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The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases

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1. Introduction

Beginning this special issue of the *Utrecht Law Review*, Sabine Gless and John Vervaele define transnational crimes as offences that affect multiple jurisdictions but are not core crimes in public international law; transnational criminal law (TCL) is 'the sum of existing laws applying to transnational crime'.[1] Arguing that the right to a fair trial is indeed one of TCL's general principles, Gless then asks whether the use of foreign evidence – and the supranational coordination of evidence gathering – could undermine the individual's right to a defence under Article 6(3) of the European Convention on Human Rights (ECHR).[2] As she points out, the risks to and requirements of Article 6 ECHR could vary depending on the transnational dimensions of the criminal proceedings. In other words, the *ways* in which national, supranational or international authorities share the tasks of investigating, prosecuting and sanctioning transnational offences could determine the *ways* in which the right to a fair trial may be infringed. I continue her inquiry by considering the relevance of the ECHR's fair trial rights in another type of transnational (criminal) proceedings, namely, cooperative efforts to 'recover' assets that are associated with acts of grand corruption. Precisely, I ask how the European Court of Human Rights (ECtHR) is likely to deal with the argument that State Parties to the ECHR and its protocols have violated the right to a fair trial by directly enforcing confiscation orders issued abroad with respect to assets that are or that substitute for the proceeds, objects or instrumentalities of high-value, high-level political corruption offences[3] ('illicit wealth'). In so doing, I build on my previous and forthcoming studies of the interactions between corruption, asset recovery and human rights in public international law.[4]

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1 S. Gless & J. Vervaele, 'Law Should Govern: Aspiring General Principles for Transnational Criminal Justice', 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10. See also, N. Boister, '"Transnational Criminal Law"?' 2003 *European Journal of International Law* 14, no. 5, p. 955; 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, 29 April–8 May 1995, UN Doc. A/CONF.169/15/Add.1 (4 April 1995), Para. 9.

2 S. Gless, 'Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle', 2013 *Utrecht Law Review* 9, no. 4, pp. 90-108.

3 For similar definitions of 'grand corruption', see N. Lash, 'Corruption and Economic Development', 2004 *Journal of Economic Asymmetries*, no. 1, p. 3; G. Moody-Stuart, 'The Costs of Grand Corruption', 1996 *Economic Reform Today*, no. 4, p. 19; C. Nicholls et al., *Corruption and the Misuse of Public Office*, 2011, Para. 1.07.

4 See, in particular, R. Ivory, *Corruption, Asset Recovery, and the Human Right to Property in Public International Law*, 2012, Baseler Dissertation, Blue Series, forthcoming as *Corruption, Asset Recovery, and the Protection of Property in Public International Law*: *The Human Rights of Bad Guys*, 2014.

This article has four substantive parts. Section 2 illustrates how understandings of corruption as transnational crimes have contributed to broad requirements for cooperative confiscation in international anti-corruption treaties and related instruments. Such 'asset recovery' measures are increasingly portrayed as supportive of some (economic, social and cultural) human rights, though the potential for tension between asset recovery measures and other (civil and political) entitlements have also been noted. Section 3 then considers the approach of the ECtHR to regulating the adverse consequences of international cooperation in criminal matters, in particular for the right to a fair trial. Analysing the ECtHR jurisprudence on the enforcement of foreign confiscation orders in matters of money laundering, it argues that the 'flagrant denial of justice' is the relevant standard for cooperative confiscation cases that aim at asset recovery. Section 4 explores how the 'flagrant denial' standard would be applied in asset recovery cases, analysing such matters as the scope of the ECHR, the features and evidence of 'flagrant' denials, and the standard of diligence expected of requested ECHR State Parties. The paper ends in Section 5 with a summary of the arguments and reflections on the ways in which the Court's 'flagrant denial' case law could contribute to the formulation of a general principle on the right to a fair trial in TCL.

2. International efforts against corruption and for asset recovery – and human rights

My inquiry starts with the multilateral treaties and supranational legislative instruments that states concluded on the 'phenomenon' or 'problem' of corruption during the 1990s and the first decade of this century.[5] Mirroring earlier suppression conventions and overlapping with treaties and instruments on extradition and mutual legal assistance (MLA, MLATs),[6] what I call the 'anti-corruption treaties' contribute substantively and procedurally to TCL insofar as they treat corruption as a crime or a type of criminal behaviour(s).[7] They depart from the assumption that corruption affects the interests of multiple states by distorting competition, facilitating organised crime and terrorism and endangering democracy and development, amongst other things.[8] They do not generally define corruption in the abstract, but encourage or require their State Parties to criminalise various misuses of power or trust for reward, along with related behaviours that enable the enjoyment of the benefits of crime and/or inhibit

5 See, esp., the 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, OJ C 316, 27.11.1995, p. 49 (EUCPFI) and its first and second protocols (EUCPFI-P1 and P2); 1996 Inter-American Convention against Corruption, *International Legal Materials*, 1996, p. 724 (IACAC); Council Act of 26 May 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 European Communities or officials of Member States of the European Union, OJ C 195, 25.6.1997, p. 2 (EUOCC); 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *International Legal Materials*, 1998, p. 1 (OECD-ABC); 1999 Criminal Law Convention on Corruption, 2216 *United Nations Treaty Series*, p. 225; 2000 United Nations Convention against Transnational Organized Crime, 2225 *United Nations Treaty Series*, p. 209 (UNTOC); 2001 Protocol Against Corruption to the Treaty of the Southern African Development Community, <http://www.sadc.int/documents-publications/show/795> (last visited 13 September 2013) (SADC-PAC); 2003 African Union Convention on Preventing and Combating Corruption, *International Legal Materials*, 2004, p. 1 (AUCPCC); 2003 United Nations Convention against Corruption, 2349 *United Nations Treaty Series*, p. 41 (UNCAC).

6 See, esp., 1990 Convention on Money Laundering, the Confiscation, Search and Seizure of the Proceeds of Crime, 1862 *United Nations Treaty Series*, p. 69; 1992 Inter-American Convention on Mutual Assistance in Criminal Matters, *Organization of American States Treaty Service*, no. 75 (IACMACM); Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1; 2002 Protocol on Mutual Legal Assistance in Criminal Matters to the Treaty of the Southern African Development Community, available at <http://www.sadc.int/documents-publications/show/807> (last visited 13 September 2013) (SADC-MLAP); Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 25.11.2006, p. 59 (EU Dec. 2006/783/JHA); 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, *European Treaty Series*, no. 198. See also 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 12 March 2012, COM(2012) 85 final, 2012/0036 (COD).

7 Ivory, supra note 4, Ch. 2, 3. This definition excludes the 1999 Civil Law Convention on Corruption, 2246 *United Nations Treaty Series*, p. 3, which is concerned with the civil law responses to corruption, and the 2001 Protocol on the Fight Against Corruption to the Treaty on the Economic Community of West African States, reprinted UNODC, Compendium of International Legal Instruments on Corruption, 2005, <http://www.unodc.org/documents/corruption/corruption-compendium-en.pdf> (last visited 22 December 2012), p. 211, which has not yet entered into force. See also J. Bacio Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption*, 2012, p. 3.

8 Ivory, supra note 4, Ch. 2; G. Stessens, 'The International Fight against Corruption', 2001 *International Review of Penal Law* 72, pp. 894-895.

law enforcement.[9] As is particularly important for this special issue, they also require State Parties to cooperate with each other in detecting, investigating, prosecuting and punishing Convention offences.[10]

Read with the related MLATs, the anti-corruption treaties generally oblige their Parties to cooperate for the purposes of confiscating illicit wealth and so, in the language of the United Nations Convention against Corruption (UNCAC), to contribute to 'asset recovery'.[11] I have argued elsewhere that 'asset recovery' is an ambiguous term in public international law.[12] It can be broadly defined as a goal with two parts: (1) that 'politically exposed persons' (PEPs) and their close family members and associates should be significantly less able to move corruption-related wealth through financial institutions; and (2) that states with jurisdiction over corruption offences should be better able to obtain or regain ownership of those assets or substitute items. However, in another narrower sense, asset recovery is a catch-all phrase for the legal processes by which State Parties use each other's coercive powers to achieve the return of illicit 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 offence (the 'victim state').[13]

Though clearly foreseen as a means to prevent, deter and remediate corruption and associated money laundering, cooperative confiscations only rarely succeed in achieving the goal of asset recovery in practice. Frequently, those seeking the 'return of wealth' falter at one or more 'barriers to recovery': weak political support from other government decision-makers; non-compliance with the legal requirements for confiscation or cooperation in the victim or haven state; the inability of the parties to locate the assets or to restrain them before they are transformed or transferred to another jurisdiction – the list goes on.[14] In response, states have employed alternative strategies for securing the return of illicit wealth to victim countries. These include civil and criminal proceedings in haven jurisdictions; settlements between prosecutors and those close to former regimes; and financial sanctions with respect to current or serving leaders.[15] In addition, through the anti-corruption and related MLA treaties and instruments, states have recommended or required the adoption of measures that relax the requirements of proof of the predicate offence or the connection between the thing and the offence.[16] The UNCAC, most notably, foresees that State Parties may require offenders to demonstrate the lawful origins of 'property liable to confiscation (…)'.[17] It recommends that they criminalise illicit enrichment.[18] And, in 'appropriate cases', it requires them to '[c]onsider taking such measures as may be necessary to allow confiscation of such property [of foreign origin] without a criminal conviction (…)'.[19]

International efforts to combat corruption are increasingly perceived as supportive of human rights.[20] A study issued under the auspices of the UN High Commissioner for Human Rights in 2011 calls for a 'human rights-based approach' to asset recovery in which victim and haven states (or, better

9 On the concept of 'corruption' in the anti-corruption treaties, see further Ivory, supra note 4, Ch. 2 and Ch. 3. Cf. J. Bacio Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption*, 2012, pp. 18-21.

