Enterprises*, the court found the twelve-year seizure of valuable company voting rights to "establish facts important for the criminal proceedings, and . . . prevent illegal transfers of securities" did not strike a fair balance with the general interest in (economic) crime control.[800] It emphasized "the importance of conducting investigations of suspected serious economic crimes. . . . with due diligence in order to ensure that these crimes are properly assessed and the proceedings duly terminated."[801] Conversely, the three-and-a-half-year seizure of bank accounts in *Benet Czech* was proportionate to the general interest of fighting crime since the tax evasion by the company's former manager was alleged to have been "highly sophisticated and extensive" and perpetrated through "an international network of numerous companies in several countries."[802] The investigators' efforts to review seized accounting and customs records and locate witnesses were appropriate,[803] and the applicant had had ample opportunity to seek interim judicial review.[804]

In *Dassa Foundation* v. *Liechtenstein* the court could have applied these principles to the eight-year seizure of a bank account in an international bribery and money laundering investigation; however, the court dismissed the complaint for non-exhaustion of domestic remedies.[805] For the same reason, the court refused to consider whether the length of the thirty-four-month enforcement proceedings in *Saccoccia* and the six-year-and-eleven-month preliminary investigation in *Duboc* were compatible with Art. 6(1) ECHR.[806] If asset recovery cases are brought before the ECtHR, applicants may well raise the total length of the preliminary restraining order asset freeze or seizure under Art. 6(1) ECHR, if not under Art. 1 ECHR-P1, as part of the proportionality of the interference with possessions. Evidence that the applicants sought to delay the proceeding or that the cooperating states have ceased to diligently pursue the criminal or MLA proceedings could be relevant, as may the requested state's mechanisms to challenge the ancillary orders. In the absence of effective mechanisms, such nominally interim orders may be vulnerable to the EGC's critique in *Kadi No. 3*, namely, that they are *de facto* confiscations.[807]

[800] (ECtHR, October 9, 2008), para. 10.
[801] *Forminster Enterprises* (ECtHR, October 9, 2008), para. 77. See also *Károly Hegedűs* (ECtHR, November 3, 2011), para. 26.
[802] (ECtHR, October 21, 2010), para. 46. See also *Benet Praha* (ECtHR, February 24, 2011), paras. 102–114.
[803] *Benet Czech* (ECtHR, October 21, 2010), paras. 47–48.
[804] *Benet Czech* (ECtHR, October 21, 2010), para. 49.
[805] (ECtHR, July 10, 2007), "The Law," para. D.
[806] *Saccoccia* (ECtHR, July 5, 2007), "Complaints," para. 1(a), "The Law," para. 1(2)(a); *Duboc* (ECtHR, June 5, 2012), paras. 43, 47.
[807] See further p. 193 and following above.

5.5.2.5 The provision of compensation

If the cooperative confiscation proceedings stall or the haven state rejects the request, the aggrieved party may claim that he/she (or it) is entitled to compensation. However, as a rule, state parties are not required to compensate individuals or legal persons for controlling their use of possessions under Art. 1 ECHR-P1, third sentence.[808] This even holds true if the things were restrained as the proceeds, objects, or instrumentalities of a crime of which the applicant has been acquitted.[809] Consequently, restraining orders have been found to be proportionate despite the state's failure to compensate the applicant for loss of use; depreciation in value; or damage during seizure.[810] The state is even entitled to defray the costs of administering and maintaining restrained assets from a defendant who is subsequently acquitted of the underlying criminal charge.[811] Generally, the ECtHR only requires a "possibility . . . to initiate proceedings against the State and to seek compensation" when items of personal property are (unlawfully) seized or retained as evidence of an offense.[812] Illicit wealth that is restrained and confiscated to achieve the goal of asset recovery will rarely be covered by this exception; therefore, such interferences may be proportionate – despite the fact that they were uncompensated and non-compensable in the haven state's domestic law.

5.5.2.6 The exceptional circumstances of the confiscation order

Finally, the context in which the confiscation order was issued may itself help persuade the court that the interference was proportionate. As mentioned above, the ECtHR had regard "to the exceptional circumstances of German reunification" when it found the Act of June 29, 1990 proportionate to

[808] See, e.g., *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd* v. *UK*, App. No. 44302/02 (2008) 46 EHRR 45, para. 79. See further Harris et al., *Law of the European Convention on Human Rights*, p. 688. Cf. deprivations of possessions under the second sentence: Clayton and Tomlinson, *Law of Human Rights*, vol. I, paras. 18.119–18.120; Cremer, "Eigentumsschutz," para. 134; Harris et al., *Law of the European Convention on Human Rights*, p. 680; Fischborn, *Enteignung ohne Entschädigung*, pp. 86–87. See, e.g., *Lithgow* (1986) 8 EHRR 39, para. 120.

[809] *Andrews* v. *UK*, App. No. 49584/99 (ECtHR, September 26, 2002). See also *Adamczyk* (ECtHR, November 7, 2006), "The Law."

[810] *Raimondo* (1994) 18 EHRR 237, para. 33; *Adamczyk* (ECtHR, November 7, 2006), "The Law"; *Atanasov and Ovcharov* (ECtHR, January 17, 2008), para. 73; *Simonjan-Heikinheimo* (September 2, 2008), "The Law"; *Borzhonov* (ECtHR, January 22, 2009), para. 61. Cf. *Jucys* (ECtHR, January 8, 2008), paras. 34–39.

[811] *Andrews* (ECtHR, September 26, 2002), "The Law."

[812] *Jucys* (ECtHR, January 8, 2008), para. 37; *Karamitrov* (ECtHR, January 10, 2008), para. 77; *Borzhonov* (ECtHR, January 22, 2009), para. 6; *Novikov* (ECtHR, June 18, 2009), para. 46. Cf. *Károly Hegedűs* (ECtHR, November 3, 2011), para. 26.

the general interest in *Honecker*.[813] The ECmHR similarly cited Italy's particular problems with organized crime in considering whether its preventative confiscations struck a fair balance in *M* and subsequent cases.[814] This reasoning was affirmed in *Silickienè* but was less successful in *Grifhorst* v. *France*, where the court found that international instruments on money laundering themselves required proportionate implementation.[815] Nonetheless, cases such as *Honecker*, *M*, and *Silickienè* indicate that the court may be more generous with its interpretation of the margin of appreciation when confiscations respond to complex political transition and/or entrenched (and politicized) organized crime.[816]

5.5.3 Preliminary conclusions

Having considered the scope, nature, lawfulness, and purpose of the interference, the court ends its inquiry under Art. 1 ECHR-P1 with a weighing-up exercise: Did the respondent state strike a fair balance between the pursuit of a legitimate objective and the protection of the individual's fundamental right to property?[817] In this section, I considered the general interest in enforcing foreign confiscation orders that aim at asset recovery and the proportionality of measures to those ends. I found, on the one hand, that the ECtHR is most likely to characterize the general interest as the reduction of the incidence of corruption and associated acts of money laundering – if not the remediation of the economic and social consequences of those offenses in the cooperating states. With so much clear, I examined, on the other hand, the factors that the court could consider in assessing the proportionality of orders in asset recovery cases.

In dealing with confiscations imposed pursuant to breaches of domestic law, the court has regarded procedural proportionality as a particularly important factor. Strasbourg has been reluctant to characterize confiscation orders as criminal matters, however, and so to subject them to the stricter requirements of Art. 6(2) and (3) ECHR. When innocent owners have challenged confiscations of instrumentalities and objects of smuggling, the court has emphasized the domestic (non-criminal) classification and (preventative) objectives of the confiscation laws, as well as the rigorous evaluation of

[813] (ECtHR, November 15, 2001), "The Law," para. 1. See also *Jahn* (2006) 42 EHRR 49, paras. 111–117.

[814] *M* (ECmHR, 15 April 1991), "The Law," para. 2; *De Rosa* (ECmHR, February 20, 1995), "The Law," para. 2. See also *Arcuri* (ECtHR, July 5, 2001), "The Law," para. 1.

[815] *Grifhorst* (ECtHR, February 26, 2009), para. 104.

[816] See also *Cichopek and Others* v. *Poland*, App. No. 15189/10 (ECtHR, May 14, 2013), paras. 135, 143, 146–157. See also Peters and Altwicker, *Europäische Menschenrechtskonvention*, paras. 32.32–32.33.

[817] *James* (1986) 8 EHRR 123, para. 50.

(accounting) evidence that establishes the connection between the things possessed by the applicant and the offense. For similar reasons, it has generally refused to consider preventative NCB confiscations and punitive conviction-based confiscation orders as giving rise to new criminal charges.

In any case, compliance with Art. 6 ECHR is neither a necessary nor a sufficient condition for compliance with Art. 1 ECHR-P1. What would appear essential under that article is the requirement that the aggrieved property-holder has an opportunity to challenge the confiscation order before an independent and impartial judicial tribunal in a proceeding that is otherwise fair within the meaning of Art. 6(1) ECHR. This factor is even more important in cases on cooperative confiscation. In *Saccoccia* and *Duboc*, the ECtHR *only* considered the adequacy of Austria's procedures for challenging the enforcement orders; it did not mention the US criminal law norms or procedures, the size of the order, the length of the interference, and the other (non-procedural) conditions for granting or assessing the requests in Austrian law. In cases on other qualified rights and foreign orders, the court has expressly or implicitly refused to consider the adequacy of the foreign proceedings as part of the proportionality test, adopting a narrower approach than the ECJ in its financial sanctions case law. In so doing, the court may have sought to defer to the sensitivity of property questions (and cooperation matters) in national and international law, especially given the tentative nature of the applicant's claim to the possessions in the *Saccoccia* and *Duboc* cases.[818] Additionally or alternatively, it may have sought to acknowledge the practical challenges that the requested state party would have faced had it been required to assess the (substantive) proportionality of its counterpart's confiscation order. Its conclusion should provide comfort to ECHR state parties that are asked to cooperate for the purposes of asset recovery. Nonetheless, it is regrettable that the court did not describe its approach or considerations more clearly. In failing to explain how this crucial aspect of the right to property applies in cooperative confiscations, it abdicated part of its supervisory function and created more uncertainty for haven state parties, non-contracting victim states, and beneficiaries of the convention's guarantees.

5.6 Property and equality under the ECHR

A last point of uncertainty in asset recovery cases is the interaction between rights to property and equality under the ECHR. If state parties appear to single out particular PEPs or related third parties, would they violate the convention or its protocols? What if the haven states introduce "targeted" asset recovery laws or provisions, like those in Canada and Switzerland

[818] Lehavi, "The Global Law of the Land," 465–471.

but applicable to cooperative confiscations?[819] Article 14 ECHR provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." As Art. 14 ECHR is an accessory right,[820] it only prohibits discrimination in the recognition of the other guarantees.[821] An independent and more general right to equality appears at Art. 1 of Protocol 12 to the ECHR, but is currently less relevant due to the low number of ratifications among Europe's financial centers.[822]

Presuming cooperative confiscation orders interfere with interests protected by Art. 1 ECHR-P1, the first question is whether the respondent state treated the PEP or related party differently for a reason in Art. 14 ECHR.[823] The holding of high governmental (or quasi-governmental) office is an "identifiable, objective or personal characteristic" that constitutes "other status" under Art. 14 ECHR,[824] as are familial relationships.[825] Therefore, special-purpose asset recovery laws that overtly differentiate between PEPs and related parties and other people liable to the enforcement of foreign confiscation orders are likely to involve a relevant form of differential treatment. Applicants may also argue that the unequal application of a generic MLA law or treaty was motivated by one of the express grounds for discrimination in Art. 14 ECHR, such as nationality, political opinions, or property or minority status. However, the ECtHR is reluctant to find a secondary motive when it

[819] SRVG (Switzerland), Art. 1; Freezing Assets of Corrupt Foreign Officials Act (Canada), ss. 4(1)–(2)(a). See further p. 43 and following above.

[820] Arnardóttir, *Equality and Non-Discrimination*, p. 35; Loukaidēs, *ECHR: Collected Essays*, p. 57.

[821] See, e.g., *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium"* v. *Belgium*, App. No. 1474/62 et al. (1979–80) 1 EHRR 252, para. 9; *Rasmussen* v. *Denmark*, App. No. 8777/79 (1985) 7 EHRR 371, para. 29, discussed further Arnardóttir, *Equality and Non-Discrimination*, pp. 35–36.

[822] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 2000, entry into force, April 1, 2005, 177 ETS. As of October 3, 2013, it had been ratified by Albania, Andorra, Armenia, Bosnia and Herzogovina, Croatia, the Czech Republic, Finland, Georgia, Cyprus, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, FYR Macedonia, and Ukraine.

[823] *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark* (A/23), App. No. 36571/06, 1 EHRR 711, para. 56; *Burden* v. *UK*, App. No. 13378/05 (2008) 47 EHRR 38, paras. 61–66; *Clift* v. *UK*, App. No. 7205/07 (ECtHR, July 13, 2010), paras. 55, 66. See generally Arnardóttir, *Equality and Non-Discrimination*, pp. 71–76.

[824] *Sidabras and Džiautas* v. *Lithuania*, App. Nos. 55480/00 and 59330/00 (2006) 42 EHRR 6, para. 41; *Valkov* v. *Bulgaria*, App. Nos. 2033/04 et al. (ECtHR, October 25, 2011), para. 115.

[825] *Marckx* (1979–80) 2 EHRR 330, para. 39; *Burden* (2008) 47 EHRR 38, paras. 61–66.

has already found there was legitimate reason for restricting a qualified right, as it is likely to do when states cooperate for the purposes of asset recovery.[826]

The second issue is whether there is an objective and reasonable justification for the distinction, i.e., whether it is proportionate to a legitimate aim[827] given "the circumstances, the subject-matter and the background."[828] The ECtHR has found the responsibilities of high office and the gravity of an offense to be acceptable justifications for discrimination in the application of substantive guarantees.[829] The court also affords states a wider margin of appreciation when a distinction is based on property status, is a "general measur[e] of economic or social strategy,"[830] or is a control of the use of possessions.[831] For reasons already discussed, it is unlikely that a respondent state would overstep the margin for appreciation by enforcing a foreign confiscation order without checking for full compliance with Art. 6 ECHR or Art. 1 ECHR-P1 in the victim state. However, a measure which prevented affected parties from challenging the enforcement of a cooperative confiscation order before the haven state's court would fall foul of Art. 1 ECHR-P1, Art. 6 ECHR, and Art. 14 ECHR read with Art. 1 ECHR-P1 and Art. 6 ECHR.[832] If the measure violates Art. 1 ECHR-P1 or Art. 6 ECHR, it would not be considered separately under Art. 14 ECHR.

