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

Radha Dawn Ivory

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’. 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). 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 (‘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.

* Dr. iur University of Basel; BA/LLB (Hons. I) University of Queensland; Solicitor of the Supreme Court of Queensland, Australia. Email: radha_ivory@yahoo.com.au.


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 ECtHR, 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


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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{11} I have argued elsewhere that ‘asset recovery’ is an ambiguous term in public international law.\textsuperscript{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’).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{16} The UNCAC, most notably, foresees that State Parties may require offenders to demonstrate the lawful origins of ‘property liable to confiscation (…).’\textsuperscript{17} It recommends that they criminalise illicit enrichment.\textsuperscript{18} And, in ‘appropriate cases’, it requires them to ‘consider taking such measures as may be necessary to allow confiscation of such property [of foreign origin] without a criminal conviction (…).’\textsuperscript{19}

International efforts to combat corruption are increasingly perceived as supportive of human rights.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{12} Ivory, supra note 4, Ch. 2.
\item \textsuperscript{13} Surveyed in Ivory, supra note 4, Ch. 4.
\item \textsuperscript{14} See generally K. Stephenson et al., Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action, 2011.
\item \textsuperscript{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.
\item \textsuperscript{16} See, in particular, COE/ECrimeCC, 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/SH, Art. 3(2); UNCAC, Arts. 31(8), 54(1)(c). See further Ivory, supra note 4, Ch. 4.
\item \textsuperscript{17} UNCAC, Art. 31(8).
\item \textsuperscript{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.
\item \textsuperscript{19} UNCAC, Art. 54(1)(c).
\end{itemize}
put, their representatives) perceive their parallel duties to ‘seek repatriation (…) [and] to assist and facilitate repatriation (…)’.

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 (…)’.

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.

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; (…)’. 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.

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). Hence, the Office of the High Commissioner has cautioned states against ignoring the human rights implications of anti-corruption policies and ‘techniques’, as have human rights and anti-corruption NGOs in exploring the connection between their areas of expertise.

Meanwhile, legal academics have warned of new risks to individual rights through international cooperation and asset-related measures. The circumstances in which states are most likely to seek asset recovery – during or immediately after a ‘radical political transformation’ – may also be the source of concerns about the reasons for cooperation and the fairness of the proceedings, as I have discussed elsewhere.

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 hven state in cooperative confiscation proceedings that aim at asset recovery, in particular with non-contracting (‘third’) states. My focus is on the UNCAC.
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

43 Pellegrini v Italy, appl. no. 30882/96, [2001-VIII] ECHR, Para. 40.
45 Pellegrini v Italy, appl. no. 30882/96, [2001-VIII] ECHR, Paras. 44-46.
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.\(^57\) 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 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

---

55 *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012.
56 *Duboc v Austria* (dec.), appl. no. 8154/04, 5 June 2012.
57 *Saccoccia v Austria* (dec.), appl. no. 69917/01, 5 July 2007, ‘Complaints’.
the applicant’s ‘civil rights and obligations’. On the facts of Saccoccia (and Duboc), Austria had complied with the ‘public oral hearing’ requirement of Article 6(1) ECHR. 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. 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. 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’. 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, and it has repeatedly applied the flagrant denial test in other cases on extradition and expulsion; the transfer of prisoners to international criminal tribunals; and the enforcement of foreign child custody orders. 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, I would ask whether the Court applied the...
The Right to a Fair Trial and International Cooperation in Criminal Matters

correct set of principles in Saccoccia\textsuperscript{70} or whether it is generally correct to treat extraditions as territorial exercises of jurisdiction under Article 1 ECHR.\textsuperscript{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.\textsuperscript{72} I share his view, though I think it unlikely that the Court would be willing to acknowledge the conflict as such.\textsuperscript{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 havre 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 (…)'.\textsuperscript{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 fundamentally as to amount to a nullification, or destruction of the very essence, of the right (…)'.\textsuperscript{75}

The ECtHR confirmed and applied these principles in Othman (Abu Qatada) v UK,\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{80} It also found it very probable that the Jordanian State Security Court would admit those statements in a retrial.\textsuperscript{81} Nonetheless, having regard to the safeguards in any such proceedings, the SIAC considered that the retrial as a whole would be fair.\textsuperscript{82}

For Strasbourg, by contrast, the admission of torture evidence at a foreign criminal trial would amount to a flagrant denial of justice;\textsuperscript{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,\textsuperscript{84} their guarantees for the rights of the defence were of no ‘real practical value (…)’.\textsuperscript{85} They were, in short,
a ‘criminal justice system which is complicit in the very practices which it exists to prevent (...).’

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.