10 Ivory, supra note 4, Ch. 2; C. Nicholls et al., *Corruption and the Misuse of Public Office*, 2006, Para. 9.04; C. Nicholls et al., *Corruption and the Misuse of Public Office*, 2011, Pt. VI.

11 UNCAC, Preamble, Art. 1(b), Ch. V. See also UNCAC, Arts. 37(1), 46(3)(k). See further Ivory, supra note 4, Ch. 4.

12 Ivory, supra note 4, Ch. 2.

13 Surveyed in Ivory, supra note 4, Ch. 4.

14 See generally K. Stephenson et al., *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, 2011.

15 For a survey of key asset recovery cases involving Switzerland, see Ivory, supra note 4, Ch. 2, as well as the diverse contributions to M. Pieth (ed.), *Recovering Stolen Assets*, 2008.

16 See, in particular, COECrimCC, Art. 19(3) read with its Explanatory Report, Paras. 93-94; COEMLC 1990, Art. 13 read with its Explanatory Report, Para. 43; COEMLC 2005, Art. 23(5) read with Explanatory Report, Paras. 164-165; COM(2012) 85 final, Arts. 4(1), 5; EU Dec. 2005/121/JHA, Art. 3(2); UNCAC, Arts. 31(8), 54(1)(c). See further, Ivory, supra note 4, Ch. 4.

17 UNCAC, Art. 31(8).

18 UNCAC, Art. 20 ('when committed intentionally, (…) 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'). There is no requirement that the state prove that an official obtained the assets through an offence involving the abuse of public power or trust: see further UNODC Division for Treaty Affairs, Legislative Guide for the Implementation of the United Nations Convention against Corruption, 2006, <http://www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html> (last visited 11 January 2013), Para. 296; D. Wilsher, 'Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases', 2006 *Crime, Law & Social Change* 45, p. 28.

19 UNCAC, Art. 54(1)(c).

20 International Council on Human Rights Policy (ICHRP) and TI, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*, 2010, <http://www.ichrp.org/en/projects/131> (last visited 12 January 2013), p. 63.

put, their representatives) perceive their parallel duties to 'seek repatriation (…) [and] to assist and facilitate repatriation (…)'.[21] These arise, it finds, from the 'duty to ensure the application of the maximum available resources to the full realization of economic, social, and cultural rights' and the 'obligation of international cooperation and assistance (…)'.[22] According to the study, measures to enhance the prospects of asset recovery do not necessarily compromise due process. Citing the ECtHR, it argues that non-conviction-based (NCB) confiscation regimes and presumptions of illicit acquisition may be remedial and proportionate restrictions of the presumption of innocence.[23] Thus, it recommends that, 'When appropriate, recipient countries of funds of illicit origin should de-link confiscation measures from a requirement of conviction in the country of origin; (…).[24] These recommendations are in keeping with the observation made by others elsewhere that corrupt officials are well placed to use national jurisdictional boundaries and legal rights to defeat law enforcement efforts.[25]

At the same time, it would seem antithetical to the concept of universal and inalienable human rights to allow limitations to entitlements just because of an individual's location vis-à-vis a cooperating state and/or alleged crime (or an association with a sort of alleged criminal).[26] Hence, the Office of the High Commissioner has cautioned states against ignoring the human rights implications of anti-corruption policies and 'techniques',[27] as have human rights and anti-corruption NGOs in exploring the connection between their areas of expertise.[28] Meanwhile, legal academics have warned of new risks to individual rights through international cooperation and asset-related measures.[29] The circumstances in which states are most likely to seek asset recovery – during or immediately after a 'radical political transformation'[30] – may also be the source of concerns about the reasons for cooperation and the fairness of the proceedings, as I have discussed elsewhere.[31] In this contribution, I consider the underlying issue, namely, the potential or perceived tension between human rights and anti-corruption policies. I do so through the lens of Article 6 ECHR and from the perspective of the haven state in cooperative confiscation proceedings that aim at asset recovery, in particular with non-contracting ('third') states.[32] My focus is on the UNCAC,

21 UN High Commissioner for Human Rights (HRC), Comprehensive study on the negative impact of the non-repatriation 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 (14 December 2011), Para. 25, as well as Para. 38. See also Human Rights Council, 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/RES/22/12 (10 April 2013).

22 HRC, Comprehensive study on the negative impact of the non-repatriation 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/19/24 (14 December 2011), Para. 25.

23 HRC, Comprehensive study on the negative impact of the non-repatriation 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/19/24 (14 December 2011), Para. 46.

24 HRC, Comprehensive study on the negative impact of the non-repatriation 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/19/24 (14 December 2011), Para. 63, Recommendation (a)(iv). See also UN Doc. A/HRC/19/24, Para. 46. HRC 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 (19 July 2011).

25 K. Stephenson et al., *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, 2011, p. 12; J. Thuo Gathii, 'Defining the Relationship between Human Rights and Corruption', 2009 *University of Pennsylvania Journal of International Law* 31, pp. 161-171.

26 See W. Kälin & J. Künzli, *The Law of International Human Rights Protection*, 2010, p. 32 (defining human rights 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 (…)'.).

27 UN High Commissioner for Human Rights in cooperation with the Government of the Republic of Poland, Background Note: United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 8–9 November 2006, HR/POL/GG/SEM/2006/2, Para. 14.

28 International Council on Human Rights Policy (ICHRP) and TI, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*, 2010, <http://www.ichrp.org/en/projects/131> (last visited 12 January 2013), pp. 63-69.

29 On cooperation, see Gless, supra note 2. On confiscation and related measures, see generally P. Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, 2003; M. Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*, 2005; M. Pieth, 'Article 3(3). Seizure and Confiscation', in M. Pieth et al. (eds.), *The OECD Convention on Bribery: A Commentary*, 2007, pp. 259-260; G. Stessens, *Money Laundering: A New International Law Enforcement Model*, 2000, pp. 68-76. On counter-terrorist asset freezes, see, e.g., I. Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, 2006', <http://www.coe.int/t/dlapil/cahdi/Texts_&_Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf> (last visited 12 January 2013); C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, 2009.

30 See generally, R. Teitel, *Transitional Justice*, 2000, p. 4. See also F. Ni Aolain & C. Campbell, 'The Paradox of Transition in Conflicted Democracies', 2005 *Human Rights Quarterly* 27, no. 1, pp. 172-213.

31 Ivory, supra note 4, Ch. 5. See also TI-UK, 'Combating Money Laundering and Recovering Looted Gains: Raising the UK's Game', 2009, <http://www.transparency.org.uk/publications> (last visited 10 March 2011), Para. 177.

32 See also Ivory, supra note 4, Ch. 5.

which is the most recent and extensive anti-corruption treaty and which links (developed) states in Europe with (developing) states in other regions in commitments against corruption.