5.7 Conclusions

Drawing on the case law and the case studies, I have used this chapter to submit that state parties to the ECHR-P1 are likely to act within the scope of Art. 1 when they enforce foreign confiscation orders. The right to property benefits people from third states, be they individuals in high office, their associates or relatives, or corporations that those human beings beneficially own or control. Most enforcement orders would already be within the

[826] *Handyside* (1979–80) 1 EHRR 737, paras. 52, 66; *Özgür Gündem* v. *Turkey*, App. No. 23144/93 (ECtHR, March 16, 2000), para. 75. See further Arnardóttir, *Equality and Non-Discrimination*, p. 74. See also Loukaidēs, *ECHR: Collected Essays*, pp. 68–70 (discrimination in the exercise of prosecutorial discretion). See further p. 219 and following above.

[827] *Belgium Linguistics* (1979–80) 1 EHRR 252, para. 10.

[828] *Clift* (ECtHR, July 13, 2010), para. 73.

[829] *Valkov* (ECtHR, October 25, 2011), para. 117; *Gerger* v. *Turkey*, App. No. 24919/94 (ECtHR, July 8, 1999), para. 69. Cf. *Clift* (ECtHR, July 13, 2010), para. 61.

[830] *Stec and Others* v. *UK*, App. Nos. 65731/01 and 65900/01 (2006) 43 EHRR 47, para. 52.

[831] *Chabauty* v. *France*, App. No. 57412/08 (ECtHR, October 4, 2012), para. 50.

[832] *Giavi* v. *Greece*, App. No. 25816/09 (ECtHR, October 3, 2013), paras. 44, 55. See also *Ireland* v. *UK* (A/25), App. No. 4310/17 (1979–80) 2 EHRR 25, paras. 225–23; *Sejdić and Finci* v. *Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06 (ECtHR, December 22, 2009), paras. 46–50 (close supervision of restrictions aimed at preventing impunity of violent political groups and ensuring transitions to democracy).

protocol's temporal scope, as most state parties have ratified the protocol; for Switzerland and Monaco, some pre-EIF restraints and confiscations may be as well. As for the territorial scope of the protocol, the court has already interpreted the concept of jurisdiction to apply to the adverse foreign consequences of extradition; it is likely to take a similar approach in cooperative confiscation cases. Whether this exercise of jurisdiction would be truly territorial or extraterritorial, and whether state parties would have a duty to inquire into the circumstances for granting the foreign order under Art. 1 ECHR-P1 were open questions. Finally, Art. 1 ECHR-P1 would seem to cover a PEP's rights *in rem* and *in personam*, though perhaps not to things to which he/she (or it) had no entitlement and no legitimate expectation of (re)gaining in domestic (private) law.

Next, I considered how the court is likely to characterize the execution of foreign confiscation orders as interferences with property under Art. 1 ECHR-P1. The court reads Art. 1 ECHR-P1 as regulating three forms of interference or rules. Implicitly, it distinguishes interferences according to their intensity, duration, and purpose, the purposive element being particularly important in cases on confiscation. Since *Handyside*, Strasbourg has generally treated confiscations as interferences under the third sentence and rule – preventative/remedial confiscations because they give effect to prohibitions on the dangerous or harmful use of things, punitive confiscations because they enforce penalties. Drawing on minority judicial opinions and academic commentary, I argued that this approach is flawed. It uses circular reasoning and results in a superficial assessment of the impact of the interference by the court. The court would do better, in my view, to consider the government's purpose at the justification stage of the inquiry and to concentrate, at the interference stage, on the intensity and duration of the state's action. The court varied its approach in several cases on unlawful confiscations, though it persisted in *Saccoccia* (and *Duboc*) in classifying the (lawful) execution orders as interferences under the third rule.

In any case, I established that the justifications for the interference are the same under each rule. The court will ask whether the interference was lawful, in a broad and narrow sense, and whether it was proportionate to a general interest recognized by Art. 1 ECHR-P1. On the issue of lawfulness, I argued that the haven state party must have empowered its nationally competent authorities to confiscate (and restrain) the assets pursuant to a request for assistance from the victim state in the circumstances of the case at hand. Such orders would be lawful in the broad sense if they were precise, accessible, and certain, and accompanied by appropriate procedural safeguards. The fact that the foreign confiscation order was enforced in the absence of dual criminality, or in the face of competing domestic or international proceedings or doubts about the motivations of the requesting state is unlikely to render it unlawful under Art. 1 ECHR-P1. On the question of

proportionality, I argued that the reduction of the incidence of corruption and associated acts of international money laundering would be the most likely characterization of the general interest. However, the promotion of economic development, financial stability, and international cooperation in criminal matters were other convention-compatible goals. In assessing whether enforcement orders are in proportion to those goals, *Saccoccia* and *Duboc* indicate that procedures in the requested state are paramount. Given the complexity and sensitivity of these property questions, the court's failure to say what weight, if any, it gave to other factors, especially the laws, conduct, and procedures of the requesting state, is understandable if regrettable.

6

Asset recovery and other regional rights to property

At the beginning of this book, I established a working definition of human rights to property and sourced those rights in public international law. Though I noted the omission of a human right to property in the two binding global human rights instruments, I identified individual guarantees on property in the UDHR and in several regional human rights regimes, as well as a peoples' right to free disposition of natural wealth and resources in the ICCPR and ICESCR. European human rights to property, in particular Art. 1 ECHR-P1, were my focus in Chapter 5. In this chapter, I consider the regional property guarantees in the Americas, Africa, the Middle East, and the Asia/Pacific. I identify the key regional rights, describe their scope and justifiable limitations, and anticipate how they would be applied to the enforcement of foreign confiscation orders that aim at asset recovery. Since these "other" regional human rights treaties and instruments provide broader protections for peoples' rights to resources and development, I also consider in some detail whether and, if so, how collective rights to property could interact with individual entitlements. I do not separately address Islamic or Asian soft law rights to property or the human rights provisions in American or African sub-regional economic integration treaties.[1]

6.1 Property rights in the two Americas

In the Americas, as in Europe, the end of World War II and the start of the Cold War prompted states to formalize intergovernmental mechanisms on cooperation in cultural, security, and, eventually, human rights matters.[2] As amended, the 1948 Charter of the OAS (OAS Charter) refers to "fundamental" and "individual" rights,[3] and is read as incorporating the substantive

[1] For an overview of these instruments, see Hummer, "Menschenrechtsschutz in beiden Amerikas," pp. 664–670; "Menschenrechtschutz in Afrika," pp. 938–944; "Menschenrechtsschutz im Asiatisch-Pazifischen Raum," pp. 1174–1176; Karl, "Menschenrechtsschutz im Islamisch-Arabischen Raum," pp. 1126–1130.

[2] Encyclopædia Britannica, "Organization of American States (OAS)."

[3] Bogota, April 30, 1948, in force December 13, 1951, 119 UNTS 3, Arts. 3(1), 17.

provisions of the American Declaration of the Rights and Duties of Man (ADRDM).[4] The ADRDM's rights and freedoms are reinforced and supplemented, in turn, by the ACHR, which is formally binding among its state parties.[5] The ADRDM and ACHR are overseen at the international level by the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR), which are organs of the OAS with powers to hear individual petitions.[6] However, unlike the ECtHR, the IACtHR is only competent to hear individual cases that have been referred by the commission when the respondent state party has made the appropriate declaration.[7]

Both the ADRDM and the ACHR contain guarantees on property. Recalling Art. 17 UDHR, Art. XXIII ADRDM provides that "[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." Then, apparently borrowing from Art. 1 ECHR-P1,[8] Art. 21 ACHR expressly guarantees the rights to use and enjoy and not be deprived of one's property:

> Article 21
>
> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interests of society.
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons for public utility or social interest, and in cases and according to the forms established by law.
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

The question for this section is whether Art. 21 ACHR would limit the power of state parties to enforce foreign confiscation orders that aim at asset recovery.

[4] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights* (Advisory Opinion OC-10/89), Series A No. 10 (IACtHR, July 14, 1989), paras. 29–47. See further Buergenthal and Shelton, *Protecting Human Rights in the Americas*, pp. 39–44; Harris, "The Inter-American Achievement," pp. 4–5; Hummer, "Menschenrechtsschutz in beiden Amerikas," pp. 645–646; Pasqualucci, "The Inter-American Human Rights System," pp. 253–256; *Practice and Procedure of the Inter-American Court*, pp. 2–7.

[5] Pasqualucci, "The Inter-American Human Rights System," p. 256.

[6] Statute of the Inter-American Commission on Human Rights, La Paz, Bolivia, October 1979, in force November 1979, OAS AG/Res. 447 (IX-0/79) (as amended), Arts. 9(b), 18(b)–(d), 20; ACHR, Arts. 44, 61–62. See Hummer, "Menschenrechtsschutz in beiden Amerikas," pp. 646–650, 653–659; Pasqualucci, "The Inter-American Human Rights System," pp. 260, 262–263.

[7] ACHR, Arts. 61(1), 62(1). See further Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights*, Ch. 1; Pasqualucci, "The Inter-American Human Rights System," pp. 262–263; *Practice and Procedure of the Inter-American Court*, pp. 83–84.

[8] Krause, "The Right to Property," at p. 153.

6.1.1 The scope of the right under Art. 21 ACHR

The first issue is again whether a state party to the ACHR is temporally, personally, territorially, and substantively within the scope of the convention and its right to property when it enforces a foreign confiscation order. The scope of a right, as I noted in the last chapter, is the "circumscribed part of reality . . . which [it protects]."[9] The scope of the ACHR's right to property is determined by Art. 21 read with Art. 1 ACHR and the general international law on treaties, as codified by the Vienna convention of that name.

6.1.1.1 Temporal scope

Like the ECHR and its protocols, the ACHR applies to violations that occur after its entry into force for each state party.[10] The IACtHR has developed its own doctrine of continuing violations,[11] though its application to the right to property is disputed in the literature.[12] Be that as it may, I submit that Art. 21 ACRH may apply to post-EIF decisions to enforce foreign confiscation orders, even if they relate to pre-EIF requests. In *Cantos* v. *Argentina*, the IACtHR assumed jurisdiction over interferences under Art. 21 ACHR that resulted from an Argentinean Supreme Court judgment of 1996 but not with respect to the underlying agreement or surrounding events of the early 1970s.[13]

6.1.1.2 Personal scope

Unlike the European human rights to property, the ACHR's rights and freedoms only benefit natural persons: "For the purposes of this Convention, 'person' means every human being."[14] Nevertheless, the IACtHR has treated some government acts in respect of a legal person's property as interferences with the property of its stakeholders.[15] In *Ivcher Bronstein* v. *Peru*, it held the respondent state to have violated Art. 21 ACHR by:

[9] Ehlers, "ECHR General Principles," para. 40.

[10] Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights*, para. 13.21; Pasqualucci, *Practice and Procedure of the Inter-American Court*, p. 137. See, e.g., *Case of the Moiwana Community* v. *Suriname* (Preliminary Objections) Series C No. 124 (IACtHR, June 15, 2004), paras. 37–44. See ACHR, Art. 62(1); VCLT, Art. 28.

[11] See generally Burgorgue-Larsen and Úbeda de Torres, *The Inter-American Court of Human Rights*, para. 13.21; Ormachea, "Moiwana Village," 284–285; Pasqualucci, *Practice and Procedure of the Inter-American Court*, pp. 138–141.

[12] Pasqualucci, *Practice and Procedure of the Inter-American Court*, p. 141.

[13] *Case of Cantos* v. *Argentina* (Preliminary Objections) Series C No. 85 (IACtHR, September 7, 2001), paras. 25, 38–40.

[14] ACHR, Art. 1(2).

[15] Harris, "The Inter-American Achievement," p. 16; Pasqualucci, *Practice and Procedure of the Inter-American Court*, pp. 135–136.

- annulling the petitioner's original share purchase;
- suspending "his rights as majority shareholder and his appointment as director and chairman";
- calling an extraordinary general meeting "to elect a new board"; and
- prohibiting him from transferring his shares.[16]

Subsequently, in *Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador*, the court held that the seizure, maladministration, and conditional release of a company's premises, plant, business documents, financial instruments, and accounts in a criminal investigation affected the ability of its 50-percent-shareholder-*cum*-general manager to participate in his shareholding.[17] Citing *Bronstein*, the court acknowledged a "difference between the rights of the shareholders of a company and those of the company itself."[18] However, it found the "participation in the company's shares" to be of value and to have "formed part of its owner's patrimony from the moment it was acquired. As such, this participation constituted an asset to which Mr. Chaparro had the right to use and enjoyment."[19] Applying the same logic to cases on asset recovery, the enforcement of a confiscation order against a legal person or its property may constitute an interference with a closely related shareholding under Art. 21 ACHR.

6.1.1.3 Territorial scope

If the aggrieved individual is within the scope of the convention *ratione personae*, the next task will be to demonstrate that he/she is within its scope *ratione loci*. Much like Art. 1 ECHR, Art. 1(1) ACHR requires state parties "to ensure to all persons subject to their jurisdiction the free and full exercise of [its] rights and freedoms."[20] Whilst the IACtHR has avoided an express definition of jurisdiction,[21] the IACmHR has refused to limit the concept in the ADRDM or ACHR to territory.[22] It has also confirmed that acts carried out in the execution

[16] *Case of Ivcher Bronstein* v. *Peru* (Merits, Reparations, and Costs) Series C No. 74 (IACtHR, February 6, 2001), para. 76(s), 101–116.

[17] *Case of Chaparro Álvarez and Lapo Íñiguez* v. *Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Series C No. 170 (IACtHR, November 21, 2007), para. 182. See also *Haydee A. Marín and Others* v. *Nicaragua*, Rpt. No. 12/94 (IACmHR, February 11, 1994), Ch. III.

[18] *Chaparro* (IACtHR, November 21, 2007), para. 181.

[19] *Chaparro* (IACtHR, November 21, 2007), para. 182.

[20] ACHR, Art. 1(1). See further Gondek, *Reach of Human Rights*, pp. 139–141, 143–147; Milanovic, "From Compromise to Principle," 413; *Extraterritorial Application*, p. 12.

[21] *Case of Fairén-Garbi and Solís-Corrales* v. *Honduras* (Merits) Series C No. 2 (IACtHR, March 15, 1989), para. 161. Cf. *Garibaldi v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 203 (IACtHR, September 23, 2009), para. 146.