The ECtHR’s Second Section applied – and perhaps extended – Othman in El Haski v Belgium.
The applicant, a Moroccan national, had been convicted in Belgium of participating in a Moroccan
terrorist organisation. His conviction was based, in part, on witness statements gathered in Morocco
and transmitted to Belgium by Moroccan authorities. 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. 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.

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.’ The Court also affirmed that the admission of evidence
obtained through inhuman or degrading treatment could make a foreign criminal trial flagrantly unfair.

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.’ The Fourth Section
decided to examine these arguments on their merits 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.).

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.
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.
93 El Haski v Belgium, appl. no. 649/08, 25 September 2012, Para. 88.
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 extratritorial 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 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.108 In making those findings, the Court (implicitly) disregarded expert testimony on the effect of SAMs on defendants 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

Para. 258.

98 Tsonyo Tsonev v Bulgaria (No. 3), appl. no. 21124/04, 16 October 2012, Para. 59.
100 El-Masri v ‘the Former Yugoslav Republic of Macedonia’ [GC], appl. no. 39630/90, 13 December 2012, Para. 239.
103 Bader and Kanbor v Sweden, appl. no. 13284/05, [2005-XI] ECHR.
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. 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', 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. Resident in Denmark and apprehended in Sweden, the applicant was ordered to be extradited to Rwanda to stand trial for genocide and related offences. He complained to Strasbourg that Sweden had thereby exposed him to a flagrant denial of his rights under Article 6 ECHR. The Fifth Section acknowledged that several jurisdictions had previously refused the transfer or extradition of genocide suspects to Rwanda on fair trial grounds but ultimately held in favour of the Government. It emphasised that the International Criminal Tribunal for Rwanda (ICTR) had recently found trial conditions in Rwanda much improved and that the Rwandan legislature had passed witness protection laws that had been considered effective by Dutch and Norwegian authorities. 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. Finally, the applicant would be entitled to free legal representation from Rwanda's well-qualified bar 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.

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. 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. 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. He argued that he had flagrantly denied justice because he had been unable to challenge the finding that drugs were intended for distribution. 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 Salabiku v France, 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 Ahorugeze v Sweden, appl. no. 37075/09, 27 October 2011, Para. 126.
130 Willcox v UK and Hurford v UK, appl. nos. 43759/10 and 43771/12, 8 January 2013.
131 Willcox v UK and Hurford v UK, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 3.
132 Willcox v UK and Hurford v UK, appl. nos. 43759/10 and 43771/12, 8 January 2013, Para. 40.
plea (…).

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.

Although they involved very different factual scenarios, Othman, Babar Ahmad, Ahorugoeze, 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. 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. 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.

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. 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 a 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?

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 and has already recognised the need to apply procedural duties ‘realistically’ in post-conflict environments. That said,
ECHR.148 In asset recovery cases, respondent governments or intervening third parties may bring reports.


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 (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
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, 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. 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. 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.

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?

The ECHR 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. Here, its apparent source was Pellegrini. 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. 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 (...). It made similar comments in Pellegrini and in Stapleton v Ireland, which concerned the execution of an European Arrest Warrant almost thirty years after the applicant's alleged crimes. That said, and as Gless explains, an inflexible approach to acts of cooperation in civil and criminal matters.

The Right to a Fair Trial and International Cooperation in Criminal Matters

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, Para. 153 Moutousseau and Washington v France, appl. no. 53988/05, 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.
159 Moutousseau and Washington v France, appl. no. 53988/05, 6 December 2007, Para. 90; Eskinazi and Chelouche v Turkey (dec.), appl. no. 14600/05, 14 December 2005, Para. C(2); Hirs 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’).
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 ECHR 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 rebuffed 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
democracy, human rights and the rule of law (…)'. 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 Torture182] as regards both Turkey and the international community as a whole' (...)." 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 torture186 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 to and 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.
184 Al-Saadoon and Mufdhi v UK, appl. no. 61498/08, 2 March 2010, Paras. 164-165.
186 Othman (Abu Qatada) v UK, appl. no. 8139/09, 17 January 2012, Paras. 186-207.
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. 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, 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. 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 had declared itself prepared to monitor’ the Rwandan proceedings against the applicant, as well as the conditions of his detention. In Othman, the ‘very fact of monitoring visits’ lessened the risk of a violation under Article 3 ECHR. 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.

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 ECHR regulates the adverse consequences of international cooperation in criminal matters for Convention rights and freedoms. I showed that the ECHR 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 ECHR 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.
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.
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 ECtHR 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. 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. Likewise, it remains to be seen how other regional human rights bodies apply and possibly attenuate ‘their’ fair trial standards in international cooperation cases.

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. If we revert to the traditional language of sources of law and rules on treaty interpretation, we are helped by references to due process and the rights of third parties 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 Mdoi se v Botswana, no. 97/93, AfCHPR, 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.


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).