3. The adverse consequences of cooperation and the (flagrant) denial of Article 6 ECHR

As Sabine Gless explains, State Parties to the ECHR may violate that Convention and its protocols by cooperating with other states in criminal matters even though the 'adverse consequences' of assistance have occurred or may occur abroad.[33] The leading case is *Soering v UK*,[34] where the ECtHR established that a requested State Party incurs liability under Article 3 ECHR if it orders the extradition of an individual to a state in which there are 'substantial grounds (...) for believing that [he/she] (...) faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (...)'.[35] If there is such a risk, Article 3 ECHR implicitly prohibits extradition, 'however heinous the crime allegedly committed'.[36] Any other conclusion, *Soering* says, would be incompatible with 'the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers (…)'.[37]

In *obiter*, the Court in *Soering* also held that requested states might exceptionally violate Article 6 ECHR if 'the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'.[38] Subsequently, in *Drozd and Janousek v France and Spain*, the ECtHR applied this principle to the enforcement of a foreign criminal sentence under Article 5 ECHR.[39] The majority found that France would have been obliged to refuse to execute the Andorran prison sentences had it emerged that the Andorran convictions were 'the result of a flagrant denial of justice (…)', though this '[was not] shown (…) in the circumstances of the case (…)'.[40] 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 [Article 6 ECHR].'[41] To hold otherwise would have 'thwart[ed] the current trend towards strengthening international co-operation in the administration of justice, (…)'.[42]

The ECtHR appeared to apply a stricter 'yardstick' for assessing the compatibility of foreign proceedings with Article 6 ECHR in *Pellegrini v Italy*.[43] In that case, Italian judges had confirmed and enforced a Vatican order that annulled the applicant's marriage and defeated her claim to maintenance.[44] The applicant had not had access to the file before the Vatican courts and had not been informed of her right to counsel.[45] 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 Article 6 of the Convention, 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. (…)'[46]

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33 Gless, supra note 2. See also A. van Hoek & M. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', 2005 *Utrecht Law Review* 1, no. 2, pp. 5-6. See, e.g., *Al-Skeini and Others v UK* [GC], appl. no. 55721/07, [2011] ECHR, Para. 133.
34 *Soering v UK*, [1989] ECHR (Ser. A).
35 *Soering v UK*, [1989] ECHR (Ser. A), Para. 91.
36 *Soering v UK*, [1989] ECHR (Ser. A), Para. 89.
37 *Soering v UK*, [1989] ECHR (Ser. A), Para. 89.
38 *Soering v UK*, [1989] ECHR (Ser. A), Para. 113.
39 *Drozd and Janousek v France and Spain*, [1992] ECHR (Ser. A). See further J. Dugard & C. van den Wyngaert, 'Reconciling Extradition with Human Rights', 1998 *American Journal of International Law* 92, pp. 203-204. See also *Iribarne Pérez v France*, [1995] ECHR (Ser. A), Para. 29; Ivory, supra note 4, Ch. 5 (with further references).
40 *Drozd and Janousek v France and Spain*, [1992] ECHR (Ser. A), Para. 110.
41 *Drozd and Janousek v France and Spain*, [1992] ECHR (Ser. A), Para. 110.
42 *Drozd and Janousek v France and Spain*, [1992] ECHR (Ser. A), Para. 110.
43 *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Para. 40.
44 *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Paras. 26-30.
45 *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Paras. 44-46.
46 *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Para. 40.

Unconvinced of Italy's reasons for dismissing the applicant's complaints in the enforcement proceedings, the ECtHR found a violation of the right to an equal hearing under Article 6(1) ECHR.

The early case law thus raises the question of whether the ECtHR in fact uses two standards to determine when ECHR State Parties are responsible for foreign procedural flaws under Article 6; if there are two standards, the further issue for this article is which standard would apply to cooperative confiscations that aim at asset recovery.[47] The closest and most informative case to date is *Saccoccia v Austria* in which the applicant US citizen had been convicted of 'large-scale money laundering'.[48] The US District Court had ordered the forfeiture of some USD 136 million in proceeds and substitute assets, including cash, bonds and other financial instruments found in an Austrian apartment that had been leased in the applicant's name.[49] The Austrian Ministry of Justice had admitted the US request for enforcement of the final forfeiture order; the Vienna Regional Criminal Court had approved the order's execution;[50] and the Vienna Court of Appeal had rejected the applicant's challenges to the orders under Articles 6 and 7 ECHR and Article 1 of the Protocol to the ECHR (ECHR-P1). Before the ECtHR, the applicant sought to show, under Article 6, that the Austrian courts had failed to sufficiently consider deficiencies in the US criminal and confiscation proceedings.[51] Adapting the language of *Pellegrini* to express the test in *Soering* and *Drozd and Janousek*:

> '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.'[52]

The First Section acknowledged the potentially competing standard in *Pellegrini* but found 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 Article 6 ECHR had been a condition for enforcing the US order under the Austrian MLA law.[53] Although the Austrian courts had 'followed in essence the reasons given by the United States Court of Appeals, (...)' the ECtHR found that '[they 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'.[54] The ECtHR cited *Saccoccia* to dismiss a second US drug-money launderer's complaint in *Duboc v Austria*.[55] Perhaps in view of *Saccoccia*, Mr Duboc only complained about the fairness of the Austrian *exequatur* proceedings under Article 6 ECHR.[56]

In *Saccoccia*, the ECtHR had also rejected the applicant's submission that the enforcement proceedings themselves involved the determination of a 'criminal charge' under Article 6 ECHR and the imposition of a retrospective penalty under Article 7 ECHR.[57] In its 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.[58] The *exequatur* order was, moreover, a measure to enforce the US penalty rather than a penalty in its own right.[59] The *exequatur* proceedings were nevertheless within the scope of the civil limb of Article 6(1) ECHR as they effectuated a decision that determined

47 T. Schilling, 'The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights', 2012 *Rivista di diritto internazionale privato e processuale*, available at <http://works.bepress.com/theodor_schilling/9> (last visited 12 October 2012), p. 28. See also J. Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law', 2012 *International & Comparative Law Quarterly* 56, no. 1, pp. 5, 35, 43; A. van Hoek & M. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', 2005 *Utrecht Law Review* 1, no. 2 pp. 8-9.

48 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Facts', Para. A(1); *Saccoccia v Austria* (merits), appl. no. 69917/01, 18 December 2008.

49 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Facts', Para. A(1).

50 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Facts', Para. A(2).

51 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Facts', Paras. A(2), 1-4.

52 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 2.

53 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Facts', Paras. B(1), 2.

54 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 2.

55 *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012.

56 *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012, Para. 30.

57 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'Complaints'.

58 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 1(1)(1)(a).

59 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 1(3).

the applicant's 'civil rights and obligations'.[60] On the facts of *Saccoccia* (and *Duboc*), Austria had complied with the 'public oral hearing' requirement of Article 6(1) ECHR.[61] The decisions, which 'concerned rather technical issues of inter-State cooperation in combating money-laundering through the enforcement of a foreign forfeiture order', could be determined without a public hearing and without taking the applicants' submissions in person.[62] Later in the *Saccoccia* judgment, the Court found that the applicant had been allowed to participate, through his legal representatives, in the judicial proceedings and had made 'ample' submissions, which the Viennese courts had considered in detailed written decisions.[63] As a result, Austria had violated neither Article 6(1) ECHR nor, for that matter, Article 1 ECHR-P1, the right to property.

Saccoccia and *Duboc* verify my assumption that persons affected by enforcement orders may allege deficiencies in the foreign criminal trial and/or confiscation proceeding, as well as deficiencies with the local *exequatur* proceeding in the requested ECHR State Party. They also confirm that the ECtHR is prepared to consider whether State Parties have exposed or may expose such individuals to unfair criminal or confiscation proceeding by executing foreign confiscation orders. The Court in *Saccoccia* appears to prevaricate about the standard to be used in making this assessment. Nonetheless, in my submission, it favours the view that requested State Parties would only incur Convention responsibility if they fail to consider whether the foreign order was 'the result of a flagrant denial of justice'.[64] Not only does the Court frame its task as such in *Saccoccia* but it does so by paraphrasing *Pellegrini*. Also, the ECtHR has since reinterpreted *Pellegrini* in line with *Drozd and Janousek*,[65] and it has repeatedly applied the flagrant denial test in other cases on extradition and expulsion;[66] the transfer of prisoners to international criminal tribunals;[67] and the enforcement of foreign child custody orders.[68] Finally, it would be inconsistent for the Court to apply Article 6 ECHR more strictly in cooperative confiscation cases than in cases on extraditions and prisoner transfers since the latter involve greater interference with personal autonomy.

4. The 'flagrant denial of justice' standard applied

If I am correct, the ECtHR's own role in cooperative confiscation cases would be limited to ascertaining whether the requested State Party had correctly applied the flagrant denial standard. The issue would thus become how the ECtHR applies the flagrant denial standard to cooperative confiscation proceedings that aim at asset recovery.

4.1. The scope of the ECHR

A preliminary issue is whether such cooperative confiscations would be within the scope of the ECHR having regard to the location of the alleged victim and the parallel, treaty-based obligation to cooperate in criminal matters. On the one hand, Mr Saccoccia was imprisoned in the US at the time of the execution of the request and so was neither in Austria's national territory nor in a territory under its effective control. If the location of the accused determines the application of the Convention and its protocols, as commentary on *Soering* and *Drozd and Janousek* suggests,[69] I would ask whether the Court applied the

60 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 1(1)(1)(a).

61 *Saccoccia v Austria* (merits), appl. no. 69917/01, 18 December 2008, Paras. 70-80; *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012, Para. 38.

62 *Saccoccia v Austria* (merits), appl. no. 69917/01, 18 December 2008, Paras. 78-79 quoted and applied in *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012, Paras. 39-40.

63 *Saccoccia v Austria* (merits), appl. no. 69917/01, 18 December 2008, Paras. 87, 89-91.