[22] Gondek, *Reach of Human Rights*, pp. 144–147; Milanovic, *Extraterritorial Application*, pp. 180–181; Pasqualucci, *Practice and Procedure of the Inter-American Court*, pp. 147–148. See, e.g., *Saldaño* v. *Argentina*, Rpt. No. 38/99 (IACmHR, March 11, 1999), para. 17; *Coard* v. *United States*, Rpt. No. 109/99 (IACmHR, September 29, 1999), para. 37.

of requests for extradition are within the convention's scope *ratione loci*.[23] Most pertinently, it admitted the complaint of Mr. Wong Ho Wing, a Chinese national who was arrested in Peru and detained with view to his extradition to China to face trial *inter alia* for bribery and smuggling.[24] Before the IACmHR, Mr. Wong Ho Wing had alleged violations – actual and potential – of his rights to life, humane treatment, a fair trial, and judicial protection under Arts. 4, 5, 8, and 25 ACHR read in conjunction with Art. 1(1) ACHR. He submitted that there were irregularities in the Peruvian extradition proceeding, as well as deficiencies in the Chinese government's assurance that he, if convicted, would not be sentenced to death.[25] Acknowledging the "the risk of harm to the right to life," the IACtHR ordered Peru to abstain from executing the request until the IACmHR had determined the merits of the case.[26] It emphasized, "[i]n addition, . . . the importance of the mechanism of extradition and the obligation that States collaborate with each other in this regard."[27]

After the Peruvian Constitutional Court upheld Mr. Wong Ho Wing's appeal in mid-2011, the IACtHR lifted the provisional measures.[28] It imposed them again after Peru's executive failed to acknowledge the finality of the constitutional court's decision.[29] The Peruvian court had identified a conflict between Peru's duties to extradite Mr. Wong Ho Wing under its treaty with China and its duty to protect his right to life under the ACHR; it concluded that the right to life prevailed.[30] The commission had previously found that it was competent *ratione loci* to hear the complaint because the petition "allege[d] violations . . . occurring within the territory of a State Party to that convention."[31] When read with the commission's earlier statements on extraterritorial jurisdiction, these comments strongly suggest that the inter-American bodies will conclude that the adverse (extraterritorial) consequences of cooperation may give rise to violations of the ACHR's substantive provisions. The IACtHR's cases on indigenous and tribal ownership indicate, furthermore, that the existence of a

[23] *Cecilia Rosana Nuñez Chipana* v. *Venezuela*, Rpt. No. 89/05 (IACmHR, October 24, 2005), para. 27; *Nelson Ivan Serrano Saenz* v. *Ecuador*, Rpt. No. 52/05 (IACmHR, October 24, 2005), para. 38; *Antonio Zaldaña Ventura* v. *Panama*, Rpt. No. 77/07 (IACmHR, October 15, 2007), para. 41.

[24] *Wong Ho Wing* v. *Peru*, Rpt. No. 151/10 (IACmHR, November 1, 2010).

[25] *Wong Ho Wing* (IACmHR, November 1, 2010), para. 46.

[26] *Matter of Wong Ho Wing regarding Peru (Order)* (IACtHR, May 28, 2010), para. 14.

[27] *Matter of Wong Ho Wing regarding Peru (Order)* (IACtHR, May 28, 2010), para. 16.

[28] *Matter of Wong Ho Wing regarding Peru* (Order) (IACtHR, October 10, 2011), paras. 6–8.

[29] See, in particular, *Matter of Wong Ho Wing regarding Peru (Order)* (IACtHR, June 26, 2012). In *Matter of Wong Ho Wing regarding Peru (Order)* (IACtHR, August 22, 2013), the court states that the IACmHR issued its Report on the Merits, No. 78/13, regarding case 12.794, on July 18, 2013; however, at the time of writing, that decision was not available.

[30] *Matter of Wong Ho Wing regarding Peru* (Order) (IACtHR, October 10, 2011), paras. 6–8.

[31] *Wong Ho Wing* (IACmHR, November 1, 2010), paras. 33, 1101–1102.

countervailing treaty obligation is not reason enough for state parties to disregard their duty to respect and ensure the right to property in Art. 21 ACHR.[32]

6.1.1.4 Substantive scope

The last question in this sub-section is whether the inter-American notion of property is broad enough to cover thing-based relationships that could be affected by foreign confiscation orders that aim at asset recovery. According to the IACtHR, the term "property" in Art. 21 ACHR embraces "those material objects that may be appropriated, and also any right that may form part of a person's patrimony; [. . .] includ[ing] all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value."[33]

In defining property, the court has stressed the autonomy of concepts in international human rights treaties and the importance of interpreting those terms in ways that evolve with "the times" and are in keeping with "current living conditions."[34] Thus, it has held Art. 21 ACHR to protect communal interest of afro-descendant and indigenous communities in land, waterways, and forests;[35] shareholdings and their ancillary rights and powers;[36] statutory entitlements to equalized pension payments;[37] and private rights *in personam*

[32] See further p. 281 and following below.

[33] *Bronstein* (IACtHR, February 6, 2001), para. 122. See also *Case of the Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua* (Merits, Reparations, and Costs) Series C No. 79 (IACtHR, August 31, 2001), para. 144; *Chaparro* (IACtHR, November 21, 2007), para. 174; *Case of Furlan and Family* v. *Argentina* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 246 (IACtHR, August 31, 2012), para. 220; *Case of the Massacres of El Mozote and Nearby Places* v. *El Salvador* (Merits, Reparations, and Costs) Series C No. 252 (IACtHR, October 25, 2012), para. 129; *Case of the Santo Domingo Massacre* v. *Colombia* (Preliminary Objections, Merits, and Reparations) Series C No. 259, para. 269.

[34] *Mayagna (Sumo) Awas Tingni Community* (IACtHR, August 31, 2001), para. 146. See also Davidson, *The Inter-American Human Rights System*, pp. 334–336; "Civil and Political Rights," p. 276; Lixinski, "Treaty Interpretation."

[35] *Mayagna (Sumo) Awas Tingni Community* (IACtHR, August 31, 2001), paras. 149–153; *Case Indigenous Community of the Yakye Axa* v. *Paraguay* (Merits, Reparations, and Costs) Series C No. 125 (IACtHR, June 17, 2005), paras. 118–121, 124, 131, 135–137, 154; *Case of the Saramaka People* v. *Suriname* (Preliminary Objections, Merits, Reparations, and Costs Judgment) Series C No. 172 (IACtHR, November 28, 2007), paras. 87–95; *Case of Yatama* v. *Nicaragua* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 127 (IACtHR, June 23, 2005), esp. Concurring Opinion of Judge S. Garcia-Ramirez, paras. 18–24; *Case of the Kichwa Indigenous People of Sarayaku* v. *Ecuador* (Merits and Reparation) Series C No. 245 (IACtHR, June 27, 2012), para. 145.

[36] *Bronstein* (IACtHR, February 6, 2001), paras. 122–123; *Chaparro* (IACtHR, November 21, 2007), para. 182.

[37] *Case of the "Five Pensioners"* v. *Peru* (Merits, Reparations, and Costs) Series C No. 98 (IACtHR, February 28, 2003), paras. 102–103.

and *in rem*.[38] It has not yet determined that the right to property would apply to bare possession as enjoyed by those who have illicitly acquired intangible things. Its repeated references to "acquired rights" and "patrimony" – the collection or pool of economic assets and liabilities held by a person during his/her lifetime[39] – may indicate that property excludes relationships that are not recognized or protected under local law. However, its express references to objects of value and in possession, taken with its willingness to apply a constitutional definition of property that is autonomous of definitions in domestic law, support the opposite conclusion. The same can be said of the court's willingness to take cognizance of developments in other areas of public international law, including ECtHR case law.

6.1.2 The nature of the interference

Presuming that state parties act within the temporal, personal, territorial, and substantive scope of Art. 21 ACHR when they enforce foreign confiscation orders, do they interfere with property in a manner regulated by Art. 21 ACHR? Like Art. 1 ECHR-P1, Art. 21 ACHR distinguishes between acts that subordinate the use and enjoyment of property and acts that deprive a person of property.[40] And, even more than the ECtHR, the IACtHR has failed to develop or apply a rigorous distinction between the two types of interference. For example, in *Bronstein*, the court determined that there had been a breach of Art. 21(1) and (2) ACHR, though it cited an ECtHR case on the deprivation of possessions and explained that:

> [The right to property] establishes: a) that ["][e]veryone has the right to the use and enjoyment of his property"; b) that such use and enjoyment may be subordinated, by law, to "social interest"; c) that a person may be deprived of his property for reasons of "public utility or social interest and in the cases and according to the forms established by law"; and d) that this deprivation shall be upon payment of just compensation.[41]

In *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the IACtHR made a like statement of principle and found a breach of Art. 21 generally.[42]

[38] *Chaparro* (IACtHR, November 21, 2007). See also *Haiti*, Res. 15/83, Annual Report of 1982–1983 (IACmHR, September 27, 1983), Ch. IV; *Marín* (IACmHR February 11, 1994); *Furlan* (IACtHR, August 31, 2012), para. 220.

[39] Ansay, "Third Way?" pp. 484–485; Çoban, *Property Rights within the European Convention on Human Rights*, p. 13, n. 19, citing Lametti, "The Deon-Telos of Private Property."

[40] See esp. *Indigenous Community of the Yakye Axa* (IACtHR, June 17, 2005), paras. 145–148.

[41] *Bronstein* (IACtHR, February 6, 2001), paras. 120, 124, 131, n. 90 citing *Belvedere Alberghiera SRL* v. *Italy*, App. No. 31524/96 (ECtHR, May 30, 2000), para. 53.

[42] *Mayagna (Sumo) Awas Tingni Community* (IACtHR, August 31, 2001), paras. 143, 155; *Saramaka People* (IACtHR, November 28, 2007), para. 116; *"Five Pensioners"* (IACtHR, February 28, 2003), para. 121; *Indigenous Community of the Yakye Axa* (IACtHR, June 17, 2005), para. 156.

If asked to consider the enforcement of foreign confiscation orders, the IACtHR could be expected to apply Art. 21(1) ACHR simply because Art. 21(2) ACHR requires the state party to pay compensation.[43] In early confiscation cases before the ECtHR, dissenting judges did argue that some confiscations of instrumentalities and objects of crime were compensable under Art. 1 ECHR-P1.[44] However, this interpretation was not adopted in subsequent cases and, if it had been applied, would have resulted in the use of different provisions of the property right for interferences that are ostensibly the same. Citing *Raimondo* v. *Italy*[45] in its 2002 report on terrorism and human rights, the IACmHR appeared to accept this view:[46]

> [T]he taking of property for reasons of public utility or social interest that gives rise to a duty to compensate should be distinguished from controls upon the use or enjoyment of property, including those arising in connection with criminal proceedings such as sequestration or confiscation. In the latter instance, while each case must be evaluated in its own circumstances in light of the principles of proportionality and necessity, restrictions on the use or enjoyment of property may well be necessary in the general interest, to effectively investigate and deter criminal activity and to ensure that the property does not provide criminal defendants with advantages to the detriment of the community at large. By their nature, these types of controls do not entail a duty to compensate.[47]

That said, in *Chaparro*, the IACtHR seemed to adopt a position closer to that of the ECtHR in its recent cases on unlawful confiscations. It held Ecuador to have violated Art. 21(1) ACHR by failing to release a factory and its contents unconditionally, promptly, and in good order once it was clear that they had not been used to manufacture instrumentalities of drug trafficking.[48] Conversely, it found that the unlawful seizure and continued retention of the second applicant's car violated Art. 21 ACHR, paragraphs (1) *and* (2).

6.1.3 The justifications for the interference

Whether an enforcement order deprives an individual of property or merely subordinates its use and enjoyment, it will only be *justified* when it is imposed by law and in pursuit of a public or social interest. In the jurisprudence of the IACtHR, these express conditions would appear to have been subsumed within

[43] Krause, "The Right to Property," p. 151.
[44] See esp. *Air Canada* (1995) 20 EHRR 150, Dissenting Opinion of Judge Martens joined by Judge Russo, 180–182, discussed at p. 190 and following above.
[45] App. No. 12954/87 (1994) 18 EHRR 237, para. 30.
[46] Inter-American Commission of Human Rights, "Terrorism and Human Rights," paras. 365–371.
[47] Inter-American Commission of Human Rights, "Terrorism and Human Rights," para. 368.
[48] *Chaparro* (IACtHR, November 21, 2007), paras. 195, 199, 204, 209, 214.

a prohibition on arbitrariness; a requirement that the state's action have a legal basis; and a principle of proportionality between ends and means.