64 See also *Stapleton v Ireland*, (dec.), appl. no. 56588/07, [2010] ECHR, Paras. 27-32.

65 *Lindberg v Sweden*, appl. no. 48198/99, 15 January 2004, 'The Law', Para. 1.

66 See, e.g., *Cruz Varas and Others v Sweden*, [1990] ECHR (Ser. A), Paras. 69-70, 82; *Vilvarajah and Others v UK*, [1992] (Ser. A), Para. 103; *Chahal v UK*, [1996-V] ECHR, Para. 80; *Einhorn v France*, appl. no. 71555/01, [2001-XI] ECHR, Paras. 32-34; *Mamatkulov and Askarov v Turkey* [GC], [2005-I] ECHR, Paras. 88-91.

67 *Naletilić v Croatia* (dec.), [2000-V] ECHR.

68 *Eskinazi and Chelouche v Turkey* (dec.), [2005-XIII] ECHR, Para. C(2); *Maumousseau and Washington v France*, appl. no. 39388/05, 6 December 2007, Paras. 95-99.

69 R. Lawson, 'Life After *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans & M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, p. 84; M. Milanovic, *The Extraterritorial Application of Human Rights Treaties*, 2011, p. 9; M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment

correct set of principles in *Saccoccia*[70] or whether it is generally correct to treat extraditions as territorial exercises of jurisdiction under Article 1 ECHR.[71] On the other hand, I note that in neither *Saccoccia* nor *Duboc* did the Court consider whether Austria's duty to enforce the confiscation order under its MLAT with the US was at odds with its duty to secure the applicants' fundamental rights and freedoms under the ECHR and ECHR-P1. Marko Milanovic characterises *Soering*-style cases of international cooperation in criminal matters as raising unavoidable and irresolvable norm conflicts in public international law.[72] I share his view, though I think it unlikely that the Court would be willing to acknowledge the conflict as such.[73]

4.2. The degree of injustice

Presuming that cooperative confiscations are within the scope of the ECHR, what procedural flaws would render an ECHR haven state responsible for irregularities in a victim state's asset recovery proceedings? The Court does not list criteria for distinguishing 'flagrant' from 'ordinary' denials of justice in *Soering* or *Drozd and Janousek*. However, in *Ahorugeze v Sweden*, it described a 'flagrant denial' as 'go[ing] beyond mere irregularities or lack of safeguards in the trial procedures (...)'.[74] 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 (...)'.[75]

The ECtHR confirmed and applied these principles in *Othman (Abu Qatada) v UK*.[76] There, the ECtHR found a breach of Article 6 ECHR due to a real risk of a retrial on the basis of 'torture evidence'.[77] A Jordanian national, Mr Othman, was to be deported from the UK following his convictions *in absentia* in Jordan for participating in terrorist conspiracies.[78] Mr Othman lost an initial challenge before the UK Special Immigration Appeals Commission (SIAC) and, after a victory before the Court of Appeal, failed again before the House of Lords.[79] The SIAC had found 'at least a very real risk' that Jordanian intelligence officials had obtained the decisive witness statements through torture or inhuman or degrading treatment.[80] It also found it very probable that the Jordanian State Security Court would admit those statements in a retrial.[81] Nonetheless, having regard to the safeguards in any such proceedings, the SIAC considered that the retrial as a whole would be fair.[82]

For Strasbourg, by contrast, the admission of torture evidence at a foreign criminal trial would amount to a flagrant denial of justice;[83] it was sufficient, moreover, for the applicant to show a 'real risk' that an institution like the Jordanian State Security Courts would admit such information. Citing UN and NGO reports, it found those courts 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;[84] their guarantees for the rights of the defence were of no 'real practical value (...)'.[85] They were, in short,

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on "Life after *Bankovic*"', in F. Coomans & M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, 2004, pp. 126-127. Cf. G. Gilbert, *Responding to International Crime*, 2006, p. 141.

70 See also M. Milanovic, *The Extraterritorial Application of Human Rights Treaties*, 2011, p. 126.

71 Ivory, supra note 4, Ch. 5.

72 M. Milanovic, *The Extraterritorial Application of Human Rights Treaties*, 2011, pp. 243-248. Borrowing from 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': *Extraterritorial Application*, 2011, p. 236. See also M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', 2009 *Duke Journal of Comparative & International Law* 20, p. 74.

73 Ivory, supra note 4, Ch. 5.

74 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 115. See also *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 260.

75 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Paras. 114-115.

76 See also *Othman (Abu Qatada) v UK,* appl. no. 8139/09, 17 January 2012, Paras. 259-260.

77 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 282.

78 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 1, 25.

79 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 26-66.

80 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 45, 269.

81 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 25, 45.

82 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 46.

83 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 267.

84 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 276.

85 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 276-278.

a 'criminal justice system which is complicit in the very practices which it exists to prevent (...)'.[86] As 'detailed, (...) clear and specific' reports of torture by Mr Othman's co-defendants 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.[87]

The ECtHR's Second Section applied – and perhaps extended – *Othman* in *El Haski v Belgium*.[88] The applicant, a Moroccan national, had been convicted in Belgium of participating in a Moroccan terrorist organisation.[89] His conviction was based, in part, on witness statements gathered in Morocco and transmitted to Belgium by Moroccan authorities.[90] These statements, he alleged, had been obtained through conduct that was contrary to Article 3 ECHR; hence, he claimed, his Belgian criminal trial was unfair under Article 6 ECHR.[91] The ECtHR agreed. Reports from NGOs and international organisations on the treatment of people like the witnesses indicated that there was a 'real risk' that those particular individuals had been tortured or exposed to inhuman or degrading treatment in custody.[92] A 'real risk' was the appropriate standard when, '*en tout cas, lorsque le système judiciaire de l'Etat tiers dont il est question n'offre pas de garanties réelles d'examen indépendant, impartial et sérieux des allégations de torture ou de traitements inhumains ou dégradants*'.[93] The Court also affirmed that the admission of evidence obtained through inhuman or degrading treatment could make a foreign criminal trial flagrantly unfair.[94]

Whilst it is not impossible that foreign confiscation orders that aim at asset recovery would be tainted by torture evidence, it is more likely that they would involve less egregious allegations of unfairness: the use of evidentiary devices, such as presumptions of illicit acquisition, to prove the predicate offence or the connection between the thing and an offence; the hearing of proceedings by special tribunals; trials in absentia or the lack of a hearing for affected third parties; judicial dependence or bias; adverse media reporting or prejudicial comments by the executive; discrimination (or political motivation) in the decision to prosecute and/or seek confiscation; and so forth. The extradition and expulsion cases are also instructive here, however. In *Othman*, the Court admitted complaints that non-torture-related procedural flaws would together render the applicant's Jordanian retrial flagrantly unfair. Amongst other things, Mr Othman had alleged that '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'.[95] The Fourth Section declined to examine these arguments on their merits[96] but signalled, 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);
> – 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.*).'[97]

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86 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 267.
87 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 269-271.
88 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012. See S. Smet, '*El Haski v Belgium*: Continuing Debate on the (In)admissibility of Evidence Obtained through Ill-Treatment', <http://strasbourgobservers.com> (last visited 3 October 2012).
89 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Paras. 1, 8, 25.
90 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Paras. 24-25.
91 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Para. 34.
92 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Paras. 92-93. See further S. Smet, '*El Haski v Belgium*: Continuing Debate on the (In)admissibility of Evidence Obtained through Ill-Treatment', <http://strasbourgobservers.com> (last visited 3 October 2012).
93 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Para. 88.
94 *El Haski v Belgium*, appl. no. 649/08, 25 September 2012, Para. 97; S. Smet, '*El Haski v Belgium*: Continuing Debate on the (In)admissibility of Evidence Obtained through Ill-Treatment', <http://strasbourgobservers.com> (last visited 3 October 2012). See also *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 267.
95 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 248, 268.
96 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 268, 286.
97 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 115; *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012,

In *Tsonyo Tsonev v Bulgaria (No. 3)*, the Court appeared to recognise a fifth, non-torture-related form of flagrant denial: 'proceedings amounting to a mockery of basic fair trial principles',[98] as per *Ilaşcu and Others v Moldova and Russia*.[99] Further, in *El-Masri v 'the Former Yugoslav Republic of Macedonia'*, the Grand Chamber affirmed that 'extraordinary rendition (…) which entails detention ..."outside the normal legal system" and which, "by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention"', flagrantly denies the rights in Article 5 ECHR.[100]

These cases both confirm that a range of serious procedural flaws could give rise to a flagrant denial of justice and make clear that the standard will be extremely difficult to satisfy under Article 6 ECHR in international cooperation matters. In the authorities just cited, the Court only found a violation of Article 6 ECHR in *Stoichkov v Bulgaria* where the respondent state had itself convicted the applicant *in absentia*.[101] Of the cases involving an extradition or expulsion,[102] the Court only found violations in *Bader and Kanbor v Sweden* where the applicants had already been convicted *in absentia* and sentenced to death in a third state (Syria) which had provided no assurance of a retrial, let alone a retrial that would not result in another death sentence; Articles 2 and 3 ECHR were at issue there.[103] *Ilaşcu and Others* involved extraterritorial violations of Articles 3 and 5 ECHR but not, notably, acts of international cooperation in criminal matters.[104] In *El-Masri*, as in *Babar Ahmad and Others v UK*, the Court *defined* 'extraordinary rendition' as 'extra-judicial transfer' to a situation in which there was a 'real risk' of treatment contrary to Article 3 ECHR.[105]

The stringency of the flagrant denial standard may be illustrated with three further cases. In *Babar Ahmad*, the Court refused to admit complaints under Article 6 ECHR that had been brought by alleged Islamic terrorists who were due to be extradited to the US.[106] The Court accepted that the men would be subject to pre-trial 'Special Administrative Measures' (SAMs) that would severely restrict their ability to move and interact with other people.[107] It found that, pre-trial, the measures were not a form of solitary confinement,[108] however, and they were not such as to coerce the applicants into settlement; unduly restrict their rights to attorney-client privilege; or flagrantly impede the conduct of their defence.[109] In making those findings, the Court (implicitly) disregarded expert testimony on the effect of SAMs on defendants[110] and (explicitly) emphasised the strength of US constitutional guarantees as supervised by US trial courts.[111] What could be called 'rule of law factors' were also instrumental in convincing Strasbourg that there was no real risk of the admission of torture evidence in the US.[112] In addition, Strasbourg was sufficiently assured that the men would not be designated enemy combatants, sentenced to death or transferred extra-judicially to other jurisdictions.[113] The likely conditions and length of the applicants' detention post-trial were also not such as to coerce these applicants into accepting plea bargains.[114] The real risk that they would spend the rest or the most of the rest of their lives subject to SAMs in ultra-high security ('Supermax') prisons did raise serious questions under Article 3 ECHR for the Court;[115]

Para. 258.

98 *Tsonyo Tsonev v Bulgaria (No. 3)*, appl. no. 21124/04, 16 October 2012, Para. 59.

99 *Ilaşcu and Others v Moldova and Russia* [GC], appl. no. 48787/99, [2004-VII] ECHR, Para. 436.

100 *El-Masri v 'the Former Yugoslav Republic of Macedonia'* [GC], appl. no. 39630/90, 13 December 2012, Para. 239.

101 *Sejdovic v Italy*, appl. no. 56581/00, 10 November 2004. See also *Stoichkov v Bulgaria*, appl. no. 9808/02, 24 March 2005. Cf. *Einhorn v France*, appl. no. 71555/01, [2001-XI] ECHR; *Al-Moayad v Germany*, appl. no. 35865/03, 20 February 2007.

102 *Einhorn v France*, appl. no. 71555/01, [2001-XI] ECHR; *Bader and Kanbor v Sweden*, appl. no. 13284/04, [2005-XI] ECHR; *Al-Moayad v Germany*, appl. no. 35865/03, 20 February 2007.

103 *Bader and Kanbor v Sweden*, appl. no. 13284/04, [2005-XI] ECHR.

104 *Ilaşcu and Others v Moldova and Russia* [GC], appl. no. 48787/99, [2004-VII] ECHR, Paras. 212-216, 286, 436, 461-463.

105 *El-Masri v 'the Former Yugoslav Republic of Macedonia'* [GC], appl. no. 39630/90, 13 December 2012, Para. 221; *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 113.

106 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Paras. 125-135, 159-160, 163-166.

107 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 131.

108 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Paras. 126-131.

109 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 133.

110 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 85.

111 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 133.

112 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Paras. 66, 159-160.

113 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Paras. 105-119. Cf. *El-Masri v 'the Former Yugoslav Republic of Macedonia'* [GC], appl. no. 39630/90, 13 December 2012, Para. 239.

114 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 168-169.

115 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Para. 146.

however, it dismissed these complaints on the merits.[116] Several other arguments on prosecutorial delay and jury prejudice, which related to adverse media coverage, US Government statements, anti-terrorist designations and the history of the forum (New York), were to be held manifestly ill-founded.[117]

If *Babar Ahmad* illustrates how the Court may respond when a request emanates from a third state with 'a long history of respect of democracy, human rights and the rule of law',[118] *Ahorugeze* indicates how it may deal with requests from states that have been the scene of major human rights violations and political transitions. In *Ahorugeze*, the applicant was a Rwandan citizen and ethnic Hutu who had been head of the Rwandan Civil Aviation Authority before 1994.[119] Resident in Denmark and apprehended in Sweden, the applicant was ordered to be extradited to Rwanda to stand trial for genocide and related offences.[120] He complained to Strasbourg that Sweden had thereby exposed him to a flagrant denial of his rights under Article 6 ECHR.[121] The Fifth Section acknowledged that several jurisdictions had previously refused the transfer or extradition of genocide suspects to Rwanda on fair trial grounds[122] but ultimately held in favour of the Government.[123] It emphasised that the International Criminal Tribunal for Rwanda (ICTR) had recently found trial conditions in Rwanda much improved[124] and that the Rwandan legislature had passed witness protection laws that had been considered effective by Dutch and Norwegian authorities.[125] Information from those states, as well as the ICTR, likewise showed that Rwanda's judiciary was sufficiently experienced, independent and impartial to hear and determine the applicant's case.[126] Finally, the applicant would be entitled to free legal representation from Rwanda's well-qualified bar[127] and was unlikely to be prejudiced by his previous position, his testimony for other defendants and his record of unsuccessful litigation in other Rwandan courts.[128]

Finally, the recent decision of the Fourth Section in *Willcox v UK and Hurford v UK* indicates how the Court is likely to deal with complaints about presumptions in foreign proceedings.[129] The first applicant, Mr Wilcox, was a UK citizen who had been convicted and sentenced to prison in Thailand for possessing illicit drugs for the purposes of distribution.[130] Having succeeded in obtaining a transfer of his sentence to the UK under its bilateral prisoner transfer agreement with Thailand, the applicant challenged his detention under Article 5 ECHR. Amongst other things, he submitted that the enforcement of his prison sentence was arbitrary since it was based on an irrebuttable presumption under Thai law that possession of more than 3 grams of certain illicit substances was possession for the purposes of distribution.[131] He argued that he been flagrantly denied justice because he had been unable to challenge the finding that drugs were intended for distribution.[132] Whilst it acknowledged the possibility that the Thai presumption could give rise to a violation of Article 6(2) ECHR, the Court refused to find that the applicant had been flagrantly denied justice. Recalling *Salabiaku v France*,[133] it noted and that the Thai prosecutor had still borne the burden of proving possession and that the court had heard evidence on this point. Moreover, the applicant had been tried in Thailand with adequate procedural safeguards: '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 he was sentenced in accordance with the applicable law and was given a significant reduction for his guilty

116 *Babar Ahmad and Others v UK* (merits), appl. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.
117 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, and 36742/08, 6 July 2010, Paras. 163, 166, 171.
118 *Babar Ahmad and Others v UK* (dec.), appl. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, Para. 179.
119 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Paras. 9-11.
120 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 12.
121 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 96.
122 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 117.
123 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 128.
124 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Paras. 117, 127.
125 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Paras. 118-123.
126 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 125.
127 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 124.
128 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 126.
129 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013.
130 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 3.
131 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 40.
132 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013, Paras. 8, 93.
133 *Salabiaku v. France*, [1988] ECHR (Ser. A), no. 141-A.

plea (…).'[134] It was also significant for the Court that the *purpose* of the presumption was to deter drug trafficking and that the applicant had not previously raised his concerns with the British authorities. The ECtHR, therefore, dismissed this applicant's complaint under Article 5 ECHR as being manifestly ill-founded.[135]

Although they involved very different factual scenarios, *Othman*, *Babar Ahmad*, *Ahorugeze*, and *Willcox* all demonstrate the stringency of the flagrant denials standard under Article 6 ECHR in international cooperation cases. The cases confirm Aukje van Hoek and Michiel Luchtman's observation that Strasbourg accommodates the State Parties' interest in cooperation by accepting a 'certain loss' of fair trial rights in transnational cases.[136] In my submission, the Court effectively creates a third category of proceeding under Article 6 ECHR to which an even more attenuated fair trial standard applies. In fact, its *obiter* in *Othman* notwithstanding, the Court would seem reluctant to find a flagrant denial of justice when the foreign proceedings do not involve or result in a violation of the right to life or the freedom from torture, inhuman or degrading treatment.[137] The question is why the Court has been so shy in treating as 'flagrant' other types of injustice under Article 6 ECHR. In my view, the explanation has much to do with the principles of sovereignty, equality and consent in public international law, but not simply with the reluctance of the Court to impose Convention standards on non-contracting states. After all, Article 6 ECHR still places some limit on their ability to obtain assistance from ECHR State Parties and fair trial provisions appear in many other international 'human' and 'fundamental' rights instruments.[138] Rather, the Court's extremely narrow interpretation of the flagrant denial test could reflect its uncertainty about the *content* of any customary human right to or general principle on the right to a fair trial in public international law.[139] By sticking closely to the right to life and the freedom from torture, inhuman and degrading treatment in its application of the standard, the Court thus minimises the risk that it will stray far from the existing international consensus on states' extraterritorial human rights obligations – whilst preventing the worst forms of human rights arbitrage in TCL and signalling that it could find violations in other cases. Effectively, in the flagrant denial test, the Court expresses its reluctance to cast judgment on 'foreign' notions of justice.