In cases on the use and enjoyment by indigenous and tribal peoples of their communal lands, the IACtHR has insisted that interferences be "established by law," "necessary," "proportional," imposed "with the aim of achieving a legitimate objective in a democratic society," and not such as to "endange[r] the very survival of the group and of its members.[49] In *Mayagna (Sumo) Awas Tingni Community*, the court implied that the state's failure to recognize indigenous ownership was an unjustifiable interference with the applicants' property because it created "constant uncertainty" about the use and enjoyment of the land.[50] In *Indigenous Community of the Yakye Axa* v. *Paraguay*, it clarified that:

> The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.[51]

Affirming these principles in *Sawhoyamaxa Indigenous Community* v. *Paraguay*, the IACtHR found the respondent state under a duty to return indigenous land or provide a substitute.[52] The existence of later third party claims was not "'an objective and reasoned' ground for dismissing *prima facie*" indigenous claims, even if the new owner's rights were protected by a "bilateral commercial" treaty.[53] "To the contrary," the court was obliged to interpret such treaties in keeping with the ACHR, "which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."[54] In *Saramaka People* v. *Suriname*, the IACtHR found that state parties could grant concessions that did not "amount to a denial of [the group's] survival as a tribal

[49] *Indigenous Community of the Yakye Axa* (IACtHR, June 17, 2005), paras. 143–149; *Saramaka People* (IACtHR, November 28, 2007), paras. 127–128.
[50] (IACtHR, August 31, 2001), para. 144.
[51] (IACtHR, June 17, 2005), para. 145 (citations omitted).
[52] *Case of the Sawhoyamaxa Indigenous Community* v. *Paraguay* (Merits, Reparations and Costs) Series C No. 146 (IACtHR, March 29, 2006), para. 135.
[53] *Sawhoyamaxa Indigenous Community* (IACtHR March 29, 2006), para. 137. See further Lehavi, "The Global Law of the Land," 425–471, 452–453.
[54] *Sawhoyamaxa Indigenous Community* (IACtHR, March 29, 2006), para. 140.

people" as determined through the observation of three safeguards, including the community's "effective participation" in decision-making.[55]

The IACtHR has also emphasized the qualities of lawfulness, procedural fairness, and public interest in decisions on private property under Art. 21 ACHR. Finding violations of Art. 21(2) ACHR in *Bronstein*, it noted that there was no evidence that the Peruvian government had acted for reasons of "public utility" or "social interest" and no evidence that it had paid "just compensation" or acted "according to the forms established by law" in restricting the petitioner's shareholding.[56] To the contrary, it referred to its findings under Art. 25 ACHR, to establish that Peru had denied the petitioner due process and violated the requirements of local law; hence, the measures were "inappropriate" and "arbitrary."[57] In *"Five Pensioners"* v. *Peru*, it found that the Peruvian government had breached Art. 21 ACHR by failing to observe its own administrative procedures when changing the petitioners' statutory pension entitlements and by failing to restore those entitlements when ordered to do so by the Peruvian courts.[58] The entitlements had been reduced "without any proceeding or any decision having been issued" and without any prior notice to the petitioners.[59] In *Salvador Chiriboga* v. *Ecuador*, the IACtHR read the right to property with the rights to a fair trial and judicial protection, to find Ecuador in breach of the ACHR for failing to promptly determine a dispute about ownership of private land and to compensate the owners for their interim loss of use and enjoyment.[60] It noted that Arts. 8, 21, and 25 ACHR are "interconnected" and that the state had an obligation to provide property-holders with legal certainty.[61] In two cases from 2012, the economic position of the applicant was also relevant under Art. 21 ACHR.[62]

In *Chaparro*, the IACtHR applied these principles to a seizure and deposition of a factory, related items of personal property, and a car in a criminal investigation. It held that the provisional measures must have been "regulated by

[55] IACtHR Series C No. 172 (November 28, 2007), para. 129. See also *Application filed by the IACmHR with the IACtHR against the Republic of Ecuador* (Case 12.465 Kichwa People of Sarayaku and its Members) (2010), paras. 116–163; *Kichwa Indigenous People* (IACtHR, June 27, 2012), paras. 159–177. See further Pentassuglia, *Minority Groups and Judicial Discourse*, pp. 19–20; Schönsteiner, Beltrán y Puga, and Lovera, "Challenges of Consolidating Democracies," 383–384; Shelton, "Self-Determination in Regional Human Rights Law," 75–76.

[56] (IACtHR, February 6, 2001), para. 128.

[57] *Bronstein* (IACtHR, February 6, 2001), paras. 113–115, 129.

[58] (IACtHR, February 28, 2003), paras. 116–117, 121.

[59] *"Five Pensioners"* (IACtHR, February 28, 2003), para. 109.

[60] (IACtHR, May 6, 2008), paras. 48–118.

[61] *Salvador Chiriboga* (IACtHR, May 6, 2008), paras. 49, 64.

[62] *Furlan* (IACtHR, August 31, 2012), para. 222; *Case of Uzcategui* v. *Venuzuela* (Merits and Reparations) Series C No. 249 (September 3, 2012), para. 204.

law" and "justified by the inexistence of another type of measure that is less restrictive of the right."[63] In particular, they must have been:

- "necessary to guarantee the investigation and the payment of the applicable pecuniary responsibilities, or to avoid the loss or deterioration of the evidence";[64]
- minimally intrusive in terms of their duration and the damage they cause to the things seized;[65]
- judicially imposed and supervised;[66] and
- supported by a statement of reasons that showed there were "sufficient probabilities and evidence that the property was really involved in the offense."[67]

On the facts of the case, Ecuador had acted for a convention-compatible purpose in executing the seizure, namely:

> (i) to avoid the property continuing to be used in unlawful activities; (ii) to ensure the success of the criminal investigation; (iii) to guarantee the pecuniary responsibilities that could be declared as a result of the legal actions, and (iv) to avoid the loss or deterioration of the evidence. It is evident that these measures are adequate and effective to ensure the availability of the evidence that will allow drug-trafficking crimes to be investigated.[68]

It violated Art. 21(1) ACHR, however, because it had maintained the seizure orders when there was no evidence of a connection between the factory and the offense and retained possession of the factory and its contents after the courts had lifted the measures. It had, additionally, failed to care for the factory and its contents during the five years of the seizure.[69] As noted above, it found the seizure and retention of the second petitioner's car was both arbitrary and without any legal basis.[70]

Applying these conditions to situations of asset recovery, it would seem that state parties to the ACHR should ensure that they are empowered to give effect to confiscation orders from foreign states under laws that are "clear, specific, and foreseeable." The decision to enforce the foreign confiscation order should be subject to review in a timely and otherwise fair judicial proceeding, as described in Art. 8 ACHR. The IACtHR may also insist that a probative

[63] *Chaparro* (IACtHR, November 21, 2007), paras. 186, 188.
[64] *Chaparro* (IACtHR, November 21, 2007), para. 188.
[65] *Chaparro* (IACtHR, November 21, 2007), paras. 188, 204, 209.
[66] *Chaparro* (IACtHR, November 21, 2007), para. 188.
[67] *Chaparro* (IACtHR, November 21, 2007), para. 197.
[68] *Chaparro* (IACtHR, November 21, 2007), para. 186.
[69] *Chaparro* (IACtHR, November 21, 2007), paras. 197–198, 208–209, 211.
[70] *Chaparro* (IACtHR, November 21, 2007), para. 218.

connection exists between the thing, individual, and offense; for this reason, it may be reluctant to accept the evidentiary devices approved of by the European court. In addition, it is uncertain whether and, if so, to what extent ACHR state parties must assess the actual or anticipated foreign consequences of their decisions to assist in criminal matters.

6.1.4 The collective dimension

The cases on indigenous and tribal property have been described as bolstering, if not creating, a right to permanent sovereignty in the inter-American convention.[71] It is nevertheless unlikely that the IACtHR would recognize the collective interests at stake in asset recovery as within the scope of Art. 21 ACHR. In most cases, the interests of small, ethnically distinct communities to culturally significant lands and resources would be distinguishable from those of large, diverse national populations to pools of financial assets, even if both groups could argue victimization "within the framework of modernity."[72] However, the inter-American court has been prepared to read the ACHR's civil and political rights as entailing positive duties to cooperate in criminal matters[73] and to protect individual economic and social entitlements.[74] This provides a strong basis for arguing that a national population's interest in the return of illicit wealth qualifies the individual's interest in the peaceful enjoyment of those things, perhaps sufficiently to temper the IACtHR's strict interpretation of proportionality under Art. 21 ACHR.

6.1.5 Preliminary conclusions

This brief survey of the inter-American case law on the right to property has yielded several conclusions about the applicability of Art. 21 ACHR to enforcement orders in asset recovery cases. To begin, it has showed that at least some enforcement orders are likely to be within the temporal, personal, and substantive scope of the ACHR. The (extra)territorial scope of the convention in cooperation cases was less clear but seemed to be similar to that of the ECtHR. By contrast, it was almost certain that the IACtHR would regard the

[71] Miranda, "Intrastate Natural Resource Allocation," 811–812; *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 256. See also *Kichwa Indigenous People* (IACtHR, June 27, 2012), paras. 145–146; Shelton, "Self-Determination in Regional Human Rights Law," 74–75.

[72] Cf. Falk, "The Rights of Peoples," pp. 36–37.

[73] See, e.g., *Case of Goiburú et al.* v. *Paraguay* (Merits, Reparations, and Costs) Series C No. 153 (IACtHR, September 22, 2006), paras. 130–132. See further Pasqualucci, *Practice and Procedure of the Inter-American Court*, pp. 227–228.

[74] See, e.g., *Case of Suárez Peralta* v. *Ecuador* (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 261 (IACtHR, May 21, 2013), paras. 126–133.

enforcement of a foreign confiscation order as an interference with the right to property under Art. 21 ACHR, even though its criteria for distinguishing particular interferences are unclear. Likewise, it was highly probable that the IACtHR would insist on the legality, legal certainty, and proportionality of any enforcement order, though it was only possible to speculate on how the court would apply those criteria on the facts of an "asset recovery" case. As the IACtHR has been more willing than the ECtHR to scrutinize the reasons for the interference, it may also consider the substantive basis for foreign confiscation orders. That said, its recognition of second and third generation rights in other contexts and its characterization of extradition as a mechanism to protect rights, may lead it to adopt a narrower reading of the individual right to property in such situations.

6.2 Property rights in pan-Africa

In Africa, as in Europe and the Americas, human rights are established and enforced at the pan-regional level under a self-declared multilateral human rights treaty.[75] Created by members of the Organization of African Unity – the forerunner of the AU – the AfCHPR establishes individual rights at Arts. 2–18,[76] collective rights at Arts. 19–24, and state and individual duties at Arts. 25–29. Its implementation is overseen primarily by the African Commission on Human and Peoples' Rights (AfCmHPR), which receives "communications" relating to violations of all charter rights from state parties[77] and other actors.[78] Where a non-state-party communication "relates to special cases which reveal the existence of a series of serious or massive violations of human and people's rights" and the Assembly of Heads of State and Government agrees, the commission may make "an in-depth study and . . . a factual report, accompanied by its findings and recommendations."[79] Further, since 2004, the African Court on Human and Peoples' Rights (AfCtHPR)[80] has been empowered to receive complaints from the commission and directly from individuals and NGOs in relation to state parties that have made the appropriate declaration.[81] It has jurisdiction "concerning the interpretation and application of the Charter, this Protocol [establishing the AfCtHPR] and any other relevant Human Rights instrument ratified by the States concerned."[82]

75 See generally Hummer, "Menschenrechtschutz in Afrika." 76 AfCHPR, Arts. 1–19.
77 AfCHPR, Arts. 47–54.
78 AfCHPR, Arts. 55–59, esp. 55(1), 56(1). See further Hummer, "Menschenrechtsschutz in Afrika," p. 931; Shaw, *International Law*, pp. 393–394.
79 AfCHPR, Art. 58(1)–(2).
80 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ouagadougou, Burkina Faso, June 9, 1998, in force January 25, 2004, available at www.achpr.org/instruments/court-establishment, accessed October 15, 2013.
81 AfCtHPR Protocol, Art. 34(6). 82 AfCtHPR Protocol, Arts. 3(1), 5(3).

Article 14 AfCHPR provides that "[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." The scope of Art. 14 and its requirements are somewhat hard to gauge from its wording:[83] it creates no express right to peacefully use and enjoy property or to participate in the institution of ownership; rather it guarantees a "right to property." Rights to property may be thing-based relationships in private law or correlatives of governmental duties with respect to those private relationships, as I mentioned in Chapter 2. Also, until recently, the AfCmHPR has been reluctant to systematically analyze the elements of Art. 14,[84] finding violations with little or no explanation of the concept of property, the beneficiaries of the right, the types of interference, and the possible justifications.[85] That said, there is no doubt that Art. 14 AfCHPR protects a wide range of individual and collective thing-based relationships from unlawful and disproportionate government "encroachments."[86] Hence, there are good reasons to consider whether it could be violated by the direct enforcement of a foreign confiscation order that is intended to contribute to asset recovery.

6.2.1 *The scope of the right under Art. 14 AfCHPR*

Like the ECtHR and IACtHR, the AfCmHPR and AfCtHPR have reason to consider coercive measures that are enforced pursuant to requests for assistance to be within the scope of their regional human rights treaty. First, in the absence of an express provision on its temporal scope, the AfCmHPR has read the charter as applying to violations that occur after its EIF with respect to each state party, including those violations that began before and

[83] Van Banning, *Human Right to Property*, p. 62. See also Cotula, *Human Rights, Natural Resource and Investment Law*, p. 45.

[84] Krause and Alfredsson, "Article 17," p. 371; Nmehielle, *African Human Rights System*, pp. 119–120; Olaniyan, "Civil and Political Rights," pp. 238–241; Ouguergouz, *The African Charter of Human and People's Rights*, pp. 152–155.

[85] *Union Interafricaine des Droits de l'Homme and Others* v. *Angola*, Comm. No. 159/96 (2000) AHRLR 18, paras. 17, 21; *Modise* v. *Botswana*, Comm. No. 97/93 14AR (2000) AHRLR 30, paras. 94, 97; *Malawi African Association and Others* v. *Mauritania*, Comm. Nos. 54/91 et al. (2000) AHRLR 149, paras. 127, 143; *Media Rights Agenda and Others* v. *Nigeria*, Comm. Nos. 105/93 et al. (2000) AHRLR 200, paras. 76–77, 92; *Huri-Laws* v. *Nigeria*, Comm. No. 225/98 (2000) AHRLR 273, paras. 52–55; *Social and Economic Rights Action Centre (SERAC) and Another* v. *Nigeria*, Comm. No. 155/96 (2001) AHRLR 60, paras. 59–60, 70; *DRC* v. *Burundi, Rwanda and Uganda*, Comm. No. 227/99 (2004) AHRLR 19, para. 88; *African Institute for Human Rights and Development on behalf of Sierra Leonean Refugees in Guinea* v. *Guinea*, Comm. No. 249/02 (2004) AHRLR 57; *Rabah* v. *Mauritania*, Comm. No. 197/97 (2004) AHRLR 78, para. 14; *Bissangou* v. *Republic of Congo*, Comm. No. 253/02 (2006) AHRLR 80, para. 76.

[86] Olaniyan, "Civil and Political Rights," p. 238; Viljoen, "The AfCHPR: Travaux Préparatoires," 321.

continued beyond that date.[87] Second, though Art. 14 AfCHPR does not specify its beneficiaries,[88] the AfCmHPR has recognized the right to property as vesting in corporations, political parties, natural persons, and peoples.[89] Article 14 benefits foreigner property-holders[90] and the AfCHPR the relatives of PEPs, as the AfCtHPR's provisional measures in favor of Seif al-Islam el-Qaddafi attest.[91] Third, notwithstanding the lack of an express jurisdictional provision,[92] the AfCHPR has determined that the charter and its property right apply within the territory of state parties.[93] In addition, it has found Art. 5 AfCHPR was violated by acts or omissions that occurred in a third state following an individual's expulsion.[94] Fourth, the AfCmHPR has applied Art. 14 AfCHPR to a wide range of interests in tangible and intangible things – from interests in land[95] to choses in possession[96] (e.g., foodstuffs,[97] livestock,[98] dwellings,[99] office files and computer equipment,[100] and cash),[101] to judgment debts[102] and contractual rights with respect to bank

[87] Viljoen, "Communications under the African Charter," pp. 105–106 citing *Njoka* v. *Kenya*, Comm. No. 142/94 (2000) AHRLR 132, para. 5; *Pagnoulle on behalf of Mazou* v. *Cameroon*, Comm. No. 39/90 (2000) AHRLR 57, paras. 15–17. See also AfCHPR, Art. 63(3).