4.3. Proving flagrant denials in situations of asset recovery

In any event, if we take the Court at its word and conceive of the flagrant denial test somewhat more broadly, cooperative confiscation cases aiming at asset recovery are likely to raise four issues. The first is how the ECtHR would conceptualise 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 PEP or related party in the requesting state or the requesting state's decision to use exceptional rules to respond to past human wrongs?[140] To what extent would it adapt the flagrant denial standard to accommodate conditions 'on the ground' in the victim jurisdiction? The Court construes the ECHR and its protocols in the light of other international conventions[141] and has already recognised the need to apply procedural duties 'realistically' in post-conflict environments.[142] That said,

134 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 97.

135 *Willcox v UK and Hurford v UK*, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 98. For another recent example, see *Khodorkovskiy and Lebedev v Russia*, appl. nos. 11082/06 and 13772/05, 25 July 2013, Pt. V, Paras. 803-804.

136 A. van Hoek & M. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', 2005 *Utrecht Law Review* 1, no. 2, p. 10.

137 My thanks to John Vervaele for his input into this point. See also, J. Vervaele, 'Extraordinary Rendition and Transnational Forced Disappearance under Criminal Law and the IHRL', in M. Caianiello & M. Corrado (eds.), *Preventing Danger: New Paradigms in Criminal Justice*, 2013, pp. 193-197; F. Meyer, 'The Present System of Human Rights and other Basic Values for Criminal Justice Systems', <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/meyer/seminare/unterlagen/BasicValues.pdf> (last visited 13 January 2013), pp. 333-336.

138 See, e.g., Universal Declaration of Human Rights, GA Res. 217 (III), International Bill of Human Rights, UN Doc. A/RES/217(III)A-E (10 December 1948), Declaration of Human Rights, Arts. 10-11; 1966 International Covenant on Civil and Political Rights, 999 *United Nations Treaty Series*, p. 171, Art. 14; 1969 American Convention on Human Rights, 1144 *United Nations Treaty Series*, p. 143, Art. 8; 1981 African Charter on Human and Peoples' Rights (AfCHPR), Art. 7.

139 See, e.g., L. May, *Global Justice and Due Process*, 2012, pp. 37-42, 197-201.

140 R. Teitel, *Transitional Justice*, 2000, Ch. 4. See also J. Dugard & C. van den Wyngaert, 'Reconciling Extradition with Human Rights', 1998 *American Journal of International Law* 92, pp. 202-204 (on difficulties in comparing notions and practices of justice in different legal systems).

141 See *Neulinger and Shuruk v Switzerland*, appl. no. 41615/07, 8 January 2009, Paras. 132-138.

142 *Al-Skeini and Others v UK* [GC], appl. no. 55721/07, [2011] ECHR, Para. 168 (on Art. 2 ECHR).

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? Applying its stringent flagrant denial test in *Ahorugeze*, the Court took the view that 'the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3'.[143] 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'.[144] 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.[145] Secrecy and official complicity are also associated with corruption offences; but they are typically cited to justify departures from standard criminal procedure and not to increase the level of scrutiny on the victim country.

Third, presuming that the 'real risk' test applies, what evidence will the Court use to establish less grave flagrant denials and how will it respond to the type of evidence that is likely to be brought in asset recovery cases? In *Babar Ahmad*, the Strasbourg judges employed their knowledge of the constitutional guarantees and the legal and political culture in the US, supported by a statement from a US Government official, to conclude that that country could be relied upon to observe the fundamental requirements of Article 6 ECHR.[146] In *Othman*, the opinions of non-governmental and international organisations were plainly crucial to the Court's assessment of the actual or potential conditions in Jordan. In *Yefimova v Russia*, the First Section held it '[could] attach a certain weight to the information contained in recent reports from independent international human rights protection bodies and organisations, or governmental sources (…)' about the situation in Kazakhstan.[147] However, it found that the reports relied on in that case were too generally phrased and not indicative of treatment flagrantly contrary to Article 6 ECHR.[148] In asset recovery cases, respondent governments or intervening third parties may bring reports on corruption in the requesting state before the ECtHR to show the importance of cooperation for the purposes of asset recovery. 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 still in the process of consolidation, however, the impact of post-transition justice sector reforms may be more difficult to assess, especially if the return of assets is requested before the conviction or final confiscation order.[149]

Fourth, which aspects of the foreign proceedings would have had to have been unfair and is the standard of unfairness the same for them all? Several processes in the victim state may lead to the issuing of the confiscation order, not least the trial for the predicate offence and the proceeding that results in the imposition of the confiscation order (if separate).[150] The ECtHR has been reluctant to characterise the latter as giving rise to new 'criminal charges' under Article 6 ECHR: the Court has generally accepted that they are preventative, remedial or akin to the determination of a sentence.[151] On this basis, it has

143 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 116. See also *Bakoyev v Russia*, appl. no. 30225/11, 5 May 2013, Para. 103.

144 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 116.

145 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 276.

146 See, in particular, *Babar Ahmad and Others v UK*, appl. nos. 24027/07, 11949/08 and 36742/08, 6 July 2010, Paras. 29, 133.

147 *Yefimova v Russia*, appl. no. 39786/09, 19 February 2013, Para. 192.

148 *Yefimova v Russia*, appl. no. 39786/09, 19 February 2013, Para. 222.

149 Stessens, supra note 29, p. 414.

150 Ivory, supra note 4, Ch. 4.

151 See, e.g., *M v Italy*, appl. no. 12386/86, ECmHR, 15 April 1991, 'The Law', Para. 1; *Air Canada v the United Kingdom*, [1995] ECHR (Ser. A), Paras. 52-55; *Phillips v the United Kingdom*, appl. no. 41087/98, [2001-VII] ECHR, Paras. 30-36; *Arcuri v Italy* (dec.), appl. no. 52024/99, [2001-VII] ECHR, 'The Law', Para. 2; *Butler v UK* (dec.), appl. no. 41661/98, [2002-VI] ECHR, 'The Law', Para. B; *Yildirim v Italy* (dec.), 19 April 2003, 'The Law', Para. 2; *Crowther v UK*, appl. no. 53741/00, 1 February 2005, Para. 25; *van Offeren v Netherlands*, appl. no. 19581/04, 5 July 2005, 'The Law'; *Walsh v UK*, appl. no. 43384/05, 21 November 2006, 'The Law', Para. 1; *Grayson and Barnham v UK*, appl. nos. 19955/05 and 15085/06, 23 September 2008, Para. 37; *Silickienè v Lithuania*, appl. no. 20496/02, 10 April 2012, Paras. 45-54. See further Ivory, supra note 4, Ch. V(5)(b)(bb).

been prepared to accept a wide range of confiscation orders – made with the help of several types of evidentiary devices – as falling outside the scope of Article 6(2) and (3) ECHR and compatible with the general right to a fair procedure under Article 6(1) ECHR. These are exceptional cases, however,[152] and, in my submission, the Court is likely to face a particular challenge if it attempts to apply this jurisprudence, such as it is, to *foreign* confiscation orders that aim at asset recovery, particularly from third states. To avoid this challenge, the Court should either clarify the criteria that distinguish 'civil' from 'criminal' confiscation orders under Article 6 ECHR or continue to apply the same 'flagrant denial' test to acts of cooperation in civil and criminal matters.[153] New jurisprudence suggests that the Court is taking a different route: according to the First Section in *Insanov v Azerbaijan*, the Court would only find a confiscation order that is part of the sentence procedurally disproportionate under Article 1 ECHR-P1 if the criminal proceeding was itself a flagrant denial of justice.[154] Although that case was a challenge to a domestic confiscation order, it was also, interestingly, brought by a former government minister who had been convicted of corruption.[155]

4.4. The standard of diligence

A related but more general issue is how far the requested ECHR State Party is expected to go in determining whether the requesting state has committed or may commit a flagrant denial of justice. In asset recovery cases, what standard of diligence would be expected of the haven state when assessing confiscation requests under Article 6 ECHR? Would it have a duty to actively inquire into the fairness of the proceedings in the victim country or does it only have to consider the issue if raised?[156] If there is a duty of active inquiry, does it apply to all requests or only to requests from some states?