[88] Viljoen, "The AfCHPR: Travaux Préparatoires," 321.

[89] On natural persons as beneficiaries, see, e.g., *Modise* (2000) AHRLR 30, para. 94; *Bissangou* (2006) AHRLR 80, para. 76; *Dino Noca* v. *DRC*, Comm. No. 286/2004 (AfCmHPR, October 9–22, 2012), para. 128. On corporations as beneficiaries, see *Media Rights Agenda* (2000) AHRLR 200 (media organizations); *Zimbabwe Lawyers for Human Rights and Another* v. *Zimbabwe*, Comm. No. 284/03 (AfCmHPR, March 30, 2009), paras. 175–179 (limited liability company); *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 209. On registered political parties, see *Interights* (AfCmHPR, February 22, 2010), paras. 44–47.

[90] *Noca* (AfCmHPR, October 9–22, 2012), paras. 128, 137.

[91] *AfCmHPR (Provisional Measures)* (AfCtHPR, March 15, 2013).

[92] Gondek, *Reach of Human Rights*, p. 14.

[93] *Association of Victims of Post Electoral Violence and Another* v. *Cameroon*, Comm. No. 272/03 (AfCmHPR, November 11, 2009), paras. 107, 112, 115, 133–136.

[94] *Modise* (2000) AHRLR 30, para. 32. See further Icelandic Human Rights Centre, "Extradition, Expulsion, Deportation and Refoulement." See also *DRC* (2004) AHRLR 19, paras. 62–63 (respondents liable for extraterritorial acts of militants whom it had supported) discussed further in Gondek, *Reach of Human Rights*, pp. 207–208; Viljoen, "Communications under the African Charter," pp. 107–108.

[95] *Malawi African Association* (2000) AHRLR 149, paras. 13–17, 127–128; *Endorois Welfare Council* (AfCmHPR, February 4, 2010); *Noca* (AfCmHPR, October 9–22, 2012).

[96] *Union Interafricaine des Droits de l'Homme* (2000) AHRLR 18, paras. 1, 17–20; *Modise* (2000) AHRLR 30, paras. 7, 94; *DRC* (2004) AHRLR 19, paras. 7, 88; *SERAC* (2001) AHRLR 60, paras. 59–62; *Sierra Leonean Refugees* (2004) AHRLR 57, para. 3.

[97] *Sierra Leonean Refugees* (2004) AHRLR 57, para. 3.

[98] *Malawi African Association* (2000) AHRLR 149, paras. 13–17, 127–128.

[99] *SERAC* (2001) AHRLR 60, paras. 59–62.

[100] *Huri-Laws* (2000) AHRLR 273, paras. 14–15, 52.

[101] *Sierra Leonean Refugees* (2004) AHRLR 57, para. 3 and conclusions.

[102] *Bissangou* (2006) AHRLR 80, para. 76.

deposits.[103] It does not always insist that the alleged victim evidence title to the things[104] and, in a case on indigenous claims to land, has found traditional possession to substitute for legal title.[105]

6.2.2 *The nature of the interference and its justification*

Further, from the commission's recent decisions, it is clear that Art. 14 AfCHPR creates a right to "peaceful enjoyment of property" that limits the power of states to interfere with property. In *Sudan Human Rights Organization and Another* v. *Sudan* and *Interights and Others* v. *Mauritania*, the commission determined that:

> [t]he right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.[106]

The conditions for justifiable interferences were elaborated in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*.[107] In that case, the AfCmHPR clarified that an "encroachment" on property must satisfy a "two-pronged" test: "'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'."[108] "In accordance with law" meant satisfaction of the requirements in local and international law, whilst "appropriateness" would seem to have entailed proportionality.[109] Citing the ECtHR and echoing the IACtHR, the AfCmHPR affirmed that "limitations

[103] *Interights on behalf of Pan African Movement and Others* v. *Eritrea and Ethiopia*, Comm. Nos. 233/99 and 234/99 (2003) AHRLR 74, paras. 8, 59–60.

[104] See, e.g., *Malawi African Association* (2000) AHRLR 149, para. 128; *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE)* v. *Sudan*, Comm. Nos. 279/03 and 296/05 (AfCmHPR, May 13, 2009), para. 199.

[105] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 186–209, esp. 199, 209.

[106] (AfCmHPR, May 13, 2009), para. 193. See also *Interights* (AfCmHPR, February 22, 2010), para. 46; *Noca* (AfCmHPR, October 9–22, 2012), para. 143.

[107] (AfCmHPR, February 4, 2010). See also *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme* v. *Mauritania*, Comm. No. 373/09 (ACmHPR, March 3, 2010), paras. 43–45. See further Ashamu, "A Landmark Decision from the African Commission."

[108] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 211. See also *Noca* (AfCmHPR, October 9–22, 2012), para. 144.

[109] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 211–238; *Noca* (AfCmHPR, October 9–22, 2012), para. 145.

must be strictly proportionate with and absolutely necessary for the advantages that follow," "the least restrictive measures possible," and not such as to render the right "illusory."[110] In *Dino Noca* v. *DRC*, the commission confirmed that Art. 14 AfCHPR has a procedural dimension.[111] On the facts of *Endorois Welfare Council*,[112] Kenya had failed to adequately recognize the Endorois' title[113] and unjustifiably encroached on their ownership rights by forcibly evicting and excluding them from their traditional lands,[114] which were then on-sold to third parties and "improved" with roads and a ruby mine.[115] In so doing, Kenya had acted without a legal basis,[116] and without assessing the impact of its actions on the Endorois community or its land; ensuring that the Endorois consented to and participated in the land-use decisions; compensating the Endorois adequately for their loss; or sharing with them the benefits of new land uses.[117] Similar considerations led it to conclude that there had been violations of the collective rights to self-determination and development under Arts. 21 and 22 AfCHPR.[118] Other decided cases leave little room for doubt that interferences committed without justification, in the pursuit of unlawful objectives, in violation of existing laws, and/or in conjunction with severe breaches of other convention rights violate Art. 14 AfCHPR.[119]

Thus, it would seem that enforcement orders would be held to encroach on property under Art. 14 AfCHPR for the same reasons they would be held to control the use of property under Art. 1 ECHR-P1 and subordinate its use and enjoyment under Art. 21 ACHR. In a given case, the state party would need to demonstrate that its actions were appropriate (perhaps, strictly proportionate) and compliant with applicable local and international laws on confiscation and MLA. In applying the concepts of appropriateness/proportionality and legality to enforcement orders, it is likely that the AfCmHPR would draw on the European and inter-American case law on confiscation and, possibly, international

[110] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 213–215, citing *Constitutional Rights Project and Others* v. *Nigeria* (2000) AHRLR 227, para. 42; *Handyside* (1979–80) 1 EHRR 737.

[111] *Noca* (AfCmHPR, October 9–22, 2012), para. 152.

[112] For a summary, see Ashamu, "A Landmark Decision from the African Commission," 308–311.

[113] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 191, 196, 199.

[114] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 199, 206, 209–210, 214–238.

[115] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 13–14.

[116] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 224.

[117] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 214–238.

[118] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 267–268, 277–298.

[119] *Huri-Laws* (2000) AHRLR 273, paras. 52–53 (search without warrant and evidence of public need or community interest); *Union Interafricaine des Droits de l'Homme and Others* v. *Angola*, Comm. No. 292/04 (2000) AHRLR 18, para. 20; *Noca* (AfCmHPR, October 9–22, 2012), paras. 146–147.

cooperation in criminal matters. In fact, the African commission has already applied the fair balance criterion to cases on preventative and repressive seizures and asked, amongst other things, whether "the decision-making process was procedurally fair" and whether there were "safeguards against abuse."[120]

6.2.3 The right to property and the collective right to wealth and resources

What is harder to predict is how the AfCHPR's individual right to property would interact with its collective right to the free disposition of wealth and natural resources in Art. 21 AfCHPR. Recalling common Art. 1(2) ICCPR and ICESCR,[121] Art. 21(1) AfCHPR provides that "[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it." "In case of spoliation," Art. 21(2) AfCHPR says, "dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation." An express qualification, Art. 21(3) AfCHPR, dictates that the freedom of disposition "shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law." By Art. 21(4), the AfCHPR requires state parties to "individually and collectively . . . exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity." By Art. 21(5) AfCHPR, they are to eliminate "all forms of foreign economic exploitation . . . to enable their people to fully benefit" from their natural wealth. Article 21 follows the rights to equality and self-determination under Arts. 19–20 AfCHPR and is followed by the rights to peace, development, and a generally satisfactory environment under Arts. 22–24 AfCHPR.

Communications on Arts. 19–24 AfCHPR go some way to clarifying who benefits from the right to free disposition and what they may demand of whom. The AfCmHPR has signaled that the concept of "a people" includes inhabitants or citizens of an entire state,[122] as well as sub-state collectives whose members identify themselves as a distinct group and share historical, political,

[120] *Zimbabwe Lawyers for Human Rights* (AfCmHPR, March 30, 2009), para. 176. See also *Media Rights Agenda* (2000) AHRLR 200, para. 42. Commenting on other rights, the AfCmHPR has read Art. 27(2) as establishing a general requirement of proportionality: Viljoen, "The AfCHPR: Travaux Préparatoires," 321.

[121] See further p. 35 and following above.

[122] *Jawara* v. *Gambia*, Comm. Nos. 147/95 and 149/96 (2000) AHRLR 107 (ACHPR 2000), para. 73; *DRC* (2004) AHRLR 19, paras. 94–95 ("illegal exploitation/looting of the natural *resources of the complainant state*" was a "deprivation *of the right of the people of the* Democratic Republic of Congo" [emphasis added]). See further Viljoen, *International Human Rights Law in Africa*, p. 222.

geographical, and cultural characteristics.[123] Commentators note that "peoples" was left "deliberately undefined" and thus takes its meaning from the context of particular rights and issues.[124] As for "wealth and natural resources," this would seem to include collectively held land and its subjectively valuable features,[125] at least as these are necessary for the peoples' survival as such.[126] The "illegal exploitation / looting" of "natural resources" constitutes a "deprivation" of the right,[127] as does the appropriation of those things from indigenous people without adequate compensation or adherence to appropriate consent and consultation procedures.[128] States are to prevent third parties from engaging in disproportionate interferences with the community's right under Art. 21 AfCHPR.[129] An unjustified deprivation of natural resources must be remedied with restitution or compensation under Art. 21(2) AfCHPR[130] and may coincide with a violation of the right to development in Art. 22 AfCHPR.[131]

At this juncture, the issue is two-fold: First, could a victim state party to the AfCHPR or its population claim a violation of Art. 21 AfCHPR due to a haven state party's refusal to enforce a foreign confiscation order? Second, could a haven state party raise Art. 21 AfCHPR to justify its decision to enforce an order against

[123] *Gunme and Others* v. *Cameroon*, Comm. No. 266/03 (2009) AHRLR 9, paras. 169–171, 178–179; *Sudan Human Rights Organisation and Another* v. *Sudan*, Comm. No. 279/2003 (2009) AHRLR 153, para. 220; *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 255. See also *Katangese Peoples' Congress* v. *Zaire*, Comm. 75/92 (2000) AHRLR 72 (ACHPR 1995); *Malawi African Association* (2000) AHRLR 149, para. 142; *SERAC* (2001) AHRLR 60, paras. 55–58; *Legal Resources Foundation* v. *Zambia*, Comm. No. 211/98 (2001) AHRLR 84, para. 73; *DRC* (2004) AHRLR 19, paras. 90–95; *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 252–268. See further Viljoen, *International Human Rights Law in Africa*, pp. 222–223.

[124] Ouguergouz, *The African Charter of Human and People's Rights*, pp. 205–211. See also Kiwanuka, "The Meaning of 'People'," 82, 88–101; Shelton, "Self-Determination in Regional Human Rights Law," 64–66; Viljoen, *International Human Rights Law in Africa*, p. 219.

[125] *SERAC* (2001) AHRLR 60, paras. 2–6, 55–58; *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 124, 265–267.

[126] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 267.

[127] *DRC* (2004) AHRLR 19, paras. 90–95. Cf. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)* (2005) ICJ Reports 168, para. 244; Dissenting Opinion of Judge Kateka, para. 56.

[128] *SERAC* (2001) AHRLR 60, paras. 55–58; *Endorois Welfare Council* (AfCmHPR, 4 February 2010), paras. 252–268.

[129] *SERAC* (2001) AHRLR 60, para. 57.

[130] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), para. 268.

[131] *SERAC* (2001) AHRLR 60, paras. 52–54; *DRC* (2004) AHRLR 19, para. 95; *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 269–298. Cf. *AfCmHPR* v. *Kenya*, App. No. 006/2012, Order of Provisional Measures (AfCtHPR, March 15, 2013), para. 20 (granting provisional measures to protect the Ogiek Community of the Mau Forest with respect to Arts. 14 and 22 *inter alia* but not Art. 21, as pleaded).

a former PEP or his/her family members or associates?[132] Any answer to these questions will traverse the particular issues of interpretation identified in Chapter 2: Does the notion of "wealth and natural resources" cover illicit wealth? The commission has said that Art. 21 AfCHPR does not protect "movable and immovable property," though the items in that case were "individual assets."[133] If illicit wealth is within the scope of Art. 21 AfCHPR, is the right to free disposition infringed by the non-enforcement of a foreign confiscation order? There is jurisprudence from the European human rights court to suggest that a disproportionate refusal to recognize foreign judgments will violate qualified entitlements.[134] That said, the ECtHR was unwilling to find a state under a positive obligation to recover assets that have been frozen by a foreign entity operating abroad.[135] Next, in the context of Art. 21 AfCHPR and corruption/asset recovery, what is a "people"? Some fear a statist interpretation of permanent sovereignty would allow former leaders to argue that their resource allocation decisions are *per se* correct.[136] Confiscation proceedings that aim at asset recovery could then be characterized as violations of the right to free disposal, especially if they are instigated unilaterally by a haven jurisdiction.[137] Then, presuming Art. 21(1) AfCHPR confers a right on populations, does it impose positive duties on other states, e.g., to cooperate for the purposes of achieving asset recovery? Though vaguely worded, Art. 21(4) AfCHPR would seem to add to the case for a duty of free disposition *erga omnes* insofar as it requires state parties to "individually and collectively . . . exercise the right to free disposal." Finally, to what extent are duties of free disposition qualified by individual civil and political rights in the AfCHPR? In particular, if measures that enhance the prospects of asset recovery conflict with Art. 14, which prevails?

Most of these issues await consideration by the commission and its observers; the last question, on norm conflict, warrants exploration here. Citing the rights to permanent sovereignty and development, Prof. Ndiva Kofele-Kale has recently renewed his call for the recognition of an emerging customary "right to a corruption-free society."[138] That new human right is violated, he says,

[132] Brems, "Conflict Human Rights," 304–305.

[133] *Bissangou* (2006) AHRLR 80, para. 82.

[134] *Wagner and JMWL* v. *Luxembourg*, App. No. 76240/01 (ECtHR, June 26, 2007); *Negrepontis-Giannisis* v. *France*, App. No. 56759/08 (ECtHR, May 3, 2011). See further Schilling, "Enforcement of Foreign Judgments."

[135] *Likvidējamā p/s "Selga"* (ECtHR, October 1, 2013), para. 113.

[136] Reviewing the argument, see Duruigbo, "Permanent Sovereignty and Peoples," 34, 44; Kofele-Kale, *International Responsibility for Economic Crimes*, pp. 108–111, 261, 288–291; Miranda, "Intrastate Natural Resource Allocation," 803–804.

[137] For similar arguments, see *Case Concerning Criminal Proceedings in France (Republic of the Congo* v. *France)*, Request for the Indication of a Provisional Measure, Order of June 17, 2003 (2003) ICJ Reports 102; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France*), Judgment (2008) ICJ Reports 177.

[138] Kofele-Kale, "Corruption Free Society," 152, 165; *Combating Economic Crimes*, p. 133.

when states "corrupt[ly] transfer . . . ownership of national wealth to those select nationals who occupy positions of power and influence."[139] It is secured when they refrain from acts of corruption and "fight corruption in all its manifestations,"[140] including by preventing and responding to specific acts of corruption and establishing legal rules and institutions that enhance the enforcement of anti-corruption laws.[141] Finding a conflict between the right to a corruption-free society and the right to a fair criminal trial,[142] he suggests that the collective right, as such, prevails:

> When a compromise cannot be arranged, the alternative is to establish a priority rule that ranks conflicting rights in order of importance. By definition, a priority rule accords one right absolute primacy over the other. But before settling on such a rule an effort should first be made to assess the effect of [sic] each right has on other human rights as well as their impact on society as a whole . . .
>
> In this respect, the collective right to a corruption-free society, more so than the individual right to [a] fair trial, has far reaching effects on other guaranteed human rights . . . Priority should therefore be given to the right to a corruption-free society because it represents a group or collective right, that is, a right that vests in a community and is exercised jointly by *all* individuals in that collectivity.[143]

Judging by the preambles of the anti-corruption treaties and the anti-corruption programs of states and international organizations, Kofele-Kale's core contention – that international law recognizes a negative relationship between corruption and development – is correct. There is also increasing support for the view that states have obligations to prevent and suppress at least some forms of corruption as an incidence of respecting, protecting, and fulfilling human rights.[144] In *Noca*, a case involving the arbitrary transfer of alien property to a Congolese public official, the African commission hints at positive obligations under Art. 14 AfCHPR to draft and supervise laws in ways that remove opportunities for corruption.[145] Indeed, the UN High Commissioner for Human Rights has suggested that victim and haven states have duties to diligently cooperate for the purposes of asset recovery under international human rights law.[146]

[139] Kofele-Kale, *Combating Economic Crimes*, p. 133.
[140] Kofele-Kale, *Combating Economic Crimes*, p. 134.
[141] Kofele-Kale, *Combating Economic Crimes*, pp. 134–136.
[142] Kofele-Kale, *Combating Economic Crimes*, pp. 137–144.
[143] Kofele-Kale, *Combating Economic Crimes*, p. 143.
[144] See Chapter 1, n. 39.
[145] *Noca* (AfCmHPR, October 9–22, 2012), paras. 7, 161–163.
[146] A/HRC/19/42, para. 25. See also Human Rights Council Res. 17/23, The negative impact of non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, UN Doc. A/HRC/17/23 (July 19, 2011), para. 2; 19/38, The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation, UN Doc.

That said, the emergence of a customary right to a corruption-free society is highly contestable, as is the need for such a right and the inevitability of its conflict with individual entitlements. In my view, Kofele-Kale downplays the controversies that surrounded the drafting of the instruments on permanent sovereignty and overstates the clarity of their terms.[147] He also ignores the paucity of direct references to human rights in the anti-corruption treaties, especially the UNCAC,[148] and the silence on corruption in the human rights instruments, especially those concluded more recently amongst developing and newly developed states. Similar criticism could be made of the "human rights-based approach to asset recovery processes," suggested by the UN High Commissioner.[149] Reflecting those uncertainties, it is not apparent whether Kofele-Kale's right to a corruption-free society is an individual or collective, "freestanding" or derivative entitlement.[150] If it simply rebadges a duty to secure socio-economic rights (or permanent sovereignty and development), Prof. Ilias Bantekas and Dr. Oette Lutz suggest that it is superfluous.[151]

Further, as Kofele-Kale does not directly apply the standard conflict-resolution techniques in public international law to his problem,[152] he also avoids the issue of the fragmentation. In its report on that topic, the International Law Commission (ILC) found a "strong presumption against normative conflict" in public international law.[153] It argued for an interpretative approach of "systemic integration," i.e., a process of legal reasoning "whereby international obligations are interpreted by reference to their normative environment ('system')" and the system is taken to comprise general international law, other specialized treaties,

A/HRC/RES/19/38 (April 19, 2012); 22/12, The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation, UN Doc. A/HRC/22/12 (April 10, 2013). Yusuf, "Equal Rights and Self-Determination," p. 390.

[147] Salomon, "From NIEO to Now," 37–38; Schrijver, *Sovereignty Over Natural Resources*, p. 4; Summers, *Peoples in International Law*, pp. 179–185, 366–372.

[148] Ivory, "Transparency and Opacity."

[149] Note also the voting patterns for the Human Rights Council resolutions on the non-repatriation of funds of illicit origin, A/HRC/RES/17/23, A/HRC/RES/19/38, and A/HRC/22/12.

[150] Kofele-Kale, "Corruption Free Society," 152, 163–165; *Combating Economic Crimes*, pp. 131–136.

[151] Bantekas and Lutz, *International Human Rights Law*, pp. 513–514.

[152] See Kofele-Kale, *Combating Economic Crimes*, pp. 131, 137–144, referring to the lack of hierarchy between norms in public international law but applying schemas proposed in the literature.

[153] GA, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of States against Corruption the International Law Commission Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682/Add. 1 (April 13, 2006), paras. 37, 411; see also para. 7 (defining fragmentation as "the emergence of specialized and relatively autonomous spheres of social action and structure").

and the "normative environment more widely."[154] The reporters assume that conflict-identification and conflict-resolution are themselves interpretative (political) acts.[155] They argue that people who apply international law have "political obligation[s]" to do so transparently and in a way that accords with the (evolving) preferences of the international community.[156]

In this way, I submit that the collective right to free disposition and the individual right to property should initially be read to accommodate each other in situations of cooperative confiscation that aim at asset recovery. Rights to permanent sovereignty and internal self-determination are described as embedding the idea of participation.[157] Meaningful participation requires the systemic recognition and protection of civil and political rights, as does humanly meaningful development.[158] The same has been said of "justice in times of transition."[159] To secure the rights to free disposition and development, states may be obliged to identify and change legal institutions that permit or encourage grand corruption – at least within their jurisdictions, if not as it affects other states. However, to be consistent with the principle of permanent sovereignty and self-determination, such reforms should be undertaken in ways that recognize the interconnected qualities of the collective and individual interests. A harmonizing or relational approach is all the more important given the ambiguities of the concept of corruption and the challenges of assessing the effectiveness of anti-corruption measures. Kofele-Kale acknowledges these concerns but appears to disregard them in his insistence on the primacy of collective rights and his depiction of a "war against corruption."[160]

A systematic reading of collective and individual rights finds support in the African commission's case law on property and in the wording of the charter. In *Endorois Welfare Council*, the AfCmHPR characterized Art. 21 AfCHPR as a second African property right that is subject to the same limitations as Art. 14 AfCHPR.[161] The commission discussed *Saramaka People*, in which the IACtHR applied a proportionality analysis to a conflict between competing individual and collective proprietary interests in land.[162] Previously, in *Gunme and Others* v. *Cameroon*, the African commission had emphasized the "equa[l]

154 A/CN.4/L.682/Add. 1, paras. 5, 7, 413–419.
155 A/CN.4/L.682/Add. 1, paras. 20, 412.
156 A/CN.4/L.682/Add. 1, para. 35.
157 See, e.g., Cassese, "Self-Determination of Peoples," pp. 97–98, 101–104; Shelton, "Self-Determination in Regional Human Rights Law," 66.
158 Sen, *Development as Freedom*, Ch. 6.
159 De Greiff, "Theorizing Transitional Justice," pp. 38–39, 56–57, 64.
160 See, e.g., Kofele-Kale, "Presumed Guilty," 933, 936; *Combating Economic Crimes*, pp. 9, 29, 96, 110, 142. For a critique of the language of war in discussions of human rights, see Foot, "Human Rights in Conflict," 109–112.
161 (AfCmHPR, February 4, 2010), para. 267.
162 (IACtHR, November 28, 2007), paras. 128–140. See also *Indigenous Community of the Yakye Axa* (IACtHR, June 17, 2005), paras. 146–154. See also Miranda, "Intrastate Natural Resource Allocation," 816, 820.

importan[ce]" of collective and individual entitlements, as well as the lack of "demarcation" or hierarchy between them.[163] The preamble of the AfCHPR likewise presents human and peoples' rights as indivisible,[164] whilst Art. 61 AfCHPR signals that the charter is to be interpreted in harmony with other agreements between its parties.[165] A principle of the AUCPCC is "[r]espect for human and peoples' rights in accordance with the [AfCHPR] and other relevant human rights instruments"; a requirement is that "any person alleged to have committed acts of corruption and related offences . . . receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the [AfCHPR] and any other relevant international human rights instrument recognized by the concerned States Parties."[166] Whether or not the AUCPCC creates a separate legal basis for cooperative confiscation, these provisions should inform an interpretation of the AfCHPR in asset recovery matters.

Thus, if the right of free disposal is interpreted as a right of states to choose how to deploy their economic resources and if populations are entitled to have wealth and resources administered in their interests, Arts. 14 and 21 AfCHPR may still be aligned. Article 14 AfCHPR could be subject to a narrower interpretation when it is relied on to oppose the enforcement of a foreign confiscation order issued for the purpose of asset recovery. Read in this way, Art. 21 AfCHPR would require state parties to take into account a particular sort of public interest when considering a particular claim to protection under Art. 14 AfCHPR. Articles 14 and 21 AfCHPR, in turn, could create a duty on victim and haven governments to diligently pursue asset recovery. Drawing on the inter-American case law on extradition,[167] the African tribunals could require state parties to lower the legal barriers to the enforcement of foreign confiscation orders aimed at asset recovery or to consider the interests of victim populations when they use discretions under existing MLA treaties and laws. All such measures would remain subject to the common "two-pronged" test for justifiable interferences under Arts. 14 and 21 AfCHPR. This approach thus permits the conclusion that states have "gone too far" in enhancing the prospects of asset recovery, on the one hand, or in protecting PEPs or their relatives or associates, on the other. It does not provide a logically fixed criterion for determining the boundaries between proportionate interference and human/peoples' rights violation. What it does do, however, is require law-appliers to consider the individual or collective interests in relation to each other and, in

[163] *Gunme and Others* (2009) AHRLR 9, paras. 173–174, 176.

[164] See, e.g., Preamble ("Recognizing, on the one hand, that fundamental human rights stem from the attributes of human beings, which justify their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights"). See also Viljoen, *International Human Rights Law in Africa*, p. 215 (on the charter's drafting history).

[165] AfCHPR, Art. 61.

[166] AfCHPR, Art. 14. See p. 95 and following above.

[167] See n. 73 above.

the context of human rights litigation, to acknowledge their perception of a conflict and their proposal for conflict-resolution. Unlike Kofele-Kale's solution, it does not assume categorical (moral) priority for one of the categories of interest.

6.2.4 Preliminary conclusions

To summarize, it is possible that the AfCmHPR and AfCtHPR would accept that the enforcement of a foreign confiscation order interferes with the right to property in Art. 14 AfCHPR. Whether they would find such an order justified would depend on whether it is lawful and proportionate to general interests. In the African, as in the inter-American, case law, the requirements have been rather strictly construed. At the same time, the charter and its enforcement bodies have afforded greater protection to collective or communal property interests. It would at least be open to the tribunals to construe "third peoples'" interests in asset recovery as public interests under the individual property guarantees. In addition, though its scope is uncertain, Art. 21 AfCHPR may be read as obliging haven states to take steps to enforce foreign confiscation orders or victim states to take positive action to recover misappropriated national wealth. Each property right supplies a limit to the other.

6.3 The (new) Arab right to property

Having entered into force in March 2008, the League of Arab States' Arab Charter on Human Rights (ArCHR)[168] is the only Islamic or Arab human rights instrument to bind its state parties in public international law.[169] A revised and "modernized" version of an earlier charter,[170] the ArCHR recognizes a range of civil, political, economic, and social rights,[171] as well as a collective right to self-determination and "control over wealth and resources."[172] Property is covered by Art. 31 ArCHR: "Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property."

[168] Tunis, May 22, 2004, in force March 15, 2008, reprinted *HRLJ*, 12 (2005), 893 (unofficial translation).

[169] Karl, "Menschenrechtsschutz im Islamisch-Arabischen Raum," p. 1133.

[170] Arab Charter on Human Rights, Cairo, September 15, 1994, reprinted *HRLJ*, 18 (1997), 151 (unofficial translation). On the history of the League of Arab States human rights charters, see Al-Midani and Cabanettes, "Arab Charter on Human Rights 2004," 147–149; Rishmawi, "Revised Arab Charter on Human Rights," 362; "Arab Charter on Human Rights: An Update."