The ECtHR uses different standards in its case law. In *Drozd and Janousek*, it required the 'emergence' of a flagrant injustice whereas, in *Saccoccia*, it referred to domestic courts having 'duly satisfied themselves' that the foreign proceedings complied with the Convention standard.[157] Here, its apparent source was *Pellegrini*.[158] However, in dealing with other forms of cooperation, the Court has looked at what the requested state 'knew or should have known' about the requesting state's proceedings at the time it granted the request.[159] Further, 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 (...)'.[160] It made similar comments in *Pellegrini*[161] and in *Stapleton v Ireland*,[162] which concerned the execution of an European Arrest Warrant almost thirty years after the applicant's alleged crimes.[163] There, the fact that the UK was a party to the ECHR was the Court's primary justification for finding *no* flagrant denial by Ireland of the right to a hearing within a reasonable time.[164]

Commenting on *Stapleton*, André Klip concludes that ECHR State Parties are *presumed* to abide by Article 6 ECHR when cooperating with each other in criminal matters.[165] This interpretation is in line with the ECtHR's approach to cooperation under the auspices of the EU, specifically, its readiness to apply a 'rebuttable presumption of equivalent protection' to interferences that flow from a State Party's 'strict international legal obligations' towards the Union.[166] That said, and as Gless explains, an inflexible

152 *Geerings v the Netherlands*, appl. no. 30810/03, 1 March 2007. See also *Vulakh and Others v Russia*, appl. no. 33468/03, 10 January 2012, Paras. 32-37.
153 *Maumousseau and Washington v France*, appl. no. 39388/05, 6 December 2007, Para. 99.
154 *Insanov v Azerbaijan*, appl. no. 161333/08, 14 March 2013, Para. 184.
155 *Insanov v Azerbaijan*, appl. no. 161333/08, 14 March 2013, Paras. 5-41.
156 See further Stessens, supra note 29, pp. 403-404.
157 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 2.
158 *Pellegrini v Italy*, appl. no. 30882/96, [2001-VIII] ECHR, Para. 40. See also *Maumousseau and Washington* (2010) 51 EHRR 35, Para. 96.
159 *Maumousseau and Washington v France*, appl. no. 39388/05, 6 December 2007, Para. 90; *Eskinazi and Chelouche v Turkey* (dec.), appl. no. 14600/05, 14 December 2005, Para. C(2); *Hirsi Jamaa and Others v Italy* [GC], appl. no. 27765/09, [2012] ECHR, Para. 131; *El-Masri v 'the Former Yugoslav Republic of Macedonia'* [GC], appl. no. 39630/90, 13 December 2012, Para. 218 ('knew or ought to have known').
160 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, 'The Law', Para. 2.
161 *Pellegrini v Italy*, no. 30882/96, [2001-VIII] ECHR, Para. 40.
162 *Stapleton v Ireland* (dec.), appl. no. 56588/07, [2010] ECHR, Paras. 26, 30.
163 See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7. 2002, p. 1.
164 *Stapleton v Ireland* (dec.), appl. no. 56588/07, [2010] ECHR, Para. 26.
165 A. Klip, *European Criminal Law: An Integrative Approach*, 2012, pp. 426-427.
166 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], appl. no. 45036/98, [2005-VI] ECHR, Paras. 52, 155-156, 159-166.

presumption of compliance for ECHR State Parties would seem to be at odds with the express justification for the flagrant denial test in *Drozd and Janousek*, namely, that Article 6 ECHR is attenuated because third states have not agreed to the Convention.[167] Moreover, as both EU Member States and ECHR State Parties systematically violate fundamental rights and freedoms, membership of those legal spaces is not a reliable risk-based criterion for assigning responsibility under the ECHR.[168]

Given these concerns, it is of note that the ECtHR has become more willing to scrutinise acts of cooperation among ECHR State Parties and between those states and international organisations. In *M.S.S. v Belgium and Greece*,[169] it found Belgium liable for Greek violations of an Afghan asylum seeker's rights under Article 3 ECHR.[170] Since the Dublin Regulation empowered Belgium to refuse the transfer 'if [it] considered that (…) Greece, was not fulfilling its obligations under the Convention',[171] the matter 'did not strictly fall within Belgium's international legal obligations [and] the presumption of equivalent protection [did] not apply (…).[172] To the extent that there was an additional presumption that a State Party, like Greece, would 'respect its international obligations in asylum matters',[173] this was rebutted by international reports, communications and EU reform efforts describing the treatment of asylum seekers there.[174] Then, in *Al-Jedda v UK*, the Court established a presumption of compliance between measures that flow directly from UN Security Council resolutions under Chapter VII UN Charter and the ECHR:[175] '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'.[176] The Grand Chamber distinguished *Al-Jedda* in *Nada v Switzerland*, though it still found Switzerland in breach of Article 8 ECHR for failing to use its discretion under the resolution to ameliorate the effects of the sanctions on the applicant,[177] an elderly man who had been effectively unable to leave his 1.6 km place of residence during the six-odd years of the travel ban.[178]

What emerges from these cases is an unstable set of presumptions about the trustworthiness of requesting states and international organisations. The strongest presumption – of equivalent protection – is limited to State Parties' 'strict international legal obligations' towards supranational organisations, such as the EU, that protect Convention rights and freedoms in a manner at least commensurable to the Convention.[179] Next, is a presumption of compliance with the Convention by its State Parties: also rebuttable, it may require State Parties to monitor political, economic and legal developments within each other's jurisdictions so as to ascertain whether the 'presumption' is warranted in a particular case. After that is the presumption of compliance by which binding UN Security Council resolutions are read as compatible with the ECHR. It, too, may be rebutted by 'clear and explicit language, imposing an obligation to take measures capable of breaching human rights';[180] but, even then, the Court has been willing to read in a discretion to implement the obligations in compliance with human rights standards. Last, are requests from third states to which strictly no presumption applies – at least if the issue is raised, State Parties should ensure that justice will not be flagrantly denied. However, the Court would seem more willing to trust (or allow State Parties to trust) third states that have a 'long history of respect of

167 Gless, supra note 2.

168 See, e.g., *Ananyev and Others v Russia*, appl. nos. 42525/07 and 60800/08, 10 January 2012. See also A. van Hoek & M. Luchtman, 'Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights', 2005 *Utrecht Law Review* 1, no. 2, p. 10; N. Mole, 'The Complex and Evolving Relationship between the European Union and the European Convention on Human Rights', 2012 *European Human Rights Law Review*, no. 4, p. 364.

169 *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR.

170 And Art. 13 due to the lack of remedies against such violations in its own legal system: *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR, Paras. 353-354, 369-396. See Council Regulation (EC) no. 343/2003 of 18 February 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 L 50, 25.2.2003, p. 1.

171 *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR, Para. 340.

172 *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR, Para. 340.

173 *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR, Paras. 343, 345.

174 *M.S.S. v Belgium and Greece* [GC], appl. no. 30696/09, [2011] ECHR, Paras. 344-352.

175 *Al-Jedda v UK* [GC], appl. no. 27021/08, [2011] ECHR, Para. 102.

176 *Al-Jedda v UK* [GC], appl. no. 27021/08, [2011] ECHR, Para. 102.

177 *Nada v Switzerland* [GC], appl. no. 10593/08, 12 September 2012, Paras. 172-198. See further A. Henderson, 'When the UN breach human rights… who wins?', <http://ukhumanrightsblog.com> (last visited 10 October 2012).

178 *Nada v Switzerland* [GC], appl. no. 10593/08, 12 September 2012, Para. 172.

179 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC], appl. no. 45036/98, [2005-VI] ECHR, Para. 157.

180 *Nada v Switzerland* [GC], appl. no. 10593/08, 12 September 2012, Paras, 130, 166.

democracy, human rights and the rule of law (...)'.[181] When the requesting state is not a liberal democracy, it appears to require a closer examination of the guarantees and procedures in the foreign courts. There are questions about how the Court distinguishes one type of third state from another, given that it focuses on reports by states, NGOs, and international organisations and does not engage with sociological or political literature on 'transitions to democracy' or the rule of law. This may simply and rightly reflect the limits on a court's expertise and access to evidence; it does raise questions about the accuracy of its assessments of the risk of injustice from particular foreign countries.