[171] Al-Midani and Cabanettes, "Arab Charter on Human Rights 2004," 148–149; Rishmawi, "Revised Arab Charter on Human Rights," 364.

[172] ArCHR, Art. 2(1).

Theoretically, the Arab Human Rights Committee (ArHRCmte) may have occasion to consider the scope of Art. 31 and its application to asset recovery cases. The seven-member ArHRCmte established under Art. 45 ArCHR is supposed to receive reports from state parties on their efforts to implement the charter's substantive provisions. It is to study, examine, and comment on them before making "necessary recommendations" in its annual report to the secretary general of the League of Arab States.[173] However, it has no supplementary power to receive complaints directly from individuals or states,[174] and no back-up from an "Arab Court on Human Rights" with a supervision and enforcement mandate.[175]

The lack of jurisprudence and commentary on the charter's substantive rights means that I can only speculate on how Art. 31 ArCHR would apply to enforcement orders that result in the confiscation of a foreign PEP's illicit wealth. On the one hand, it would seem that the interpretation of the right to property may be no less generous than the right in other human rights instruments, such as the AfCHPR, to which its contracting states are party.[176] On the other hand, the concepts of "everyone," "private property," arbitrariness, unlawfulness, and "divestment" in Art. 31 ArCHR may well have different meanings in the context of the charter. Not only does the charter refer to God, the "eternal principles . . . established by the Islamic Shari'a and other divinely-revealed religions," and the "faith" of the "Arab World," but it presents itself as a reaffirmation of the state parties' commitment to the Cairo Declaration on Islamic Human Rights (CDIHR).[177] Concluded by the foreign ministers of the Organization of the Islamic Conference in 1990, the non-binding CDIHR attempts to derive human rights standards from a conservative interpretation of Islamic law.[178] In my view, it contains one of the *least protective* property rights in any international human rights instrument – soft or hard – especially with respect to confiscations. Article 15 CDIHR provides that:

> (a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or the society in general. Expropriation is not permissible except for requirements of public interest and upon payment of prompt and fair compensation.

[173] ArCHR 2004, Art. 48(1) and (3)–(5). See further Rishmawi, "Arab Charter on Human Rights: An Update," 172–175.

[174] Al-Midani and Cabanettes, "Arab Charter on Human Rights 2004," 149.

[175] Al-Midani and Cabanettes, "Arab Charter on Human Rights 2004," 149.

[176] ArCHR, Art. 43. See further Karl, "Menschenrechtsschutz im Islamisch-Arabischen Raum," p. 1133; Rishmawi, "Revised Arab Charter on Human Rights," 370.

[177] August 5, 1990, UN GAOR, World Conference on Human Rights, 4th Session, Agenda Item 5, UN Doc. A/CONF.157/PC/62/Add.18 (1993) (English translation). See ArCHR, Preamble; further Karl, "Menschenrechtsschutz im Islamisch-Arabischen Raum," p. 1127; Rishmawi, "Revised Arab Charter on Human Rights," 366–369.

[178] Karl, "Menschenrechtsschutz im Islamisch-Arabischen Raum," pp. 1128–1130.

(b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

Were Art. 31 ArCHR interpreted in keeping with Art. 15 CDIHR, it would not apply to proceeds of crime *ratione materiae* and may not require more than a declaration of "necessity" under the law of the requested state.

In all, the interpretation of Art. 31 ArCHR and its application by domestic or international tribunals to enforcement orders in asset recovery cases will depend very much on the haven state's existing human rights obligations and the interpretation and weight given by the decision-maker to norms within regionally prevalent religious traditions. How these factors may shape the Arab right to property is hard to predict. It may be a matter for observation as and when states in the Middle East seek to recover illicit wealth from regional financial centers after the Arab Spring.

6.4 A human right to property in the Asia/Pacific?

With the entry into force of the ArCHR, the Asia/Pacific became the only region without a regional treaty-based human right to property – and without a clear prospect of developing one. The region's ethnic and religious diversity, its large and dispersed population, and its leaders' hostility towards the idea of universal human rights had long contributed to the lack of a formalized system for human rights protection, such as exists in other regions.[179] In 2008, however, the ASEAN acknowledged the "protect[ion] and promot[ion] [of] human rights and fundamental freedoms" as a purpose in its charter.[180] It later adopted terms of reference for the creation of an "ASEAN human rights body,"[181] and tasked an "ASEAN Intergovernmental Commission on Human Rights" with developing "an ASEAN Human Rights Declaration [AHRD] with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights."[182] ASEAN leaders signed the non-binding AHRD at the Twenty-first ASEAN Summit in Phnom Penh on November 18, 2012.[183]

[179] Ginbar, "Human Rights in ASEAN"; Hummer, "Menschenrechtsschutz im Asiatisch-Pazifischen Raum," pp. 1170–1171; Shelton and Wright-Carozza, *Regional Protection of Human Rights*, pp. 90–91.

[180] Charter of the Association of Southeast Asian Nations, Singapore, November 20, 2007, in force December 15, 2008, available at www.asean.org/asean/asean-charter/asean-charter, accessed October 15, 2013, Art. 1(7). See also Shelton and Wright-Carozza, *Regional Protection of Human Rights*, p. 103.

[181] ASEAN Charter, Art. 14.

[182] Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Jakarta, October 2009, available at www.aseansec.org/wp-content/uploads/2013/07/TOR-of-AICHR.pdf, accessed October 15, 2013, para. 4.2.

[183] Shanahan Renshaw, "The ASEAN Human Rights Declaration 2012," 557.

Criticized as unrepresentative of civil society perspectives and incompatible with existing human rights standards,[184] the AHRD does contain a right to property at Art. 17: "Every person has the right to own, use, dispose of and give that person's lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such possessions." Superficial similarities notwithstanding, Art. 17 AHRD is narrower, in my view, than Art. 17 EUCFR and UDHR. As is most relevant to asset recovery, Art. 17 AHRD omits the third sentence of Art. 17(1) EUCFR on the use of property in the general interest. It is possible that a third rule could be read into the first sentence of Art. 17 AHRD on the right to use one's lawfully acquired possessions. However, it is not clear whether the AHRD's concept of property is intended to be as broad as the EUCFR's and, if so, whether its criteria for justifying interferences are as stringent. Unlike Art. 17(1) EUCFR, second sentence, Art. 17 AHRD omits express reference to the public interest, lawfulness, and fair and timely compensation, mentioning only *arbitrary* deprivations, like Art. 17(1) UDHR.[185] Further, the AHRD's "general principles" require "balanc[e] with the performance of . . . human duties" and appear to subordinate all of its human rights to "national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society."[186] A qualification in the statement on the adoption of the AHRD merely "reaffirm[s]" the ASEAN leaders' commitments to existing human rights standards.[187] Article 35 also acknowledges "the right to development "[as] an inalienable human right" benefiting individuals and "peoples of the ASEAN"; however, it prohibits states from invoking "the lack of development . . . to justify the violations of internationally recognised human rights."

6.5 Conclusions

One of the more remarkable features of the "property story" in public international law is the omission of property guarantees from the twin covenants and their profusion in (pan-)regional human rights treaties. Though none of these clauses is exactly the same, each qualifies the state parties' sovereign power to restrict certain thing-based relationships in the public interest and entitles individuals and groups to some degree of freedom in the use and enjoyment of those things *vis-à-vis* the state. I used Chapter 5 to consider how the ECtHR is likely to assess enforcement orders in cooperative confiscation cases under

[184] Shanahan Renshaw, "The ASEAN Human Rights Declaration 2012," 558–559.

[185] On the narrowness of the protection against deprivations in the UDHR, see van Banning, *Human Right to Property*, p. 39.

[186] AHRD, Arts. 6, 8; Amnesty International, "Postpone Deeply Flawed Declaration."

[187] ASEAN, "Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD)."

Art. 1 ECHR-P1. I used this chapter to explore how similar bodies in other regions could apply their property entitlements.

In the Americas, member states of the OAS have created two regional human rights to property along with two bodies for their supervision and enforcement. IACtHR judgments and IACmHR reports indicate that Art. 21 ACHR is temporally, personally, substantively, and territorially broad enough to cover enforcement orders that aim at asset recovery. What is unclear is the way in which they would interpret the requirements of necessity, proportionality, and establishment by law. The IACtHR applied these concepts strictly in *Chaparro*, paying particular attention to the strength of the connection between the thing and the offense, as well as the need for judicial supervision and a legal basis. That said, given the relative dearth of cases on the adverse (extraterritorial) consequences of cooperation, it is unclear how these principles would apply when the confiscation order was issued by another state.

In Africa, the AfCmHPR's recent reports have done much to clarify the scope and content of Arts. 14 and 21 AfCHPR. It is now beyond doubt that Art. 14 AfCHPR prevents state parties from unlawfully and disproportionately encroaching on a broad range of individual and collective thing-based relationships. Moreover, it is apparent that Art. 21 AfCHPR entitles national communities and some sub-state groups to determine what – if anything – is done with their wealth and natural resources; it prohibits national governments from curtailing this discretion other than in a manner that is proportionate to a public/general interest and in accordance with appropriate laws. Whether this right requires state parties to the AfCHPR to seek and provide assistance in asset recovery cases remains to be seen. At the very least, it will require the AfCmHPR to give weight to the goal of asset recovery when balancing competing public/general and individual/private interests. This approach is preferable to a portrayal of the right to free disposition, as a manifestation of permanent sovereignty over natural resources, as absolute.

Whether international instruments would come to provide equivalent protections for recovered property in other regions is less certain. It can be inferred from Art. 31 that the Arab charter restricts the power of states to interfere with individual thing-based relationships. It expressly requires, furthermore, that such interferences have a basis in law and that they not be arbitrary. What is unclear is how those terms will be interpreted given the charter's particular references to religious principles and the CDIHR. As for the Asia/Pacific, ASEAN has finalized its human rights declaration without clearly providing a right to property that protects against regulations of the use of possessions, let alone possessions of potentially illicit origin.

7

General conclusions

What is the relationship between corruption, asset recovery, and human rights in public international law? Could states violate an international human right to property by enforcing foreign confiscation orders with respect to the proceeds, instrumentalities, or objects of corruption or substitute assets if they have another international legal obligation to do so? The questions that have driven this book tap an old vein in human rights discourse, namely, the fundamental entitlements of the most reviled members of society and the limits of state power with respect to "classic" civil liberties. Yet they do so in the context of contemporary concerns about the fragmentation of international law, the unequal global distribution of individual wealth and power, and the accountability of states and non-state actors for decisions that affect individuals outside their territorial or institutional borders. So, in advocating for more and quicker asset recovery, influential international organizations and NGOs have warned against the abuse of human rights by PEPs,[1] and "[t]he negative impact of non-repatriation of funds . . . on the enjoyment of human rights" in victim states.[2] Meantime, people and organizations that have been objects of anti-corruption prosecutions, asset restraint and confiscation proceedings, and acts of international cooperation in criminal matters have begun complaining to regional tribunals about violations of their treaty-based guarantees.

I acknowledged in Chapter 2 that any serious attempt to address these issues is contingent upon the definitions of corruption, asset recovery, and human rights to property. None of those concepts has a fixed or undisputed meaning across academic disciplines or within public international law. Corruption, for one, is ordinarily used to denote moral or physical decay or breaches of public duty through bribery. Also defined by economists, social scientists, and national

[1] Stephenson et al., *Barriers to Asset Recovery*, pp. 21, 23, 83; Transparency International UK, "Laundering and Looted Gains," p. 39. See also COSP, Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech from October 24 to 28, 2011, CAC/COSP/2011/14 (November 10, 2011), Res. 4/4, para. 8 ("[The COSP] . . . Encourages States parties to remove barriers to asset recovery, including, *inter alia*, by simplifying their legal procedures and preventing abuse of those procedures").

[2] UN Doc. A/HRC/17/23 (July 19, 2011).

lawmakers, corruption is not typically regarded as an offense in international criminal law. Further, it is seldom expressly defined in the anti-corruption suppression conventions and soft law instruments which states concluded during the 1990s and the first decade of this century. They treat corruption, rather, as various misuses of power or office for private gain that states are obliged or encouraged to criminalize within their territorial or extraterritorial jurisdictions. So defined, corruption offenses generally involve transactions with or with respect to local or foreign public officials as well as their unilateral abuses of position. Some instruments foresee equivalent offenses for persons in the private sector. I described all these offenses in Chapter 3, along with the treaties' provisions on jurisdiction, defenses, (criminal) procedure, and penalties.

Asset recovery, for its part, is only mentioned in the UNCAC and there without an express definition. Implicitly, it would seem to connote *both* the goal of preventing, deterring, and redressing the movement of corruption-related wealth through the international financial system by or for PEPs *and* a suite of processes by which one state uses another state's coercive powers to obtain or regain ownership of such illicit wealth. The convention's drafters appeared to favor the former meaning without ever completely abandoning the latter. I too distinguished between the goal of asset recovery and the measures by which it is to be achieved, particularly what I called cooperative confiscation. This term describes the compulsory transfer of ownership of illicit wealth by a state with jurisdiction over those things (the haven state) at the behest of a state with legislative and judicial competence over the alleged offense (the victim state) usually, though not only, by requests for MLA. Most of anti-corruption suppression conventions and surveyed MLATs required their state parties to cooperate for the purposes of confiscation, as I showed in Chapter 4; some specified the method of enforcement and the procedures for placing, assessing, and refusing or executing such requests.

Finally, whilst common usage suggests that a human right to property is simply a human being's fundamental entitlement with respect to things, philosophers and lawyers disagree about the very notions of humanity, rights, and property, not to mention the sources and limits of human rights to property in public international law. With reference to the legal-philosophical literature, I provisionally defined human rights to property as positive and negative rights that pertain to the allocation and enjoyment of thing-based relationships and that serve to ensure the promotion, respect for, and protection of human dignity. I sourced these norms primarily in special-purpose regional human rights treaties, particularly the ACHR, AfCHPR, and ECHR-P1, as interpreted by their respective international tribunals. Property rights also figure in the UDHR and the AHRD, ArCHR, CISCHR, and EUCFR, however. The increased prevalence of treaty-based human rights to property is itself significant given the historical controversies surrounding the right to property in customary international law.