4.5. The effect of assurances and the importance of monitoring

If there are substantial grounds for believing that a person would be exposed to a flagrant denial of justice abroad, how relevant are a requesting state's assurances that it will respect fair trial rights? The ECtHR has again taken different views over time. 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" (...)', not to mention its '"reaffirm[ation of] its obligation to comply with the requirements of the provisions of [the UN Convention against Torture[182]] as regards both Turkey and the international community as a whole" (...)'.[183] 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 the requesting state.[184] 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 (...)'.[185]

Applying *Saadi* in *Othman*, the Fourth Section found that Jordan had provided adequate assurances against torture[186] and listed eleven 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 [sic] 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 (...);
> (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 (...);

181 *Babar Ahmad and Others v UK*, appl. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, Para. 179.
182 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1465 *United Nations Treaty Series*, p. 85.
183 *Mamatkulov and Askarov v Turkey* [GC], appl. nos. 46827/99 and 46951/99, [2005-I] ECHR, Para. 76. Cf. Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan.
184 *Al-Saadoon and Mufdhi v UK*, appl. no. 61498/08, 2 March 2010, Paras. 164-165.
185 *Saadi v Italy* [GC], appl. no. 37201/06, [2008] ECHR, Para. 148 citing *Chahal v UK*, 15 November 1996, [1996-V] ECHR, Para. 105.
186 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 186-207.

(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 (...).'[187]

Specifically addressed to the risk of torture, these factors guide the Court in considering the effect of assurances against other types of violation, *Babar Ahmad* suggests.[188] I submit that points (viii) and (ix) would be particularly important in cases of cooperative confiscations aimed at asset recovery. Not only do international organisations and NGOs already supervise aspects of asset recovery processes,[189] but, when assistance is requested by a state in transition and/or without a long history of the rule of law, the Court would seem to regard monitoring as a supplement to (or a substitute for) reliable supervision of the executive by the courts.[190] In *Ahorugeze*, for example, the Fourth Section noted with approval that the ICTR had ordered the monitoring of other transferred Rwandan proceedings and that 'Sweden ha[d] declared itself prepared to monitor' the Rwandan proceedings against the applicant, as well as the conditions of his detention.[191] In *Othman*, the 'very fact of monitoring visits' lessened the risk of a violation under Article 3 ECHR.[192] The Court's confidence in this non-judicial, non-state procedure is all the more 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; the inadequacy of Jordanian judicial guarantees; and the relative dependence of the NGO in that case on the two cooperating states.[193]

5. Conclusions

Concluding this article, I return to the questions I embedded in Section 1: Which general principles are part of transnational criminal law? Do they include the right to a fair trial? And, if so, which methods of cooperation between law enforcement authorities endanger those fundamental (human) entitlements? I explored these questions by asking whether ECHR State Parties are likely to violate Article 6 ECHR by directly enforcing foreign confiscation orders that have been issued abroad with regard to illicit wealth in grand corruption cases. Identifying cooperative confiscation as one mechanism by which states have sought to prevent, suppress and remediate the transnational crime(s) of corruption, I showed in Section 2 that states have sought to enable 'asset recovery' by encouraging or requiring each other to lower the barriers to confiscation and cooperation in the anti-corruption and related treaties and instruments. Such approaches have found favour with other international actors as measures to enhance the enjoyment of human rights, in particular, social, cultural and economic rights. They are, however, a perceived source of tension with other civil and political human entitlements.

Perceived or real, the tension between human rights and anti-corruption policies will be mediated in part by regional human rights tribunals. In Section 3, I considered how the ECtHR regulates the adverse consequences of international cooperation in criminal matters for Convention rights and freedoms. I showed that the ECtHR has begun deciding the issues that would or could arise in asset recovery cases, not least, the responsibility of State Parties for (extraterritorial) violations of fair trial rights that are directly perpetrated by other states or ordered by international organisations. The test for imposing responsibility under Article 6 ECHR in cooperative cases remains unclear: the Court has acknowledged that 'flagrant denials' could arise due to several forms of injustice; however, it has been reticent to find violations of Article 6 ECHR in cooperation cases that did not involve or result in treatment contrary to Article 2 or 3 ECHR.

Were the ECtHR indeed prepared to find flagrant denials in a broader range of cases, I considered, in Section 4, the issues of application: What is the basis of the Court's jurisdiction to apply Convention rights to international cooperation proceedings? How should the Court conceptualize the risk of flagrant

187 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Para. 189.
188 *Babar Ahmad and Others v UK*, appl. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, Paras. 98, 106-108, 110.
189 See M. Pieth, 'Collective Action and Corruption', in M. Pieth (ed.), *Collective Action: Innovative Strategies to Prevent Corruption*, 2012.
190 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 127.
191 *Ahorugeze v Sweden*, appl. no. 37075/09, 27 October 2011, Para. 127.
192 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 24, 80-82, 203-204.
193 *Othman (Abu Qatada) v UK*, appl. no. 8139/09, 17 January 2012, Paras. 191-192, 203-204, 278.

unfairness in a state that has recently undergone a major political transition? What type and degree of proof of unfairness does the Court demand of applicants? To what extent does it impose a duty on the requested State Party to ascertain actual or potential injustices in the foreign proceedings? And when does the Court allow the requested state to rely on assurances that fair trial rights would be respected in foreign proceedings? Considering these issues through the lens of the Court's existing extradition, expulsion, confiscation and cooperation case law generated further questions as well as answers for cooperative confiscation cases that aim at asset recovery.

The article thus ends with reflections on the ways in which the Court's 'flagrant denial' case law could contribute to the formulation of a general principle on the right to a fair trial in TCL. I speculated that the Court's reluctance to detach Article 6 from Articles 2 and 3 ECHR in cooperation cases was due to its unwillingness to formulate a 'global' concept of justice and a fair trial. So, what does the ECtHR's cooperation and 'flagrant denial' case law tell us about this project's greater goal of identifying general principles of TCL? Applying Gless and Vervaele's inductive/comparative approach, the ECtHR's 'flagrant denial' cases would go some way to showing that 'a right to a fair trial' is a general principle of TCL, at least within the legal space of the Convention. As the judicial arm of an international organisation, the ECtHR contributes to the formation of customary rules and general principles of international law, at least among Party States. Then, when the ECHR State Parties comply with the Court's pronouncements or incorporate its standards into their national MLA laws – in full or subject to the *effet attendué* – they act and talk as if these standards are internationally legally binding.[194] The fair trial provisions in other human rights instruments and in domestic law would also seem to count towards such a general principle, though whether these provisions actually create similarly strict obligations would need to be established with further empirical research.[195] Likewise, it remains to be seen how other regional human rights bodies apply and possibly attenuate 'their' fair trial standards in international cooperation cases.[196]

Deducing a fair trial principle from a *telos* of TCL is a promising but difficult undertaking. If TCL includes human rights norms, as well as substantive and procedural norms on transnational crime, there is a good argument for saying, as Gless and Vervaele have done, that its object is to achieve justice – and that fair trials are essential to that objective. The challenge is to defend a definition of TCL in more normatively heterogeneous 'spaces' than Europe and to defend and specify the resulting concept of justice and a 'fair trial'. In doing the former, we encounter the lack of a clear, positive higher-order norm that regulates the horizontal and vertical relationships between international legal norms.[197] If we revert to the traditional language of sources of law and rules on treaty interpretation, we are helped by references to due process[198] and the rights of third parties[199] in the anti-corruption suppression conventions – not, however, by the lack of direct references to human rights in most of those instruments. In doing the latter, we encounter the diversity of domestic and international norms that comprise TCL and, with it, the following questions: if TCL emerges from different legal systems and philosophical traditions, can we assume that its norms reflect a congruent concept of 'justice'? If so, can we assume that the area of overlap is sufficient to give rise to a meaningful *transnational* general principle on the right to a fair trial? These issues will continue to be investigated as part of this project and other efforts to identify and justify emerging global systems of (criminal) justice, human rights and the rule of law. ¶

194 Though it could be argued that they are giving effect to their contractual obligations and not acting on the basis of some understanding of the principles of general international law.

195 My thanks to Peter Nelson for his input into this point.

196 The inter-American and pan-African tribunals have only considered the responsibility of State Parties for violations directly perpetrated by other states in the context of the right to life and the prohibition on torture, cruel, inhuman or degrading treatment. They did not read into those provision an *effet attendué*: *Wong Ho Wing v Peru*, no. 151/10, IACmHR, 1 November 2010 (IACHR, Art. 4); *John Modise v Botswana*, no. 97/93, AfCmHPR, 6 October 2000, Para. 91. See further Icelandic Human Rights Centre, 'Extradition, Expulsion, Deportation and Refoulement', <http://www.humanrights.is> (last visited 2 November 2011). See also *Democratic Republic of Congo v Burundi, Rwanda, and Uganda*, no. 227/99, May 2003, Paras. 62-63 (respondents liable for extraterritorial acts of militants whom they had supported) discussed further in M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, 2010, pp. 207-208.

197 D. Shelton, 'International Law and "Relative Normativity"', in M. Evans (ed.), *International Law*, 2010, p. 142.

198 UNCAC, Preamble, Arts. 32(2), 55(3)(b); UNTOC, Art. 24.

199 UNCAC, Preamble, Arts. 34, 55(3)(b) and (9), 57(2); UNTOC, Arts. 12(8), 13(8).