In Chapters 5 and 6, I used the jurisprudence of regional human rights tribunals to consider whether, and if so when, states would violate key European, American, and African rights to property by directly enforcing foreign confiscation orders issued with respect to PEPs and members of their entourages. I began by asking whether enforcement actions in asset recovery cases would be within the personal, temporal, territorial, and material scope of the conventions and their property guarantees. I found, first, that each was likely to benefit individuals in high public office from third states and that the European and African rights were likely to directly benefit corporate associates of PEPs. Second, I ascertained that each would apply to enforcement orders issued after their EIF with respect to each state party, as well as to some restraining orders and confiscation proceedings that began before and continued thereafter. This was a significant finding given that cooperative confiscation cases that aim at asset recovery may last for several years and that states with large offshore financial centers have not yet ratified the human rights conventions. Third, I considered that the direct enforcement of foreign confiscation orders is likely to be within the treaties' concepts of jurisdiction, even if the acts that give rise to the interference were carried out by and in the territory of the requesting state. The ECtHR has already interpreted that concept to include the adverse foreign consequences of extradition and expulsion, the transfer of sentences, and the enforcement of civil judgments.[3] Importantly, it was open to a similar argument in *Saccoccia*, in which it dismissed complaints about the enforcement of a large foreign confiscation order under Art. 6 ECHR and Art. 1 ECHR-P1.[4] The inter-American and pan-African tribunals have not heard a case like *Saccoccia*. But the AfCmHPR has dealt with the extraterritorial consequences of expulsion,[5] and the IACtHR has approved a Peruvian Constitutional Court's decision not to extradite a man charged with capital economic offenses.[6] Finally and substantively, I determined that the European, American, and African rights to property would embrace PEPs' personal rights and rights *in rem*, as well as – perhaps – their *de facto* relationships to or through things.

Presuming that a potential beneficiary actually has property within the meaning of the ECHR-P1, ACHR, and AfCHPR, I had no doubt that states would interfere with that interest by enforcing foreign confiscation orders. The characterization of the interference under Art. 1 ECHR-P1 and Art. 21 ACHR was problematic, however. Whilst confiscation orders clearly deprive a person of title to things, the ECtHR and IACtHR have generally considered them merely to control or subordinate the use and enjoyment of possessions or property. The ECtHR would appear to have reasoned that deprivations are,

[3] See, e.g., *Soering* (1989) 11 EHRR 439; *Drozd* (1992) 14 EHRR 745; *Pellegrini* (2002) 35 EHRR 2.

[4] *Saccoccia* (ECtHR, July 5, 2007); (2010) 50 EHRR 11.

[5] *Modise* (2000) AHRLR 30.

[6] *Matter of Wong Ho Wing regarding Peru (Order)* (IACtHR, October 10, 2011).

by definition, compensable interferences with property; that confiscations are, by definition, non-compensable interferences; and, hence, that confiscation orders cannot deprive persons of property within the meaning of that term. This view is well established in the court's jurisprudence, notwithstanding a narrow exception for unlawful confiscations and strong critiques from commentators and dissenting judges. The position of the IACtHR is less certain, though in *Chaparro*, a case concerning the restraint of things apparently related to drug trafficking, it would appear that the inter-American court tended toward the majority Strasbourg view.[7] The African commission has not considered this issue as it has not read a taxonomy of interferences into Art. 14 AfCHPR.

By far the biggest hurdle for an aggrieved PEP will be to counter the respondent state's argument that the interference was justified, i.e., lawful and proportionate to a public objective. On the lawfulness criterion, I argued that nationally competent authorities must have adhered to laws that have empowered them to confiscate and/or restrain the assets pursuant to a notice or request for assistance from that state in relation to that offense. The ECtHR has elaborated that all such laws must be sufficiently precise, accessible, and foreseeable, and accompanied by appropriate procedural safeguards. Drawing on its extradition and confiscation case law, I speculated that some cooperative confiscation laws could be too broad, obscure, or unforeseeable to be compatible with the rule of law. However, I cautioned that the PEP's or associate's supposed knowledge of the risks of offshore banking would inform the court's assessment. Also, I found it unlikely that the enforcement of a foreign confiscation order would be unlawful just because the requested state failed to invoke the dual criminality requirement, the *ne bis poena in idem* principle, or the political offense exception to refuse the request.

On the proportionality requirement, I considered the reduction of the incidence of corruption and associated acts of international money laundering to be the most probable characterization of the general interest. The observance of obligations on international cooperation in criminal matters, the preservation of financial stability in the requested state, and the promotion of social and economic development in victim countries, were other convention-compatible goals. Given its highly individualistic concept of property, I encouraged the ECtHR, in particular, to recognize third peoples' interests in asset recovery. As for the relationship between means and ends, I found that states enjoy considerable discretion under all the instruments. The margin of appreciation is widest under Art. 1 ECHR-P1 and particularly broad when there is an alleged connection between the thing and an offense. The scope of the order and the conduct of the parties are relevant considerations in domestic confiscation cases; but the ECtHR generally accepts the necessity of confiscation if the

7 (IACtHR, November 21, 2007).

aggrieved property-holder had an adequate opportunity in a fair hearing to contest the order before local courts. In *Saccoccia* and its sister decision, *Duboc*, the ECtHR appeared to take an even narrower view, only expressly considering Austria's procedures for determining whether it could enforce the American forfeiture order in that part of the judgment. In its admissibility decision on *Saccoccia*, the court had approved of Austria's efforts to ensure that the US proceedings were conducted in accordance with Art. 6 ECHR.

The IACtHR and AfCmHPR tended to express the proportionality requirement of Art. 21 ACHR and Art. 14 AfCHPR more strictly. The IACtHR considered the strength of the connection between the restrained things and the offense in *Chaparro*, in addition to the procedures for judicial review. In *Endorois Welfare Council*,[8] the AfCmHPR pronounced the need for "limitations [to] be strictly proportionate with and absolutely necessary for the advantages that follow," "the least restrictive measures possible," and not such as to render the right "illusory."[9] That said, in no case to date has the IACtHR or AfCmHPR considered how these conditions would apply in circumstances of international cooperation in criminal matters. Hence, it is unclear whether they would be just as exacting when there is a countervailing interest in an efficient international division of labor in the suppression of crime. Further, in my submission, the regional recognition of collective rights to self-determination and development could justify narrower readings of individual property clauses in asset recovery cases. Compared to the ECHR, the "other" regional systems provide greater protection for collective and communal thing-based relationships and/or development. The pan-African peoples' right to free disposition is best developed. I speculated that it may support arguments about an obligation to return wealth for the purposes of asset recovery.

The inter-American and pan-African approach to proportionality and group entitlements gives pause to consider the apparent convergence of the criteria for justifying interferences with property among the regional human rights tribunals and treaties.[10] It also highlights an underlying dilemma in international adjudication on regional property rights, namely, the extent to which international decision-makers should assess the substantive criteria by which states determine whether to interfere with a protected relationship to and through things. Does or should the individual right to property correlate *only* with a state duty to act lawfully and to afford the property-holder a fair procedure when interfering with possessions? Or should the courts *also* consider the scope of the interference and the conditions for its imposition? Commenting on decisions of the ECtHR, IACtHR, and AfCmHPR, Amnon Lehavi advocates a

[8] (AfCmHPR February 4, 2010).
[9] *Endorois Welfare Council* (AfCmHPR, February 4, 2010), paras. 213–215.
[10] See also Cotula, *Human Rights, Natural Resource and Investment Law*, p. 74.

tempered version of the first approach. He argues that property rights cannot be applied as strictly as "hardcore" "counter-majoritarian" human rights, such as rights to life or liberty, because property, in itself, is a "social-political institution."[11] Presuming governmental authority is reasonably responsive to popular control, the substantive conditions and consequences of an interference with property are only internationally relevant when the interference is systematically arbitrary or discriminatory and/or it deprives an individual of core human rights.[12]

Applied to cooperative confiscations that aim at asset recovery, Lehavi's thesis suggests that international human rights tribunals must afford states a broad margin of appreciation in cooperative confiscation cases. Indisputably, the interference with property occurs on the territory of the requested state through the application of its coercive power. Yet those thing-based relationships may have been created, at least in part, under the rules of another jurisdiction and deemed liable to confiscation in the context of that or another state's fundamental political transition. Ugo Mattei, whom Lehavi acknowledges in his paper, argues that "[i]ndeed, all political revolutions can be regarded as redistributions of property rights beyond the constitutional limits of the previous social organizations."[13] Practically, in the aftermath of such events, it may be extremely difficult for a haven state to ascertain whether the victim state has acted lawfully, fairly, proportionately, and for the right reasons in undertaking the criminal, confiscation, and/or cooperation proceeding. This is to say nothing of the difficulties it may have in assessing whether the victim state's lawmaking processes are "democratic" or "legitimate." Combined with the complexity – even delicacy – of relations between states, the principle of mutual trust and efficiency in international cooperation in criminal matters, and the close connection traditionally perceived between sovereignty and criminal law, the scope for criticism of enforcement orders would seem narrow indeed.

This approach, which is already apparent in Strasbourg's jurisprudence, raises questions about the utility of the property guarantee in asset recovery cases. If all states are expected to do is fairly determine whether there is an entitlement to a thing by applying reasonably well-publicized and clear legal rules, why raise the right to property? Why not rely simply on general guarantees for due process and the rule of law, especially if it is clear that the assets are or represent the proceeds of crime? In my submission, these questions can be answered from at least three perspectives.

First, a finding that the haven state has violated the right to property may significantly affect the remedy and the reputational consequences of the litigation for the parties. Large awards are possible in property disputes, at least

[11] Lehavi, "The Global Law of the Land," 469–471.
[12] Lehavi, "The Global Law of the Land," 470. [13] Mattei, *Basic Principles*, p. 30.

within Europe.[14] In addition, success in claiming the right to property may affect the perceived legitimacy of the haven's state asset recovery efforts, if not its protections for foreign account holders or investors more generally. It is also a statement of entitlement for an applicant who, in private law, may have none. Second, for international adjudicators and policy-makers, property rights are not merely standards for adjudication but mechanisms for illuminating and encouraging discussion about rules that govern access to resources within, and increasingly between, political communities. Property rules and institutions may be disputed; nonetheless – or precisely for that reason – there is value in the public balancing of interests which tribunals undertake when they apply them. Third, for practitioners and students of public international law, property is an ideal prism through which to study the relationship between the international rules on corruption/asset recovery and human rights. It necessitates a contextualized exploration of issues of lawfulness and procedural fairness; it contributes to an understanding of state opinion and practice with respect to property; and it encourages further consideration of how qualified human rights should be recognized when law enforcement powers (and duties) are shared between states. For all these reasons, international courts and tribunals should be encouraged to engage with the difficult issues raised by property rights in asset recovery cases, and not merely to hide behind the procedural guarantees or procedural and legality aspects of property guarantees. For similar reasons, collective and individual rights to property should be treated as systemically related and mutually qualified.

To summarize, I have answered the question what is the relationship between corruption, asset recovery, and the human right to property in public international law, by focusing on the criminalization, confiscation, and cooperation provisions of the anti-corruption suppression conventions and related MLATs, as well as the rights to property in regional human rights instruments in Europe, the Americas, and Africa. I have speculated that the European, inter-American, and pan-African human rights tribunals would regard the enforcement of foreign confiscation orders that aim at asset recovery as justified interferences with regional property rights – provided that the requested state acted lawfully and gave the aggrieved party a fair opportunity to contest the order before its courts. I noted, however, that many issues remain under-explored or undetermined: the forms of illicit wealth that are property; the haven state's responsibility for the adverse (extraterritorial) consequences of assistance; the relationship between its duties to respect and protect property and to assist with confiscation; and the relationships between property and procedural rights, individual and collective rights, and collective rights *inter se*.

[14] *Former King of Greece and Others* v. *Greece*, App. No. 25701/94 (ECtHR, November 28, 2002) (13,700,000 euros); *Centro Europa 7 SRL and Di Stefano* v. *Italy*, App. No. 38433/09 (ECtHR, June 7, 2012) (10,000,000 euros plus tax).

I would encourage judicial decision-makers and commentators to engage expressly with these issues.

In many ways, the contingency of my answer reflects "the nature, structure, and content" of the international legal system (to quote Prof. Shelton).[15] Even if one accepts, as I have done in this book, that states and international organizations are empowered to create international laws in the form of customs, treaties, and general principles, international lawmaking is still strikingly decentralized and loosely organized.[16] At the same time, the ambiguous relationship between corruption, asset recovery, and human rights is a consequence of political decisions by the primary subjects of international law. Having accepted a construction of corruption as a transnational crime, states agreed to criminalize corrupt and corruption-related conduct and to cooperate for the purposes of confiscation. They did so in overlapping but incongruent suppression conventions, which borrowed from and presupposed the existence of other multilateral and bilateral treaties on drug trafficking, organized crime, money laundering, and international cooperation in criminal matters. They generally chose not to say how those obligations would relate to their duties under (earlier) human rights treaties. Indeed, they generally promoted "the fight against corruption" and the "fundamental principle" of the recovery/return of assets without clearly defining those terms or clearly acknowledging the extent to which those – important – goals were supportive of and/or subject to their other commitments and objectives.

Ultimately, whether the apparent compartmentalization of corruption/asset recovery and human rights is due to the structure of the international legal system or states' choices is beside the point. What is important is that the potential tensions between the mechanisms of asset recovery and the requirements of human rights are acknowledged and resolved when they arise in a transparent and reasonably predictable manner. Like Higgins, I see international law, particularly the international public law on property, as "the harnessing of authoritative decision-making to the achievement of certain values in international society."[17] The enunciation and promotion of asset recovery may well require international executive and judicial decision-makers, including human rights tribunals, to reassess their established notions of property rights in light of new concerns with political corruption, money laundering, and the global distribution of wealth and resources. Conversely, the possibility of human rights review may serve as an incentive for states to sharpen their notions of the problem (corruption and underdevelopment) and to justify – even evaluate – their proposed solution (asset recovery) given its relative

[15] Shelton, "Relative Normativity," p. 141. See also A/CN.4/L.682/Add. 1, paras. 5–6, 486.

[16] Shelton, "Relative Normativity," p. 142.

[17] Higgins, "The Taking of Property," 268, citing McDougal, Lasswell, and Reisman, "Theories about International Law."

benefits and costs. Even when human rights have not been breached, they are still standards for political criticism and the basis for arguments about the existence or scope of rights in general international law. Such processes can be seen to obstruct asset recovery. Or they can be seen to reflect the diversity of individual and national preferences that are embedded in and channeled through the treaties, principles, and customs of public international law.

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